

Finding Legal Basis for the Right to Housing – Case Law of the European and Inter-American Courts of Human Rights (Comparative Review)

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EXECUTIVE SUMMARY

The following thesis analyzes the approaches and case law of the Inter-American Court of Human Rights and the European Court of Human Rights toward the right to housing and interests related to this right. The thesis analyzes general considerations regarding the right to housing, discussing its overall impact and importance, its components, and international treaties enshrining this right. Following that, the thesis discusses the arguments of the courts to protect socio-economic rights through the civil and political rights provisions, such as the effectiveness and indivisibility of rights, the “Vida Digna” doctrine, and the obligation of progressive realization. It provides a critical comparison of the arguments and assesses their effectiveness. Chapter 3 analyzes the case law of the Inter-American Court of Human Rights and the European Court of Human Rights regarding the right to housing. The conclusion summarizes the discussed topics, emphasizes the advantages and disadvantages of the courts’ approaches and arguments, and offers recommendations to grant a higher degree of protection to the right to housing.

TABLE OF CONTENTS

Executive summary	ii
Table of contents	iii
List of Abbreviations.....	iv
Introduction	1
1. General considerations regarding the right to housing and interests related to it	4
2. Arguments of the ECtHR and the IACtHR to provide protection for ESCR through CPR	10
2.1. Arguments of the ECtHR	13
2.1.1. Indivisibility of rights.....	14
2.1.2. Effectiveness of rights	15
2.1.3. Critics	18
2.2. Arguments of the IACtHR	20
2.2.1. The right to life.....	20
2.2.2. Obligation of progressive realization	21
2.2.2.1 IACtHR case law regarding the Article 26 of the ACHR before 2017	23
2.2.2.2. Changing the approach and applying Article 26 in case of the Lhaka Honhat	26
2.3. Comparing the arguments of the ECtHR and the IACtHR	27
3. Case law of the ECtHR and the IACtHR regarding the interests related to the right to housing	30
3.1. Case law of the ECtHR	30
3.1.1. The right to private and family life	30
3.1.2. Prohibition of torture	33
3.2. Case law of the IACtHR.....	36
3.2.1. Case of the “Mapiripán Massacre” v. Colombia.....	37
3.2.2. Cases of the Yakye Axa Indigenous Community v. Paraguay and Sawhoyamaxa Indigenous Community v. Paraguay	38
3.3. Comparing the case law of the ECtHR and IACtHR	40
Conclusion.....	43
Bibliography.....	47

LIST OF ABBREVIATIONS

ACHR	The American Convention on Human Rights
CPR	Civil and Political Rights
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
IACtHR	The Inter-American Court of Human Rights
ICESCR	International Covenant on Economic, Cultural and
OAS	The Organization of American States
UDHR	Universal Declaration of Human Rights

INTRODUCTION

The right to housing is a fundamental human right that significantly impacts different fields of a person's life, such as education, health, and employment. The following thesis analyzes the approaches and case law of the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) toward the right to housing and interests related to this right. Both courts are essential regional human rights bodies, which play crucial roles in protecting human rights in their respective regions as state parties are obliged to comply with their judgments. Although the ECtHR and IACtHR have protected different housing interests, the right to housing is not enshrined in the American Convention on Human Rights (ACHR) or in the European Convention on Human Rights (ECHR). This raises questions regarding the courts' authority to provide protection for the right to housing, what can be a legal basis for that, how this protection can be justified, and how extensive it can be.

The thesis will comprehensively analyze the relevant case law of the ECtHR and the IACtHR. It will discuss the division of civil and political rights (CPR) and economic, social, and cultural rights (ESCR), the legal basis enshrined in the ECHR and the ACHR to protect socio-economic rights. In addition, the thesis will examine the legal principles, standards, and interpretations applied by each court in protecting economic, social, and cultural rights (ESCR) and analyze the similarities, differences, and evolving trends in the jurisprudence of these regional human courts. The paper will also compare and critically evaluate the effectiveness of the approaches taken by these courts in protecting the ESCR from the perspective of forging the scope of rights. It will analyze relevant academic literature and judgments of the ECtHR and IACtHR. Thesis will also explore the differences in legal frameworks and factors that influence the courts' interpretations. Understanding the similarities and differences between the approaches of ECtHR and IACtHR will contribute to highlighting the gaps and challenges the courts face and

identify best practices to increase the extent to which the right to housing and related interests can be protected. Following that, the thesis will analyze the selected case law, in which the ECtHR and the IACtHR have protected the interests related to the right to housing by referring to different CPR enshrined in the ECHR and the ACHR.

The research methodology for this paper involves a review of academic literature and case law of the ECtHR and IACtHR. The literature review focuses on academic papers and case law of the ECtHR and the IACtHR related to the protection of components of the right to housing and interests related to it. In pursuit of identifying pertinent legal precedents, an analytical approach has been adopted, involving the targeted exploration of specific provisions enshrined in the ECHR and the ACHR, coupled with the inclusion of selected keywords, thereby facilitating the retrieval of relevant judicial decisions.

The thesis discusses the following topics: 1. General considerations regarding the right to housing, 2. Arguments of the courts to protect socio-economic rights through the civil and political rights provisions, 3. Case law of the ECtHR and the IACtHR regarding the right to housing, 4. Conclusion, summarizing the discussed topics and offering recommendations to grant a higher degree of protection to the right to housing.

The thesis hypothesizes that the ECtHR and the IACtHR have effectively used various interpretative methods and legal arguments, such as the indivisibility and effectiveness of rights, *Vida Digna*, 26 in order to forge the scope of the CPR enshrined in the ECHR and ACHR to protect the housing rights. However, the courts have the opportunity to grant a higher level of protection to the right to housing and related interests through further evolving comprehensive legal arguments to justify the protection of ESCR through CPR and to refer to other conventional provisions.

The ultimate goal of the thesis is to contribute to advancing the protection of the right to housing and related interests within the European and American human rights systems. For that reason, the paper will assess which court has used more effective approaches and interpretations to forge the scope of the ECHR and ACHR provisions in a manner to provide a higher level of protection for the right to housing. Based on the analysis, the article will offer recommendations regarding the approaches and interpretations developed by the courts, which will contribute to advancing the protection of the right to housing and related interests. Comparative analysis of the experiences of the ECtHR and the IACtHR will contribute to seeing the challenges faced by the courts from different perspectives and finding optimal solutions.

1. GENERAL CONSIDERATIONS REGARDING THE RIGHT TO HOUSING AND INTERESTS RELATED TO IT

The realization of social, economic, and cultural rights has a great impact on every person's life. Despite this fact, they are frequently considered second-generation rights and are perceived as less important and sometimes even non-valid rights.¹ However, this is not the only existing idea regarding the importance of social and economic rights. Sometimes they are even considered to be more significant for human life than civil and political rights.² To emphasize the importance of social and economic rights, Isaiah Berlin argued that these rights are preconditions for the realization of other rights and freedoms and noted: "what is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?". Berlin emphasized that "first things come first" and to make a person able to enjoy civil and political rights, he/she needs to have basic social guarantees such as house, food, etc.³

The right to housing "should be seen as the right to live somewhere in security, peace and dignity".⁴ Considering its widespread impact on the life of every human being, it can be considered one of the most important rights. The significance of realizing the right to housing has also been stressed in Fact Sheet No. 21 by the UN Office of the High Commissioner for Human Rights (OHCHR). According to the document, "Human rights are interdependent, indivisible and interrelated. In other words, violating the right to adequate housing may affect

¹ See: Jeanne M. Woods, "Emerging Paradigms of Protection for Second-Generation Human Rights," *Loyola Journal of Public Interest Law* 6, no. 2 (Spring 2005): 103; Daniel P. L. Chong, *Debating Human Rights*. (Boulder, Colorado: Lynne Rienner Publishers, 2014), 181-185.

² András Sajó, "The Fate of Human Rights in Indifferent Societies", in *Critical Essays on Human Rights Criticism. Issues in Constitutional Law 10*, eds. Andras Sajo and Renata Uitz, (The Hague: Eleven International Publishing, 2020), 27.

³ Isaiah Berlin, *Four Essays on Liberty*. (Oxford New York: Oxford University Press, 1984), 124.

⁴ 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, para. 7.

the enjoyment of various other human rights and vice versa. Access to adequate housing can be a precondition for the enjoyment of several human rights, including the rights to work, health, social security, vote, privacy, or education. The possibility of earning a living can be seriously impaired when a person has been relocated following a forced eviction to a place removed from employment opportunities. Without proof of residency, homeless people may be unable to vote, enjoy social services or receive health care. Schools may refuse to register slum children because their settlements have no official status. Inadequate housing can have repercussions on the right to health; for instance, if houses and settlements have limited or no safe drinking water and sanitation, their residents may fall seriously ill”.⁵ This statement clearly demonstrates the significance of the right to housing.

The Committee on Economic, Social and Cultural Rights (CESCR) evolved the same idea. According to the CESCR, “the human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights”.⁶ Therefore, inadequate housing can lead to various negative consequences such as health problems, educational deficits and violence. These issues, on the other hand, can affect the lives of not only the ones who are not provided with adequate housing but the whole of society.⁷ Despite its importance, the right to housing is not broadly accepted as a legally justiciable right in many countries,⁸ frequently based on general argument regarding the implementation of the ESCR that the states might not have enough funds necessary to ensure these rights.⁹ Therefore, implementation of the right to housing is a

⁵ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 21, The Human Right to Adequate Housing, November 2009, Fact Sheet No. 21/Rev.1, p. 9.

⁶ 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, para 1.

⁷ Chester Hartman, “The Case for a Right to Housing.” *Housing Policy Debate* 9, no. 2 (January 1998): 225.

⁸ Kucs, Arturs, Zane Sedlova, and Liene Pierhurovica. "The right to housing: International, European, and national perspectives." *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 64 (2008): 101.

