INTERFERING WITH ECONOMIC, SOCIAL, AND CULTURAL RIGHTS:

The interplay between limitations and states' obligations in international adjudication

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The dissertation does not contain materials accepted for previous publications, including for another degree, or written by another person, unless otherwise acknowledged.

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Abstract

Interferences with human rights are present in everyday life. In the realm of civil and political rights (CPR), interferences have been conceptualized through the notion of limitations. These limitations have primarily served as a tool to assess state actions, particularly in contexts where states are expected to refrain from acting. Interferences with economic, social and cultural rights (ESCR) has not received the same attention in the conceptualization of limitation. They have been conceptualized through states' obligations, such as progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality. The two sets of concepts—limitations and states' obligations—function as analytical frameworks for examining interferences. Both frameworks rely on analytical methods, such as proportionality, to conduct the assessment. Since these two parallel frameworks have been developed independently, my dissertation is guided by two questions: i. '*What* is the framework used by international bodies to assess interference with ESCR?'; and ii. '*How* do international bodies assess interference with ESCR?'

In my dissertation, I adopt a comparative methodology, relying on doctrinal analysis of case law. The jurisdictions examined include the UN, African, European, and Inter-American systems. The adjudicatory bodies that I analyze are the UN Committee on Economic, Social, and Cultural Rights, African Commission on Human and Peoples' Right, African Court on Human and Peoples' Rights, Inter-American Commission on Human Rights, Inter-American Court of Human Rights, European Committee of Social Rights, and the European Court of Human Rights. Methodologically, case law analysis is my chosen method and is divided into two complementary case studies. The first examines the forced removal of individuals from their homes or lands, emphasizing states' negative obligations to interfere with the realization of human rights. The second examines austerity measures, centering on states' positive obligations and how to conceptualize limitations of such obligations. By engaging with two case studies that engage both sets of obligations, across diverse international and regional

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human rights bodies, my research offers a comprehensive examination of ESCR adjudication with regard to conceptualizing limitations.

Through case law analysis, I demonstrate that the limitation assessment serves as the primary analytical framework employed by international bodies, with proportionality functioning as the sole analytical method. However, the limitation assessment conducted by international bodies diverges from the traditional notion developed for CPR. While the criteria established in international treaties—namely, legality, legitimacy, and proportionality—remain present, they increasingly reflect the significance of states' obligations in cases of interferences with ESCR. Adjudicators examine the existing law, the states' justifications and the impact of measures even if not always labelling these elements as legality, legitimacy, and proportionality. Through these analytical choices, the limitation assessment has evolved into a mode of analysis for legal reasoning. Notably, proportionality comprises both non-negotiable obligations (e.g., the provision of alternative accommodation in cases of forced removal) and the balancing exercise. Important for the conceptualization of interferences with ESCR, certain states' obligations have been applied as parallel frameworks to the limitation assessment. While the language varies, the bodies' focus remains similar: review existing laws, states' justifications, and the impact of measures. Notably, one of the most innovative practices of the international bodies is the incorporation of states' obligations directly into the limitation assessment itself, thereby enhancing the level of scrutiny. This approach ensures that ESCR-specific elements, such as the availability of resources, are factored into the analysis of ESCR interferences. Overall, my analysis shows that interferences with ESCR, although assessed similarly to limitations of CPR, are conceptualized through the interplay between limitations and states' obligations, thereby incorporating ESCR-specific elements to better capture their nuances and complexity.

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List of abbreviations

Rights:

Civil and political rights (CPR)

Economic, social, and cultural rights (ESCR)

Treaties:

African Charter on Human and Peoples' Rights (ACHPR)

American Convention on Human Rights (ACHR)

American Declaration of the Rights and Duties of Man (ADRDM)

European Convention on Human Rights (ECHR)

European Social Charter (ESC)

International Covenant on Economic, Social, and Cultural Rights (ICESCR)

Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (OP-ICESCR)

Protocol of San Salvador (PSS)

Revised European Social Charter (RESC)

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

International Bodies:

African Commission on Human and Peoples' Rights (ACmHPR)

African Court on Human and Peoples' Rights (ACtHPR)

Committee on Economic, Social, and Cultural Rights (CESCR)

European Committee of Social Rights (ECSR)

European Court of Human Rights (ECtHR)

Inter-American Commission on Human Rights (IACmHR)

Inter-American Court of Human Rights (IACtHR)

Organizations

International Labour Organization (ILO)

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Organization of American States (OAS)

United Nations (UN)

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Introduction

On November 27, 2019, the last turbine of the Belo Monte Dam, a hydroelectric power plant whose construction was approved during the second term of President Lula, was formally inaugurated by the former President, Jair Bolsonaro. Prompted by the need to create a sustainable future while meeting Brazil's growing energy needs, the Dam, which was aptly labelled a 'Brazilian Giant', promised to deliver approximately 11.000 megawatts of clean energy, making it the largest hydropower plant in Brazil. Reflecting on its construction, the Mining and Energy Minister stated in 2019 that the dam's construction "boosted the local and national economy"[1] and would benefit upwards of 60 million people.[2]

On the flipside of the stated benefits of the Dam were its unignorable costs. Dam projects, as is well known, typically result in large-scale displacement of persons alongside the destruction of vast habitats. The Belo Monte project, in this regard, was no different. The construction on the Xingu River displaced approximately 40,000 people, many of whom were from marginalized backgrounds.[3] For these people, the Dam project, far from being a blessing, was a curse. Take for instance, the story of Hélio Alves da Silva, a fisherman from the Santo Antônio community, which was one of the areas that was direly affected by the flooding that followed the construction of the Dam. Hélio's life was permanently transformed by the construction of the 'Brazilian Giant.' Reflecting on it, he stated that "it wasn't just the machines arriving and tearing down the houses, it was the destruction of our dreams, of our bonds of

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[1] 'Governo Inaugura Belo Monte e Dá a Largada Para a Construção de Novas Hidrelétricas — Ministério de Minas e Energia', accessed 13 September 2025, https://www.gov.br/mme/pt-br/assuntos/noticias/governo-inaugura-belo-monte-e-da-a-largada-para-a-construcao-de-novas-hidreletric-2. Original statement: "Os investimentos realizados para a implantação de Belo Monte movimentaram a economia local e nacional. Continuaremos a trabalhar juntos com os demais ministérios, estados, municípios e órgãos envolvidos para construir novas usinas hidrelétricas, que, a exemplo desta, trazem segurança para o sistema elétrico, energia limpa, barata e de qualidade para garantir o desenvolvimento regional e nacional"

[2] 'Governo Inaugura Belo Monte e Dá a Largada Para a Construção de Novas Hidrelétricas — Ministério de Minas e Energia'.

[3] 'Pesquisa Faz Diagnóstico Sobre Danos à Moradia de Comunidades Ribeirinhas Na Região Amazônica', accessed 14 September 2025, https://portal.fgv.br/noticias/pesquisa-faz-diagnostico-sobre-danos-moradia-comunidades-ribeirinhas-regiao-amazonica.

friendship."[4] For Hélio, like uncountable others, the Dam project represented the loss of work, a home, support networks, and all the elements that make up a community.

The Belo Monte Dam construction is a vivid example of a measure that results in interference with the rights of persons like Hélio. These interferences, which are at times permitted by the law, demand careful consideration. They require the balancing of individual or collective claims against the stated benefits of the measure, the determination of alternative measures to lessen the damage caused, and the assurance of procedural safeguards, all of which are factors that adjudicators at the national and international level must contend with while deliberating on the permissibility of the measures taken by a state.

To assist the calculations that institutions must make while analyzing these complex situations, adjudicators are equipped with the tool of limitations, which helps them determine when rights—which are not absolute, with some exceptions[5]—can be limited and for what reasons. Traditionally, limitations have been linked to, and studied from the perspective of, civil and political rights (CPR), such as freedom of expression.[6] However, as the Belo Monte project and other similar projects suggest, the rights at stake for individuals like Hélio extend beyond CPR: among other things, their rights to housing, work, and livelihood are at stake. This, in turn, begs the question of whether the traditional limitation assessment, developed from the CPR perspective, is sufficient and suitable to analyze interferences such as those suffered by Hélio? Or whether a need to rethink limitations in light of the rights at stake is required?

Interferences with human rights are a pervasive feature of legal systems. Since most human rights are not absolute, their limitations are often necessary and justified, subject to meeting certain requirements. As previously indicated, in international human rights law, the

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[4] 'Remoção Forçada de Ribeirinhos Por Belo Monte Provoca Tragédia Social Em Altamira | Cimi', accessed 13 September 2025, https://cimi.org.br/2015/06/37308/. Original statement: "Não foram só as máquinas chegarem e derrubarem as casas, foi a destruição dos nossos sonhos, dos vínculos de amizade."
[5] Albrecht Weber, 'Limitation and Derogation of Fundamental Rights', in *Writing Constitutions*, ed. Wolfgang Babeck and Albrecht Weber, Volume 2: Fundamental Rights (Springer, 2024), 581.
[6] See, for instance: Kai Möller, 'The Proportionality of Lockdowns', *LSE Law, Society and Economy Working Papers 13/2021*, 2021, 2–13.

concept of limitations is used to analyze when interferences with rights can be deemed justified. Due to the overbearing influence of CPR on the formulation of limitations, the concept has come to embody the idea that states ought to refrain from interfering with rights, unless adequate justifications are provided.[7] With regards to economic, social, and cultural rights (ESCR), although it has been broadly acknowledged that they can be subject to limitations,[8] interferences with these rights are typically conceptualized in terms of states' obligations. These include obligations such as progressive realization, non-retrogression, minimum core, non-discrimination and substantive equality, which hold a special place in ESCR adjudication.[9] On the whole, these obligations direct states to fully realize ESCR, subject to maximum available resources.

Considering the development of these two separate bodies of literature—limitations for CPR and states' obligations for ESCR—the questions that begs to be asked is: how can interferences with ESCR be conceptualized? Are they analyzed through the exclusive use of states' obligations? How do state's obligations relate to the limitations? Can the logic of the two be combined or are they separate legal concepts? - These are the central questions that drive my inquiry and analysis of case law.

Interferences with rights derive both from state action and inaction.[10] Among the two, the former informs the traditional understanding of limitations, while the latter informs the

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[7] Frederick Schauer, 'A Comment on the Structure of Rights', *Georgia Law Review* 27, no. 2 (1993): 427.
[8] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012), 106–7.
[9] See, for instance: David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance', *South African Law Journal* 119, no. 3 (2002): 484–501; Lilian Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance', *De Jure* 46 (2013): 742–69; Katharine G. Young, 'Waiting for Rights: Progressive Realization and Lost Time', in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019); Sandra Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression', *South African Journal on Human Rights* 37, no. 2 (2021): 181–204; Ben TC Warwick, 'Concepts of Non-Retrogression in Economic and Social Rights', *Human Rights Quarterly* 47, no. 1 (2025): 115–40.
[10] Carlos Bernal Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', in *Rechtsphilosophie Und Grundrechtstheorie*, ed. Martin Borowski et al. (Mohr Siebeck, 2017), 511; Laura Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', in *Proportionality in Law: An Analytical Perspective*, ed. David Duarte and Jorge Silva Sampaio (Springer, 2018), 34.

debates around ESCR interferences. Regarding the latter, can it be argued that, since they involve considerations beyond the traditional state action paradigm, reliance on limitations alone to analyze interferences with ESCR is insufficient? Instead, to fill the conceptual gap, the incorporation of states' obligations is essential. Against this backdrop, my dissertation aims at bringing the literature on CPR limitations and ESCR obligations into conversation. It demonstrates how limitations are applied to the international adjudication of ESCR and how states' obligation feature in these cases to fill the gaps that traditional limitations analysis leaves open.

To fulfill these aims, I compare the jurisprudence of the United Nations (UN), African, European, and Inter-American human rights systems and identify similarities and differences in their legal reasoning. Within the chosen systems, I focus on the output of seven quasi-judicial and judicial bodies. In the UN system, I analyze decisions from the Committee on Economic, Social, and Cultural Rights (CESCR) due to its exclusive competence over ESCR matters. From the African system, I study both the African Commission on Human and Peoples' Rights (ACmHPR) and the African Court on Human and Peoples' Rights (ACtHPR). Similarly, in the Inter-American system, I examine the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR). Finally, in the European system, I look at the workings of the European Committee of Social Rights (ECSR) and the European Court of Human Rights (ECtHR). The wide selection of international bodies allows me to analyze diverse sets of cases and ensure that my contributions hold wide applicability within the realm of international human rights law.

As for the jurisprudence of these bodies, for this dissertation, I have selected two types of cases: the forced removal of individuals from their homes or lands and cases emerging in response to the austerity measures adopted by states. The selection of these case studies was informed by their contrasting orientations. The forced removal cases emphasize the negative obligation to refrain from interfering—and prohibiting third parties from interfering—with

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rights, while the cases dealing with austerity measures concern the failure to fulfill positive states' obligations due to economic hardship. By emphasizing both the positive and negative orientations, I canvass the full breadth of ESCR, thereby ensuring that my claims are representative of ESCR as a whole.

To structure my analysis and answer the overarching question of how interferences with ESCR are conceptualized in international adjudication, I frame my analysis through two research questions: i. '*What* is the framework used by international bodies to assess interference with ESCR?'; and ii. '*How* do international bodies assess interference with ESCR?' These questions act as guides to extract the fine details of ESCR adjudication in forced removal and austerity measures cases. My methodology consists of comparative analysis to identify features of ESCR adjudication that are shared across the systems under analysis. As for my method of analysis, I engage in doctrinal case law analysis.

In terms of my findings, I demonstrate that limitations, as an analytical framework, are applicable to ESCR adjudication, with proportionality analysis acting as the primary analytical method[11] used to decide cases. I show that the proportionality analysis conducted by international bodies comprises of two components: non-negotiable obligations and the balancing exercise. Here, non-negotiable obligations refer to states' obligations—such as the provision of alternative accommodation in cases of forced removal—which are deemed essential for an interference to be considered proportionate. Differently, the balancing exercise encompasses the states' interests or the applicants' rights, which must be weighed in order determine the proportionality of the measure undertaken. While the balancing exercise is perceived as part of the traditional limitation assessment, the creation of non-negotiable obligations is a recent trend of international adjudication.

[11] I chose the term 'analytical method to describe reasonableness and proportionality. However, scholars use different terminologies. See, for example: Sandra Liebenberg, 'Reasonableness Review', in *The Oxford Handbook of Economic and Social Rights*, ed. Malcolm Langford and Katharine G. Young (Oxford University Press, 2022). Liebenberg calls them 'inquiries.'

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On the question of the relationship between limitations and states' obligations, I demonstrate that specific states' obligations, which are traditionally understood as separate from the limitation assessment, have been incorporated into the limitation assessment by the international bodies to heighten scrutiny and adjust their reasoning to assess the realization of ESCR. For instance, substantive equality has become a recurring feature in the balancing exercise of the proportionality analysis in cases concerning the rights of disadvantaged groups, which represents a large segment of the cases under scrutiny in this dissertation. Furthermore, I demonstrate that in cases where international bodies have used states' obligations as analytical frameworks, the legal reasoning used to analyze the obligations, and the content of the obligations tend to overlap with the limitation assessment. For instance, the assessment of interferences in the austerity measures cases through the lens of both limitations and non-retrogression focus primarily on states' justification and the proportionality of the measures introduced. For these reasons, I argue that the limitation assessment has evolved to encompass states' obligations, thereby intensifying the scrutiny of interferences in ESCR cases.

In what follows, I lay down the sketch of these arguments by situating my findings in the state of the field (Section 1), methodology (Section2), and the structure of my dissertation (Section 3).

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1. Situating my findings in the state of the field

The starting point of my research is that most rights can be interfered with because of which they are referred to as relative rights.[12] With that said, a few rights are considered absolute, such as the rights prohibiting torture and slavery.[13] For these rights, no justification is sufficient to allow for an interference.[14] However, when it comes to relative rights, interferences

[12] Weber, 'Limitation and Derogation of Fundamental Rights', 581.
[13] Weber, 'Limitation and Derogation of Fundamental Rights', 581.
[14] Martin Borowski, 'Absolute Rights and Proportionality', *German Yearbook of International Law* 56 (2013): 393–98.

are by definition permissible, if adequate justifications are provided. Chief among the permissible justifications is that interference is necessary to ensure the realization of rights or for proper working of a democratic society.

In the literature, interferences are traditionally referred to as limitations and are sometimes also known as restrictions.[15] They are considered external to the right that is being interfered with insofar they "specify the circumstances in which the government can pursue a public policy objective even though doing so conflicts with a constitutional right [or a human right] as interpreted."[16] Limitations can be imposed at any point in time, with the possibility of their scope changing over time.[17] Furthermore, they can be in effect indefinitely (i.e. they need not be accompanied by a stipulated timeline).[18] For this reason, limitations are not designed to solve emergencies, which is the proper domain of derogations whose function is to suspend rights' application.

As Hafner-Burton et al. argue, derogations function as "escape clauses"[19] and "are a rational response to […] uncertainty."[20] They must be formally declared and justified against the contingencies that may emerge from exceptional circumstances. For this reason, derogations are characterized by their exceptionalism,[21] quite unlike limitations, which are introduced during ordinary times. Although the inquiry into derogations of ESCR is crucial for a comprehensive analysis of rights protection, I refrain from analyzing them in this dissertation

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[15] Thilo Marauhn and Vera Strobel, 'Limitations and Restrictions of Rights', in *Elgar Encyclopedia of Human Rights*, ed. Christina Binder et al. (Edward Elgar Publishing, 2022), 427.
[16] Stephen Gardbaum, 'Limiting Constitutional Rights', *UCLA Law Review* 54 (2004): 801–4.
[17] Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', *Human Rights Law Review* 9, no. 4 (2009): 559–60.
[18] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 559–60.
[19] Emilie M. Hafner-Burton et al., 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge University Press, 2016), 86.
[20] Hafner-Burton et al., 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', 91.
[21] See: Laurent Sermet, 'The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion', *African Human Rights Law Journal* 7, no. 1 (2007): 149–50; Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation', *International Journal of Constitutional Law* 10, no. 3 (2012): 672.

due to my exclusive focus on interferences that are a part of ordinary, as opposed to exceptional, law.

1.1. Limitations of economic, social, and cultural rights

While the scholarship on limitations does explicitly exclude ESCR from analysis, there exists an implicitly assumption that limitations relate to negative obligations of states rather than positive obligations,[22] which is imagined to be the proper domain of ECSR.[23] The Elgar Encyclopedia of Human Rights, for instance, affirms that "[l]imitations and restrictions largely apply to *negative rights*, which require the government to respect individual freedoms and to refrain from interfering therewith. (emphasis added)"[24] By contrast, positive rights, which are traditionally associated with ESCR, are considered "subject to balancing with governmental capacities and conflicting obligations but not normally to limitations and restrictions."[25] Alternatively, it is argued that interferences with ESCR ought to be tested using frameworks that are specific to these rights, such as progressive realization, instead of, or at best in addition to, limitation clauses.[26] Contrary to both of these positions, my claim, which I lay out in my "Analytical Framework" chapter, is that multiple frameworks exist and are used to assess interferences with ESCR by international human rights bodies, with the limitation assessment being the primary one.

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[22] See: Oscar M. Garibaldi, 'General Limitations on Human Rights: The Principle of Legality', *Harvard International Law Journal* 17, no. 3 (1976): 503–58; T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing', *The Yale Law Journal* 96, no. 5 (1987): 943–1005; Jeremy Waldron, 'Rights in Conflict', *Ethics* 99, no. 3 (1989): 503-519.; Schauer, 'A Comment on the Structure of Rights'; David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004); Gardbaum, 'Limiting Constitutional Rights'; Grégoire C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009); Möller, 'The Proportionality of Lockdowns'; Weber, 'Limitation and Derogation of Fundamental Rights'. These scholars discuss interferences through the lens of limitations as applicable to CPR.

[23] See, for instance: Gardbaum, 'Limiting Constitutional Rights'; Webber, *The Negotiable Constitution: On the Limitation of Rights*; Kai Möller, 'The Right to Justification and the Culture of Justification', *LSE Law, Society and Economy Working Papers 21/2023*, 2023, 2–17; Weber, 'Limitation and Derogation of Fundamental Rights'.

[24] Marauhn and Strobel, 'Limitations and Restrictions of Rights', 427.

[25] Marauhn and Strobel, 'Limitations and Restrictions of Rights', 427.