⁹ Ilias Bantekas and Oette Lutz, *International Human Rights Law and Practice*, Third edition, (Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2020), 413.

problematic issue and in many cases is considered to be a subject of progressive realization instead of immediate actions.¹⁰

The right to housing has first been recognized by the Universal Declaration of Human Rights (UDHR).¹¹ It is also enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although the right is stipulated in various international human rights treaties, Article 11(1) of the ICESCR is the most comprehensive among them.¹² The right incorporates and covers broad a concept of interests related to a person's right to live in "security, peace and dignity".¹³ The components of the right are defined in General Comments No. 4 and No. 7 by the UN Committee on Economic, Social and Cultural Rights (CESCR). According to these documents, the right to housing protects legal interests such as legal security of tenure¹⁴, protects against forced evictions, harassment, and other threats,¹⁵ protects from arbitrary or unlawful interference with one's privacy, family, home or correspondence,¹⁶ guarantees habitability,¹⁷ accessibility,¹⁸ cultural adequacy,¹⁹ etc. The right to is not forged as merely the right to have a roof above the head. Instead, it implies adequate housing conditions, such as the availability of services, materials, facilities, and infrastructure.²⁰

Unfortunately, the right to housing is not enshrined in important regional human rights treaties, such as the ECHR and the ACHR. The ACHR is one of the most important treaties in the Inter-

¹⁰ 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, para. 4.

¹¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 25.

¹² 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, para. 2.

¹³ Ibid, para. 7.

¹⁴ Ibid, para. 8(a).

¹⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, para. 1.

¹⁶ 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, para. 9.

¹⁷ Ibid, para. 8(d).

¹⁸ Ibid, para. 8(e).

¹⁹ Ibid, para. 8(g).

²⁰ Ibid, para. 4(b).

American system regarding human rights protection, as although it is limited to ratification, it has binding force.²¹ The document incorporates civil and political rights as well as economic, social, and cultural rights (to a smaller extent).²² As already mentioned, right to housing is not explicitly incorporated in the ACHR. However, article 26 of the ACHR is a general provision protecting ESCR through establishing the obligation of progressive realization.²³ However, the scope and applicability of this provision are controversial, which will be discussed in the following chapter. The ECHR can be considered as a European analog of the ACHR. Similarly to the ACHR, the ECHR does not incorporate an article protecting the right to housing. The ECHR is also mainly focused on CPR - the only social and economic right enshrined in the ECHR is the right to education.²⁴ This can be explained by the fact that both of the conventions were drafted in the era of Cold War by the western block countries, which were promoting CPR opposing the USSR.²⁵ Despite the fact that none of the mentioned conventions stipulate the right to housing, both documents have been interpreted in a way that interests related to the right to housing have been formally considered.²⁶ It should also be mentioned that within the European and Inter-American human rights systems other documents such as the Charter of the Organization of American²⁷ states and European Social Charter²⁸ enshrine the right to housing. The binding force and justiciability of these documents will be discussed below.

In the past supranational human rights courts, including the IACtHR, were used to avoid enforcement of the ESCR. The IACtHR was severely criticized for its approach towards Article

²¹ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 1.

²² Chapter II of the ACHR enshrines civil and political rights, which are separately stipulated in articles 3-25. Unlikely, Chapter III of the ACHR, which concerns socio-economic rights, includes only one article, Article 26 – Progressive Development.

²³ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 26.

²⁴ Council of Europe, *The European Convention on Human Rights*, 4 November 1950, Protocol No. 1, Article 2.

²⁵ Bantekas and Lutz, *International Human Rights Law and Practice*, 414-415.

²⁶ Scott Leckie, *From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Human Rights Law*. (London: The Programme, 1992): 24.

²⁷ Organization of American States, *Charter of the Organisation of American States*, 30 April 1948, Article 34(K).

²⁸ Council of Europe, *European Social Charter*, 18 October 1961, Article 31.

26 of the ACHR in the case of *Five Pensioners v. Peru* by particular scholars as well as one of the judges who provided a dissenting opinion in the judgement, considered to diminish the meaning and scope of the Article.²⁹ It is discussed that this critique was the reason for which, the court changed this approach and “introduced a conceptual breakthrough to assess social rights”,³⁰ including the right to housing. Following this critique, the IACtHR noted that the obligation deriving from Article 26 had complementary nature.³¹ The court went further in the case “*Cuscul Pivaral v. Guatemala*” the IACtHR declaring that “a literal, systematic and teleological interpretation leads to the conclusion that Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter”.³² The court has passed several decisions concerning the issues related to right to housing, which will be further discussed in the following chapters. These decisions forge the IACtHR’s approach toward the right to housing and create key standards for protecting not only this right, but social and economic rights in general. Similarly, the ECtHR also protects ESCR, as part of the interests protected by CPR is socio-economic.³³ The ECtHR has forged case law protecting the interests related to housing matters under Articles 3 and 8 of the ECHR and Article 1 of the Protocol No.1. However, the court never speaks about them as ESCR. Instead, it presents them as components of various CPR.

In addition to legal factors, before discussing the arguments and case law of the ECtHR and IACtHR to protect ESCR, including the right to housing, political, economic and social factors should also be considered. Both the ECtHR and IACtHR experience outside influences and face

²⁹ Laurence Burgorgue-Larsen, Amaya Úbeda de Torres, and Rosalind Greenstein, *The Inter-American Court of Human Rights: Case-Law and Commentary*. (Oxford ; New York: Oxford University Press, 2011), 629.

³⁰ Thomas M. Antkowiak, "A "Dignified Life" and the Resurgence of Social Rights," *Northwestern Journal of Human Rights* 18, no. 1 (Winter 2020): 4.

³¹ IACtHR, *Acevedo Buendia and others v. Peru*, July 1 2009, §105.

³² IACtHR, *Cuscul Pivaral v. Guatemala*, 23 August 2018, §97.

³³ Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, (Cambridge: Cambridge University Press, 2018): 57; Ida Elisabeth Koch, “Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective,” *The International Journal of Human Rights* Vol. 10, No. 4 (December 2006): 407.

political pressure.³⁴ Therefore, besides the legal principles and compatibility with the ECHR and ACHR, the courts also have to consider political circumstances and expected outcomes regarding each case. Another challenge the courts experience is that although the judgements of ECtHR and IACtHR formally have a binding force to state parties,³⁵ their implementation significantly depends on the will of distinct institutional actors within the state parties.³⁶ Regarding the ESCR economic conditions are also important as the realization of ESCR frequently involves performing positive obligations for which financial resources are needed.³⁷ In addition to that, “the effective implementation of human rights requires a culture of human rights at all levels of government as well as in society in general ... they must become institutionalized socially and become embedded in peoples’ mindsets”.³⁸ The ECtHR and IACtHR have to consider all these factors and not merely assess the cases from a legal perspective but also fit into diplomatic stance and engage in dialogue with the state parties. This becomes especially important when the courts define CPR provisions of the convention broadly and apply them the meaning which was not implicated during the *travaux préparatoires*.

³⁴ David Kosař and Lucas Lixinski. “Domestic Judicial Design by International Human Rights Courts.” *American Journal of International Law* 109, no. 4 (2015): 754.

³⁵ Council of Europe, *The European Convention on Human Rights*, 4 November 1950, Article 46, Paragraph 1; Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 68, Paragraph 1.

³⁶ Alexandra Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights," *Cornell International Law Journal* 44, no. 3 (Fall 2011): 513.

³⁷ Bantekas and Lutz, *International Human Rights Law and Practice*, 413.

³⁸ Robert Spano, “The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law,” *Human Rights Law Review*, Volume 18, Issue 3 (September 2018): 489

2. ARGUMENTS OF THE ECtHR AND THE IACtHR TO PROVIDE PROTECTION FOR ESCR THROUGH CPR

Throughout the years, applicants filed complaints to the ECtHR regarding the states' failure to provide access to healthcare, education, housing, and other ESCR, and in this way tested, whether the court confirmed what state parties have obligation to provide access to these goods.³⁹ As already mentioned, the ECHR and the ACHR are focused on the CPR.⁴⁰ However, that did not prevent the ECtHR and the IACtHR to protect interests related to ESCR. The courts defined the CPR enshrined in the ECHR and ACHR in a broad manner, covering socio-economic matters not explicitly constituted in the texts of conventions. For instance, the courts found violations of rights such as the right to life or the right to private and family life based on social issues. As the courts broadly defined the CPR and included socio-economic issues within their scope, which were not explicitly expressed in provisions, they needed solid arguments and proper justification to rationalize the decisions. These arguments will be discussed in the following subchapters.

It is also important to mention that besides the European and American conventions on human rights, there are other important documents within these systems concerning the ESCR. Namely, the European Social Charter,⁴¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San

³⁹ Elizabeth Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Review*, Vol. 2, No. 4 (2009): 408.

⁴⁰ *Ibid.*, 398.

⁴¹ For example, the European Social Charter protects socio-economic rights such as right to work, right to protection of health, right to housing, etc. See: Council of Europe, *European Social Charter*, 18 October 1961, Articles 1-19.

Salvador"),⁴² and Charter of the Organization of American States.⁴³ These documents stipulate the ESCR to a great extent. *Ratione materiae* is an important matter regarding these documents.

According to the ACHR, "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it".⁴⁴ It is discussed whether the IACtHR has jurisdiction *ratione materiae* over the treaties to which specific provisions of the ACHR refer.⁴⁵ To consider the IACtHR to have jurisdiction over treaties other than the ACHR "convention in question must allow for jurisdiction of the court through a compromissory clause" and the defendant state must have ratified this compromissory clause.⁴⁶ The Inter-American Court of Human Rights has declared itself competent to apply, not only the ACHR, but also Protocol of San Salvador.⁴⁷ The Protocol of San Salvador expressly allows jurisdiction of the IACtHR through Article 16(6), but the provision refers only Articles 8(a) and 13 of the protocol, protecting the trade union rights and the right to education.⁴⁸ Therefore, it is discussed that taking into consideration "the negative inference of the language used in Article 19 is that the violation of other rights enshrined in the Protocol", the Protocol of San Salvador "grants the right to file a case ... on two grounds only, trade union rights (Article 8.a) and the right to education (Article 13).⁴⁹ However, some scholars support

⁴² For example, the Protocol of San Salvador protects socio-economic rights such as right to social security, right to health, right to food, right to education, etc. See: Organization of American States, *Protocol of San Salvador*, 16 November 1999, Articles 6-18.

⁴³ Organization of American States, *Charter of the Organisation of American States*, 30 April 1948, Article 34.

⁴⁴ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 62, Paragraph 3.

⁴⁵ Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*. Second Edition. (Cambridge: Cambridge University Press, 2013), 122.

⁴⁶ Burgorgue-Larsen, Úbeda de Torres, and Greenstein, *The Inter-American Court of Human Rights: Case-Law and Commentary*, 64.

⁴⁷ Tara J. Melish, "The Inter-American Court of Human Rights: Beyond Progressivity" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008), 375.

⁴⁸ Organization of American States, *Protocol of San Salvador*, 16 November 1999, Article 19, Paragraph 6.

⁴⁹ Oswaldo R. Ruiz-Chiriboga, "The American convention and the protocol of San Salvador: two intertwined treaties: non-enforceability of economic, social and cultural rights in the Inter-American System." *Netherlands Quarterly of Human Rights* 31, no. 2 (2013): 161. Burgorgue-Larsen, Úbeda de Torres, and Greenstein, *The Inter-American Court of Human Rights: Case-Law and Commentary*, 619.

the so called “direct approach” and argue that “Article 26 ACHR is directly applicable to any ESC rights violation, and the limitation set by Article 19(6) PSS shall not alter this possibility”.⁵⁰

It is also discussed that Article 26 of the ACHR applies to the whole OAS Charter, including Article 34, and establishes obligations for the state parties to safeguard these rights.⁵¹ This notion is shared by supporters of the direct approach, which uses the procedural rules to allege violations of ESC rights.⁵² However, this approach has been criticized in literature based on the argument that “‘temptation’ to introduce through Article 26 ACHR “States obviously did not intend to incorporate in the Convention’s system, designed primarily for the protection of civil and political rights’”.⁵³

Several factors should be considered regarding referring to the European Social Charter by the ECtHR. Article 19 of the ECHR lists only the convention and its protocols as documents over which the ECtHR has material jurisdiction.⁵⁴ This provision does not prevent the ECtHR from referring to other human rights instruments in its judgements. Article 53 of the ECHR states, “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.⁵⁵ State parties of the ECHR have also ratified other human rights treaties and therefore have to recognize the acceptability of

⁵⁰ Ruiz-Chiriboga, "The American convention and the protocol of San Salvador: two intertwined treaties: non-enforceability of economic, social and cultural rights in the Inter-American System," 161.

⁵¹ Antkowiak, "A "Dignified Life" and the Resurgence of Social Rights," 26.

⁵² Ruiz-Chiriboga, "The American convention and the protocol of San Salvador: two intertwined treaties: non-enforceability of economic, social and cultural rights in the Inter-American System," 170.

⁵³ Ibid.

⁵⁴ Council of Europe, *The European Convention on Human Rights*, 4 November 1950, Article 19.

⁵⁵ Ibid., Article 53.

their provisions.⁵⁶ However, as the ECtHR is eligible to consider applications only regarding violations of rights enshrined in ECHR and its protocols,⁵⁷ the European Social Charter is considered to be a complementary treaty to the ECHR in the field of the ESCR.⁵⁸ In other words, the ECtHR cannot find violation based on the in compliance of the state parties' actions with the provisions of the European Social Charter, but the court can refer to the treaty while discussing the scope of the state's obligation regarding protecting the particular socio-economic right.

Considering the applicable human rights treaties and their binding force, the ECtHR and IACtHR have developed significant legal arguments to grant protection to the ESCR through the provisions enshrining the CPR or referring to progressive realization. These arguments will be discussed in the following subchapters.

2.1. Arguments of the ECtHR

In its case law, the European Court of Human Rights has developed different arguments, which were used to interpret the articles of the convention in a way that would provide protection of socio-economic rights and interests related to them. The arguments most discussed and most frequently used by the ECtHR are 1. Indivisibility of rights and 2. Effectiveness of Rights.⁵⁹ These arguments will be analyzed in the following subchapters.

⁵⁶ Luke Clements and Alan Simmons, "European Court of Human Rights" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008), 411.

⁵⁷ Council of Europe, *The European Convention on Human Rights*, 4 November 1950, Articles 33 and 34.

⁵⁸ Amaya Úbeda de Torres, "Justiciability and social rights," in *Research Handbook on International Law and Social Rights*, ed. Christina Binder, et al. (Northampton, MA, USA: Edward Elgar Publishing Limited, 2020), 47.

⁵⁹ See: Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, (Cambridge: Cambridge University Press, 2018): 62-77; Clements and Simmons, "European Court of Human Rights," 409-410;

2.1.1. Indivisibility of rights

The argument for the indivisibility of rights is based on the notion that there is no strict border between ESCR and CPR, and these rights are interrelated. Therefore, a particular interest can be a component of both types of rights simultaneously.⁶⁰ This approach outlines the importance of the ESCR,⁶¹ representing the idea that socio-economic rights are crucial for the overall well-being and dignity of individuals and communities. To protect the ESCR, the European Court of Human Rights has been using CPR through referring to the social dimensions of these rights.⁶² Although the text of the ECHR does not include any reference to the relationship between the CPR and ESCR, it is discussed that “the categorization of rights as either social and economic or civil and political is an entirely artificial construct.”⁶³ The ECtHR has referred this topic in its case law. A good example of that is the notion evolved by the court in the 1979 decision “Airey v. Ireland”. The court noted that “whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature”.⁶⁴ The Court, therefore, considers, that “the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention”.⁶⁵ This approach is still used by the ECtHR till this day.⁶⁶ Therefore, the court has developed case law, recognizing the fact that the civil and political rights also include social dimension, which can be used as means to protect socio-economic rights.

⁶⁰ See: Ida Elisabeth Koch, “Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective,” *The International Journal of Human Rights* Vol. 10, No. 4 (December 2006): 405-430;

⁶¹ Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 86.

⁶² Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 399.

⁶³ Clements and Simmons, “European Court of Human Rights,” 409.

⁶⁴ ECtHR, *Airey v. Ireland*, Application no. 6289/73, 9 October 1979, §26.

⁶⁵ *Ibid.*

⁶⁶ ECtHR, *Beeler v. Switzerland* [GC], Application no. 78630/12, 11 October 2022, §51.

The ECtHR has been willing to find social elements in the CPR protected by the ECHR⁶⁷ to justify the protection of socio-economic interests through the CPR provisions. An excellent example is ECtHR's decision "Sidabras and Dziautas v. Lithuania" which shows us how broad the courts definition of a particular right can be and how the connection can be found between the ESCR and CPR. In this case, the ECtHR noted, that "private sector employment does affect private life" and applied the ECHR using this particular aspect of the right to work.⁶⁸ In other words, the court used the right to private and family life as a mean to protect the interest related to the right to work. The significance of this case lies in the ECtHR's examination of relevant rights outlined in international instruments that lacked binding force on the state party.⁶⁹ Introducing this approach is a substantial advancement in protecting the ESCR, as it gives the court opportunity to protect a wide range of the ESCR through finding connections between them and the CPR.

2.1.2. Effectiveness of rights

The ECtHR has declared that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".⁷⁰ Effective realization of rights might be related to different dimensions of life, including economic conditions. The principle of effectiveness is coupled with various interpretative methods, for instance, compliance with "the general spirit of the Convention, an instrument designed to maintain and promote the ideas and values of a democratic society".⁷¹ Referring to "general spirit of the Convention" allows the ECtHR to broaden the scope of rights in a way that they cover interests, which are not explicitly included in the text of the ECHR. The argument "effectiveness of rights" is also

⁶⁷ Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 73.

⁶⁸ Ibid., 76.

⁶⁹ Ibid., 77.

⁷⁰ European Court of Human Rights, *Airey v. Ireland*, §24.

⁷¹ Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 64.

intertwined with the “living instrument” doctrine. The doctrine was developed by the ECtHR to transform the ECHR into “a dynamic living instrument, which must adapt to changing political and social mores in member states”.⁷² Using this interpretative technique was a great asset to enhance the protection of ESCR,⁷³ as it also was used by the ECtHR to include interests deriving from socio-economic rights within the scope of the CPR protected by the ECHR.

To elucidate the socio-economic aspect of the ECHR, the ECtHR has also used “autonomous” interpretation, which outlines that the meaning of provisions of the ECHR “is not equated with the meaning that these very same concepts possess in domestic law”.⁷⁴ Therefore the court has established standard that, when it finds it proper, the ECtHR is entitled to apply to a specific right the meaning and scope, which are not established or recognized on a national level. In summary, the argument of the effectiveness of rights depicts ESCR protection as a mere by-product. It recognizes that socio-economic interests should be protected through the ECHR as they not only fall within the scope of the convention, but their protection also promotes the effectuation of the convention.⁷⁵ The legal basis for this approach can also be found in Article 31 paragraph 1 of the Vienna Convention Law of Treaties of 1969. According to this provision, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁷⁶ Reference to the “object and purpose” of the treaty, which is to “secure to everyone within their jurisdiction the rights and freedoms defined” in the ECHR⁷⁷ can be considered to be a strong argument used by the court to protect ESCR related interests which affect the realization of CPR. Regarding this matter, it is further noted that “in order for the Convention to safeguard the individual in a

⁷² Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 405.

⁷³ Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 67.

⁷⁴ *Ibid.*, 66.

⁷⁵ *Ibid.*, 68.

⁷⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31, Paragraph 1.