[26] In her work, Young argues that there are six modes of limiting ESCR: progressive realization, limitations, derogation, reservation, amendment, directive principles. See: Young, *Constituting Economic and Social Rights*, 101–17.

In making this claim, I build on the work of a small set of scholars who, despite the tendencies of the mainstream, focus on limitations of ESCR. Their interventions have mostly been made at the national level,[27] with only a few focusing on international law.[28] Regarding the analysis conducted at the national level, scholars often use the language of positive rights or positive action, instead of ESCR, to describe the same set of rights that I am interested in. Furthermore, unlike my approach, which consists of conducting a systematic case law analysis, their approach focuses on either normative claims or a small number of cases from one jurisdiction. Despite these differences in nomenclature and methodology, due to the overlap in subject matter and theoretical approach, I rely on and build upon the work of these scholars.

The aforementioned scholars typically understand limitations as encompassing four types: interference through states' action; omission or insufficiency through inaction; equality; and regression.[29] Despite this comprehensive understanding, most of the discussions on limitations have focused on interference or insufficiency, thereby leaving equality and regression out of the discussion. In my dissertation, by contrast, while I focus on interference through state action and inaction, I also analyze equality and regression as alternative frameworks to limitations.

In terms of the criteria of the limitation assessment, the scholarship on the subject matter can be categorized into three groups: First, there exists a group that asserts that the method applicable to assess limitations of ESCR are the same as those applicable for CPR,[30] even during

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[27] See: Robert Alexy, 'Constitutional Rights and Proportionality', *Revus: Journal for Constitutional Theory and Philosophy of Law* 22 (2014): 51–65; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012); Contiades and Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation'; David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine', *I•CON* 12, no. 3 (2014): 710–39; Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis'; Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable'.

[28] See: Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights'; Abdi Jibril Ali, 'Economic, Social and Cultural Rights General Obligations in the African Charter on Human and Peoples' Rights' (Ghent University, 2020).

[29] Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', 511; Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', 34.

[30] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), 429–34.

periods of crisis.[31] The second group argues that the limitations of ESCR are completely different from CPR. Some within this group argue that reasonableness—at times with minor moderations[32]—instead of proportionality should be applied to assess limitations of ESCR,[33] while others argue that balancing is the more appropriate method.[34]

The third group finds the middle ground between the first and second. This group argues that limitations of ESCR are neither the same nor completely different from that of CPR. Although these scholars collectively argue that proportionality is the appropriate analytical method for assessing interferences with rights, be CPR or ESCR, they diverge significantly in their view on which aspect of the proportionality analysis is the most relevant to ESCR adjudication. Most scholars argue that while the suitability and necessity criteria are the same for ESCR and CPR, a difference between the two emerges at the balancing stage (proportionality stricto sensu) of the analysis.[35] Differently, a smaller group claims that additional elements, such as 'vulnerability' and individual needs, have been incorporated into the proportionality analysis for ESCR, thereby setting it apart from CPR adjudication.[36] Notwithstanding which of two groups is to be agreed with, it is apparent that for these scholars, regardless of the similarly in the structure of the proportionality analysis, due to the separate development between CPR and ESCR, the content of their respective proportionality analysis differs.

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[31] Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine', 738.
[32] Katharine G. Young, 'Proportionality, Reasonableness, and Economic and Social Rights', *Boston College Law School Legal Studies Research Paper No. 430*, 2017, 30–32; Liebenberg, 'Reasonableness Review', 12.
[33] Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?', *UCLA School of Law Research Paper No. 16-04*, 2017, 12–22.
[34] Bernhard Schlink, 'Proportionality (1)', in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 727; Kai Möller, *The Global Model of Constitutional Rights*, Oxford Constitutional Theory (Oxford University Press, 2015), 179.
[35] Robert Alexy, 'On Constitutional Rights to Protection', *Legisprudence* 3, no. 1 (2009): 12–15; Klatt and Meister, *The Constitutional Structure of Proportionality*, 95–98; Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', 35–40; David Duarte, 'Gains and Losses in Balancing Social Rights', in *Proportionality in Law: An Analytical Perspective*, ed. David Duarte and Jorge Silva Sampaio (Springer, 2018), 63–65.
[36] Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', 520.

Despite the differences between the three groups of scholars that I have identified, a common thread between them is evident: all of these scholars agree that limitations are applicable to ESCR. This, in turn, rebuts the claim that limitations are exclusively applicable exclusively to CPR.[37] I build on this position, which has developed both through case law analysis[38] and normative enquiry,[39] by undertaking a comprehensive and systematic case law analysis on forced evictions and austerity measures before international human rights bodies. Through this, I demonstrate that the limitation assessment framework indeed is applicable in the adjudication of ESCR's interferences. Further, I argue that the third group of scholars, which claimed that a modified proportionality analysis is and should be used for ESCR, reflects the practice of my chosen jurisdictions. Beyond confirming their claim, I also argue that a modification to the limitation assessment for ESCR is required to ensure a comprehensive analysis of such interferences through states' obligations, a claim that I flesh out in my final chapter on "Conceptualizing interferences with economic, social, and cultural rights."

1.2. States' obligations

As previously indicated, ESCR have traditionally been conceptualized through the lens of states' obligations, namely, progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality. These obligations bring to light specific features of ESCR. For instance, progressive realization stresses that ESCR must be fully realized over time, subject to available resources.[40] Meanwhile, non-retrogression ensures that states, while progressively realization ESCR, do not take backwards steps, thereby reducing the rights

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[37] Marauhn and Strobel, 'Limitations and Restrictions of Rights', para. 427.
[38] See: Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis'.
[39] See: Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?'
[40] See, for example: Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights', *Journal of Human Rights Practice* 1, no. 3 (2009): 402–35; Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance'; Young, 'Waiting for Rights: Progressive Realization and Lost Time'.

protections already in place.[41] As for the minimum core, it ensures that states maintain essential levels and certain obligations, thereby creating a minimum shelf that cannot be breached.[42] Finally, non-discrimination and substantive equality, which are applicable to all human rights, are crucial for ESCR for they prohibit unequal treatment, while emphasizing the need to address systemic challenges that act as roadblocks on the path to equality.[43]

The literature on ESCR obligations has adopted states' obligations as an analytical framework for assessing ESCR violations. In this regard, while some scholars present states' obligations as inherently different than limitations,[44] others argue that they are either similar[45] or identical[46] to limitations. Against this background, I bridge the scholarship on limitations and states' obligation to conceptualize how interferences, in practice, are subject to adjudication. My contribution lies in analyzing the interaction between limitations and states' obligations when international bodies adjudicate on ESCR, by demonstrating how the states' obligations feature in the case law of the relevant bodies, and if and how they supplement the limitation assessment.

[41] See, for example: Christian Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', in *Ni Un Paso Atrás: La Prohibición de Regresividad En Materia de Derechos Sociales* (Del Puerto, 2006); Aoife Nolan et al., 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights', in *Economic and Social Rights after the Global Financial Crisis*, ed. Aoife Nolan (Cambridge University Press, 2014); Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression'; Warwick, 'Concepts of Non-Retrogression in Economic and Social Rights'.

[42] See, for example: Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance'; Sisay Alemahu Yeshanew, 'Combining the "Minimum Core" and "Reasonableness" Models of Reviewing Socio-Economic Rights', *ESR Review* 9, no. 3 (2008): 8–13; Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *The Yale Journal of International Law* 113 (2008): 113–75.

[43] See, for example: Margot E. Salomon, 'Why Should It Matter That Others Have More? – Poverty, Inequality and the Potential of International Human Rights Law', *LSE Law, Society and Economy Working Papers 15/2010*, 2010, 1–21; Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law', *Human Rights Law Review* 18 (2018): 411–40; Meghan Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform', *Oxford Journal of Legal Studies* 41, no. 4 (2021): 1197–226; Gillian MacNaughton, 'Emerging Human Rights Norms and Standards on Vertical Inequalities', in *Human Rights and Economic Inequalities*, ed. Gillian MacNaughton et al. (Cambridge University Press, 2021); Sandra Fredman, *Discrimination Law*, 3rd ed, Clarendon Law Series (Oxford University Press, 2022).

[44] See: Young, *Constituting Economic and Social Rights*, 101–17.

[45] Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 23.

[46] Leckie Scott, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly* 20, no. 1 (1998): 99.

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The typology of states' obligations is also a focal point of discussion. Scholars explain that states' obligations must be comprehensive and cover fundamental aspects of rights. The tripartite obligations—obligations to respect, protect, and fulfill—has been adopted by the literature as an adequate framework to demand state action.[47] One possible way to look at interferences with ESCR would be through this tripartite structure. However, I chose to use the negative and positive obligations framework in my dissertation instead. I do so for two reasons: first, since the respect, protect, fulfill framework is not common to language used by all of the international bodies that I study, using the tripartite obligations framework would have unjustly preferred some bodies over others; second, I wanted to accommodate the specific states' obligations that I listed previously, which stood the risk of being overshowed by the tripartite framework. Differently, they are perfectly accommodated under the positive and negative obligations framework. Under it, non-retrogression and non-discrimination are classified as negative obligations, while progressive realization and substantive equality are classified as positive obligations. This classification is based on the difference in the orientation of the two types of states' obligations – negative obligations demand that states *must not* retrogress or discriminate when protecting rights, while positive obligations demand that states *must* progressively realize and ensure substantive equality when guaranteeing ESCR. In my dissertation, I consider that the non-compliance with these obligations leads to interferences, which I demonstrate is understood by the international bodies as possible frameworks to assess interferences.

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[47] See, for instance: Asbjørn Eide, *Report on the Right to Adequate Food as a Human Right*, E/CN.4/Sub.2/1987/1, Report of the Special Rapporteur on the Right to Food (United Nations, 1987), paras 66–69; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Second Edition (Princeton University Press, 1996), 35–60; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia, 2003), 169–72.

1.3. Findings

Considering my research questions and my case studies, my primary findings are that the limitation assessment is the main analytical framework used by international bodies for assessing interferences with ESCR and the proportionality analysis is their chosen analytical method. The limitation assessment follows the criteria in the limitation clauses—legality, legitimacy, and proportionality. Regarding their application, the boundaries of the three criteria of the limitation clauses are not rigid, with similar elements considered the under different criteria. For instance, the requirement for consultation in cases concerning forced removal features both in the legality criterion and the proportionality criterion. For this reason, I argue that the limitation assessment is not based on a mechanical assessment of elements that fit into well-defined containers but rather is a method of analysis that frames the assessment of interferences no matter the particulars of the case at hand. This is evident from the fact that despite the differences in nature of my chosen case studies—forced removal concerning negative obligations and austerity measures focusing on positive obligations—the general framework of analysis by the respective bodies remains the same across the two case studies.

Regarding the analytical method, I demonstrate that the international bodies that I analyze focus predominantly on the impact of an interfering measures, which belongs to criterion of proportionality stricto sensu within the proportionality analysis. They pay comparatively little attention to the suitability and necessity criteria, and at times exclude them from their analysis altogether. Furthermore, I demonstrate that the proportionality analysis has come to include two elements which broadly frame the international bodies' inquiry: i. non-negotiable obligations, which takes the form of a list of obligations that must be met to ensure a proportionate interference. Examples of such obligations include the existence of procedural safeguards, the conduct of judicial review, the conduct of consultation, and the provision of alternative accommodation, all of which are treated as essential to deem interferences in forced removal cases to be proportionate; and ii. the balancing exercise, through which the

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international body weighs the different aspects of the case at hand to establish whether the measure taken was proportionate. For instance, international bodies weigh the applicants' good faith and the behavior of national authorities to determine proportionality of the undertaken measures.

Beyond this broader claim, I also demonstrate that while both case studies use non-negotiable obligations and the balancing exercise, the analysis in the forced removal cases is typically more uniform and detailed when compared to austerity measures. In these cases, a similar set of non-negotiable obligations is invoked, and the balancing exercise typically involves a reasonably uniform set of elements. Differently, in the austerity measures cases, the list of non-negotiable obligations is smaller and less homogeneous, and the elements included in the balancing exercise are more flexible, based on the specificities of the case at hand. I attribute this difference to the sheer number of cases discussed under the forced removal umbrella and the similarities between them.

On the interplay between states' obligations and limitations, I argue that most states' obligations have been incorporated into the limitation assessment, particularly through the proportionality analysis criterion. Here, I note that among the obligations, the one which is most commonly incorporated into the proportionality analysis is that of substantive equality. This incorporation primarily occurs at the balancing stage of the proportionality analysis since most cases concern disadvantaged and marginalized communities who require specific measures to address their disadvantages. Such incorporation intensifies the scrutiny of interferences by integrating ESCR-specific elements, thereby ensuring that elements which might otherwise be overlooked are adequately addressed.

Finally, beyond the incorporation of states' obligations into the limitation assessment, I argue that in a few cases, the two function as parallel frameworks. In this regard, it is worth noting that the austerity measures case study contains more cases that treat states' obligations as parallel frameworks when compared to the forced removal case study. This difference is

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explainable based on the fact that the austerity measures cases raise more issues concerning positive obligations, which is the proper domain of states' obligations, as previously mentioned.

The functioning of the states' obligations and limitation assessment as parallel frameworks in a few cases does not upset my claim regarding the overlap between the two frameworks. As I demonstrate in the chapter on "Austerity Measures", with the exception of the minimum core, all the other states' obligations, when applied as parallel frameworks, also focus on similar elements as the limitation assessment. Without naming them as such, international bodies even while using the states' obligation framework parallelly to the limitations framework assess the existing law (legality), the states' justifications (legitimacy), and the impact of measures (proportionality). Among these, the focus of the bodies is typically on justifications and impact of measures, which, as previously mentioned, were the elements that drew the most attention in limitation assessment as well.

On the whole, my case law analysis demonstrates that the assessment of interferences with ESCR, while following the structure and criteria of the limitation assessment, is complemented by the invocation of states' obligations. The merger between the two introduces a heightened scrutiny of the legality of the actions undertaken, the justifications provided for them, and the impact of said measures. Such incorporation, I argue, is a positive step towards the protection of ESCR. With that said, I believe international bodies should be encouraged to be more systematic and comprehensive in their incorporation of states' obligations into the limitation assessment for ESCR. Doing so would ensure that ESCR-specific elements are systematically taken into consideration and *ad hoc* analyses of cases is avoided.

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2. Methodology

This section addresses my methodology, research design and methods chosen to answer my research questions. The first sub-section discusses my comparative methodology and jurisdictions, explaining my functionalist approach. My research consists of a doctrinal and

interpretative inquiry based on inductive findings. The second sub-section explains my case studies and the types of cases in each of them.

2.1. Comparative methodology

As previously outlined, the aim of my dissertation is to identify the rules for adjudicating interferences with ESCR across the regional and international human rights systems. For achieving this end, a comparative enquiry across the relevant systems is appropriate, as it enables me to underscore the common rules for adjudication. Although it is possible to study international human rights law by analyzing the workings of a single jurisdiction, doing so does not present a holistic picture of international rights adjudication.[48] As a result, I included all the jurisdictions from the UN, African, European and Inter-American human rights systems, so as to ensure that I provide a comprehensive analysis of interferences with ESCR in the sub-field of international human rights law.

From the UN system, I focus only on the CESCR. Although various UN treaties concern themselves with ESCR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) was the first treaty to deal with exclusively and comprehensively with ESCR. For this reason, I focus exclusively on this committee. As for the regional systems, from the African and Inter-American systems, I study the quasi-judicial and judicial bodies from each system i.e. the ACmHPR, ACtHPR, IACmHR and the IACtHR. In the African system, the main treaty is the African Charter on Human and Peoples' Rights (ACHPR). As for the Inter-American system, three treaties are relevant: the American Convention on Human Rights (ACHR), the American Declaration of the Rights and Duties of Man (ADRDM), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (PSS). Lastly, from the European system, I

[48] In a conversation with Aristoteles Constantinides, he remarked that it is impossible to research ESCR adjudication in a non-comparative way.

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analyze the workings of the ECSR, under both the European Social Charter (ESC) and Revised European Social Charter (RESC), the ECtHR, under the European Convention on Human Rights (ECHR), due to their complementary nature with ESCR adjudication.

In light of Hirschl's typology of comparative research, my project falls within the type of investigation that is geared towards "[generating] concepts and analytical frameworks for thinking critically about […] norms and practices."[49] As for my sources, I rely on legal concepts as developed by scholars and adjudicatory bodies and analyze their application as analytical frameworks for deciding ESCR cases. My research design focuses on identifying similarities and "functions across"[50] the comparators, which together provide an understanding of ESCR that can be considered general and transferable across the chosen jurisdictions.

To study how the different human rights bodies deal with ESCR adjudication, I adopt a functionalist approach.[51] Functionalism, as many have observed, is the mainstream approach in comparative law,[52] and "is used to identify a common ground (*tertium comparationis*) between two or more legal systems."[53] This approach focuses on the similarities and differences between such legal systems by keying in on the function that legal concepts—such as limitations—or institutions play in multiple jurisdictions.[54] Functionalism has notably faced significant criticisms off late.[55] Bomhoff, for instance, argues that scholars using the functionalist approach tend to overemphasize similarities, thereby overlooking the differences and oversimplifying the context of each system.[56] Frankenberg adds that the functionalist approach tends to "[reduce]

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[49] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014), 238; Ran Hirschl, 'Comparative Methodologies', in *The Cambridge Companion to Comparative Constitutional Law*, ed. Roger Masterman and Robert Schütze (Cambridge University Press, 2019), 24.
[50] Hirschl, 'Comparative Methodologies', 25.
[51] Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies', in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 55.
[52] Mathias Siems, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare', *American Journal of Comparative Law* 67, no. 4 (2019): 864.
[53] Siems, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare', 877.
[54] Jacco Bomhoff, 'Balancing, the Global and the Local Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law', *Hastings International and Comparative Law Review* 31, no. 2 (2008): 564.
[55] See: Jaakko Husa, 'Traditional Methods', in *The Cambridge Handbook of Comparative Law*, ed. Mathias Siems and Po Jen Yap (Cambridge University Press, 2024).
[56] Bomhoff, 'Balancing, the Global and the Local Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law', 564–65.

the law to a formal technique of conflict resolution,"[57] overlooking other crucial characteristics of the law, such as its impact on and basis in moral considerations.[58]

Despite these criticisms, functionalism remains my chosen approach since it fulfills my overarching goal of distilling the analytical framework and method employed in the adjudication of interferences of ESCR.[59] I accept and acknowledge the limitations of my chosen approach (e.g. it's acontextuality), however, considering the limits of the format of a dissertation, I am forced to work within them. For this reason, future interventions in this regard are certainly due. Based on these methodological choices, my dissertation is characterized as a doctrinal and interpretative project, relying on case law analysis to answer my research questions. The selection of cases to find common answers constitutes inductive research.

To sum up, my comparative project focuses on human rights adjudicatory bodies through functionalism in order to reach a general framework that is applied in cases of interferences. The research is doctrinal and interpretative, employing inductive research. The next subsection deals with the methods chosen to conduct this project.

2.2. Methods: case law analysis

The method chosen for my dissertation is case law analysis, which enables me to holistically compare and contrast analytical choices to assess interferences with ESCR. Since my research is comparative and I chose four jurisdictions, it would not be feasible to analyze all cases involving interferences with ESCR. Rather, I selected case studies that constitute possible interferences. Regarding the selection of case studies, I chose the ones that would necessarily involve ESCR. Bearing in mind that human rights are interdependent and interrelated, some cases also involve CPR, but my analysis focuses on their ESCR dimensions.

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[57] Gunter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', *Harvard International Law Journal* 26, no. 2 (1985): 437.
[58] Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', 437.
[59] See Jackson, 'Comparative Constitutional Law: Methodologies', 62–66; Siems, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare', 865.

Although other fields of international law protect ESCR, this dissertation focuses on human rights law. Consequently, a limitation of my dissertation is the lack of analysis of international humanitarian law (which includes armed conflicts), refugee law, and other branches of international law. Additionally, since the focus is on interferences rather than suspension, derogations are also excluded.

The two case studies are forced removal of individuals from their homes or lands and austerity measures. The rationale behind their selection is the differing nature of the interference. Forced removal is linked to negative states' obligations since states must refrain from interfering with the enjoyment of rights, but if they do, they must justify such interference. By contrast, austerity measures are linked to positive states' obligations. States are required to implement measures to ensure full realization of ESCR, but austerity measures (a state (in)action) decreases rights' protection, which leads to an interference. These two case studies enhance the comparative nature of my dissertation, as they cover all possible types of cases involving interferences with various rights. Thus, the choice of these two case studies allows me to investigate in a comprehensive manner how the selected bodies deal with interferences with ESCR and to draw conclusions that are broadly representative of ESCR adjudication.