⁷⁷ Council of Europe, *The European Convention on Human Rights*, 4 November 1950, Article 1.

real and practical way, it must be subject to an extensive interpretation reaching into the area of economic, social and cultural rights, an interpretation which is in perfect keeping with the Vienna Convention Law of Treaties of 1969”.⁷⁸

Another important dimension of the effectiveness of the rights argument is the concept of positive obligations of the state parties regarding the protection of rights enshrined in the ECHR. This argument is also used to justify the protection of the ESCR by referring to the CPR provisions. The ECtHR considers that articles enshrining substantive rights establish positive obligations for the state parties in conjunction with Article 1 of the Convention.⁷⁹ It is discussed that “human rights can be adequately protected if states content themselves with merely standing by and doing nothing has become patently absurd”.⁸⁰ In other words, there are situations, when taking positive actions are necessary to ensure compliance with the human rights standards, including the ones embodied in the ECHR.⁸¹ This argument is especially relevant in terms of protecting the ESCR, as it is a prevalent and widely accepted notion, that “unlike civil and political rights, which are generally viewed as requiring negative obligations of non-interference ESC rights are positive in nature”.⁸²

Throughout the years, the ECtHR “has continued to lay the foundations for a body of socio-economic rights jurisprudence through an incremental interpretation of the traditional canon of civil and political rights and the development of positive state obligations in Articles 2, 3 and 8

⁷⁸ Koch, “Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective,” 412.

⁷⁹ Council of Europe, Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights, January 2007, Human rights handbooks, No. 7, p. 9.

⁸⁰ Brice Dickson, “Positive Obligations and the European Court of Human Rights,” *Northern Ireland Legal Quarterly* 61, no. 3, (2010): 204.

⁸¹ Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 402.

⁸² Bantekas and Lutz, *International Human Rights Law and Practice*, 418.

and Articles 6 and 14 ECHR”.⁸³ Article 8 of the ECHR has immense significance within this context. The ECtHR has expansively interpreted the substantive elements of the right to private and family life and developed the notion of “respect” in terms of this right, which has been used as a legal foundation to develop an extensive array of both negative and positive obligations.⁸⁴ For instance, concerning the right to housing Article 8, premised on the notion of “respect for home”, is considered to give rise to the state parties’ obligations such as safeguarding against environmental pollution or providing a person with alternative accommodation (in some cases).⁸⁵ Consequently, referring the positive obligations of the state parties is one of the most effective techniques to safeguard socio-economic aspects of civil and political rights.

2.1.3. Critics

To summarize, the topic of arguments used by the ECtHR to protect ESCR using the ECHR has forged case law in which the approaches are different towards the issue. In different decisions, the ECtHR considered the positive obligations to be based on the states overriding obligation “to ensure to everyone the rights and freedoms set out in the convention” or to ensure that the rights guaranteed by the ECHR are “practical and effective” as mentioned above. In other cases, the ECtHR referred to the state’s general obligation to fulfill the object and the purpose of the ECHR.⁸⁶

This approach's overall shortcoming is that the court failed to offer a single theory that would explain the expansion of affirmative duties in ECHR rights. The ECtHR could not manage to evolve a principled theory regarding the positive obligations of the state parties, which would

⁸³ Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 398.

⁸⁴ *Ibid.*, 403.

⁸⁵ *Ibid.*, 416.

⁸⁶ *Ibid.*, 398.

create a universal framework and make it clear where the limits of the state responsibility are set in terms of protecting rights enshrined in the ECHR, particularly in the area of socio-economic needs.⁸⁷ On the other hand, this can be an opportunity for the court to be more flexible and use a different approach in every single case to protect the socio-economic dimensions of the CPR to a greater extent.

The ECtHR's socio-economic practice has also faced criticism from various scholars regarding the “indivisibility of rights” argument. Brems referred to this approach in his critique, highlighting the challenge arising from the inherent tension between the reality of indivisibility and the ECtHR’s need to determine the margins of its jurisdiction to consider social rights.⁸⁸ Another critical argument emphasizes that while the ECHR does not explicitly protect the ESCR the case law of the ECtHR follows incremental reasoning approach. It is suggested that the ECtHR should adopt a consistent theory of adjudication to cope with the issues regarding the ESCR, “instead of having recourse to case-by-case solutions, that lack comprehensive reasoning”.⁸⁹

Therefore, the main argument against the ECtHR’s approach is that there is no unified theory based on which the court would decide cases. On the one hand, that can be considered to be a failure of the ECtHR, as it has a negative impact in terms of foreseeability, especially considering the fact that it is also hard to determine on which argument the ECtHR will base a particular decision in the future. The topic becomes more unforeseeable considering the fact that the court did not just shift from one approach to another. Instead, the ECtHR might use one of them whenever it considers this proper. For example, throughout the years, the court referred

⁸⁷ Ibid., 402.

⁸⁸ Ibid., 81.

⁸⁹ Ibid., 81-82.

to “democratic values”, “human dignity”, “personal autonomy” and “pluralism” in different cases in 1995, 1997, 2002, 1993 and 2011.⁹⁰

2.2. Arguments of the IACtHR

The IACtHR has declared that “treaty-based norms, which are essential to the effectiveness of the international protection system as a whole, must be interpreted and applied so that their safeguards are truly practical and effective”.⁹¹ To protect social, economic, and cultural rights the Inter-American Court of Human Rights has used Articles 4 and 26 of the ACHR.⁹² First, the IACtHR used to refer to Article 4 of the convention and recognized socio-economic rights as essential elements of this article. Second, the court introduced a bold interpretation of Article 26 of the ACHR and found independent violations of different ESCR.⁹³

2.2.1. The right to life

Article 4 of the ACHR, enshrining the right to life, has been used by the IACtHR to grant protection to the ESCR. According to the provision, “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception”.⁹⁴ The words “to have his life respected” were used by the IACtHR as the ground for the “Vida Digna” (dignified life) doctrine, based on which the court evolved important standards regarding the scope and meaning of the right to life.

⁹⁰ Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 65.

⁹¹ IACtHR, *Serrano Cruz Sisters v. El Salvador*, 1 March 2005, §65.

⁹² See: Tara J. Melish, “The Inter-American Court of Human Rights: Beyond Progressivity” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008), 385-392; Thomas M. Antkowiak, “A “Dignified Life” and the Resurgence of Social Rights,” *Northwestern Journal of Human Rights* 18, no. 1 (Winter 2020): 16-28.

⁹³ Antkowiak, “A “Dignified Life” and the Resurgence of Social Rights,” 16.

⁹⁴ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 4, paragraph 1.

In the decision *Villagrán Morales v. Guatemala*, the IACtHR noted that “In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence”.⁹⁵ This argument is closely related to the positive obligations as it refers to “guarantee a dignified existence” which in other words can be formulated that the state parties to ensure the protection of specific rights. The IACtHR has defined the right to life in a broad manner and declared that the states violated the obligation derived from Article 4 of the ACHR as they failed to protect individuals from threats, homelessness, separation from family, and poverty and declared these interests to be components of the right to life through establishing the concept of “Vida Digna”.⁹⁶

2.2.2. Obligation of progressive realization

Article 26 of the ACHR imposes the obligation to state parties to adopt measures to progressively achieve the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards outlined in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.⁹⁷ This provision has been used as an effective mean for the IACtHR to impose obligations on state parties regarding the ESCR. However, the formulation and wording of Article 26 raise doubts about the scope and degree at which the provision protects the ESCR.⁹⁸

⁹⁵ IACtHR, “Street Children” (*Villagrán-Morales et al.*) v. Guatemala, 19 November 1999, §144

⁹⁶ IACtHR, “Mapiripán Massacre” v. Colombia, 15 September 2005, §161-162.

⁹⁷ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 26.

⁹⁸ Julieta Rossi and Víctor Abramovich. “La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos” [“The protection of economic, social and cultural rights in Article 26 of the American Convention on Human Rights”]. *Estudios Socio-Jurídicos* 9, no. SPE (2007): 37.

International human rights documents, including the International Covenant on Economic, Social and Cultural Rights declare the ESCR as a subject of progressive realization.⁹⁹ The state parties, referring to the time factor, might use the “progressive realization” clause as an argument to avoid responsibility regarding ensuring the realization of ESCR. However, the fact that the states are not required to immediately ensure the full realization of a particular ESCR does not make them free of every obligation regarding this right. It is noted that “the progressive realization qualification requires a state to strive towards fulfillment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints”.¹⁰⁰ Therefore, the state parties have obligation to make steps forward to the realization of these rights.

It is also important to mention that the ESCR are autonomously recognized rights by Article 26, although these rights are not explicitly enlisted in the provision and there is just a reference to the Charter of the Organization of American States.¹⁰¹ This fact should still be assessed positively from the human rights perspective, as the importance of respecting and promoting these rights is further emphasized. In addition, some of these rights, including the right to housing, are also mentioned in Article 34 of the Charter of the Organization of American States (OAS).¹⁰² As already mentioned, there is no unanimous position on whether Article 34 of the OAS Charter is binding for the state parties.¹⁰³ The debate also arises regarding the issue, whether Article 26 applies to the whole OAS Charter and establishes obligations for the state

⁹⁹ United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Article 2(1).

¹⁰⁰ Lillian Chenwi, “Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance.” *De Jure* 46, no. 3 (2013): 745.

¹⁰¹ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 26.

¹⁰² Organization of American States, *Charter of the Organisation of American States*, 30 April 1948, Article 34.

¹⁰³ See: Thomas M. Antkowiak, “Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads,” in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Haeck, Yves *et al.* (Cambridge, Antwerp, Portland: Intersentia, 2015), 264; Ruiz-Chiriboga, “The American convention and the protocol of San Salvador: two intertwined treaties: non-enforceability of economic, social and cultural rights in the Inter-American System,” 170.

parties to safeguard these rights.¹⁰⁴ In addition, these rights are stipulated in the protocol of San-Salvador,¹⁰⁵ which, as already mentioned above, is also questioned about being a source of obligations for the state parties.¹⁰⁶ The issues and discussion regarding the jurisdiction *ratione materiae* have already been discussed at the beginning of this chapter. However, the objective of the thesis is to analyze the case law and argumentations of the IACtHR regarding the protection of ESCR. Therefore, in the following chapters, the IACtHR's jurisdiction over documents other than the ACHR will be considered in a way how the IACtHR sees this issue. The IACtHR considered that rights enshrined in the Protocol of San Salvador and Article 34 of the OAS Charter fall within the scope of Article 26.¹⁰⁷ This gave the court additional grounds to declare state parties responsible for failing to ensure the realization of these rights, as the court is considered to have the authority to consider cases regarding violations of these rights.

2.2.2.1 IACtHR case law regarding the Article 26 of the ACHR before 2017

The case Lagos del Campo v. Peru (2017) was the first case in which the IACtHR found a violation of Article 26. Prior to that the IACtHR examined Article 26 in cases “Five Pensioners v. Peru”¹⁰⁸ and Acevedo-Buendia v. Peru”.¹⁰⁹ In both of these cases the IACtHR considered it to be an obligation of the state parties to ensure progressive development of applicants’ right to pension in terms of general obligation of progressive realization of the ESCR.¹¹⁰ The approach demonstrated by the IACtHR in Five Pensioners v. Peru and Acevedo-Buendia v. Peru has

¹⁰⁴ Thomas M. Antkowiak, “Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads,” in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Haeck, Yves *et al.* (Cambridge, Antwerp, Portland: Intersentia, 2015), 264.

¹⁰⁵ Organization of American States, *Protocol of San Salvador*, 16 November 1999, Articles 6-18.

¹⁰⁶ See: Ruiz-Chiriboga, “The American convention and the protocol of San Salvador: two intertwined treaties: non-enforceability of economic, social and cultural rights in the Inter-American System,” 161; Burgorgue-Larsen, Úbeda de Torres, and Greenstein, *The Inter-American Court of Human Rights: Case-Law and Commentary*, 619.

¹⁰⁷ Melish, “The Inter-American Court of Human Rights: Beyond Progressivity,” 375.

¹⁰⁸ IACtHR, *Five Pensioners v. Peru*, 28 February 2003, §142-148.

¹⁰⁹ IACtHR, *Acevedo Buendia and others v. Peru*, §92-107.

¹¹⁰ *Ibid.* §145-148.

significantly narrowed down the scope of Article 26 of the ACHR and its potential for safeguarding various interests, which will be discussed below. Therefore, it should be assessed negatively from human rights perspective.

The IACtHR has expressed numerous significant ideas concerning the concept and scope of Article 26 of the ACHR. First, it referred to the dual nature of ESCR by mentioning that ESCR have individual and collective dimensions at the same time. However, following that the IACtHR stated that “progressive development ... should be measured in function of the growing coverage of economic social and cultural rights in general ... of the entire population ... and not in function of the circumstances of very limited group”.¹¹¹ Therefore, the court considered socio-economic rights not as the rights of an individual, but the rights of the whole society and set standard to assess the right in terms of the nation-wide situation, rather based on circumstances experienced by a certain group.

In the *Acevedo-Buendia v. Peru* case, the IACtHR emphasized the interdependence between ESCR and CPR,¹¹² which deserves a positive evaluation. The court went further and declared that the state’s regression in safeguarding ESCR was “actionable” under Article 26 of the ACHR.¹¹³ Following that, the IACtHR highlighted that the obligations deriving from Article 26 of the ACHR have complementary nature.¹¹⁴ This kind of assessment diminishes the scope and significance of Article 26, rendering it ineffective in protecting ESCR. Therefore, this approach should not be endorsed.

¹¹¹ IACtHR, *Five Pensioners v. Peru*, §147.

¹¹² IACtHR, *Acevedo-Buendia and others v. Peru*, §99.

¹¹³ *Ibid.*, §103.

¹¹⁴ *Ibid.*, §105.

The approach of the IACtHR to assess the progressive realization of socio-economic rights based on general, country-wide situation,¹¹⁵ should also be assessed negatively in terms of protecting the ESCR. Regarding this matter, judge Roux-Rengifo noted - “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”.¹¹⁶ Of course, violation of a certain socio-economic right can refer just to an individual or a group of individuals and in some cases it might even have an effect on the whole population.¹¹⁷ However, judge Roux-Rengifo was right when he noted that the ACHR does not determine a specific number of victims of human rights violations. Therefore, the approach evolved by the IACtHR in the case *Five Pensioners v. Peru* can be considered to invent unnecessary demands, which burden applicants with an unjustified obligation to demonstrate that some alleged violations impact the whole society. Another shortcoming of this approach is that it establishes unqualified recognition of ESCR as a consequence.¹¹⁸ It would be better from the human rights perspective if the IACtHR analyzed alleged violations of social, economic and cultural rights under the “conduct-based, individual-oriented” duties of Articles 1 and 2 of the American Convention.¹¹⁹

In summary, in the cases mentioned above, the IACtHR missed the opportunity to comprehensively interpret Article 26 of the ACHR and establish it as an effective means to protect ESCR within the Inter-American system. However, there has been a recent shift in this approach, and the IACtHR forged broader scope of protection of Article 26. The new approach

¹¹⁵ See: IACtHR, *Five Pensioners v. Peru*, §147.

¹¹⁶ IACtHR, *Five Pensioners v. Peru*, Separate Opinion of Judge Carlos Vicente de Roux-Rengifo.

¹¹⁷ Julieta Rossi and Víctor Abramovich. “La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos” [“The protection of economic, social and cultural rights in Article 26 of the American Convention on Human Rights”]. *Estudios Socio-Jurídicos* 9, no. SPE (2007): 45.

¹¹⁸ Thomas M. Antkowiak, “Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads,” in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Haeck, Yves *et al.* (Cambridge, Antwerp, Portland: Intersentia, 2015), 267.

¹¹⁹ *Ibid.*

has also been used in the case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, which will be discussed in the following chapter.

2.2.2.2. Changing the approach and applying Article 26 in case of the Lhaka Honhat

In 2017 the Inter-American Court of Human Rights considered the case Lagos del Campo v. Peru, where a violation of Article 26 of the ACHR was found. Following that, the IACtHR also found a violation of Article 26 of the ACHR in numerous decisions and established different tendencies of jurisprudence regarding the ESCR.¹²⁰ In Cuscul Pivaral v. Guatemala, the court noted that “a literal, systematic and teleological interpretation leads to the conclusion that Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter”.¹²¹ Through this interpretation the IACtHR declared Article 26 of the ACHR as a legal base for protection of the ESCR enshrined in the OAS Charter, turning this provision into effective machinery in this regard.

The IACtHR further evolved the notion regarding the obligation of progressive realization and noted that it “should not be interpreted in the sense that, while implementation is underway, these obligations are deprived of specific content; moreover, this does not mean that the States may postpone indefinitely the adoption of measures to give effect to the rights in question, especially nearly forty years after the entry into force of the inter-American treaty. Therefore, there is also an obligation of non-retrogressivity in relation to rights that have been realized”.¹²² Defining Article 26 and the corresponding state obligations in this manner led the Court to find

¹²⁰ Antkowiak, "A "Dignified Life" and the Resurgence of Social Rights," 25.

¹²¹ IACtHR, Cuscul Pivaral v. Guatemala, §97.

¹²² IACtHR, Poblete Vilches et al. v. Chile, 8 March 2018, §104.

violations of ESCR, such as the right to work,¹²³ right to health,¹²⁴ right to social security,¹²⁵ on the basis of this provision.

It is also important to note that in the case *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the court noted that “when examining State responsibility, it is necessary to establish that, as revealed by the foregoing, notwithstanding the obligation to adopt measures to achieve “progressively” the “full realization” of the rights included in Article 26 of the Convention, the content of such rights includes aspects that are enforceable immediately”.¹²⁶ Therefore, the IACtHR once again stressed the state parties’ obligations deriving from Article 26 to take steps toward the “progressive” and “full realization” of the ESCR protected by this provision. The court further noted that regarding this matter, the obligation established in Articles 1(1) and 2 of the ACHR are also applicable.¹²⁷ Following that, the IACtHR once again referred to positive obligations of the state parties noting that “the state (has) an obligation to ensure the enjoyment of the rights by preventing or avoiding their violation by private individuals” as well.¹²⁸

2.3. Comparing the arguments of the ECtHR and the IACtHR

As mentioned above, the ECtRH and the IACtHR have different legal bases to base their decisions on protecting the ESCR and the interests related to them. Namely, the Inter-American Court of Human Rights considers itself eligible to refer not only to the ACHR but also to the

¹²³ IACtHR, *San Miguel Sosa v. Venezuela*, 8 February 2018, §211-222.

¹²⁴ IACtHR, *Cuscul Pivaral v. Guatemala*, §118-153.

¹²⁵ IACtHR, *Muelle Flores v. Peru*, 6 March 2019, §170-208

¹²⁶ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 6 February 2020, §272.

¹²⁷ *Ibid.* §272

¹²⁸ *Ibid.* §272

Protocol of San Salvador¹²⁹ and the whole OAS Charter, including Article 34¹³⁰ (although this assumption by the court is debatable¹³¹). As already mentioned, in the case of the ECtHR, the European Social Charter can be considered as a complementary treaty to the ECHR.¹³² In addition, the ECHR does not include a provision similar to Article 26 of the ACHR. For that reason, the ECtHR, unlike the IACtHR, is not able to base the violations of the ESCR and ESCR-related interests on independent provisions of the convention. Instead, it has to demonstrate the connection between the ESCR and CPR and grant protection to the ESCR as an interest protected by a particular CPR. However, the approaches of these two regional courts are pretty similar regarding protecting the ESCR.

One of the common arguments used by both courts is the argument of the indivisibility of rights. Both the IACtHR¹³³ and the ECtHR¹³⁴ have stressed the interdependence between socio-economic and civil and political rights in their case law. In addition, in their decisions, both courts referred to the positive obligations of the state parties regarding the ESCR, and while discussing this matter, both courts referred to Articles 1 of the ECHR and ACHR. Both provisions are similar and establish the responsibility of the state parties to protect the rights enshrined in these conventions within their jurisdictions.¹³⁵¹³⁶ The ECtHR has used Article 1 of the ECHR as the basis of the state parties' positive obligations in conjunction with provisions

¹²⁹ Melish, "The Inter-American Court of Human Rights: Beyond Progressivity," 375.