Before addressing each case study separately, a few words on the bodies and the general case law selection via their databases. When I decided to conduct my research through case studies, I chose not to select the cases based on frameworks or specific rights. In other words, I did not select cases based on terms such as 'limitations,' 'obligations,' 'the right to housing' or 'the right to social security.' Instead, I used keywords that capture my case studies to avoid selection bias, which I discuss separately. However, I excluded all cases decided under "process guarantees,"[60] such as fair trial, as these cases do not address the substance of ESCR, as I explain in the "Setting the Scene" chapter.

[60] Tara J. Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas', *International Law and Politics* 13, no. 2 (2006): 195.

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One relevant factor in the comparative analysis of adjudicatory bodies is the existence of databases. A few international bodies have databases with filters and search functions for keywords, whereas others only have a list of decisions with their name and number. Thus, the method of searching cases changes depending on whether the international body has a database. Regardless of databases, my cutoff date for all my case law selection was 31 December 2024. In my selection, I included only judgments that contained the merits of the decision, clearly stating the legal reasoning for violations. Most bodies have their decisions either in English or translated to English—I address the exceptions together with the databases.

The international bodies that have databases are the CESCR, IACtHR, ECSR, and the ECtHR. The CESCR has a database that is included in the unified UN system for all its committees.[61] The database contains an advanced option in which I selected the CESCR as the body and 'decision on merits' as the type of document. The CESCR issued only 16 decisions, meaning that I entered the keywords in each of them and selected the relevant ones. The IACtHR's database, which only contains the IACtHR's judgments, allows searching documents through general search or a link to specific type of documents.[62] I chose the former, selecting 'decisions and judgments' because it ensured that no other document would be selected by mistake, such as provisional measures. Among the 450 decisions issued by the cutoff date,[63] most are translated to English, but some are only available in Spanish.[64] Since there are known problems with the English translations in the Inter-American system,[65] I also selected cases with keywords in Spanish to avoid possible translation mistakes in English. That said, these

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[61] 'Jurisprudence Database', ADVANCED DOCUMENT SEARCH, accessed 8 April 2025, https://juris.ohchr.org/AdvancedSearch.
[62] 'vLex', Jurisprudence of the I/A Court H.R., accessed 8 April 2025, https://jurisprudencia.corteidh.or.cr/.
[63] 'Inter-American Court of Human Rights - Judgments', accessed 8 April 2025, https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en. On the website, the IACtHR lists 552 judgments. However, 102 are Interpretations issued by the IACtHR as requested by the states.
[64] Although English, French, Portuguese, and Spanish are the official language of the system, the decisions are only issued in the national language of the party to the case—mainly Spanish—and then translated to English.
[65] Paúl focused primarily on standards of review and the differences present in the English and Spanish versions, and how these impact the meaning of the decisions issued by the Inter-American Court. See: Álvaro Paúl, 'Translation Challenges of the Inter-American Court of Human Rights and Cost-Effective Proposals for Improvement', *Inter-American and European Human Rights Journal*, no. 5 (2012): 3–26.

translation discrepancies do not affect the case law analysis because the cases are included if their content is compatible with the case studies established.

Lastly, the ECSR and the ECtHR publish their decisions in the Human Rights Documentation database (HUDOC), but with different websites for each body.[66] Both bodies translate their decisions to English, making it unnecessary to use keywords in French, the other official language. The HUDOC-ESC contains a filter for 'decisions' where I selected the 'merits' stage.[67] In English, the ECSR has issued 184 decisions, where I applied the keywords as I explain in each case study. The HUDOC-ECHR contains more filters than the other databases. Among the options under 'case-law', I only included cases under 'judgments' and excluded the cases within 'decisions' because these documents discuss inadmissibility and other procedural matters. Additionally, I only select the cases that are either about 'merits' or 'merits and just satisfaction.' The ECtHR has decided 21.222 cases by the cutoff date in English. On the one hand, the number of cases poses a challenge to the case law analysis. On the other hand, the ECtHR has well-established jurisprudence, meaning that it has a stable pattern of reasoning. Consequently, the exclusive use of keywords is unfeasible, and I decided to narrow down the cases based on their level of importance. The ECtHR created four levels of importance: Key Cases, Priority number 1, Priority number 2 and Priority number 3.[68] Key Cases are the highest level of priority, followed by the rest of the priority cases. Key cases comprise i. cases that are of high importance decided after 2016—which is the year that this category was created—and ii. cases that go into reports to exemplify the ECtHR case law.[69] Priority 1 cases are of

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[66] 'HUDOC-ESC', accessed 8 April 2025, https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdctype%22:[%22FOND%22,%22Conclusion%22,%22Ob%22]}; 'HUDOC - European Court of Human Rights', accessed 8 April 2025, https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

[67] 'HUDOC-ESC'.

[68] 'HUDOC FAQ: Frequently Asked Questions', European Court of Human Rights, n.d. The ECtHR has briefly explained the level of importance, but this document was issued before the introduction of key cases.

[69] 'HUDOC - European Court of Human Rights'. The information is present in the explanation of the filter tool.

"significant contribution to the development, clarification, or modification of its case-law."[70] Moreover, to ensure that I covered the relevant cases, I also relied on the ECtHR's factsheets and guides on the case law.[71]

In contrast with these aforementioned bodies, the ACmHPR, ACtHPR, and the IACmHR have not developed a database with keyword filters. Since there is no similar database to the ones above, I employed a systematic method of search for the case law manually. After downloading a case from a body's website, I followed three steps to select the case law. First, I read the facts of the case to decide whether it fell under my case studies. Second, I checked the provisions under analysis to ensure it was an ESCR case or a CPR case with ESCR dimensions. Third, I searched for the keywords I selected to confirm I did not miss any information.

The ACmHPR's website has a page on 'decisions on communications' that only lists the name of the cases with their numbers.[72] Since I could not separate the different types of decisions, I reviewed all of them.[73] While the total number of decisions was 277, the merits encompassed 263, with the rest being either admissibility decisions or cases that the ACmHPR strikes out for procedural reasons. By contrast, the ACtHPR designed the website in a manner that I could separate the cases from other documents. Due to this feature, I only selected the 'finalized cases' within 'cases,' which encompass judgments, rulings, and orders.[74] Rulings and orders do not cover merit decisions, which led me to analyze only judgments. In the judgment sections, the ACtHPR separates the documents into merits, reparations, merits and reparations, review, and interpretation.[75] I only read the cases under 'merits,' and 'merits and reparations,'

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[70] Information box in the level of importance. 'HUDOC - European Court of Human Rights'.
[71] See for example: 'Guide on the Case-Law of the European Convention on Human Rights: Social Rights', European Court of Human Rights, 28 February 2023.
[72] 'Decisions on Communications | African Commission on Human and Peoples' Rights', Decisions on Communications, accessed 8 April 2025, https://achpr.au.int/en/category/decisions-communications.
[73] 'African Court Cases | Decisions of the African Court', accessed 8 April 2025, https://www.african-court.org/cpmt/decisions.
[74] 'African Court Cases | Finalised Cases', accessed 8 April 2025, https://www.african-court.org/cpmt/finalised.
[75] 'African Court Cases | Decisions of the African Court'.

which led to 135 cases. Both bodies issue decisions either in English or in French,[76] meaning that I had to use keywords in both languages when the French cases were not translated to English. After I read all the cases from both African bodies, I used the African Human Rights Case Law Analyser, which was created by HURIDOCS (Human Rights Information and Documentation Systems), to confirm the case law selection in the African system.[77] Although not the official website from the African Union, it contains all the cases from both bodies.

Finally, the IACmHR's website is organized based on the type of decision, such as merits, admissibility, and others. Since my focus is case law, I excluded the cases that have been submitted to the IACmHR and sent to the IACtHR for two reasons. First, those cases include a brief procedural explanation rather than a substantive merits analysis. Second, they would have been included in the IACtHR's search, as they are already part of my case law analysis. The merit decisions are separated by years, with member states and a word search bar.[78] However, this search tool does not provide results when I entered the keywords I selected for my case studies, which meant that I checked the cases manually. The IACmHR has issued 740 cases, mainly in English. For the cases that are not translated from Spanish, I used the keywords in Spanish during the manual search.

The existence of a database influences the approach used for case law selection and the risks of mistakes on my part. With a database, the time spent selecting cases is smaller, and it provides the entire set of cases attached to a keyword. By contrast, the lack of a database prolongs the case law selection process and increases the possibility of human error. Consequently, even with the utmost attention devoted to case law selection, some cases might have been missed. I conducted a thorough review of the selected cases by double-checking

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[76] Portuguese and Arabic are also official languages of the African system, but no decision was issued in either language.
[77] 'African Human Rights Case Law Analyser | HURIDOCS', accessed 12 April 2025, https://huridocs.org/resource-library/human-rights-research-databases/african-human-rights-case-law-analyser/.
[78] 'OAS :: IACHR :: Merits Reports', accessed 8 April 2025, https://www.oas.org/en/iachr/decisions/pc/merits.asp.

them, also paying attention to decisions cited within the cases I initially selected to ensure that no crucial rulings were overlooked.

With due consideration of possible mistakes, I discussed my case studies and case law selection with experts from some of the regions to avoid overlooking important cases. In the African system, I talked to Michael Nyarko (Manager of litigation and implementation of the Centre for Human Rights at the University of Pretoria) and Satang Nabaneh (Director of Programs for the Human Rights Center at the University of Dayton). In the Inter-American system, I discussed the selection with Juliana Cesario Alvim Gomes (Assistant Professor at Central European University and Universidade Estadual do Rio de Janeiro). Lastly, in the European system, although there were databases, I ensured the case law selection was accurate with Karin Lukas (former President of the ECSR and visiting researcher at Central European University). Another important contribution for my case law selection was from my colleague Marie Laur. Some cases could not be translated from French due to their digitalization and she helped me confirm whether the cases fit into my case studies. I am very grateful to each of them for their help. Nevertheless, any possible mistake is my own. I turn now to the case studies.

2.2.1. Forced removal

My first case study, which corresponds to my chapter 3, focuses on cases where individuals were removed by the state or third parties from their homes or lands, regardless of whether they had a legal title or ownership. In these cases, the interference derives from states' obligation of non-interference (known as obligation to respect) and states' obligation to protect individuals from third parties' interference (obligation to protect). All four jurisdictions have issued decisions that relate to this case study. To identify the case law in each jurisdiction, I

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selected four keywords: *eviction*,[79] *displacement*,[80] *expropriation*,[81] and *confiscation*.[82] These terms are not interchangeable, but all encompass a similar understanding: if states or third parties remove individuals or groups from their homes or lands, states must implement certain standards to respect and protect their rights. Although each of these keywords mean a specific action, I do not differentiate between them in the case law analysis, only when international bodies mention them.

In using these keywords to select case law, I reached a total of 80 cases. In the UN system, the CESCR issued 13 decisions on removal of individuals, all under the right to housing in the ICESCR. They concerned eviction cases either from states'[83] or third parties' property.[84]

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[79] The concept of eviction is developed by the CESCR in international law. Evictions occur when individuals are removed from their home or land. Forced evictions encompass the "removal against their will … without the provision of, and access to, appropriate forms of legal or other protection." See: *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*, General Comment E/1998/22 (Committee on Economic, Social and Cultural Rights, 1997), para. 3.

[80] Displacement is understood as the mass move of individuals from a certain place. The Principles on Housing and Property Restitution for Refugees and Displaced Persons, the so-called Pinheiro Principles, affirm that "involuntary displacement [can result] from international or internal armed conflict, gross human rights violations such as 'ethnic cleansing', development projects, forced evictions and natural and manmade disasters." *Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the 'Pinheiro Principles'* (Office of the United Nations High Commissioner for Human Rights et al., 2007), 16.

[81] Expropriation is not defined in international law. In the Black's Law Dictionary, the official legal dictionary, expropriation has various meanings. In the context of home and land, expropriation derives from two different situations: either a creditor taking away property from the debtor or "the compulsory taking from a person, on compensation made, of [their] private property for the use of railroad, canal, or other public work." 'EXPROPRIATION Definition & Meaning - Black's Law Dictionary', accessed 23 April 2025, https://thelawdictionary.org/expropriation/. Between these two, I focus on cases of state expropriation due to public needs rather than a contractual obligation.

[82] Confiscation is also not defined in international law. In the Black's Law Dictionary, confiscation is defined as "[t]he act of confiscating," which is the appropriation of "property to the use of the state." 'CONFISCATE Definition & Meaning - Black's Law Dictionary', accessed 23 April 2025, https://thelawdictionary.org/confiscate/.

[83] El Mourabit Ouazizi and Boudfan v. Spain, Communication No. 133/2019, E/C.12/72/D/133/2019 (Committee on Economic, Social and Cultural Rights 9 December 2022); Vázquez Guerreiro v. Spain, Communication No. 70/2018, E/C.12/74/D/70/2018 (Committee on Economic, Social and Cultural Rights 9 November 2023); Hamid Saydawi and Masir Farah v. Italy, Communications No. 226/2021 and No. 227/2021, E/C.12/75/D/227/2021 (Committee on Economic, Social and Cultural Rights 13 March 2024).

[84] I.D.G. v. Spain, Communication No. 2/2014, E/C.12/55/D/2/2014 (Committee on Economic, Social and Cultural Rights 13 October 2015); Ben Djazia et al v. Spain, Communication No. 5/2015, E/C.12/61/D/5/2015 (Committee on Economic, Social and Cultural Rights 20 June 2017); López Albán et al. v. Spain, Communication No. 37/2018, E/C.12/66/D/37/2018 (Committee on Economic, Social and Cultural Rights 11 October 2019); Rosario Gómez-Limón Pardo v. Spain, Communication No. 52/2018, E/C.12/67/D/52/2018 (Committee on Economic, Social and Cultural Rights 5 March 2020); Soraya Moreno Romero and Children v. Spain, Communication No. 48/2018, E/C.12/69/D/48/2018 (Committee on Economic, Social and Cultural Rights 22 February 2021); El Goumari et al v. Spain, Communication No. 85/2018, E/C.12/69/D/85/2018 (Committee on Economic, Social and Cultural Rights 18 February 2021); Lorne Joseph Walters v. Belgium, Communication No. 61/2018, E/C.12/70/D/61/2018 (Committee on Economic, Social, and Cultural Rights 5 October 2021); Hernández Cortés and Rodríguez Bermúdez v. Spain, Communication No. 26/2018, E/C.12/72/D/26/2018 (Committee on Economic, Social and Cultural Rights 8 March 2023); Infante Díaz v. Spain, Communication No. 134/2019, E/C.12/73/D/134/2019 (Committee on Economic, Social and Cultural Rights 2 May 2023).

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In the African system, I identified seven decisions issued by the ACmHPR addressing forced removal. These cases can be grouped as dealing with Indigenous communities' removal due to states' projects,[85] military confiscation of lands of Indigenous and Tribal communities,[86] expropriation of lands from minorities,[87] and expropriation of land and destruction of home due to irregularities on the sale.[88] As for the ACtHPR, I selected only one case regarding forced removal of Indigenous and Tribal communities.[89] All the cases focused on the right to property in the ACHPR, and a few assessed the right to housing and the right to depose of wealth and natural resources. One case that was excluded that deserves mention is the case Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. The Sudan before the ACmHPR.[90] Although this is a relevant case and is cited in the cases I analyze, it refers to derogations during armed conflicts and is therefore outside the scope of my project.

In the Inter-American system, I identified four cases before the IACmHR and 14 before the IACtHR. The IACmHR cases concern forced removal from private land [91] and Indigenous communities.[92] As for the IACtHR, all cases analyze the removal of Indigenous and Tribal

[85] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on Behalf of Endorois Welfare Council) v. The Republic of Kenya, Communication No. 276/03 (African Commission on Human and Peoples' Rights 2009); The Nubian Community in Kenya v. The Republic of Kenya, Communication No. 317/2006 (African Commission on Human and Peoples' Rights 2015).
[86] Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union Interafricaine Des Droits de l'Homme and RADDHO, Collectif Des Veuves et Ayants-Droit, Association Mauritanienne Des Droits de l'Homme v. Mauritania, Communication No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (African Commission on Human and Peoples' Rights 11 May 2000); Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication No. 155/96 (African Commission on Human and Peoples' Rights 2001).
[87] Mouvement Ivoirien de Droits de l'Homme v. Cote d'Ivoire, Communication No. 262/02 (African Commission on Human and Peoples' Rights 2008); Open Society Justice Initiative v. Côte d'Ivoire, Communication No. 318/06 (African Commission on Human and Peoples' Rights 28 February 2015).
[88] Mbiankeu Geneviève v. Cameroon, Communication No. 389/10 (African Commission on Human and Peoples' Rights 2015).
[89] African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/2012 (African Court of Human and Peoples' Rights 26 May 2017).
[90] Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. The Sudan, Communication No. 279/03, 296/05 (African Commission on Human and Peoples' Rights 2009).
[91] Corumbiara v. Brazil, Case 11.556 (Inter-American Commission on Human Rights 11 March 2004); Sebastião Camargo Filho v. Brazil, Case 12.310 (Inter-American Commission on Human Rights 19 March 2009).
[92] Mary and Carrie Dann v. United States, Case 11.140 (Inter-American Commission on Human Rights 27 December 2002); Akawaio Indigenous Community of Isseneru and Its Members v. Guyana, Case 13.083 (Inter-American Commission on Human Rights 24 April 2024).

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communities.[93] While all the IACtHR cases were decided under the right to property in the ACHR, the IACmHR examined its decisions under the right to life in the ACHR (illegal occupation cases) and the right to property under the ADRDM (Indigenous cases). One case excluded from the IACmHR was Josefina Ghiringhelli De Margaroli and Eolo Margaroli v. Argentina. The rationale behind excluding this case was that despite the building expropriation, the applicants did not reside in the building.[94] As for the IACtHR, I excluded two precedents—mentioned in the cases I analyze. First, the case Moiwana Community v. Suriname was excluded because the forced removal of the Indigenous community occurred in the context of an internal armed conflict.[95] Second, I did not include the case Salvador Chiriboga v. Ecuador, as the expropriated building was not the residence of the applicant.[96]

Finally, the ECSR decided 16 cases addressing the removal of Roma communities from state property through evictions.[97] The cases have been decided either under the right to right

[93] Case of the Yakye Axa Indigenous Community v. Paraguay (Inter-American Court of Human Rights 17 June 2005); Case of the Sawhoyamaxa Indigenous Community v. Paraguay (Inter-American Court of Human Rights 29 March 2006); Case of the Saramaka People v. Suriname (Inter-American Court of Human Rights 28 November 2007); Case of the Xákmok Kásek Indigenous Community v. Paraguay (Inter-American Court of Human Rights 24 August 2010); Case of the Kichwa Indigenous People of Sarayaku v. Ecuador (Inter-American Court of Human Rights 27 June 2012); Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama (Inter-American Court of Human Rights 14 October 2014); Case of the Punta Piedra Garifuna Community and Its Members v. Honduras (Inter-American Court of Human Rights 5 October 2015); Case of the Garífuna Community of Triunfo de La Cruz and Its Members v. Honduras (Inter-American Court of Human Rights 8 October 2015); Case of the Kaliña and Lokono Peoples v. Suriname (Inter-American Court of Human Rights 25 November 2015); Case of the Xucuru Indigenous People and Its Members v. Brazil (Inter-American Court of Human Rights 5 February 2018); Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina (Inter-American Court of Human Rights 6 February 2020); Case of the Garífuna Community of San Juan and Its Members v. Honduras (Inter-American Court of Human Rights 29 August 2023); Case of the Indigenous Community Maya Q'eqchi' Agua Caliente v. Guatemala (Inter-American Court of Human Rights 16 May 2023); Case of the Rama and Kriol People, Afro-Criollo Indigenous Community of Bluefields and Others v. Nicaragua (Inter-American Court of Human Rights 1 April 2024).

[94] Josefina Ghiringhelli De Margaroli and Eolo Margaroli v. Argentina, Case 11.400 (Inter-American Commission on Human Rights 16 March 2009).

[95] Case of the Moiwana Community v. Suriname (Inter-American Court of Human Rights 15 June 2005).

[96] Case of Salvador Chiriboga v. Ecuador (Inter-American Court of Human Rights 6 May 2008).