¹³⁰ Thomas M. Antkowiak, "Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads," in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Haeck, Yves et al. (Cambridge, Antwerp, Portland: Intersentia, 2015), 264.

¹³¹ See: Ruiz-Chiriboga, "The American convention and the protocol of San Salvador: two intertwined treaties: non-enforceability of economic, social and cultural rights in the Inter-American System," 159-186; Burgorgue-Larsen, Úbeda de Torres, and Greenstein, *The Inter-American Court of Human Rights: Case-Law and Commentary*, 619.

¹³² See: Amaya Úbeda de Torres, "Justiciability and social rights," in *Research Handbook on International Law and Social Rights*, ed. Christina Binder, et al. (Northampton, MA, USA: Edward Elgar Publishing Limited, 2020), 47.

¹³³ IACtHR, Acevedo Buendia and others v. Peru, §99.

¹³⁴ European Court of Human Rights, Airey v. Ireland, §26.

¹³⁵ Council of Europe, *The European Convention on Human Rights*, 4 November 1950, Article 1.

¹³⁶ Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 1.

protecting substantive rights.¹³⁷ Similar to that, the IACtHR has noted that in terms of positive obligations of the state parties regarding progressive realization, which derive from Article 26 of the ACHR, Article 1 of the convention was also applicable.¹³⁸

Another important aspect is the argument for the effectiveness of rights used by the ECHR,¹³⁹ related to the “living instrument” doctrine developed by the ECtHR to make the convention “a dynamic living instrument, which must adapt to changing political and social mores in member states”.¹⁴⁰ The IACtHR has not used the argument of “living instrument” in its case law regarding the ESCR. However, the court has discussed this matter in Advisory Opinion OC-16/99 of October 1, 1999 and noted that “human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions”.¹⁴¹ Considering how the IACtHR has shifted its approaches towards Article 26 of the ACHR, the court will probably also use the argument of “living instrument” in future, which will be another means to grant protection to the ESCR.

In conclusion, although the IACtHR and the ECtHR had different legal grounds, as the IACtHR had a greater extent of material jurisdiction, the courts still developed similar arguments while trying to find legal bases for the protection of the socio-economic rights and interests related to them.

¹³⁷ Council of Europe, Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights, January 2007, Human rights handbooks, No. 7, p. 9.

¹³⁸ IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, §272.

¹³⁹ European Court of Human Rights, *Airey v. Ireland*, §24.

¹⁴⁰ Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 405.

¹⁴¹ IACtHR, *Advisory Opinion OC-16/99 of October 1, 1999*, §114.

3. CASE LAW OF THE ECtHR AND THE IACtHR REGARDING THE INTERESTS RELATED TO THE RIGHT TO HOUSING

3.1. Case law of the ECtHR

Over the years, the ECtHR has considered numerous cases regarding the right to housing and related interests in terms of the prohibition of torture, the right to private and family life, and the prohibition of discrimination.¹⁴² In the 2001 case *Chapman v. the United Kingdom*, the ECtHR stated that the ECHR does not establish a right “to be provided with a home”.¹⁴³ The court did not impose any specific obligations to state parties and mentioned that “while it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter of political, not judicial decision”.¹⁴⁴ However, the court has forged case law that protects issues related to the right to housing by falling them into the scope of protection of different civil and political rights and recognizes state obligations regarding them as well.

3.1.1. The right to private and family life

The key provision in protecting housing interests is Article 8 of the ECHR, enshrining the right to private and family life. Although the right to housing is not explicitly safeguarded by the ECHR, the ECtHR declared “the right to respect for the home” to fall within the scope of Article 8 of the convention.¹⁴⁵ While defining the concept of “home” the ECtHR established the

¹⁴² See: Clements and Simmons, “European Court of Human Rights,” 409-428; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, (Cambridge: Cambridge University Press, 2018): 234-251;

¹⁴³ ECtHR, *Chapman v. United Kingdom* [GC], Application no. 27238/95, 18 January 2001, §99.

¹⁴⁴ *Ibid.*, §99.

¹⁴⁵ ECtHR, *Ivanova and Cherkezov v. Bulgaria*, Application no. 46577/15, 21 April 2016, §52-54.

standard according to which in order to determine the “sufficient and continuous links with a specific place” each case and its circumstances should be assessed independently.¹⁴⁶ Taking into consideration how different and complex a particular case can be, this approach should be endorsed. According to the ECtHR, “the length of temporary or permanent stays in it, frequent absence from it or its use on a temporary basis, for the purposes of short-term stays or even keeping belongings in it, do not preclude retention of sufficient continuing links with a particular residential place, which can still be considered “home” for the purposes of Article 8 of the Convention”.¹⁴⁷

Another important remark regarding this topic is that the classification of a property as a "home" does not depend on the legality of the occupation under domestic law.¹⁴⁸ Defining the concept of “home” protected by Article 8 without referring to ownership or other legal institutes should be assessed positively, as it had a significant positive outcome in cases relating to Roma rights. An illustration of this positive effect can be observed in the case of *Yordanova and others v. Bulgaria*, which pertains to houses constructed on arbitrarily occupied lands. In this case, the ECtHR declared the houses built on state land without authorization to fall within the scope of “home” for the purposes of Article 8 of the ECHR,¹⁴⁹ and therefore are protected under that provision. This approach demonstrates how broad the scope of “home” can be. It aims to shield individuals from interference and extends the scope of protection to rightful owners or occupants of a "home" and even to those who unrightfully use a specific place as a "home".

Eviction cases play a significant role in the legal precedents established by the ECtHR concerning the right to housing. The margins of appreciation have significant meaning in

¹⁴⁶ ECtHR, *Winterstein and Others v. France*, Application no. 27013/07, 17 October 2013, §141.

¹⁴⁷ ECtHR, *Lazarenko and Others v. Ukraine*, Application nos. 70329/12 and 5 others 27 June 2017, §53.

¹⁴⁸ ECtHR, *McCann v. the UK*, Application no. 19009/04, 13 August 2008, §46-50.

¹⁴⁹ ECtHR, *Yordanova and Others v. Bulgaria*, Application no. 25446/06, 24 April 2012, §10, §103.

eviction cases, and the ECtHR assesses the breadth of margins of appreciation by considering the specific circumstances of each case.¹⁵⁰ The ECtHR has stated that “the margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights”.¹⁵¹ It is important to note that the concept of safeguarding the notion of “home” as outlined in Article 8 falls within this realm, given its overall impact on an individual’s rights. Consequently, the margins of appreciation experienced by the state parties are narrower and more restricted.

In addition, the ECtHR case law shows that the protection of “home” within the scope of Article 8 of the ECHR should be in accordance with the principle of proportionality. Therefore, the state parties have a procedural obligation to ensure that the interference in the right is “proportionate to the aim pursued” and “necessary in a democratic society”.¹⁵² This is a crucial procedural safeguard to prevent the state parties from arbitrary interference. The issue was considered in the case of *Berger-Krall and Others v. Slovenia*, where the ECtHR noted that “a person at risk of losing his or her home should in principle be able to have the proportionality and reasonableness of the measure”.¹⁵³ The court also referred to the state parties’ procedural obligation and declared that an independent tribunal should determine the proportionality and reasonableness of the measure in accordance with the principles set out in the ECHR.¹⁵⁴ This requirement should also be assessed positively from the human rights perspective, as considering the issue by an independent body increases probability that the decision will be fair and unbiased.

¹⁵⁰ Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 418.

¹⁵¹ ECtHR, *Yordanova and Others v. Bulgaria*, 2012, §118.

¹⁵² ECtHR, *Yevgeniy Zakharov v. Russia*, Application no. 66610/10, 14 March 2017, §33.

¹⁵³ ECtHR, *Berger-Krall and others v. Slovenia*, Application no. 14717/04, 12 June 2014, §270

¹⁵⁴ *Ibid.*

Although the obligation to respect the “home” is generally negative,¹⁵⁵ the ECtHR has also imposed positive obligations to the state parties in this regard. In *Marzari v. Italy*, the court noted, “although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter’s private life”.¹⁵⁶ Therefore, the ECtHR made it clear that in some cases under special circumstances (for example, such as severe disability) the state can be responsible to perform positive obligations as well.

3.1.2. Prohibition of torture

In some cases, issues regarding housing can lead to a violation of Article 3 of the ECHR. The ECtHR has addressed this topic in the cases *Selçuk and Asker v. Turkey* and *Moldovan v. Romania*. In both cases, the houses of the applicants were burned down by civilians¹⁵⁷ or security forces.¹⁵⁸ According to the ECtHR this led to a violation of Article 3 of the ECHR.

¹⁵⁵ Palmer, “Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights,” 415.

¹⁵⁶ ECtHR, *Marzari v. Italy* [dec], Application no. 36448/97, 4 May 1999.

¹⁵⁷ ECtHR, *Moldovan and Others v. Romania* (no. 2), Application nos. 41138/98 and 64320/01, 12 July 2005, §19.

¹⁵⁸ ECtHR, *Selçuk and Asker v. Turkey*, Application no. 12/1997/796/998-999, 24 April 1998, §11.

However, the argumentation of the ECtHR was different in these cases and focused on different factors.

In *Selcuk and Asker v. Turkey* the ECtHR considered that destruction of a house can be considered inhuman treatment when the act is performed in certain form. The court noted “bearing in mind in particular the way the applicants’ homes were destroyed and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorized as inhuman treatment within the meaning of Article 3”.¹⁵⁹ Therefore, the court emphasized the threatening nature of the security forces’ actions and considered a purposeful and violent burning of a house severe enough to be considered as inhuman treatment. Unlike that, in the case *Moldovan v. Romania* the court a violation of Article 3 was found based on the harsh living conditions, the applicants had to experience after their houses were destroyed. The court noted “severely overcrowded and unsanitary environment ... combined with the length of the period during which the applicants have had to live in such conditions ... must have caused them considerable mental suffering, thus diminishing their human dignity”¹⁶⁰ and therefore constituted “an interference with their human dignity which, in the special circumstances of this case, amounted to “degrading treatment” within the meaning of Article 3 of the Convention”.¹⁶¹ Through these judgements the ECtHR established that in certain occasions various factors, such as living in severely disadvantaged conditions or the way a property was destroyed, can be classified as inhuman and degrading treatment and constitute a violation of Article 3 of the ECHR.