[97] European Roma Rights Center v. Greece, Complaint No. 15/2003 (European Committee of Social Rights 8 December 2004); European Roma Rights Centre v. Italy, Complaint No. 27/2004 (European Committee of Social Rights 7 December 2005); European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005 (European Committee of Social Rights 18 October 2006); European Federation of National Organisations Working with the Homeless v. France, Complaint No. 39/2006 (European Committee of Social Rights 5 December 2007); International Movement ATD Fourth World v. France, Complaint No. 33/2006 (European Committee of Social Rights 5 December 2007); European Roma Rights Centre v. France, Complaint No. 51/2008 (European Committee of Social Rights 19 October 2009); International Centre for the Legal Protection of Human Rights v. Greece, Complaint No. 49/2008 (European Committee of Social Rights 11 December 2009); Centre on Housing Rights and Evictions v. Italy, Complaint No. 58/2009 (European Committee of Social Rights 25 June 2010); Centre on Housing Rights and Evictions v. France, Complaint No. 63/2010 (European Committee of Social Rights 28 June

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of the family to social, legal, and economic protection or the right to housing in the ESC and the RESC. As for the ECtHR, I reached a total of 28 cases, which concerned Roma families who were removed from their property[98] or from state property[99], individuals removed from their property,[100] and individuals removed from state property.[101] All these cases have been assessed either under the right to respect for private and family life or the right to property under Articles 8 and 1 of Protocol 1 ECHR. One relevant case that I have not covered in my dissertation is Yordanova and others v. Bulgaria.[102] Although the literature repeatedly analyzes this case,[103] it is a Priority 2 case and thus outside of the criteria established for the systematic

2011); European Roma and Travellers Forum v. France, Complaint No. 64/2011 (European Committee of Social Rights 24 January 2012); International Federation of Human Rights v. Belgium, Complaint No. 62/2010 (European Committee of Social Rights 21 March 2012); Médecins Du Monde - International v. France, Complaint No. 67/2011 (European Committee of Social Rights 11 September 2012); European Roma Rights Centre v. Ireland, Complaint No. 100/2013 (European Committee of Social Rights 1 December 2015); European Roma and Travellers Forum v. the Czech Republic, Complaint No. 104/2014 (European Committee of Social Rights 17 May 2016); European Roma Rights Centre v. Belgium, Complaint No. 185/2019 (European Committee of Social Rights 8 December 2022); Amnesty International v. Italy, Complaint No. 178/2019 (European Committee of Social Rights 18 October 2023).

[98] Case of Buckley v. the United Kingdom, Application No. 20348/92 (European Court of Human Rights 29 September 1996); Case of Beard v. the United Kingdom, Application No. 24882/94 (European Court of Human Rights 18 January 2001); Case of Chapman v. the United Kingdom, Application No. 27238/95 (European Court of Human Rights 18 January 2001); Case of Coster v. the United Kingdom, Application No. 24876/94 (European Court of Human Rights 18 January 2001); Case of Jane Smith v. the United Kingdom, Application No. 25154/94 (European Court of Human Rights 18 January 2001); Case of Lee v. the United Kingdom, Application No. 25289/94 (European Court of Human Rights 18 January 2001).

[99] Case of Connors v. The United Kingdom, Application No. 66746/01 (European Court of Human Rights 27 May 2004); Case of Winterstein and Others v. France, Application No. 27013/07 (European Court of Human Rights 17 October 2013).

[100] Case of Akkus v. Turkey, Application No. 19263/92 (European Court of Human Rights 9 July 1997); Case of Platakou v. Greece, Application No. 38460/97 (European Court of Human Rights 11 January 2001); Case of Pincová and Pinc v. the Czech Republic, Application No. 36548/97 (European Court of Human Rights 5 November 2002); Case of Zvolský and Zvolská v. the Czech Republic, Application No. 46129/99 (European Court of Human Rights 12 November 2002); Case of Bistrović v. Croatia, Application No. 25774/05 (European Court of Human Rights 31 May 2007); Case of Velikovi and Others v. Bulgaria, Applications Nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01, and 194/02 (European Court of Human Rights 15 March 2007); Case of Kozacioğlu v. Turkey, Application No. 2334/03 (European Court of Human Rights 19 February 2009).

[101] Case of Larkos v. Cyprus, Application No. 29515/95 (European Court of Human Rights 18 February 1999); Case of Wittek v. Germany, Application No. 37290/97 (European Court of Human Rights 12 December 2002); Case of Novoseletskiy v. Ukraine, Application No. 47148/99 (European Court of Human Rights 22 February 2005); Case of Prokopovich v. Russia, Application No. 58255/00 (European Court of Human Rights 18 November 2004); Case of McCann v. the United Kingdom, Application No. 19009/04 (European Court of Human Rights 13 May 2008); *Bistrović v. Croatia*; Case of Brosset-Triboulet and Others v. France, Application No. 34078/02 (European Court of Human Rights 29 March 2010); Case of Depalle v. France, Application No. 34044/02 (European Court of Human Rights 29 March 2010); Case of J.D. and A v. the United Kingdom, Applications Nos. 32949/17 and 34614/17 (European Court of Human Rights 24 October 2019).

[102] Case of Yordanova and Others v. Bulgaria, Application No. 25446/06 (European Court of Human Rights 24 September 2012).

[103] See: Christina Binder and Thomas Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence', *Hungarian Yearbook of International Law and European Law* 2015 (2015):

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search. Nevertheless, recent Priority 1 cases rely fully on the Yordanova case, which means that it is indirectly present in the analysis.

Overall, the European system has the highest number of cases dealing with forced removal, while the African system has the lowest number. However, this discrepancy does not impact the comparison because all cases concern the forced removal of individuals from their place of residence, be it home or land. In the first substantive chapter of my dissertation, I analyze the 79 selected cases to tease out the rules applied by the respective bodies for assessing interferences with ESCR.

2.2.2. Austerity measures

My second case study focuses on austerity measures imposed by states, which corresponds to chapter 4 and focuses on legal changes aimed at decreasing budget expenditure. In these cases, states are expected to improve ESCR protection through positive obligations (i.e., the obligation to fulfill), however, such austerity measures either reduce or curtail rights. I have extensively considered the types of cases that would be part of my dissertation. Cases dealing with positive obligations, such as austerity measures, are less common when compared to cases involving negative obligations. This scarcity complicated the selection of a case study capable of yielding cases from all systems. This is evident when considering that, in contrast with the previous case study, austerity measures in the context of ESCR violations have only been decided by the IACmHR, IACtHR, ECSR, and the ECtHR, despite the fact that austerity measures are common globally.[104] The African bodies have not yet decided a single case on this topic, while the CESCR has only issued soft law documents.[105] Despite the absence of cases

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51–70; Sarah Fick and Michel Vols, 'Best Protection against Eviction? A Comparative Analysis of Protection against Evictions in the European Convention on Human Rights and the South African Constitution', *European Journal of Comparative Law and Governance* 3, no. 1 (2016): 40–69.

[104] Ariranga G. Pillay, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights', personal communication, 16 May 2012.

[105] See: *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2016/1 (Committee on Economic, Social and Cultural Rights, 2016).

from two jurisdictions, the inclusion of austerity measures cases ensures that my dissertation is comprehensive and covers all aspects of ESCR adjudication. Hence, this case study compares cases from the Inter-American and European systems only, referencing CESCR documents when relevant.

Similar to the forced removal case law selection, I have chosen keywords to select the case law. The keywords are *economic situation*,[106] *economic crisis*, *financial crisis*, *budget crisis*,[107] *recession*,[108] and *austerity*[109]. Although similar, not all of them are interchangeable. These keywords encompass either the measure used to tackle the economic hardship or the reason for implementing budget cuts, affecting various ESCR as they are broader measures than forced removal.

Using the keywords in the case law selection, I arrived at a total of 23 cases. In the Inter-American system, I identified one case from the IACmHR regarding austerity measures reducing pension benefits under the rights to property and social security in the ACHR.[110] The

[106] The expression 'economic situation' is a vague and open keyword; however, its inclusion is fundamental to select cases in which international bodies assess the economic situation of countries without mentioning any other specific keyword. The importance of this keyword is clear in the analysis of facts of the case because the international bodies are not always clear about what motivated the reform but mention that the economic situation of a given country was bad.

[107] The commonality among the expressions is the word 'crisis.' In the Black's Law Dictionary, the definition of crisis is linked to financial crisis, which translates into "[w]hen the money supply cannot keep up with the demand for it. It means that money is no longer as liquid as it used to be." 'FINANCIAL CRISIS', accessed 23 April 2025, https://thelawdictionary.org/financial-crisis/. See: *The Impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights*, Resolution A/HRC/S-10/L.1 (Human Rights Council, 2009); *The Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights*, Resolution A/HRC/RES/20/10 (Human Rights Council, 2012).

[108] 'Recession' is a synonym, in this context, to crisis. As explained by the Cambridge Dictionary, recession is "a period when the economy of a country is not successful and conditions for business are bad." 'RECESSION | English Meaning - Cambridge Dictionary', accessed 23 April 2025, https://dictionary.cambridge.org/dictionary/english/recession. The CESCR considers a recession to be a period in which states cannot dispose of their resources as they wish. *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, General Comment E/1991/23 (Committee on Economic, Social and Cultural Rights, 1990), para. 13.

[109] 'Austerity' are implemented to contract states' economic and address budget deficits. *Report on Austerity Measures and Economic and Social Rights* (The Office of the United Nations High Commissioner for Human Rights, 2012), 7. See for instance: Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013); Fiona Macmillan, 'From Empire to Austerity: The Golden Thread of International Economic Law', *Robert Schuman Centre for Advanced Studies Legal Trajectories*, Legal trajectories of neoliberalism: critical inquiries on law in Europe, 2019, 7–20.

[110] National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru, Case 12.670 (Inter-American Commission on Human Rights 27 March 2009).

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IACtHR has analyzed six cases related to this case study: reduction of pensions and social benefits under the rights to property and social security,[111] and employment-related matters, under the rights to property and to work.[112] As for cases excluded that deserve mention is the IACmHR's case Jorge, José and Dante Peirano Basso v. Eastern Republic of Uruguay concerning a banking crisis in Uruguay. Although potentially relevant, the merits of the case focus on criminal charges and do not assess ESCR.[113]

In the European system, the ECSR has issued 13 decisions on austerity measures. Among these, 10 concerned reductions of social security decided under the right to social security in the ESC and the RESC[114] and 2 analyzed employment-related matters under the rights to collective bargaining and fair remuneration under the same instruments.[115] One case analyzes both issues.[116] As for the ECtHR, three cases fit the case study. Two decisions focused

[111] Case of the "Five Pensioners" v. Peru (Inter-American Court of Human Rights 28 February 2003); Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru (Inter-American Court of Human Rights 1 July 2009); Case of Muelle Flores v. Peru (Inter-American Court of Human Rights 6 March 2019); Case of the Teachers of Chañaral and Other Municipalities v. Chile (Inter-American Court of Human Rights 10 November 2021).

[112] Case of Abrill Alosilla et al. v. Peru (Inter-American Court of Human Rights 4 March 2011); Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru (Inter-American Court of Human Rights 1 February 2022).

[113] Jorge, José and Dante Peirano Basso v. Eastern Republic of Uruguay, Case 12.553 (Inter-American Commission on Human Rights 6 August 2009).

[114] Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012 (European Committee of Social Rights 7 December 2012); Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece, Complaint No. 79/2012 (European Committee of Social Rights 7 December 2012); Panhellenic Federation of Public Service Pensioners (POPS) v. Greece, Complaint No. 77/2012 (European Committee of Social Rights 7 December 2012); Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece, Complaint No. 78/2012 (European Committee of Social Rights 7 December 2012); Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece, Complaint No. 80/2012 (European Committee of Social Rights 7 December 2012); Unione Italiana Del Lavoro U.I.L. Scuola-Sicilia v. Italy, Complaint No. 113/2014 (European Committee of Social Rights 24 January 2018); Panhellenic Association of Pensioners of the OTE Group Telecommunications (PAP-OTE) v. Greece, Complaint No. 165/2018 (European Committee of Social Rights 17 May 2022); Finnish Society of Social Rights v. Finland, Complaint No. 172/2018 (European Committee of Social Rights 14 September 2022); Sindacato Autonomo Pensionati Or.S.A. v. Italy, Complaint No. 167/2018 (European Committee of Social Rights 7 December 2022); Sindacato Autonomo Pensionati Or.S.A. v. Italy, Complaint No. 187/2019 (European Committee of Social Rights 17 October 2023).

[115] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014 (European Committee of Social Rights 23 March 2017); Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015 (European Committee of Social Rights 21 March 2018).

[116] General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011 (European Committee of Social Rights 23 May 2012).

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on the complete loss or suspension of pensions,[117] and one concerned the non-payment of salaries.[118] All these cases fell under the right to property in the ECHR.

To conclude, the European system is again the one with the highest number of cases. The discrepancy in number does not impact the analysis as I am concerned with the legal reasoning employed when assessing interferences with ESCR through the imposition of austerity measures. In the second substantive chapter of my dissertation, I assess the 23 selected cases to, similar to the forced removal case study, set out the rules for analyzing interferences with ESCR and answer the research questions.

2.3. Synthesis

My dissertation relies on comparative methodology to analyze the legal reasoning employed by international human rights bodies in the UN, African, European, and the Inter-American systems when analyzing interferences with ESCR. The ultimate goal of my dissertation is to distyle their communalities and synthesizing with the aim of developing a conceptual understanding of interferences. Moreover, my project is doctrinal and interpretative, relying on inductive research. Based on these choices, I conduct case law analysis as my main method. I selected two case studies: forced removal and austerity measures. These two cases are complementary: forced removal concerns the infringement of the obligation to refrain from interfering (negative obligation), while austerity measures infringe the full realization of ESCR (positive obligation). These two case studies ensures that my claims are representative of ESCR adjudication.

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[117] Case of Béláné Nagy v. Hungary, Application No. 53080/13 (European Court of Human Rights 13 December 2016); Case of Fábián v. Hungary, Application No. 78117/13 (European Court of Human Rights 5 September 2017).
[118] Case of Mykhaylenky and Others v. Ukraine, Applications Nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02 (European Court of Human Rights 30 November 2004).

3. Structure of the dissertation

Following this introduction, my dissertation is organized in four chapters. Before outlining the structure, it is crucial to emphasize that it emerged organically from the subject matter, and the case studies themselves. The structure of the chapters, and by extension, the dissertation, was not predefined. Rather, it was shaped through engagement with the jurisprudence and scholarship. In other words, each chapter was written and rewritten in response to extensive analysis of both the scholarly literature and the case law, rather than being guided by a pre-established frame. After analyzing both sources, I grappled with the structure in order to accommodate the various concepts I engage with. Accordingly, my findings informed my structure.

Chapter 1 is titled "Setting the scene: International Adjudication of Economic, Social, and Cultural Rights" and its goals are to explain the adjudication of ESCR in international law and to present a synthesis of the relevant literature. The first section focuses on adjudication, relying on the concept of justiciability, briefly outlines the debate on ESCR justiciability, and demonstrates how international bodies have adjudicated ESCR—particularly through integrated and direct approaches to justiciability. The second part discusses the literature on ESCR, centered on states' obligations. It starts with the typology of states' obligations, then moves on to progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality.

Chapter 2 addresses the "Analytical Framework for Assessing Interferences with Economic, Social, and Cultural Rights." The first section presents the traditional limitation assessment and outlines possible analytical methods for analyzing limitations—reasonableness and proportionality analysis. In this section, I return to the debate within the ESCR scholarship regarding the identification of adequate analytical methods. As the traditional limitation assessment does not suffice to assess interferences with ESCR, the second section discusses states' obligations related to ESCR. The ESCR scholarship, developed in a separate strand,

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debates the possibility of employing states' obligations as analytical frameworks—which function as standalone assessments. For this reason, this chapter sets the framework that is followed in the substantive chapters: while I follow the limitation assessment criteria—legality, legitimacy, and proportionality—states' obligations remain relevant throughout the analysis.

Chapter 3 examines the case study on "Forced Removals." The cases in this chapter concern rulings where individuals or groups have been removed from their homes or lands. As explained, this chapter covers interferences from states' actions linked to negative obligations—obligations to refrain from acting and to protect against third parties' interference. The first section encompasses cases where the applicants owned their homes or lands, while the second section focuses on cases where the applicants were living on state or private property, whether legally or illegally.

Chapter 4 analyzes the case study on "Austerity Measures." This chapter includes cases where states adopted measures to decrease public expenditure, thereby reducing or eliminating the enjoyment of rights. These cases focus on state action and inaction in cases involving the loss or reduction of rights when states are supposed to increase their protection, which is linked to positive obligations. The first section of this chapter covers social benefits, while the second focuses on employment-related matters.

After presenting my two case studies, I conclude my dissertation by synthesizing, explaining and contextualizing my key findings. In "Conceptualizing Interferences with Economic, Social, and Cultural Rights", I demonstrate how the limitation assessment has been constructed by international bodies in the adjudication of ESCR. I then explore the role of states' obligations in cases involving interferences, highlighting the interaction between the limitation assessment and these obligations.

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Chapter 1. Setting the Scene: International adjudication of Economic, Social, and Cultural Rights

Over the past decades, the academic debate about ESCR can be divided into strands of literature, which sometimes overlap. The first concerns the justiciability of ESCR: can they be adjudicated? If yes, how? The second group focuses on the states' obligations that must be discharged to ensure the full realization of these rights. Some of these states' obligations are applied to both CPR and ESCR and some are exclusive to ESCR. Not all literature on the international adjudication of ESCR fits neatly within these categories, but—apart from content-specific discussions—they represent the most debated aspects of ESCR.

This chapter pursues two goals. First, it showcases the literature on ESCR to highlight that limitations of these rights have not been the focus. Second, it underscores the comparative nature of my dissertation and link the relevant concepts. The first section analyzes the justiciability of ESCR, focusing on its concept, debate and approaches. The goal of the section is to show that despite differences among quasi-judicial and judicial bodies and their approaches to justiciability, their ESCR jurisprudence are comparable. The second section outlines states' obligations under ESCR, beginning with a discussion of positive and negative obligations, and then addressing specific obligations, such as progressive realization, non-retrogression, minimum core, non-discrimination and substantive equality. Its aim is to conceptualize these obligations and their criteria, demonstrating how they were constructed to adjudicate interferences and their similarities with the limitation assessment. Ultimately, this chapter clarifies the literature and international bodies' choices that shape key conceptual elements for the "Analytical Framework" chapter and substantive chapters.

1. Justiciability of economic, social, and cultural rights

The justiciability of ESCR has been abundantly discussed in the scholarship, focusing primarily on the contentious issue of whether national and international courts and quasi-

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judicial bodies can adjudicate these rights.[119] Despite the absence of absolute consensus, most scholars agree that ESCR are justiciable. This conclusion is bolstered by the reality: in practice, courts routinely adjudicate ESCR-cases. Some national courts, such as those from Colombia, India, and South Africa, are well-known for advancing the justiciability of ESCR.[120] In international arena, some bodies, such as the IACtHR, have similarly contributed to protect ESCR. As a result, the question of *whether* ESCR are justiciable has been largely resolved. However, the justiciability debate continues to inform *how* adjudicatory bodies rule on ESCR.

There are clear differences regarding the approaches to the justiciability across jurisdictions. Since different treaties contain distinct competencies and provisions, the discussion on justiciability is relevant for understanding how ESCR are protected in each of the jurisdictions and how the international bodies have developed their institutional role in enforcing these guarantees. This section aims to address all relevant aspects of ESCR justiciability, which are not revisited in the substantive chapters. Instead, I compare the jurisprudence regarding forced removal and austerity measures irrespective of the nature of the body—quasi-judicial or judicial body—and the approach to justiciability.

Accordingly, the first subsection clarifies the meaning of justiciability for my dissertation, thereby explaining the basis for comparing quasi-judicial and judicial bodies. The second subsection briefly outlines the justiciability debate to acknowledge the prior academic contributions and canvass the main legal arguments for ESCR justiciability. The third subsection examines the three dominant approaches to justiciability theorized by scholars and

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[119] See: Ida Elisabeth Koch, 'The Justifiability of Indivisible Rights', *Nordic Journal of International Law* 72, no. 3 (2003): 3–40; Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas'; Aoife Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', *Center for Human Rights and Global Justice*, Working Paper nº 15, 2009; Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory', in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge University Press, 2009).

[120] See: Varun Gauri and Daniel M. Brinks, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008); Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

analyzes how the selected international bodies align with them, demonstrating overlaps in their jurisprudence.