The court has also established the state parties’ positive obligations regarding housing interests based on Article 3 of the ECHR. Although the ECtHR has declared that the court's jurisprudence

¹⁵⁹ Ibid., §78.

¹⁶⁰ ECtHR, *Moldovan and Others v. Romania* (no. 2), §110.

¹⁶¹ Ibid., §113.

does not acknowledge the right to be provided with a home,¹⁶² the ECtHR has established exceptions from this rule. In the *Tarakhel v. Switzerland* case, the ECtHR ruled that an exception can be made when the applicant is an asylum seeker who presumably belongs to an underprivileged and vulnerable group and, therefore, needs special protection. Although the court did not order any specific reparations as the state parties have discretion to “choose the means necessary to comply with the judgement”,¹⁶³ the judgement obliged Switzerland to perform positive obligations and address this issue. The court acknowledged “the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive”.¹⁶⁴ Consequently, the ECtHR unanimously concluded that Switzerland had violated Article 3 of the ECHR.

Therefore, according to the ECtHR’s case law, Article 3 of the convention also protects interests related to housing issues and imposes on state parties a negative obligation to protect human dignity and positive obligations under specific circumstances.

3.1.3. Prohibition of discrimination

Another provision of the ECHR is Article 14, the prohibition of discrimination, which was also used by the ECtHR while addressing the housing issues regarding tenancy and distribution of housing benefits.

Regarding the discrimination in terms of tenancy in the case *Larkos v. Cyprus*, the court found a violation of Article 14 in conjunction with Article 8 of the ECHR. According to the ECtHR,

¹⁶² European Court of Human Rights, *Chapman v. United Kingdom*, §99.

¹⁶³ William Schabas, *The European Convention on Human Rights: A Commentary*. (Oxford, United Kingdom: Oxford University Press, 2015), 868.

¹⁶⁴ ECtHR, *Tarakhel v. Switzerland*, §97.

the state failed to “justify the difference in treatment between tenants renting State-owned property such as the applicant and other private tenants renting from private landlords by pointing to the duties which the Constitution imposes on the authorities as regards the administration of the property of the State”.¹⁶⁵ In another case, *Karner v. Austria* the court found a violation of the same provisions, in terms of discrimination based on sexual orientation. The ECtHR noted that the Austrian government failed to justify “the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision”.¹⁶⁶ The ECtHR also declared that the state parties must adhere the principle of nondiscrimination while completing positive actions as well. In the case of *Bah v. the UK*, the court stated that “where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14”.¹⁶⁷ In this case, the ECtHR also found a violation of Article 14 in conjunction with Article 8 of the convention, as “the home and family life of the applicant” was affected.¹⁶⁸ Therefore, this standard also applies to housing benefits. These decisions make clear that Article 14 also applies to interests protecting different components of the right to housing that fall within the scope of the CPR enshrined in the ECHR.

3.2. Case law of the IACtHR

The right to housing or interests related to this right has been substantially discussed just in 3 judgements of the IACtHR. Therefore, the case law of the IACtHR regarding the right to housing is less diverse and comprehensive than the case law by the ECtHR analyzed in the previous subchapters. As mentioned above, in its earlier case law, the IACtHR referred to Article 4 of the ACHR while discussing socio-economic rights. It recognized them as elements

¹⁶⁵ ECtHR, *Larkos v. Cyprus* [GC], Application no. 29515/95, 18 February 1999, §31.

¹⁶⁶ ECtHR, *Karner v. Austria*, Application no. 40016/98, 24 July 2003, §42-43.

¹⁶⁷ ECtHR, *Bah v. the United Kingdom*, Application no. 56328/07, 27 September 2011, §40.

¹⁶⁸ *Ibid.*

of the right to life by referring to the dignified life (“Vida Digna”) doctrine. The case law of the IACtHR regarding the right to housing is from this same period; therefore, the court has examined Article 4 of the ACHR while discussing the issue. In its recent case law, the court started using Article 26 of the ACHR as a legal basis for the ESCR and found independent violations of different rights.¹⁶⁹ However the court yet has not considered the right to housing from this perspective. The court has discussed the right to housing in the cases “Mapiripan Massacre v. Colombia”, “Yakye Axa Indigenous Community. v. Paraguay” and Sawhoyamaya Indigenous Community v. Paraguay.

3.2.1. Case of the “Mapiripán Massacre” v. Colombia

In the case of “Mapiripan Massacre“ v. Colombia, the IACtHR discussed the state parties’ obligations relating to the right to housing in terms of housing rights of displaced children. At dawn on 15 July 1997, more than 100 armed men took control of Mapiripan. The massacre was carried out from 15 to 20 July by paramilitary groups.¹⁷⁰ These groups murdered,¹⁷¹ beheaded,¹⁷² and dismembered¹⁷³ civilians. After the massacre, people left the town and had to experience separation from families, rejection, and hunger.¹⁷⁴

The IACtHR declared that the Colombian government failed to protect the right to life of these children. The court referred to the state parties’ positive obligations regarding the right to life and noted that “the obligation of the State to respect the right to life of every person under its jurisdiction takes on special aspects in the case of children, and it becomes an obligation to “prevent situations that might lead, by action or omission, to breach it.”¹⁷⁵ The court further

¹⁶⁹ Antkowiak, "A "Dignified Life" and the Resurgence of Social Rights," 16.

¹⁷⁰ See IACtHR, "Mapiripán Massacre" v. Colombia, §96.29 – 96.56

¹⁷¹ Ibid.. §96.47.

¹⁷² Ibid.. §96.36, §96.55.

¹⁷³ Ibid.. §96.39.

¹⁷⁴ Ibid.. §161.

¹⁷⁵ Ibid.. §162.

noted that Colombian government “did not create the conditions and did not take the necessary steps for the boys and girls of the instant case to have and develop a decent life, but rather exposed them to a climate of violence and insecurity.”¹⁷⁶ Part of the displaced boys and girls also had to live in extremely harsh conditions, namely in “houses” which were made of tin and plastic and could not even protect them from cold.¹⁷⁷ The IACtHR has examined the case in terms of adequate living conditions and considered that living in a “house” made of tin and plastic, which does not even protect from cold cannot be compatible with the standards of adequate housing. Therefore, the IACtHR found a violation of Article 4 of the ACHR in the Case of the “Mapiripán Massacre” v. Colombia.

3.2.2. Cases of the Yakye Axa Indigenous Community v. Paraguay and Sawhoyamaxa Indigenous Community v. Paraguay

Other cases in which the court examined Article 4, paragraph 1 of the ACHR regarding the right to housing are Yakye Axa Indigenous Community v. Paraguay and Sawhoyamaxa Indigenous Community v. Paraguay. According to the facts of the cases, the indigenous community members experienced severe conditions in the settlements where they lived. Namely, “the members of the Yakye Axa Community did not have minimum basic services. The dwellings were precariously built with Karanda’y, a type of palm in the Chaco region, and tin roofing or pieces of plastic, for which reason they were especially affected by seasonal changes. Each dwelling has on average five inhabitants. They have no electricity, they use firewood to cook, and they light the place with candles and oil lamps”.¹⁷⁸ The situation was similar in the case of Sawhoyamaxa Indigenous Community. The members of the Sawhoyamaxa Community were living in 49 houses in total, with no sanitation, only a few of

¹⁷⁶ Ibid.. §162.

¹⁷⁷ Ibid.. §161.

¹⁷⁸ IACtHR, Yakye Axa Indigenous Community v. Paraguay, 17 June 2005, §50.94.

them had electricity, and people had to burn wood to cook and use oil lamps and candles to light the place.¹⁷⁹

In these decisions, the court considered the adequate living conditions components in relation to the “Vida Digna” doctrine. The IACtHR noted that the members of Sawhoyamaxa Indigenous Community and Yakye Axa Community did not have “access to appropriate housing with the basic minimum services, such as clean water and toilets”.¹⁸⁰ Therefore, the court established the right to housing not merely as a right to have a roof above one’s head but declared that a place where a person lives must meet specific criteria to be considered adequate. The IACtHR also referred to positive obligations of the state parties, noting that guaranteeing of the right to life “entails the adoption of positive measures to prevent the breach of such right”.¹⁸¹ Taking into consideration the living conditions of the members of the indigenous community the court found violation of Article 4 of the ACHR on the site of Paraguayan government for failing to adopt necessary measures to turn the living conditions of Sawhoyamaxa and Yakye Axa communities compatible with the standards of the “dignified life”.¹⁸² As a mean of reparation the court determined the obligation for Paraguayan government to allocate US \$950,000 and \$1,000,000 “to a community development program that will consist of implementation of education, housing, agricultural” and other projects benefiting the communities.¹⁸³

¹⁷⁹ IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006, §73.68.

¹⁸⁰ IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, §153; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, §161.

¹⁸¹ IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, §153.

¹⁸² IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, §166; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, §176.

¹⁸³ IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, §205; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, §224.

3.3. Comparing the case law of the ECtHR and IACtHR

The previous chapters highlighted vital cases and legal principles established by the ECtHR and the IACtHR regarding the right to housing. This chapter builds upon that foundation by examining the similarities and differences between the case law of these regional human rights courts in protecting the right to housing and the interests related to this right.