1.1. The concept of justiciability in the practice of human right bodies

Justiciability implies the capacity to adjudicate rights violations before competent bodies, thus enabling rights to be enforced through courts of law.[121] Scholars establish justiciability as a form of requesting redress for rights' violations before courts. While several authors provide different elements for this conceptual core, some offer complementary elements. Boyle, for instance, describes justiciability as the "implementation [of rights] through judicial decisions, [and] ensures accountability."[122] Similarly, Úbeda de Torres conceives justiciability as both a formal mechanism of revision and a substantive tool for ensuring the realization and effectiveness of human rights.[123] Seeking to establish a formula, Viljoen defines a justiciable right as a subjective right adjudicated by a judicial or quasi-judicial body to remedy a violation.[124] This approach yields a three-prong test for justiciability: whether a claim exists (i.e., substantive right); whether the claim can be redressed at a specific setting (i.e., the body); and whether there are consequences for the action or inaction (i.e., the remedy).[125] This test aligns with other scholars' definitions, as it aims to provide concrete solutions to redress human rights violations.

Building on these criteria, attention should be given to the existence of remedies issued by international bodies. Some of the bodies studied in here—namely, the CESCR, the

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[121] Michael K. Addo, 'The Justiciability of Economic, Social and Cultural Rights', *Commonwealth Law Bulletin* 14, no. 4 (1988): 1425.
[122] Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge, 2020), 46.
[123] Amaya Ubeda de Torres, 'Justiciability and Social Rights', in *Research Handbook on International Law and Social Rights*, with Christina Binder et al. (Edward Elgar Publishing Limited, 2020), 44–45.
[124] Frans Viljoen, 'National Legislation as a Source of Justiciable Socio-Economic Rights', *Economic & Social Rights Review in Africa* 6, no. 3 (2005): 6.
[125] Takele Soboka Bulto, 'The Indirect Approach to Promote Justiciability of Socio-Economic Rights of the African Charter on Human and Peoples' Rights', *The Kenyan Section of the International Commission of Jurists*, AHRAJ casebook series, vol. 3 (2009): 136–37.

ACmHPR, the IACmHR and the ECSR—are quasi-judicial. Although they serve functions akin to those of international courts, they do not issue binding remedies in the same manner. Accordingly, clarifying the concept of 'remedies' is essential to my dissertation, as it demonstrates that their jurisprudence is comparable.

In her seminal work on remedies, Shelton divides remedies into two categories: procedural and substantive.[126] Procedural remedies refer to whether a review has been conducted by a competent body, whereas substantive remedies concern the actual "outcome of the proceedings."[127] Shelton explains that there are many types of remedies, such as declaratory judgments and compensation.[128] Thus, this broad conceptualization of remedies challenges assumptions that judicial and quasi-judicial bodies are fundamentally incomparable.

Quasi-judicial bodies primarily redress ESCR violations through procedural remedies, as they review states' actions and determine whether these violate human rights. Over time, most of them have developed a list of remedies, even though the treaties from which they derive their authority do not grant them such competence. In other words, the quasi-adjudicatory nature of these international bodies does not preclude them from issuing remedies. However, their approaches differ as to how they understand their competence.

The CESCR issues recommendations of a declaratory nature under the Optional Protocol to the ICESCR (OP-ICESCR) and instructs states on how to comply following a finding of violation.[129] By contrast, the ACmHPR's authority to issue remedies remains

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[126] Dinah Shelton, *Remedies in International Human Rights Law*, 2nd edn (Oxford University Press, 2005), 8.
[127] Shelton, *Remedies in International Human Rights Law*, 8.
[128] Shelton, *Remedies in International Human Rights Law*, 20; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution 60/147 (United Nations, 2005). The UN General Assembly passed a resolution on remedies for violations, and it clarified that the right to a remedy includes equal and effective access to justice, reparation in an adequate, effective, and prompt manner, and access to information "concerning violations and reparation mechanism." The resolution includes a vast list of remedies, demonstrating that the concept of remedies is comprehensive.
[129] 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant', Committee on Economic, Social and Cultural Rights, 2007, para. 13.

contested.[130] Some scholars argue that the ACmHPR is competent based on its mandate to make recommendations to the head of states under the ACHPR.[131] Others, however, question this interpretation due to the absence of an explicit textual basis.[132] Regardless of this scholarly disagreement, the ACmHPR has issued recommendations and remedies that have a declaratory nature.[133] Examples of such remedies are restitution, rehabilitation, satisfaction—such as truth-telling—and non-recurrence.[134]

In contrast to the two aforementioned bodies, the IACmHR undoubtably possesses the competence to issue recommendations when drafting reports to states, as established by the wording of the ACHR.[135] These recommendations include various remedies.[136] By contrast, the ECSR lacks competence to issue remedies directly, as this authority rests on the Committee of Ministers.[137] To date, the ECSR has not overstepped the Committee of Ministers' competence. Nonetheless, it assesses the behavior of states based on past decisions and findings from report cycles to monitor if they are following the ECSR's reasoning on adequate remedies and legislative changes.[138] Therefore, all international bodies analyzed engage in some form of remedies, which does not preclude the comparison and discussion of ESCR adjudication across jurisdictions.

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[130] See Godfrey M Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights', *African Human Rights Law Journal* 6 (2006): 442–64.
[131] Tarisai Mutangi, 'Tracing the Developing Reparations Jurisprudence of African Court on Human and Peoples' Rights as Reflected in Its First Cases of Mtikila, Zongo and Konate', in *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems*, ed. Alejandro Fuentes and Annika Rudman (Pretoria University Law Press, 2023), 7.
[132] Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights', 445–47.
[133] Sisay Alemahu Yeshanew, 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and Perspectives', *African Human Rights Law Journal* 11, no. 2 (2011): 143.
[134] Mutangi, 'Tracing the Developing Reparations Jurisprudence of African Court on Human and Peoples' Rights as Reflected in Its First Cases of Mtikila, Zongo and Konate', 12–13.
[135] See Article 50 ACHR.
[136] Aslan Khuseinovich Abashidze et al., 'The Legal Analysis of the Right to Reparation for the Victims of the Human Rights Violations in the European, Inter-American and African Human Rights Protection Systems', *Indian Journal of Science and Technology* 9, no. 37 (2016): 7b.
[137] Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', *Human Rights Law Review* 9, no. 1 (2009): 92.
[138] For instance, compare the cases *COHRE v. Italy*, ¶¶ 67–78; *Amnesty International v. Italy*, ¶¶ 66–77.

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Regional courts issue binding decisions and redress the violations through substantive remedies. That said, there is a significant difference between them regarding the number and scope of remedies issued. The ACtHPR derives its remedial competence from the African Court Protocol, which empowers the ACtHPR to issue orders and award compensation for the victims. Building on this authority, the ACtHPR has expanded the types of remedies it grants.[139] As for the IACtHR, its competence to issue remedies is laid out in the ACHR. From its early jurisprudence, the IACtHR has issued a wide array of remedies, generally summarized as including: "restitution; rehabilitation; satisfaction; guarantees of nonrepetition; the obligation to investigate, prosecute, and punish; and compensation for pecuniary injuries, nonpecuniary injuries, and costs and expenses."[140] Taken together, these remedies reflect a comprehensive list.

In contrast to the previous two courts, the ECtHR issues a more limited range of remedies, as the ECHR only provides for "just satisfaction" in cases concerning human rights violations. Based on this provision, the ECtHR primarily grants monetary compensation but issues individual and general measures.[141] While financial redress remains the most common form of remedy, the ECtHR has increasingly ordered states to undertake individual and general measures.[142] From a comparative perspective, all three regional courts provide redress human rights violations through a variety of remedies.

To sum up, the concept of justiciability developed by some scholars contains three core elements: an adjudicatory body, a substantive claim, and the possibility of redress for the violation. As demonstrated, one potential obstacle to comparing judicial to quasi-judicial bodies lies in the redress aspect. Nevertheless, both types of adjudicatory bodies issue procedural and

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[139] Mutangi, 'Tracing the Developing Reparations Jurisprudence of African Court on Human and Peoples' Rights as Reflected in Its First Cases of Mtikila, Zongo and Konate', 24.
[140] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd edn (Cambridge University Press, 2013), 196.
[141] David Harris et al., *Law of the European Convention on Human Rights*, 4th edn (Oxford University Press, 2018), 162–73.
[142] Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures', *Human Rights Law Review* 17 (2017): 457–58.

substantive remedies, depending on how they interpret their mandate. The remaining two elements of the concept are addressed in the third subsection, where I examine different approaches to justiciability, focusing on the substantive rights and the bodies themselves. Before turning to how international bodies adjudicate ESCR, however, the next section considers the scholarly debate on justiciability of ESCR.

1.2. The justiciability debate

In discussing the justiciability of ESCR, my intention is not to question the justiciability of ESCR but to acknowledge possible criticisms and discuss them to clarify specific elements of ESCR. This is crucial since some of these elements, such as states' obligations and the allocation of resources, have been the focus of the literature and appear in a few cases before the international bodies under analysis. Scholarly debate on the justiciability of ESCR has been commonplace in the legal academy for more than 30 years. Normatively, the debate has focused on whether ESCR are justiciable and how far courts should go in adjudicating violations of ESCR. The discussions predominantly have predominantly taken place within national jurisdictions. From there, they have been transplanted into the international sphere; however, not all aspects addressed in national law align with those in international law, as discussed below. Empirically, courts and bodies began adjudicating ESCR through different approaches, using interpretative techniques. Hence, the justiciability debate remains pertinent to understanding both the focus and the legal reasoning adopted by the international bodies.

Broadly speaking, arguments for and against justiciability fall under three categories: the characteristics of ESCR, institutional capacity of adjudicatory bodies, and their legitimacy.[143] These arguments link with relevant concepts discussed in the next section,

[143] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 9–19.

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demonstrating that although the justiciability question is now settled, the debate answers important questions related to ESCR.

Starting with the characteristics of ESCR, key characteristics against their justiciability are the nature of states' obligations and the language used in treaties. Traditionally, CPR were associated with negative obligations (i.e., refraining from action), while ESCR were seen as requiring positive obligations (i.e., states' actions),[144] making them resource-dependent and thus considered non-justiciable. This has led to the misconception that CPR are costless, while ESCR inherently require resources. However, this view is both artificial and inaccurate,[145] as all human rights entail positive and negative obligations and depend on resource allocation.[146] The only distinction is that CPR-related resources are often seen as "less controversial […] and to have less serious implications."[147] This undermines the critique of ESCR as uniquely resource-dependent. Additionally, the wording of treaty provisions has drawn criticism regarding ESCR justiciability: ESCR were deemed vague compared to the supposedly precise language of CPR, which has been cited as a barrier to their adjudication,[148] an issue raised during the drafting of the OP-ICESCR.[149] However, the supposed precision divide is inaccurate. Both sets of rights contain inherent vagueness, stemming from the practical limits of legislatures to cover all aspects of rights.[150] This feature is equally true for treaty-making, as shown by international adjudicatory bodies that have clarified the content and standards of both CPR and ESCR through their deliberation of specific cases.[151]

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[144] Cécile Fabre, 'Constitutionalising Social Rights', *The Journal of Political Philosophy* 6, no. 3 (1998): 271–75.
[145] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 9–10.
[146] Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', *Erasmus Law Review* 2, no. 4 (2009): 382–85.
[147] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 10.
[148] Egbert Willem Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law* 9 (1978): 93; Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 11.
[149] Malcolm Langford, 'Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Special Issue of Nordisk Tidsskrift for Menneskerettigheter, vol. 27, no. 1 (2009): 9–11.
[150] Koch, 'The Justifiability of Indivisible Rights', 7.
[151] For instance, the ECtHR applies the 'autonomous concept' technique in its jurisprudence a term in the ECHR requires independent interpretation by the ECtHR. This illustrates the vagueness of CPR, as the ECHR, a civil and

Concerning the lack of institutional capacity to adjudicate ESCR, the main argument is the absence of sufficient information and expertise to adjudicate such cases comprehensively.[152] However, in practice, judges routinely address claims outside their expertise.[153] Additionally, on the question of expertise, adjudicating budget and policies can be supported through training and by "seek[ing] advice from independent experts."[154] In other words, given the nature of the judicial craft and the ability to seek assistance, adjudicating ESCR is not insurmountable and is comparable to CPR cases. Another criticism concerns the ability to deal with polycentric tasks, which translates into the idea that decisions with multiple centers or focal points may exceed judicial competence.[155] As such, resource allocation is generally a polycentric issue.[156] Yet, polycentrism cannot justify the non-justiciability of ESCR, since CPR also depend on and affect the state's budget and "may also have complex, unforeseeable policy and administrative implications."[157] In other words, polycentrism is a legal issue rather than one unique to ESCR.[158] Therefore, polycentricity alone, though it calls for careful examination by the adjudicatory bodies and has implications for how they interact with the political branches of government, ought not to be a basis for challenging the capacity of judges to deal with ESCR altogether.

The legitimacy of ESCR adjudication is the last criticism against their justiciability, which has focused primarily on national courts. Consequently, not all aspects of the criticism are transferable to international adjudication. The first aspect is democratic legitimacy, which opposes ESCR adjudication because budged allocation should be determined by the political

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political rights treaty, relies on this technique to clarify vague expressions. See: George Letsas, 'The Truth in Autonomous Concepts: How To Interpret the ECHR', *European Journal of International Law* 15, no. 2 (2004): 282.

[152] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 16.

[153] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 16–18.

[154] Fabre, 'Constitutionalising Social Rights', 282.

[155] Lon Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review* 92, no. 2 (1978): 397.

[156] Fuller, 'The Forms and Limits of Adjudication', 397–401.

[157] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 18.

[158] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012), 193–94.

(elected) branches rather than by the courts.[159] Consequently, ESCR adjudication was perceived as a usurpation of their decision-making power. The counterargument is that courts adjudicating ESCR "have become not *the exclusive* but *an additional* place for deliberation and debate."[160] In national jurisprudence, adjudication became dialogical, as courts rely on the other branches to protect rights.[161] Thus, it does not oust political authority, as the democratic dialogue forces political branches to justify their positions and potentially align them with the requirements stipulated by human rights provisions. The second aspect is separation of powers. The judicial branch can either usurp competence or request political branches to "implement welfare policies or to allocate resources in such a way as to respect people's social rights."[162] In practice, courts are cautious to avoid impacting macroeconomic politics and choose affect budgets only in tacit agreement with other branches.[163] In other words, courts tend to respect separation of powers.

Considering that my dissertation focuses on international adjudication and the argument concerning separation of power is not directly transferable to the international sphere, further discussion at the international level is required. Different arguments have been presented to justify international adjudication of ESCR based on the legitimacy of the international bodies. For instance, the argument based on the rule of law principle maintains that people must have the opportunity to bring their claims for adjudication before a competent authority.[164] Additionally, it has been argued that the adjudication of ESCR in the international sphere depends on the review of states' actions or inactions within the given competence and in

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[159] Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, no. 2, Human Rights and Rule of Law Series (International Commission of Jurists, 2008), 6; Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 11–13; Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', 379.
[160] Varun Gauri and Daniel M. Brinks, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World', in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008), 343.
[161] Gauri and Brinks, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World', 342–43.
[162] Fabre, 'Constitutionalising Social Rights', 280–81.
[163] Gauri and Brinks, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World', 344.
[164] Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 13–14.

accordance with the law.[165] Therefore, the argument against international adjudication of ESCR due to legitimacy has not been convincingly proven.

To sum up, the justiciability of ESCR has been debated due to their characteristics, institutional capacity of adjudicators, and their legitimacy. A common element across these critiques is the focus on resources available and state budget. As the next section shows, the creation and discussion of states' obligations for ESCR also emphasize available resources. Despite criticisms and scholarly rebuttal, international bodies—courts, commissions, and committees—have developed a body of interpretative techniques and asserted their competence to adjudicate ESCR. In practice, all the jurisdictions in my dissertation adjudicate ESCR through different approaches, which are the focus of the next subsection.

1.3. Justiciability approaches

Given the longstanding pushback against the justiciability of ESCR, adjudicators have developed a range of innovative approaches to adjudicate these rights. In what follows, I will present how these rights became justiciable in each jurisdiction, based on the provisions of their respective treaties. This overview of approaches will facilitate the comparison across jurisdictions. Although international bodies examine ESCR violations differently, there is still common ground for comparison: each of the bodies I analyze adjudicates ESCR. The literature identifies three approaches to justiciability: indirect, integrated, and direct. This subsection examines each in turn. Although the approaches are categorized separately, some international bodies apply them in combination, thereby offering more comprehensive protection of ESCR.

The subsection begins with the direct justiciability approach, as it is the most prominent among the international bodies under scrutiny, even when other approaches are also employed. Subsequently, the analysis moves to the two non-direct justiciability approaches, namely the

[165] Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (Intersentia, 2013), 55–56.

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indirect and integrated approaches. Together, this subsection shows that while all the relevant systems recognize ESCR as justiciable, they differ in the specific approach adopted.

1.3.1. Direct justiciability approach

The direct justiciability approach involves the autonomous adjudication of ESCR. In practice, this means that adjudicatory bodies assess ESCR violations by applying treaty provisions that explicitly enshrine these rights.[166] Although the concept of direct justiciability is straightforward, its application is not. Some international bodies derive their competence to adjudicate ESCR from their respective treaties, while others have enhanced their competence through interpretive techniques. This part analyzes how each body established its competence to adjudicate ESCR. Through this analysis, I identify three sets of avenues by which human rights bodies have arrived at direct justiciability. Despite their differing paths, these bodies stand united in their adoption of direct justiciability.

The first avenue is represented by the ICESCR and the ESC, both of which only list ESCR but did not establish adjudicatory competence from the outset. Instead, states adopted protocols that conferred adjudicatory competence to the CESCR and the ECSR. In the UN system, the CESCR was initially granted only monitoring competence through states' reports,[167] as states argued that a complaint mechanism would be inappropriate for reasons discussed in the preceding subsection.[168] After a long period, states began drafting the OP-ICESCR in the 1990s to allow for individual complaints. This process took many years due to disagreement

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[166] Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas', 204.
[167] Zdzisław (Dzidek) Kędzia, 'Social Rights Protection under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights', in *Research Handbook on International Law and Social Rights*, ed. Christina Binder et al., Research Handbooks in International Law (Edward Elgar Publishing Limited, 2020), 93–94.
[168] Langford, 'Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', 4.

over the necessity of the mechanism.[169] The Optional Protocol was adopted in 2008[170] but only entered into force in 2013. As this competence derives from a protocol, the CESCR can adjudicate ESCR violations only against states that have ratified it.

The ECSR has a similar history. The ESC, drafted in the 1950s, lacked a complaint mechanism. Following a revision, the RESC came into force in 1996[171] to strengthen social rights in the Council of Europe, particularly as non-Western European countries were joining relevant instruments.[172] Despite this, neither ESC texts implemented a complaint mechanism.[173] In 1995, responding to criticism, states drafted the Additional Protocol for Collective Complaints to bolster the RESC effectiveness.[174] After extended negotiation, the mechanism was established in 1998, making ESCR directly justiciable under the ESC. Unlike other international bodies, the ECSR adjudicates only collective complaints. Organizations, not individuals, can bring cases to assess group situations. However, this does not affect the justiciability of ESCR, as the judicial review still addresses the violations experienced by groups members, and the redress, often legislative reforms, extends beyond the group. Furthermore, adjudication is limited to states that have ratified the Additional Protocol.

One crucial caveat regarding the ESC is its *à la carte* system of ratification. This system allows states to selectively choose which provisions they wish to apply in their national law. The ESC and the RESC require states to accept at least six rights of the nine core rights, along with a specified number of other rights. Accordingly, among the 30 provisions, states must agree

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[169] Catarina de Albuquerque and Malcolm Langford, 'The Origins of the Optional Protocol', in *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, ed. Malcolm Langford et al. (Pretoria University Law Press, 2016), 20–22.
[170] Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—The Missing Piece of the International Bill of Human Rights', *Human Rights Quarterly* 32, no. 1 (2010): 176–77; Albuquerque and Langford, 'The Origins of the Optional Protocol', 34.
[171] Anna Panarella, 'The Drafting of the 1961 European Social Charter', in *The European Social Charter: A Commentary*, ed. Stefano Angeleri and Carole Nivard (Koninklijke Brill NV, 2022), 1:36–37.
[172] Stefano Angeleri and Róisín Dunbar, 'The Reform of the European Social Charter', in *The European Social Charter: A Commentary*, ed. Stefano Angeleri and Carole Nivard (Koninklijke Brill NV, 2022), 1:40–41.
[173] Angeleri and Dunbar, 'The Reform of the European Social Charter', 42.
[174] Angeleri and Dunbar, 'The Reform of the European Social Charter', 47.

to 16 of them or 63 paragraphs.[175] While this system has drawn criticism due to concerns about its effectiveness,[176] it does not alter the direct justiciability of ESCR under both versions of the ESC.

The second avenue for the introduction of direct justiciability is represented by the ACHPR, which has maintained such a system since its introduction in 1986. As the youngest treaty analyzed, the ACHPR drew on the experiences of the other human rights systems, and the Organization of African Unity (the precursor to the African Union) opted to include both CPR and ESCR in a single text.[177] The codification of ESCR was seen as necessary for their advancement,[178] as evidenced by the explicit recognition of four ESCR: the rights to property,[179] work, health and education. As for the African human rights bodies established under the ACHPR, they derive their adjudicatory competence from the ACHPR itself. The Organization of African Unity created the ACmHPR alongside the ACHPR, mandating it to adjudicate on ESCR through individual communications.[180] By contrast, the ACtHPR was established in 2004, 18 years later, through the Protocol to the ACHPR.[181] This Protocol differs from those discussed above, as it created an adjudicatory body rather than a complaints' mechanism for an existing monitoring body. The Protocol requires states to issue declarations accepting the ACtHPR's competence.[182]

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[175] Article 20(1) ESC and Article A(1) RESC establish the *à la carte* system.
[176] Stefan Clauwaert, 'The Charter's Supervisory Procedures', in *The European Social Charter and the Employment Relationship*, ed. Niklas Brunn et al. (Bloomsbury Publishing, 2017), 133–34.
[177] Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect*, 318.
[178] Frans Viljoen, 'Social Rights in the African System for the Protection and Promotion of Human and Peoples' Rights', in *Research Handbook on International Law and Social Rights*, ed. Christina Binder et al., Research Handbooks in International Law Series (Edward Elgar Publishing Limited, 2020), 203.
[179] In contrast with other human rights systems, the right to property in the African system is considered part of the ESCR, see: *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (African Commission on Human and Peoples' Rights, 2011), paras 51–55.
[180] The Banjul Charter uses the 'communications' instead of complaints or applications from Article 47.
[181] Tom Gerald Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court', *iCourts Working Paper Series* 119 (2018): 9.
[182] 'Basic Information', African Court on Human and Peoples' Rights, accessed 28 October 2024, https://www.african-court.org/wpafc/basic-information/.

The third and final avenue for the incorporation of direct justiciability is illustrated in the Inter-American system, whose Commission and Court used interpretative techniques to adopt the direct justiciability approach. The Inter-American system includes three key instruments relevant to ESCR. First, the ADRDM, adopted in 1948 by the Organization of American States (OAS), protects all human rights.[183] Second, the ACHR, drafted in 1968 and into force since 1978, was inspired by both the UN Covenants and the ECHR,[184] covering a broad range of CPR.[185] Third, in 1988, the OAS adopted the PSS. While the PSS broadly addresses ESCR, it grants adjudicatory competence only over the rights to unionization and education.[186]

Under these three instruments, the competence to adjudicate ESCR varies. The IACmHR was created in 1948, prior to the ACHR. In 1965, the IACmHR was granted competence to adjudicate cases under the ADRDM. With the creation of the ACHR, the competence extended to cases involving states that ratified it.[187] The same applies to the PSS, as competence only extends to states that ratified the protocol.[188] As for the IACtHR, it was established alongside the ACHR, which required states to declare acceptance of the IACtHR's competence to hear individual complaints. The IACtHR is also competent to hear violations under other instruments, such as the PSS, but only concerning states that have ratified the protocol.[189]

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[183] Thomas Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes', *Buffalo Law Review* 21 (1971): 121–22.
[184] Thomas Buergenthal, 'International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction', *Texas International Law Journal* 12, nos 2–3 (1977): 324.
[185] Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes', 122.
[186] Article 19 PSS.
[187] 'What Is the IACHR?', accessed 24 January 2024, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp.
[188] To understand the history of the IACmHR, see paper Robert K. Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights', *Human Rights Quarterly* 31 (2009): 856–87.
[189] 'Inter-American Court of Human Rights - What Is the I/A Court H.R.?', Inter-American Court of Human Rights, accessed 30 June 2023, https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en.

Apart from the PSS, the ACHR itself includes a provision protecting the progressive development of ESCR without explicitly listing these rights, which has been central to their adjudication. Article 26 references the implicit rights protected in the OAS Charter, which is the source of rights within the ACHR. The IACtHR, with the support of the IACmHR, introduced autonomous adjudication of ESCR by combining four interpretative techniques: a literal interpretation of Article 26 ACHR due to its reference to explicit rights; a systemic interpretation, based on the Article's position in the ACHR under the 'state obligations and rights protection' part; a teleological interpretation grounded in the *pro personae* principle,[190] which holds that no right in Convention may be suppressed; and a supplementary interpretation referencing the ACHR's preparatory works.[191] Despite the absence of a specific list of rights, both the IACmHR and the IACtHR concluded that ESCR are directly justiciable through Article 26.[192]

To conclude, all four jurisdictions of my dissertation apply the direct justiciability approach through three distinct avenues. The first involves the CESCR and the ECSR, initially monitoring bodies for the ICESCR and the ESC, which gained adjudicatory competence after years of operation, via protocols that allowed complaints against states that ratified them. The second avenue covers the African bodies, the ACmHPR and the ACtHPR. The ACHR recognized ESCR and granted adjudicatory competence to the ACmHPR. The ACtHPR, also empowered to hear cases, was established through a Protocol. Unlike the CESCR and the ECSR, the ACtHPR was created solely to adjudicate, not monitor compliance. The third avenue

[190] Article 29 ACHR.
[191] Case of Cuscul Pivaral et al. v. Guatemala (Inter-American Court of Human Rights 23 August 2018), ¶¶ 76–96.
[192] The scholarly debate on the direct justiciability of ESCR in the Inter-American system has been controversial. Although not the focus of my dissertation, the literature has summarized the arguments for and against the adjudication of Article 26 ACHR. For arguments pro direct justiciability, see: Melish, "Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas"; Krsticevic, "La Protección de Los Derechos Económicos, Sociales y Culturales En El Sistema Interamericano". For arguments against direct justiciability, see: James L. Cavallaro and Emily J. Schaffer, "Less as More: Rethinking Supernational Litigation of Economic and Social Rights in the Americas," *Hastings Law Journal* 56, no. 2 (2004): 217–82; Oswaldo Ruiz-Chiriboga, "The American Convention and the Protocol of San Salvador: Two Intertwined Treaties," *Netherlands Quarterly of Human Rights* 31, no. 2 (2013): 159–86.

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comprises the Inter-American bodies, the IACmHR and the IACtHR, and both of which directly adjudicate ESCR using interpretative techniques. The IACmHR hears cases under the ADRDM and the ACHR, while the IACtHR is competent to adjudicate cases under the ACHR for states that recognized its jurisdiction. As for the PSS, both Inter-American bodies may hear complaints against states that ratified it. Despite these different avenues, all these bodies directly adjudicate ESCR.

1.3.2. Indirect and integrated justiciability approaches

The other two approaches used by international bodies to adjudicate ESCR are the indirect and integrated approaches, which allow the adjudication of ESCR without an express provision of these rights.[193] To clarify their use in the jurisdictions analyzed, I refer to them as indirect and integrated approaches, maintaining a conceptual distinction. In both, ESCR are read into provisions that do explicitly not contain an economic, social, or cultural right during the adjudication process. These approaches are typically employed where ESCR protection is limited, but they can also serve to fill gaps in human rights treaties.[194]

The indirect approach advances the adjudication of ESCR through "process guarantees,"[195] primarily effective judicial protection and due process,[196] which confer immediate effect on indirectly rights protected.[197] Despite extensive jurisprudence, I excluded this approach from dissertation, as explained in the "Introduction", due to its exclusive

[193] The approaches' names vary in the literature: some authors considered them under one heading and called them the interdependence approach, while others changed the names of the approaches. For instance, the integrated approach can be found as the elements approach. See: Cavallaro and Schaffer, 'Less as More: Rethinking Supernational Litigation of Economic and Social Rights in the Americas', 258; Yeshanew, 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and Perspectives', 332.
[194] Yeshanew, 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and Perspectives', 320.
[195] Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas', 195.
[196] Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas', 338.
[197] Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', 384–89.

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procedural focus and lack of substantive ESCR content.[198] In contrast, the integrated approach, grounded in the indivisibility and interdependence of human rights, enables the adjudication of ESCR through CPR claims.[199] It is relevant under treaties that do not confer adjudicatory competence over ESCR. However, it is limited by the requirement that violations must be linked to civil or political rights.[200]

The integrated approach is found in two jurisdictions: the Inter-American and the European systems. In the Inter-American system, both the IACmHR and the IACtHR use it to adjudicate ESCR. While autonomous adjudication occurs through Article 26, the integrated approach remains applicable in specific cases. The IACtHR, followed by the IACmHR, developed two doctrines for adjudicating ESCR through CPR: the *vida digna* or dignified life doctrine and the collective property doctrine,[201] which were created early on and remain present in the jurisprudence to this day. Thus, the case law stemming from both doctrines remain pertinent to the analysis of ESCR.

First, the *vida digna* doctrine stems from the rights to life and personal integrity under the ACHR. Cases applying this doctrine delineate states' positive obligations "to protect the conditions necessary for life."[202] The IACtHR invokes it when groups face subsistence threats or a "'special, real, and immediate risk'" of violations.[203] It relies on these rights to find violations involving "health, education, food, access to water and cultural identity."[204] Second, the collective property doctrine recognizes that Indigenous and Tribal peoples' right to property

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[198] The limitation assessment is found in the case law of procedural protections, such as fair trial. However, their focus is exclusively on procedural guarantees and do not provide content to ESCR.
[199] Ida Elisabeth Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', *The International Journal of Human Rights* 10, no. 4 (2006): 409–10.
[200] Koch, 'The Justifiability of Indivisible Rights', 39.
[201] Thomas Antkowiak, 'A "Dignified Life" and the Resurgence of Social Rights', *Northwestern Journal of Human Rights* 18, no. 1 (2020): 16–17.
[202] Steven R. Keener and Javier Vasquez, 'A Life Worth Living: Enforcement of the Right to Health through the Right to Life in the Inter-American Court of Human Rights', *Columbia Human Rights Law Review* 40, no. 3 (2009): 607.
[203] Antkowiak, 'A "Dignified Life" and the Resurgence of Social Rights', 21.
[204] Thomas Antkowiak, 'The Inter-American Court at a Crossroads', in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia Press, 2015), 272.

encompasses other rights, including the right to cultural identity. Based on this doctrine, the IACtHR has incorporated the spiritual bond between Indigenous communities and their ancestral land into the right to property.[205] These doctrines can be applied concurrently,[206] allowing ESCR adjudication under the rights to life and property. Beyond these doctrines, the Inter-American bodies have also adjudicated ESCR, such as the rights to social security and pension,[207] under the right to property, even after shifting toward autonomous ESCR adjudication. Together, these doctrines and jurisprudence show the IACmHR and the IACtHR's commitment to protecting ESCR as comprehensively as possible.

In the European system, the ECtHR also applies the integrated approach to adjudicating ESCR. Although the ECtHR is considered a CPR document, and the right to education is the only directly justiciable ESCR,[208] it interprets the ECHR to address issues beyond the narrow scope of CPR. Leitjen explains that the ECtHR employs a robust catalog of techniques to expand the ECHR's reach to ESCR, referring to this expansion as the 'effectiveness thesis.' The ECtHR relies on a) the principle of effectiveness, which holds that human rights must not be illusory; b) the teleological interpretation of the ECHR, which focuses on the treaty's object and purpose; c) the autonomous concept technique, which assigns independent meaning ECHR's terms, detached from national definitions; and d) the living instrument doctrine, which expands the protection by interpreting the ECHR in light of the present-day conditions.[209] These techniques demonstrate the ECtHR's view that human rights are interdependent and that violations have multiple facets.

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[205] Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources', *International Journal on Minority and Group Rights*, Minority Rights in Times of Crisis, vol. 24, no. 3 (2017): 231–34.
[206] Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources', 235.
[207] Tara J. Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity (Updated Version)', in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge University Press, 2010), 29.
[208] Article 2 of Protocol 1 to the ECHR.
[209] Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press, 2018), 62–68.

Despite these expansions, the ECtHR does not employ ESCR terminology in its jurisprudence. Instead, it recognizes the socio-economic dimensions of CPR.[210] While the literature may refer to concepts like 'the right to housing' in the ECHR,[211] the ECtHR does not recognize such a right per se but protects housing within the CPR rubric, such as under the right to property.[212] Accordingly, I adopt the 'rights' terminology used in the literature. Even when the ECtHR refers to these 'dimensions,' it nonetheless imposes obligations on states and advances ESCR content.

Within the ECHR, the relevant CPR are the right to life, the prohibition of torture, the right to respect for private and family life, and the protection of property.[213] Although the list is limited, the ECtHR has achieved considerable protection within the ECHR. One key development is the doctrine of positive obligations, grounded in the Preamble and Article 1 ECHR, which establish the obligation to secure rights and freedoms.[214] The ECtHR interprets this obligation to mean that states must not only respect rights but take positive measures to secure those rights.[215] Through such interpretative techniques, the ECtHR has expanded human rights protection in the region via the integrated approach to justiciability.

In summary, the integrated approach remains relevant and evident in the case law of the IACmHR, IACtHR, and the ECtHR. The Inter-American bodies apply the *vida digna* doctrine and interpret the right to property expansively. Even with the advancement of the direct justiciability approach under the ACHR, they continue to use the integrated approach to safeguard various dimensions of human rights. As for the ECtHR, the integrated approach is

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[210] *Yordanova and others v. Bulgaria*, ¶ 118.
[211] Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', 408–9.
[212] Torres, 'Justiciability and Social Rights', 144–45.
[213] Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 47–57.
[214] Aoife O'Reilly, 'The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3', *Hibernian Law Journal* 15, no. 1 (2016): 4–5.
[215] Ellie 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* 2, no. 4 (2009): 400.

central for my dissertation, as it advances the substantive protection of ESCR. The ECtHR not only adjudicates CPR to protect ESCR but imposes positive obligations on states.

1.4. Synthesis

This section analyzed the literature on the justiciability of ESCR, one of the most widely discussed concepts. Its aim was to demonstrate that despite, practical differences among the international bodies, the justiciability does not hinder comparative analysis. The first subsection addressed the concept of justiciability, based on three elements: substantive claim, adjudicatory body, and redress. The main issue in this subsection concerned redress, as quasi-judicial bodies do not issue binding remedies. However, the declaratory nature of decisions from the CESCR, the ACmHPR, the IACmHR, and the ECSR constitute redress. In contrast, the ACtHPR, the IACtHR, and the ECtHR issue binding substantive remedies. Thus, this section clarified that variations in redress do not affect the comparison among these bodies. The second subsection summarized the justiciability debate. My goal was not to revive it but to highlight arguments raised against justiciability and the literature's responses. The three main topics were the characteristics of these rights, institutional capacity, and legitimacy. Despite the intense debate, the international bodies examined in my dissertation have affirmed that ESCR are justiciable.

In the third subsection, I explained the three approaches to justiciability developed, excluding a detailed discussion of the indirect approach, as it is not addressed in my dissertation. The direct approach to justiciability corresponds to the autonomous adjudication of ESCR, reflected in three avenues. First, the CESCR and the ECSR gained competence through later protocols. Second, the ACmHPR and the ACtHPR derive competence from the ACHPR. Third, the IACmHR and the IACtHR expended their competence through interpretative techniques to adjudicate ESCR autonomously. In addition, the integrated approach enables adjudication through substantive CPR provisions. The IACmHR and the IACtHR developed several

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doctrines under this approach that remain relevant. For the ECtHR, this is the only approach, relying on interpretative techniques to protect economic and social dimensions.

To conclude, all my jurisdictions adjudicate ESCR. Understanding the two justiciability approaches and acknowledging their differences and similarities facilitate the comparison across international bodies. In my substantive chapters, "Forced Removals" and "Austerity Measures", I compare the cases without distinguishing between the approaches, solely mentioning the rights when discussing the cases.

2. States' obligations

Another important element of ESCR is the states' obligations, which have been expanded to include progressive realization, non-retrogression, and the minimum core obligations. In addition, non-discrimination and substantive equality, although important to all human rights, are crucial to ESCR. The goal of this section is to explain and clarify the meaning of these obligations, highlighting the significant scholarly focus. These obligations are also central to the discussion of interferences with ESCR, as I examine their role in assessing such interferences. Accordingly, I address their conceptualization here, since it is not revisited in the next chapter or the substantive chapters.

Before addressing these specific obligations, the first subsection discusses the literature on unspecific states' obligations—I use this term to distinguish them from the specific states' obligations. The analysis begins with the scholarly debate on terminologies, their advantages and pitfalls, and then considers the language used by each international treaty and body analyzed in my dissertation. This subsection is crucial for clarifying the differences between the international treaties and bodies. These distinctions led me to adopt the concepts of positive and negative obligations, rather than a more complex terminology. This simplified division allows for comparison across cases without speculating into which specific obligation the (quasi-)judicial reasoning would fall.

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The following subsections explore the specific obligations relevant to my dissertation. The second subsection explains the obligations to progressive realization and non-retrogression, which function as complementary. The third subsection examines the minimum core, both essential levels and obligations. Lastly, the fourth subsection outlines the obligations to non-discrimination and substantive equality.

2.1. Typology of states' obligations in the literature and the human rights systems

Framing human rights in terms of positive and negative obligations can obfuscate the discourse by reinforcing the false notion that CPR require minimal resources, while ESCR lack immediacy. For this reason, scholars have developed a different nomenclature for states' obligations. In the philosophical arena, Shue, while analyzing the relationship between duties and basic rights,[216] argues that rights do not inherently possess positive or negative characteristics but require both action and inaction from the state. He maintains that the distinction between positive and negative duties is too simplistic to adequately protect all rights. Consequently, he identifies three state duties: to avoid, protect, and aid. These are interconnected, as they address different facets of rights protection. The duty to avoid refers to the state obligation not to interfere with rights. The duty to protect includes two aspects: i) the state must ensure no unwanted interference, and ii) its institutions must disincentivize violations. Lastly, the duty to aid reflects the state duty to support those suffering from deprivation, whether due to natural causes or state failure.[217] According to Shue, all rights entail these three duties.[218] Although human rights law does not adopt Shue's terminology, this correlation between duties and rights marked the first step toward the development of the

[216] In Shue's view, basic rights encompass security rights and subsistence rights. Those are rights that are so fundamental to individuals that other rights cannot be achieved without them. He explains that subsistence rights are inserted in economic rights but are different from them. He lists subsistence rights as food, shelter, water, air, clothing, and health.
[217] Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 35–60.
[218] Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 55–64.

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tripartite states' obligations, thereby addressing the criticisms discussed in the justiciability section regarding states' obligations.