First, it is essential to mention that both courts have used the provisions protecting CPR to grant protection to different components of the right to housing.¹⁸⁴ This is natural in the case of the ECtHR, as the ECHR has no provision protecting the ESCR, except Article 2 of Protocol No. 1 enshrining the right to education. In the case of ECtHR, these CPR were the right to private and family life, prohibition of torture, and prohibition of discrimination. The situation is different regarding the IACtHR. As mentioned, nowadays, the court considers Article 26 of the ACHR (although disputed) to cover all socio-economic rights stipulated in Article 34 of the OAS Charter, including the right to housing. However, in 2005-2006 when the IACtHR was considering the above-discussed cases, the court did not define Article 26 of the ACHR in the same way and, therefore, also referred to the CPR. The case law of the Inter-American Court of Human Rights is more homogenous. In all judgements where the IACtHR has referred to the right to housing, Article 4 of the ACHR stipulating the right to life is used as a means to protect this right.¹⁸⁵

Even though the courts referred to different CPR, in some cases, they developed similar arguments. For instance, both courts have examined whether living in severely disadvantaged

¹⁸⁴ Elizabeth Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Review*, Vol. 2, No. 4 (2009): 399; Tara J. Melish, "The Inter-American Court of Human Rights: Beyond Progressivity" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008), 385-392;

¹⁸⁵ See: IACtHR, "Mapiripán Massacre" v. Colombia, §162; IACtHR, Sawhoyamaya Indigenous Community v. Paraguay, §153;

positions constituted the violation of rights enshrined in the ECHR on the ACHR. Both courts found that the living conditions of particular people were incompatible with adequate living standards. The ECtHR considered that the fact that applicants had to live in an “overcrowded and unsanitary environment”¹⁸⁶ caused a violation of Article 3 of the ECHR, the prohibition of torture in terms of degrading treatment. However, in similar circumstances, when the applicants had to live in houses made of tin and plastic, without electricity and sanitation, the IACtHR found a violation of Article 4 of the ACHR, the right to life.¹⁸⁷ In conclusion, the ECtHR and the IACtHR have utilized different CPR to protect the right to housing and related interests, they have shared common ground in the examination of living conditions and finding violations.

Another similarity both courts share is finding violations of rights based on the state parties’ failure to comply with the positive obligations. The IACtHR applied the *Vida Digna* (dignified life) doctrine, based on which the court has declared the state parties to have positive obligations regarding the housing interests.¹⁸⁸ Similarly, the ECtHR also found a violation of the right to private and family life and prohibition of torture, as the court considered that state parties have positive obligations to protect interests related to the right to housing in specific circumstances such as when the applicant is an asylum seeker or suffers from severe disease as these individuals were considered to be underprivileged and in need of special treatment by the court.¹⁸⁹

In its case law, the ECtHR has forged standards that positively impacted individuals. For example, the court has emphasized that the concept of “home” should be assessed independently

¹⁸⁶ ECtHR, *Moldovan and Others v. Romania* (no. 2), §110.

¹⁸⁷ See: IACtHR, “Mapiripán Massacre” v. Colombia, §161; IACtHR, *Sawhoyamaya Indigenous Community v. Paraguay*, §166; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, §176.

¹⁸⁸ See: IACtHR, “Mapiripán Massacre” v. Colombia, §162; IACtHR, *Sawhoyamaya Indigenous Community v. Paraguay*, §166; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, §176.

¹⁸⁹ ECtHR, *Marzari v. Italy* [Dec], Application no. 36448/97, 4 May 1999; ECtHR, *Tarakhel v. Switzerland*, 4 November 2014, §97.

in each case, taking into account various factors such as the individual's links to a specific place and granting protection to housing interests without referring to ownership, which significantly contributed to protection the housing rights of Roma individuals as I have discussed above. The court has also promoted nondiscrimination in terms of protecting housing interests through declaring that housing benefits must be distributed in a way that is compliant with article 14 of the ECHR, prohibiting discrimination. Unfortunately, the IACtHR has not referred to these issues in its judgements.

Finally, the courts have expressed similar approaches towards the issues discussed and assessed by both, such as positive obligations of the state parties and utilization of the CPR to protect the right to the house and related interests. However, the case law of the ECtHR is more diverse and covers topics that have yet to be the subject of discussion of the IACtHR.

CONCLUSION

The thesis analyzed the approaches and case law of the ECtHR and IACtHR to protect the ESCR, particularly the right to housing and interests related to that right. Both courts have used CPR provisions of the ECHR and the ACHR to protect various components of socio-economic rights. In the case of the ECtHR, this approach was inevitable, as the court is only allowed to consider cases regarding the violations of the ECHR provisions, and the only CPR enshrined in the convention is the right to education. Therefore, the ECtHR had to develop a justification that would declare socio-economic rights and interests to fall within the scope of CPR provisions of the ECHR. In the case of the IACtHR, although the court could have used Article 26 of the ACHR and referred to the state parties' obligation regarding the progressive realization, the court also referred to CPR provisions and took a similar course. However, the approach was changed in 2017, and, presumably, the court will continue to find violations of ESCR based on Article 26.

The fact *per se* that the courts have established arguments, which justified the protection of the ESCR through the CPR provisions and developed case law, where these approaches were practically used as important means for this purpose, should be assessed positively from the perspective of human rights protection. In various judgements the ECtHR and the IACtHR discussed and declared various components of the right housing, for instance, adequate living conditions and respect for home, to fall within the scope of CPR provisions of the ACHR and ECHR and therefore forged case law which requires the state parties to protect these interests. However, some aspects can be further improved in both systems.

Regarding the ECtHR, it is important for the court not to use different approaches in different judgements, to increase the level of foreseeability and clearly determine the limits of state

obligations. Instead, the court simultaneously uses both arguments on the effectiveness and indivisibility of rights till today, which can be confusing for applicants. On the other hand, this allows the ECtHR to use an approach that will provide a better justification for protecting ESCR based on the circumstances of a particular case. From this perspective, using different approaches allows the court to act more effectively to protect socio-economic interests. Suppose the ECtHR chooses one of the arguments of indivisibility and effectiveness of rights, the flexibility of the court to protect the ESCR might be significantly affected. It might cause adverse consequences, as there may be a case in which a particular one of these approaches will be needed to grant protection to the right to housing or related interests. Therefore, it will be better if the ECtHR merges these two arguments and develops one comprehensive argument. In this case, it is less likely that this will lead to cases when the court's approach will not be effective in dealing with the challenges of a case. In addition, the argument incorporating both approaches can be expected to grant a higher degree of protection to the right to housing and the ESCR in general.

The ECtHR acknowledges that the protection of rights enshrined in the ECHR extends beyond a mere theoretical framework and requires states to take active measures to make these rights a practical reality, effectively protecting and promoting them. That includes creating an environment where individuals can exercise their rights without undue hindrance, enabling access to effective remedies, and implementing necessary measures to address systemic issues that impede the full realization of these rights. Therefore, the merged theory should focus on the comprehensive argument that the positive obligations placed on states by the ECtHR are rooted in the states' overarching duty to ensure that the rights and freedoms outlined in the convention should be secured with the degree which makes these rights practical and effective. Indeed, integrating the principle of effectiveness into the indivisibility argument will allow the ECtHR to interpret the ECHR more flexibly, adapting it to changing societal views and needs.

The "living instrument" doctrine enables the court to interpret the ECHR in a way that ensures its relevance and effectiveness in addressing contemporary challenges. This interpretative technique can be employed to include interests derived from socio-economic rights within the scope of protection provided by the ECHR. Therefore, merging these arguments would allow the court to consider the broader context and implications of human rights violations, recognizing that the enjoyment of civil and political rights cannot be fully realized without fulfilling socio-economic rights. Consequently, this comprehensive approach would enhance the court's ability to provide adequate remedies and protections in cases concerning ESCR.

In terms of case outcomes, merging these arguments would presumably result in a more nuanced analysis and a broader interpretation of human rights and provide a higher level of protection for ESCR. The ECtHR would be more inclined to consider the interconnectedness between different rights and examine the broader impact of human rights violations on individuals and communities. This comprehensive argument would provide a stronger basis for addressing complex cases involving the right to housing or related interests as well as other ESCR. Instead of relying merely on a single approach, the court could consider various factors while determining the appropriate level of protection. Therefore, the merged argument should emphasize the state's responsibility to take legislative and administrative steps to create an environment where individuals can genuinely exercise their rights.

The IACtHR has dealt with housing issues by referring to Article 4 of the ACHR, the right to life. However, as discussed in Chapter 2.2.2. (Obligation of progressive realization) the court has changed its approach and started using Article 26 of the ACHR as a means to protect the ESCR, as the article establishes state parties' general obligation regarding the realization of ESCR. Although it is disputed, the IACtHR has declared itself eligible to refer not only to the ACHR but also to the Protocol of San Salvador and the OAS Charter. The IACtHR further

noted that Article 26 of the ACHR applies to the whole OAS Charter and, therefore, to Article 34, which protects a wide range of ESCR, including the right to housing. From a pro-human rights point of view, it is desirable that the IACtHR quits referring to Article 4 of the ACHR and applies Article 26 in conjunction with Article 34 of the OAS Charter. That would allow the court not to be limited by CPR provisions of the ACHR in considering alleged violations of the right to housing (and other ESCR) and directly refer to the right to housing enshrined in article 34(K) of the OAS Charter (as well as other paragraphs of this provision regarding other ESCR). In this case, the IACtHR would address and protect all components of the right to housing, including those that do not fall within the scope of CPR provisions of the ACHR. Ultimately, the court would be able to grant a higher degree of protection to ESCR.

In conclusion, the analysis of the approaches and case law of the ECtHR and IACtHR demonstrates the positive development of protection for economic, social, and cultural rights (ESCR), particularly the right to housing and related interests. Both courts have utilized the CPR provisions of the ECHR and ACHR to safeguard various socio-economic rights, including the right to housing. While the ECtHR has employed a dual approach of indivisibility and effectiveness, the IACtHR initially relied on Article 4 of the ACHR but has shifted towards Article 26, recognizing the broader obligation of state parties for the progressive realization of ESCR. The ECtHR should merge these arguments into a comprehensive framework, ensuring higher protection and flexibility in addressing housing rights and other ESCR. The IACtHR should also abandon its reliance on Article 4 of the ACHR and exclusively apply Article 26 in conjunction with Article 34 of the OAS Charter, enabling comprehensive protection for all aspects of the right to housing. These adjustments would enhance the courts' ability to address violations and ensure the practical realization of the right to housing and other ESCR.

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