In human rights law, states' obligations were conceptualized along similar lines when Eide classified them into obligations to respect, protect, and fulfill. The first ensures that the state refrain from interfering with rights; the second protects individuals from third-party interference; and the third requires the state to fulfill rights by ensuring full enjoyment.[219] Eide first applied this tripartite framework to the right to food, but it has since been expended to all human rights.[220] These obligations are now widely used in academic analysis, particularly of ESCR.[221] Building on Eide's work, van Hoof, proposed a layered approach to obligations, arguing that it offers "a more promising point of departure for dealing with the issue of enforcement or implementation of human rights."[222] He added the obligation to promote, understood as advancing a goal over time.[223]

Combining the work of the three authors discussed above, Steiner and Alston advanced the idea of levels of obligation. They identified five obligations common to all human rights. First, the obligation to respect derives from non-interference, grounded in individuals' dignity, equality and worth. Under this obligation, the state must not worsen the individuals' situation. Second, the obligation to "create institutional machinery essential to realisation of rights"[224] requires states to allocate resources to support rights implementation. Third, the obligation to protect or prevent requires state action to avert violations. Fourth, the obligation to provide goods and services demands states spending to guarantee access to goods and services they

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[219] Eide, *Report on the Right to Adequate Food as a Human Right*, paras 66–69.
[220] Eide, *Report on the Right to Adequate Food as a Human Right*, paras 111–115.
[221] See: Koch, 'The Justifiability of Indivisible Rights'; Langford, 'The Justiciability of Social Rights: From Practice to Theory'.
[222] G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views', in *The Right to Food*, ed. Katarina Tomaševski and Philip Alston (Brill | Nijhoff, 1984), 108.
[223] Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views', 106.
[224] Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals*, 2nd edition (Oxford University Press, 2000), 182.

need. Fifth, the obligation to promote involves deeper political changes and greater expenditure, an example is public education.[225]

Sepúlveda's seminal work on states' obligations evaluates these typologies. She argues that while the framework advanced by Steiner and Alston enhances understanding, Eide's model keeps obligations concise and easier to grasp.[226] In her view, any classification of states' obligations demonstrates that all human rights require the same level of protection, as they contain three types of obligations. This counters the assumption that CPR are exclusively costless and ESCR are resource dependent. Moreover, she argues that the focus on positive and negative obligations is overly simplistic and that classifying obligations strictly as one or the other is unworkable. Therefore, she advocates the tripartite model as more suitable for assessing human rights' violations.[227]

Despite the value of the tripartite obligations and expanded models, I have adopted the positive and negative obligations, as I perceive it as the most practical frame for comparing human rights systems. This choice reflects the plurality of my jurisdictions and the aim of my dissertation. First, the goal of my dissertation is to distyle how international courts assess interferences with ESCR, where the terminology varies across treaties and bodies. All international human rights treaties contain obligations provisions but use different terms. Moreover, the international bodies sometimes diverge from the language established by their respective treaties. Using the tripartite model would require guessing which obligation a body refers to when evaluating the interference. By contrast, using the notions of both positive and negative obligations allows me to interpret interferences as requiring either action or inaction from the state. Second, it accommodates specific ESCR obligations, namely progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality,

[225] Steiner and Alston, *International Human Rights in Context: Law, Politics, and Morals*, 180–85.
[226] Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*, 169–70.
[227] Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*, 171–72.

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without tying them to the tripartite obligations. Because these terminologies may appear in the case law, I briefly discuss the treaties' provisions and the interpretative choices of the international bodies.

In the UN system, Article 2 ICESCR sets out states' obligations. This provision was criticized due to the wording chosen by states.[228] However, the CESCR and scholars have clarified it contains immediate and progressive obligations.[229] Article 2(1) includes the duty to take steps using maximum available resources and to progressively achieve the full realization of rights. The former is immediate; the latter, progressive.[230] In General Comment No. 3, the CESCR affirmed that progressive obligation requires implementing protection over time and not postponing it indefinitely.[231] In addition, Article 2(2) contains a non-discrimination clause, mandating states to refrain from discriminating against individuals based on prohibited grounds and Article 3 includes an equality clause.

Despite the textual language, the CESCR adopts the tripartite obligation advanced by Eide to give tangible effect to Article 2(1).[232] Moreover, the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights confirm that these are the obligations present in the ICESCR, providing brief definitions: the obligation to respect requires states to refrain from interference, such as arbitrary forced evictions. The obligation to protect focuses on preventing third-party interferences, and the obligation to fulfill requires measures to ensure the full realization of ESCR.[233] Hence, these obligations constitute interpretations of Article 2(1).

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[228] Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford University Press, 1992), 151.
[229] See *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9, no. 2 (1987): 156–229; Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*.
[230] Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*, 313–19.
[231] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 9.
[232] See, for instance, *General Comment No. 26: On Land and Economic, Social and Cultural Rights*, General Comment E/C.12/GC/26 (Committee on Economic, Social and Cultural Rights, 2023), paras 22–39.
[233] 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', International Commission of Jurists (ICJ), 1997, para. 6.

In the African system, the discussion on states' obligations follows a trajectory similar to that of the UN system. Article 1 ACHPR outlines states' obligations, listing the obligations to 'recognize' and to 'undertake to adopt.' This wording has been criticized as weak and in need of reform to include "stronger and more meaningful"[234] obligations. Anyangwe argues that Article 25 should also be viewed as an obligation provision due to its references to promoting and ensuring education and respecting rights and freedoms.[235] Additionally, article 2 contains the non-discrimination clause.

Due to the vagueness of Article 1, the ACmHPR developed more detailed content on states' obligations, while the ACtHPR has taken a more restrictive approach.[236] The ACmHPR has adopted the obligations to respect, protect, promote, and fulfill.[237] In the Nairobi principles, it reinforced the four obligations and linked them to all ESCR, explaining that they include both positive and negative obligations without hierarchy.[238] In contrast, lacking soft law guidance, scholars analyzing the ACtHPR's case law find that it favors the positive and negative obligations over the ACmHPR's four obligations.[239]

As for the Inter-American system, the ACHR includes two general provisions: Article 1 and Article 2. Article 1 provides the obligations to respect and ensure rights without discrimination, while Article 2 requires states to adopt measures that are "necessary to give effect" to those rights. Mac-Gregor and Pelayo Möller, analyzing the IACtHR jurisprudence, explain that the obligation to respect entails compliance with norms, either by refraining from

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[234] Christof Heyns, 'The African Regional Human Rights System: In Need of Reform', *African Human Rights Law Journal* 1, no. 2 (2001): 159.
[235] Carlson Anyangwe, 'Obligations of States Parties to the African Charter on Human and Peoples' Rights', *African Journal of International and Comparative Law* 10, no. 4 (1998): 629.
[236] Yakaré-Oulé (Nani) Jansen Reventlow and Rosa Curling, 'State Obligations in the African System', in *Judging International Human Rights Courts of General Jurisdiction as Human Rights Courts*, ed. Stefan Kadelbach et al. (Springer, 2019), 318.
[237] Reventlow and Curling, 'State Obligations in the African System', 317–18.
[238] *Nairobi Principles*, para. 4.
[239] Reventlow and Curling, 'State Obligations in the African System', 319.

action or by providing benefits.[240] Consequently, it involves positive or negative measures,[241] differing from other jurisdictions where it is typically understood as non-interference. The obligation to ensure requires states to establish an infrastructure to guarantee the enjoyment rights.[242] According to Melish, this includes preventing, investigating, sanctioning, remedying and ensuring the minimum core content. She also clarifies that Article 2 further refines the obligation to ensure,[243] as the IACtHR has explained that it entails eliminating norms and practices that contravene the ACHR and creating those that ensure effective rights.[244] Hence, Article 1 concerns obligations under specific rights, while Article 2 refers to the broader legal system.

The IACmHR and the IACtHR apply similar standards in relation to states' obligations. Both bodies employ the language of the ACHR, which encompasses both positive and negative obligations.[245] The evaluation of these obligations is conducted jointly, rather than separately or with emphasis on only one type.[246] Moreover, while analyzing inequality in the Inter-American system, Abramovich emphasizes that positive obligations are a crucial part of the jurisprudence of the respective regional bodies, as they assess whether the public policies implemented effectively tackle the issues present in the Americas.[247] Therefore, in the Inter-

[240] Eduardo Ferrer Mac-Gregor and Carlos María Pelayo Möller, 'La Obligación de "Respetar" y "Garantizar" Los Derechos Humanos a La Luz de La Jurisprudencia de La Corte Interamericana: Análisis Del Artículo 1º Del Pacto de San José Como Fuente Convencional Del Derecho Procesal Constitucional Mexicano', *Estudios Constitucionales* 10, no. 2 (2012): 151.
[241] Ferrer Mac-Gregor and Möller, 'La Obligación de "Respetar" y "Garantizar" Los Derechos Humanos a La Luz de La Jurisprudencia de La Corte Interamericana: Análisis Del Artículo 1º Del Pacto de San José Como Fuente Convencional Del Derecho Procesal Constitucional Mexicano', 152.
[242] Ferrer Mac-Gregor and Möller, 'La Obligación de "Respetar" y "Garantizar" Los Derechos Humanos a La Luz de La Jurisprudencia de La Corte Interamericana: Análisis Del Artículo 1º Del Pacto de San José Como Fuente Convencional Del Derecho Procesal Constitucional Mexicano', 154.
[243] Tara J. Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (Yale Law School & CDES, 2002), 160.
[244] *Teachers of Chañaral and other municipalities v. Chile*, ¶ 185.
[245] Tara J. Melish, 'The Inter-American Commission on Human Rights', in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge University Press, 2008), 348b; Tara J. Melish, 'The Inter-American Court of Human Rights', in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge University Press, 2008), 384b–85.
[246] Melish, 'The Inter-American Court of Human Rights', 385a.
[247] Victor Abramovich, 'De Las Violaciones Masivas a Los Patrones Estructurales: Nuevos Enfoques Y Clásicas Tensiones En El Sistema Interamericano De Derechos Humanos', *Revista Internacional de Drechos Humanos* 6, no. 11 (2009): 23.

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American system, the division between positive and negative obligations is blurred by the concept of the obligation to respect provided by the IACtHR, which addresses both types jointly throughout its case law.

Lastly, in the European system, the ECSR and the ECtHR apply the language of positive and negative obligations.[248] The ESC is significantly different from other treaties in its organization and language of the provisions. In contrast to other international treaties, the two versions of the ESC lack a general clause for obligations. Instead, each provision and paragraph outlines distinct states' obligations.[249] Scholars emphasize that rather than distinguishing positive and negative obligations, the ESC's provisions divide into immediate and progressive obligations.[250] Regardless of the structure or the scholarly focus, the ECSR maintains that states have both types of obligations, evaluated case by case.

As for the ECHR, it resembles the other international treaties but differs significantly in how it frames states' obligations. Like the ICESCR, ACHPR and the ACHR, the ECHR includes an obligation provision: Article 1 ECHR, which establishes the obligation to respect human rights. Historically, the ECtHR focused solely on this specific obligation, suggesting that ECHR rights only required a negative obligation to respect.[251] However, the ECtHR has since developed the positive obligations doctrine. It now affirms that Article 1 requires states to ensure the rights listed in its text, linking it to positive obligations.[252] What distinguishes the ECtHR, according to Mowbray, is that positive obligations impose "the duty upon states to

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[248] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 82.
[249] Csilla Kollonay-Lehoczky, 'The Methods for Interpreting the European Social Charter', in *The European Social Charter: A Commentary*, ed. Stefano Angeleri and Carole Nivard (Koninklijke Brill NV, 2022), 1:238.
[250] Berrin Ceylan Ataman and Godze Atasayan, 'Economic Policies and the European Social Charter', in *The European Social Charter and the Employment Relationship*, ed. Niklas Brunn et al. (Bloomsbury Publishing, 2017), 306–10; Karin Lukas, *The Revised European Social Charter: An Article by Article Commentary*, Elgar Commentaries Series (Edward Elgar Publishing, 2021), 8–9; Kollonay-Lehoczky, 'The Methods for Interpreting the European Social Charter', 238.
[251] Giovanni Cavaggion, 'The Implementation of the European Social Charter by National Authorities', in *The European Social Charter and the Employment Relationship*, ed. Niklas Brunn et al. (Bloomsbury Publishing, 2017), 137.
[252] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities*, Human Rights Law, Title by Title (Hart Publishing, 2014), 69–70.

undertake specific affirmative tasks."[253] Still their scope is debated, with some arguing that merging negative and positive obligations through the fair balance test blurs their distinction.[254] Consequently, the content of positive obligations remains inconsistent and difficult to grasp, as it varies across different cases.[255] Their scope depends on the case at hand and the provision violated, making positive obligations a notable development in the ECtHR jurisprudence but one best understood through case-by-case analysis.

Based on the various typologies for states' obligations and the language employed by the regional bodies, the use of positive and negative obligations proves most beneficial for my project. First, there is no consensus on the language used to describe states' obligations, but all the obligations derive from action (positive obligation) and inaction (negative obligation). Thus, referring to positive and negative obligations eliminates the need to categorize states' obligations into rigid classification—which rarely fit neatly and do not adequately reflect the nuanced approaches of different bodies. Second, the specific obligations I also analyze—progressive realization, non-retrogression, non-discrimination, and substantive equality—align well with the positive and negative obligations framework. While states must progressively realize rights and ensure substantive equality, they must not regress their protection of rights or treat individuals discriminatorily. As for the minimum core obligations, they comprise both positive and negative obligations. Therefore, the positive and negative obligations typology is best suited for my comparative analysis.

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[253] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004), 2.
[254] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge Research in Human Rights Law (Routledge, 2012), 59–62.
[255] Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (Oxford University Press, 2023), 2.

2.2. Progressive realization and non-retrogression obligations

Among the specific states' obligations, progressive realization and non-retrogression are recognized by most international bodies. The literature, especially under the ICESCR, has emphasized these obligations, explaining their applicability in international law. They are seen as two sides of the same coin, essential for understanding the full realization of ESCR.

Progressive realization stems from Article 2(1) of the ICESCR, its primary legal basis.[256] Following the entry into force of the ICESCR, experts released two key documents clarifying states' obligations. In 1987, the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights clarified that although full realization depends on progress, some rights are immediately justiciable while others require time. This concept hinges on two aspects: "full participation of all sections of society […]"[257] and measures that "improve the standard of living of the poor and other disadvantaged groups"[258]—special measures relevant to achieving substantive equality. In 1997, the Maastricht Guidelines emphasized that ESCR are progressively realized through steps taken by states, while states must "demonstrate that [they are] making measurable progress toward the full realization of the rights in question."[259] Thus, the UN system played a central role in shaping this discussion since the entry into force of the ICESCR.

The obligation to progressive realization falls under the obligation to fulfill,[260] allowing limited flexibility of state actions.[261] This flexibility is not a justification for non-compliance with ESCR obligations.[262] As Young explains, progressive realization is measured based on

[256] Haris Huremagić, 'Core Obligations and Progressive Realization', in *Elgar Encyclopedia of Human Rights*, ed. Christina Binder et al. (Edward Elgar Publishing, 2022), 372a.
[257] *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, E/CN.4/1987/17 (American Association for the International Commission of Jurists, 1987), para. 11.
[258] *Limburg Principles*, para. 14.
[259] 'Maastricht Guidelines', para. 8.
[260] Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 28.
[261] Langford, 'The Justiciability of Social Rights: From Practice to Theory', 22; Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance', 744.
[262] 'Maastricht Guidelines', para. 8.

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"available resources, time, and effective institutions of government."[263] In case of non-fulfillment of rights, states need to justify the lack of resources.[264]

The CESCR clarified this obligation in two crucial documents, which in some respects mirror the Limburg Principles. First, General Comment No. 3 asserts that states must act "as expeditiously and effectively as possible"[265] and justify any lack of progress. If states pursue deliberate retrogressive measures, the CESCR undertakes a thorough examination of the situation, requiring justification across all rights in the ICESCR and in relation to the maximum available resources.[266] Second, the CESCR's statement on the OP-ICESCR clarifies maximum available resources. The goal of the statement was to alleviate concerns regarding vagueness and clarify states' obligations, explaining that 'maximum available resources' equate to resources acquired either domestically (i.e., from national economies) or internationally through international cooperation. States must use these resources to realize ESCR.[267]

In this second document, the CESCR has created criteria for the adjudication of progressive realization, some of which resemble those found in the limitation assessment. Measures must not be arbitrary or discriminatory; they must be the least restrictive, consider disadvantaged groups, be "deliberate, concrete and targeted," be imposed within a specific time frame while considering available resources.[268] Although non-arbitrariness and the least restrictive measure align with the limitation assessment, the remaining criteria do not.

These two documents highlight crucial elements of the progressive realization obligation. Beginning with the concept of the maximum available resources, Uprimny et al. explain that its content is neither empty nor strict, enabling states to distribute resources while

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[263] Young, 'Waiting for Rights: Progressive Realization and Lost Time', 659.
[264] Young, 'Waiting for Rights: Progressive Realization and Lost Time', 659.
[265] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 9.The Limburg Principles have stated similar content.
[266] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 9.
[267] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, E/C.12/2007/1 (Committee on Economic, Social and Cultural Rights, 2007), para. 5. These elements described by the statement had also been clarified by the Limburg Principles.
[268] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para. 8.

remaining subject to the CESCR scrutiny.[269] Regarding its meaning, the notion of resources extends beyond mere financial terms. Previously, financial resources were the main consideration,[270] which included domestic and international funding.[271] However, these are not the only resources. Although the exact types of resources remain undefined, scholars have proposed various classifications.[272] The concept, as developed in academic literature, advocates a systemic understanding of all sources at the disposal of the state, linked to the notion of availability. Nevertheless, despite extensive scholarly work, the CESCR continues to prioritize money allocation.[273]

Besides available resources and timeframe, scholars have identified effective states' institutions as an implicit element of progressive realization. States must rely on effective institutions to allocate resources and assign them to the ESCR areas that require them. Consequently, state ineffectiveness and corruption are disruptive practices towards progressive realization since resources are unlawfully appropriate by individuals and "inefficient and wasteful expenditure"[274] undermines the realization of ESCR.[275] Therefore, a structural approach is essential to ensure that available resources are properly deployed toward ESCR.

Outside the adjudicatory sphere, progressive realization is assessed through monitoring mechanisms. The methodologies used are extensive and do not feature in the case law analysis.

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[269] Rodrigo Uprimny et al., 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"', in *The Future of Economic and Social Rights*, ed. Katharine G. Young (Cambridge University Press, 2019), 638.

[270] Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity?', *Human Rights Law Review* 12, no. 3 (2012): 398.

[271] Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity?', 403.

[272] Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights', *Human Rights Quarterly* 16, no. 4 (1994): 696–97; Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity?', 408–13; Uprimny et al., 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"', 639.

[273] Uprimny et al., 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"', 639.

[274] Allison Corkery and Ignacio Saiz, 'Progressive Realization Using Maximum Available Resources: The Accountability Challenge', in *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Research Handbooks in Human Rights Series (Edward Elgar Publishing, 2020), 284.

[275] Corkery and Saiz, 'Progressive Realization Using Maximum Available Resources: The Accountability Challenge', 284–85.

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Briefly, they include "indicators and benchmarks, budget and expenditure analysis, violations approach, and 'combined' approaches,"[276] which have all been explained and criticized by scholars.[277] Among these are the Social and Economic Rights Fulfillment Index (SERF) and the Outcomes, Policy Efforts, Resources and Assessment (OPERA) framework. The former advocates for comparative analysis to identify the maximum available resources [278] while the latter integrates quantitative and qualitative approaches to evaluate progress.[279] Although these assessment methodologies are valuable and merit attention, they remain outside the scope of adjudication and, therefore, do not feature in my dissertation.

Besides the concept of progressive realization and maximum available resources, the CESCR also addresses the prohibition of retrogressive measures. The non-retrogression obligation complements progressive realization,[280] implicitly understood rather than explicitly stated in the ICESCR.[281] It ensures that states cannot regress in their established protection. In essence, it prohibits measures "that suppresses, restricts or limits"[282] rights protected by law. Although non-retrogression and limitations have developed separately due to their connection to ESCR and CPR respectively, their substance substantially overlaps, as demonstrated in the next chapter.

Retrogression may result from changes in the law (*de iure* retrogression) or from measures impairing rights enjoyment (*de facto* retrogression).[283] In either case, states must

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[276] Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance', 758.
[277] See: Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights'; Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance', *Current Anthropology* 52 (2011): 83–95; Corkery and Saiz, 'Progressive Realization Using Maximum Available Resources: The Accountability Challenge'.
[278] See: Sakiko Fukuda-Parr et al., *Fulfilling Social and Economic Rights* (Oxford University Press, 2015).
[279] Corkery and Saiz, 'Progressive Realization Using Maximum Available Resources: The Accountability Challenge', 294.
[280] Manisuli Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', *The International Journal of Human Rights* 15, no. 6 (2011): 978.
[281] Nolan et al., 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights', 124.
[282] Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', 393.
[283] Nolan et al., 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights', 123.

justify such measures.[284] In its statement regarding maximum available resources, the CESCR provided six considerations to determine if resource constraints serve as a valid justification (noted that resource constraints are valid justifications only if they are factored when using them as justifications): the country's level of development; severity of breach—with particular attention to the minimum core content; economic situation, especially during recessions; external factors such as natural disasters; availability of alternative low-cost options; and whether the state sought and accepted help from the international community.[285]

Although the CESCR issued this statement in 2007, subsequent general comments and other statements have not consistently reinforced these criteria. General Comment No. 19 briefly addresses retrogressive measures in the context of social security, stating that non-retrogression may only be adopted in exceptional cases and with careful consideration of relevant factors. According to the CESCR, states must provide a reasonable justification, consider other options, include affected groups, avoid discrimination, respect the minimum core, and allow for revision of the measures.[286] The 2008 economic crisis was pivotal in refining the criteria for retrogressive measures, leading to small but significant changes.[287] In 2012, the CESCR Chairperson released an Open Letter outlining that such measures must be temporary, non-discriminatory, respect the minimum core, and be necessary and proportionate.[288] These criteria closely mirror the limitation assessment, with the exception of the 'temporarily' criterion.

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[284] Nolan et al., 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights', 126.
[285] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, 10.
[286] *General Comment No. 19: The Right to Social Security (Art. 9)*, General Comment E/C.12/GC/19 (Committee on Economic, Social and Cultural Rights, 2008), para. 42.
[287] Ben TC Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression', *International and Comparative Law Quarterly* 65, no. 1 (2016): 454–55.
[288] Ariranga G. Pillay, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights', 16 May 2012, 2.

The literature on retrogressive measures highlights two relevant aspects. First, scholars argue that the obligation to non-retrogression is subject to strict scrutiny.[289] meaning that the CESCR grants limited discretion in such cases. Second, examples cited by authors typically relate to economic factors, such as inflation,[290] and reductions in public expenditure,[291] which may result from tax cuts.[292] Hence, this obligation primarily concerns situations involving states' resources and declining revenue.

Although most of the debate on progressive realization and non-retrogression has focused primarily on the ICESCR and the CESCR's interpretation, other regional bodies have drawn on the CESCR's standards within their own systems. However, this inspiration has not led to identical requirements across regions. Thus, examining these obligations within the regional systems is essential to understand the case law of each system and to compare the concepts developed.

In the African system, the ACHPR does not explicitly mention progressive realization and non-retrogression. While much of the literature has focused on the progressive realization obligation, comparatively limited attention has been given to non-retrogression. Initially, scholars claimed that the ACHPR mandated immediate states' obligation, excluding progressive realization.[293] Progressive realization was viewed as an internal limitation to ESCR, dependent on resource constraints.[294] Despite this early view, the African bodies later incorporated

[289] Uprimny et al., 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"', 652. The authors also affirm that the minimum core and the obligation to non-discrimination are strictly scrutinized.
[290] Aoife Nolan, 'Human Rights and the Cost-of-Living Crisis', *Netherlands Quarterly of Human Rights* 41, no. 1 (2023): 6–7.
[291] Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery', in *Economic and Social Rights after the Global Financial Crisis*, ed. Aoife Nolan (Cambridge University Press, 2014), 27.
[292] Radhika Balakrishnan and Diane Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights', *Essex Human Rights Review* 5, no. 1 (2008): 6.
[293] Chidi Anselm Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', in *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, ed. Malcolm Evans and Rachel Murray (Cambridge University Press, 2002), 197; Pierre de Vos, 'A New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights', *Law, Democracy and Development* 8, no. 1 (2004): 10.
[294] Vos, 'A New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights', 10.

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progressive realization into the ACHPR. The first to do so was the ACmHPR, adopting the terminology developed by the CESCR[295] as progressive realization became embedded in ESCR interpretation.[296] This was referenced, without further explanation, in the Pretoria Declaration on Economic, Social and Cultural Rights in Africa,.[297] Later, in the Nairobi Principles, the ACmHPR cited the aspects implemented by the CESCR in its documents and methodologies, such as indicators and benchmarks, to assess state compliance.[298] Some authors consider the introduction of the obligation to progressive realization a positive step, given the limited financial resources in the African countries.[299] Taking a closer look at this development, Viljoen argues that progressive realization appears to be the norm, while immediate obligations are exceptions.[300]

Despite scholarly debate on progressive realization, most of the literature has focused on the ACmHPR rather than the ACtHPR, as the Court is newer and has issued fewer decisions, particularly on ESCR.[301] In the ACmHPR case law, progressive realization has been examined in relation to the rights to health and to development. Regarding the right to health, the ACmHPR stated that states must "take concrete and targeted steps"[302] based on available resources to realize the right[303] and ensure access for the population.[304] In connection with the

[295] Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance', 746.
[296] Amare T. Chekol and Ilyas Dogan, 'Championing Human Rights: Normative Insights into the African Charter on Human and Peoples' Rights', *BeijingLawReview* 15 (2024): 1618.
[297] 'Pretoria Declaration on Economic, Social and Cultural Rights in Africa', African Commission on Human and Peoples' Rights, 2004.
[298] *Nairobi Principles*, paras 13–15.
[299] Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides', *African Human Rights Law Journal* 6, no. 2 (2006): 341; Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect*, 378.
[300] Viljoen, 'Social Rights in the African System for the Protection and Promotion of Human and Peoples' Rights', 207.
[301] Lilian Chenwi, 'The African System', in *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, ed. Jackie Dugard et al., Research Handbooks in Human Rights Series (Edward Elgar Publishing, 2020), 46.
[302] Purohit and Moore v. the Gambia, Communication No. 241/2001 (African Commission on Human and Peoples' Rights 29 May 2003), ¶ 84.
[303] *Purohit and Moore v. the Gambia, Communication No. 241/2001*, ¶ 84.
[304] Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt, Communication 323/06 (African Commission on Human and Peoples' Rights 12 December 2011), ¶ 264.

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right to development, progressive realization means "to invest its resources in the best way possible."[305] As for the ACtHPR, in one case it noted that while rights may not be realized "in a short period of time,"[306] states must not neglect the obligation. It referenced the CESCR's concept of progressive realization, thought without identifying specific criteria.[307] Since the ACtHPR has not further addressed this obligation in documents or case law, the only reasonable conclusion is that it will follow the CESCR's approach in future cases. Therefore, while the progressive realization obligation has been incorporated into the ACHPR system, it has not been widely applied by the African regional bodies.

Similarly, the obligation to non-retrogression was incorporated into the ACHPR through the Nairobi Principles issued by the ACmHPR, which adopted an analytical method comparable to that of the CESCR.[308] The ACmHPR states that retrogressive measures are presumed impermissible, and if implemented, states must justify them based on the ACHPR rights and the national context regarding maximum available resources. Where such measures are imposed, the ACmHPR outlines seven criteria to assess violations: state's reasonable justification; consideration of alternatives measures and selection of the least restrictive one, genuine participation of affected group; absence of direct or indirect discrimination; impact on the realization of other rights; unreasonable effect on individuals or groups' access to rights; and independent national review.[309] Although the ACmHPR has not adjudicated a case involving retrogressive measures, the language of the Nairobi Principles closely mirrors the CESCR documents, overlapping with the limitation assessment as well.

As for the ACtHPR, it has issued one judgment concerning retrogressive measures—it referred to as regressive. The ACtHPR explained that this obligation derives from Article 5

[305] Kevin Mgwanga Gunme et al v. Cameroon, Communication 266/03 (African Commission on Human and Peoples' Rights 13 May 2009), ¶ 206. There was no violation in this case.
[306] Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin, Application No. 062/2019 (African Court of Human and Peoples' Rights 4 December 2020), ¶ 136.
[307] *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin, Application No. 062/2019*, ¶ 136.
[308] Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression', 190.
[309] *Nairobi Principles*, para. 20.

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ICESCR. In contrast with the CESCR and the ACmHPR, it held that once a right is recognized, states cannot suppress or prohibit a right; rather, it must establish a framework for its realization.[310] In other words, the ACtHPR equates retrogressive measures to suppression of rights. However, since the ACtHPR has not yet developed its ESCR jurisprudence, it remains unclear whether it will engage in dialogue with other international bodies or retain this interpretation.

In the Inter-American system, the obligation to progressive realization is mentioned in the ACHR and the PSS. In the ACHR, Article 26 prescribes the progressive achievement of the realization of rights, while the PSS conditions progressive realization on the level of development and available resources. Both instruments highlight the importance of international cooperation. By contrast, the ADRDM contains no reference to this obligation. Hence, the Inter-American binding documents reflect the ICESCR's logic by explicitly including progressive realization.

As in the African system, the IACmHR clarified the meaning of progressive realization prior to the IACtHR, due to its monitoring mechanism. In its 1993 Annual Report, the IACmHR explained that 'progressive development,' as framed by the ACHR, does not permit states to avoid their immediate obligations. States must "ensure the conditions that, based on states' material resources, allow the gradual and constant advancement towards the full realization of [ESCR]"[311] and resources must be used effectively to secure a minimum standard of living for all. [312] Accordingly, the Inter-American states were guided on how to progressively realize

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[310] *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin, Application No. 062/2019*, ¶¶ 135–138.
[311] 'Informe Anual 1993 - Capítulo V: Campos En Los Cuales Han de Tomarse Medidas Para Dar Mayor Vigencia a Los Derechos Humanos, de Conformidad Con La Declaración Americana de Los Derechos y Deberes Del Hombre y La Convención Americana Sobre Derechos Humanos', Inter-American Commission on Human Rights, 1993.
[312] 'Informe Anual 1993 - Capítulo V'.

rights. In its adjudicatory role, the IACmHR reaffirmed the importance of the progressive realization, drawing on the concept developed by the CESCR and applied by the IACtHR.[313]

In the early 2000s, the IACtHR initially rejected the adjudication of the obligation to progressive realization. In its first case concerning the right to social security, it argued that assessing this obligation required population-wide information, not just on the applicants.[314] This position was supported in the literature, which questioned whether the adjudicatory competence could properly evaluate progressive realization.[315] However, the IACtHR reversed its interpretation and accepted the adjudication of this obligation. It stated that it follows the CESCR's understanding, granting states flexibility to adopt measures to realize ESCR.[316] Although this shift permitted further clarification of the obligation and possible adjudication, the IACtHR has not yet substantively engaged with this obligation.[317]

The most prominent case concerning progressive realization is Cuscul Pivaral et al v. Guatemala,[318] which has received significant scholarly attention.[319] In this case, the IACtHR affirmed that this obligation entails "concrete and constant obligation to make the most effective and rapid progress possible towards the full realization of the right, insofar as their available resources permit, by legislative or other appropriate means,"[320] and that it would assess violations based on available resources.[321] Analyzing the IACtHR's case law, particularly the Guatemalan case, Rossi finds that the progressive realization obligation under the ACHR requires continuous measures to realize ESCR, and that state inaction constitutes a breach of

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[313] Jorge Odir Miranda Cortez et al. v. El Salvador, Case 12.249 (Inter-American Commission on Human Rights 20 March 2009), ¶¶ 105–107; *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 136–138.
[314] *"Five Pensioners" v. Peru*, ¶ 147.
[315] Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity (Updated Version)', 26.
[316] *Acevedo Buendía et al. v. Peru*, ¶ 102.
[317] María Barraco et al., 'Progresividad y No Regresividad: Reflexiones a La Luz de Las Sentencias Poblete Vilches y Cuscul Piraval de La Corte Interamericana de Derechos Humanos', in *Interamericanización de Los DESCA: El Caso Cuscul Pivaral de La Corte IDH*, ed. Mariela Morales Antoniazzi et al. (Instituto de Estudios Constitucionales del Estado de Querétaro, 2020), 356.
[318] *Cuscul Pivaral et al. v. Guatemala*.
[319] See for instance: Mariela Morales Antoniazzi et al., eds, *Interamericanización de Los DESCA: El Caso Cuscul Pivaral de La Corte IDH* (Instituto de Estudios Constitucionales del Estado de Querétaro, 2020).
[320] *Cuscul Pivaral et al. v. Guatemala*, ¶ 98.
[321] *Cuscul Pivaral et al. v. Guatemala*, ¶ 144.

this obligation. She emphasizes that the core of this obligation consists of "the adoption of legislative measures and complementary administrative regulations,"[322] which must be complemented with public policies and programs leading to effective progress. Despite these insights, Rossi concludes that the IACtHR has left unsolved questions, particularly concerning available resources and how progress should be measured.[323]

As for the non-retrogression obligation, neither the ACHR nor the PSS explicitly mentions it, mirroring the ICESCR and the ACHPR. Nevertheless, this obligation has been incorporated into the ACHR through Article 26 due to its language on progressive realization. Additionally, Article 2—which calls for the creation of laws and measures in accordance with the ACHR—and Article 29—the interpretative clause—support the inclusion of this obligation into the text.[324] Hence, this obligation is present in the Inter-American system despite its lack of explicit mention.

Barraco et al. analyzed non-retrogression in the IACmHR cases, including admissibility reports. They explain that the IACmHR does not consider every retrogressive measure incompatible with Article 26. Its analysis compares the individuals' situations against the collective dimension of the right involved. Citing the CESCR, the IACmHR agrees that states may not adopt regressive measures affecting the minimum core elements of rights, an absolute prohibition.[325] However, the IACmHR has rarely addressed this obligation directly in the case law and has not developed a consistent approach.

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[322] Julieta Rossi, 'Progressive Realization, Nonretrogression and Maximum of Available Resources: Agreements and Disagreements between the Inter-American Court and the United Nations ESCR Committee', in *Proportionality and Transformation Theory and Practice from Latin America*, ed. Francisca Pou-Giménez et al. (Cambridge University Press, 2022), 170.
[323] Julieta Rossi, 'Obligación de Progresividad, No Regresividad y Máximo de Los Recursos Disponibles. Puntos de Encuentro y Desencuentro Entre La Corte Interamericana y El Comité de Derechos Económicos, Sociales y Culturales de Las Naciones Unidas', in *Interamericanización de Los DESCA: El Caso Cuscul Pivaral de La Corte IDH*, ed. Mariela Morales Antoniazzi et al. (Instituto de Estudios Constitucionales del Estado de Querétaro, 2020), 372–76; Rossi, 'Progressive Realization, Nonretrogression and Maximum of Available Resources: Agreements and Disagreements between the Inter-American Court and the United Nations ESCR Committee', 170–72.
[324] Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 12–16.
[325] Barraco et al., 'Progresividad y No Regresividad: Reflexiones a La Luz de Las Sentencias Poblete Vilches y Cuscul Piraval de La Corte Interamericana de Derechos Humanos', 335.

In one case concerning the right to health, the IACmHR noted that states must limit the regression of ESCR, though it focused primarily on other obligations under Article 26.[326] In another case, the IACmHR found that the state "took what steps it reasonably could to provide medical treatment"[327] and they were "sufficiently expeditious,"[328] thus not violating Article 26. The IACmHR assessed the states' steps and expenditure. In a third case, it explicitly connected non-retrogression with the concept of limitation, explaining that states may adopt retrogressive measures that limit ESCR.[329] Therefore, although the IACmHR has not focused extensively on non-retrogression, these cases provide insight into its meaning.

Similarly, the IACtHR has rarely addressed non-retrogression.[330] In some rules, it simply mentioned the obligation without elaborating on its content or violations threshold.[331] However, in a few cases, the IACtHR has clarified its interpretation. In one case, it explained that retrogressive measures may be adopted to "restrict the exercise of a right,"[332] reinforcing the CESCR criteria from General Comment No. 3 and the 2007 statement on MAR. It also cited the IACmHR's position on the necessity of strong reasons.[333] Therefore, the IACtHR' understanding of non-retrogression aligns with that of the CESCR and the IACmHR.

The European system diverges from the other regional systems, and consequently, from the CESCR. The first key difference is the absence of progressive realization under the ECHR, which the ECtHR has not incorporated into its case law. The same applies to the non-retrogression obligation. This omission stems from the fact that the ECHR protects only CPR. Through separate opinions, Judge Pinto Albuquerque discussed both obligations under the

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[326] T.B and S.H v. Jamaica, Case 13.095 (Inter-American Commission on Human Rights 31 December 2020), ¶ 108.
[327] *Jorge Odir Miranda Cortez et al. v. El Salvador*, ¶ 108.
[328] *Jorge Odir Miranda Cortez et al. v. El Salvador*, ¶ 108.
[329] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 140.
[330] Rossi, 'Progressive Realization, Nonretrogression and Maximum of Available Resources: Agreements and Disagreements between the Inter-American Court and the United Nations ESCR Committee', 165.
[331] See for instance: Case of the Workers of the Fireworks Factory in Santo Antônio De Jesus and Their Families v. Brazil (Inter-American Court of Human Rights 15 July 2020), ¶ 172; Case of Vera Rojas et al. v. Chile (Inter-American Court of Human Rights 1 October 2021), ¶ 96.
[332] *Acevedo Buendía et al. v. Peru*, ¶ 103; *Cuscul Pivaral et al. v. Guatemala*, ¶ 143.
[333] *Acevedo Buendía et al. v. Peru*, ¶ 103; *Cuscul Pivaral et al. v. Guatemala*, ¶ 143.

ECHR, but his views were never adopted by the ECtHR.[334] Accordingly, the ECtHR does not consider these obligations as part of the states' obligations under the ECHR.

The second difference involves the ECSR's interpretation. Progressive realization is not enlisted as a general obligation under the ESC or the RESC but appears in connection with specific rights. For instance, the right to social security in both versions of the Charter requires countries "to endeavour to raise progressively the system of social security to a higher level."[335] The ECSR has affirmed that progressiveness is an intrinsic principle of the Preamble of the RESC,[336] allowing its broader application.[337] This approach resembles the African system, though the criteria differ. In collective complaints, the ECSR assesses progressive realization based on three criteria: reasonable time, measurable progress, and use of maximum available resources.[338] As for the non-retrogression obligation, the ECSR has not adopted it under the ESC.[339]

Comparatively, the European system diverges most significantly from the CESCR and the other regional systems regarding progressive realization and non-retrogression. Progressive realization has been recognized by the ECSR with distinct criteria but ignored by the ECtHR due to the competence granted to adjudicate CPR. Regarding non-retrogression, neither European body has incorporated this obligation, though violations of social rights under the ESC may provide scope for its discussion. Therefore, and based on the above discussion, debates on progressive realization and non-retrogression originated primarily within the UN

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[334] See for instance: Partly Concurring, Partly Dissenting Opinion in Case of Konstantin Markin v. Russia, Application No. 30078/06 (European Court of Human Rights 22 March 2012); Partly Concurring, Partly Dissenting Opinion in Case of Lopes De Sousa Fernandes v. Portugal, Application No. 56080/13 (European Court of Human Rights 19 December 2017).
[335] Article 12(3) ESC and RESC.
[336] *COHRE v. Italy*, ¶ 27.
[337] Kollonay-Lehoczky, 'The Methods for Interpreting the European Social Charter', 263.
[338] International Association Autism Europe v. France, Collective Complaint No. 13/2002 (European Committee of Social Rights 8 March 2004), ¶ 53.
[339] *Digest of the Case Law of the European Committee of Social Rights* (Council of Europe, 2022) footnote 1375; Karin Lukas, 'Austerity and Human Rights: Reflections on the Jurisprudence of the European Committee of Social Rights', *Robert Schuman Centre for Advanced Studies Legal Trajectories*, Legal trajectories of neoliberalism: critical inquiries on law in Europe, 2019, 31.

system and were subsequently incorporated by most of the regional bodies. However, this incorporation has not been a mere replication, as regional bodies have interpreted and applied their own understanding of these obligations.

2.3. Minimum core

Similarly to the discussion on progressive realization and non-retrogression, the concept of the minimum core has been extensively analyzed under the ICESCR. Derived from national jurisprudence, it reflects the idea of a core not susceptible to interferences.[340] As Alston explains, the drafters indicated that the CESCR should identify a minimum core for protected rights.[341] This concept supplements progressive realization by creating immediate obligations,[342] thereby ensuring that not all states' obligations fall under progressive realization. Thus, the minimum core either shields rights from interferences or require immediate implementation, prompting debate over its function when states interfere with ESCR.

Despite its presence in international human rights law, the content of the minimum core remains complex.[343] Generally, it is understood that progressive realization and non-retrogression must account for the core's immediate implementation,[344] meaning the core is exempt from progressive realization and must be upheld during retrogression. Its concept has developed through three streams: minimum core as essence, consensus, and content.[345] Despite

[340] Esin Örücü, 'The Core of Rights and Freedoms: The Limit of Limits', in *Human Rights: From Rhetoric to Reality*, ed. Tom Campbell et al. (Basil Blackwell, 1986), 49. Ingrid Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection', *German Law Journal* 16, no. 1 (2015): 35.
[341] Phillip Alston, 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9, no. 3 (1987): 352.
[342] Young, 'Waiting for Rights: Progressive Realization and Lost Time', 665–66.
[343] Audrey R. Chapman and Sage Russell, 'Introduction', in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey R. Chapman and Sage Russell (Intersentia, 2002), 8.
[344] Chapman and Russell, 'Introduction', 9.
[345] While the minimum core as essence focuses on fundamental human rights values, the minimum core as consensus centers on the practice of political actors to reach a universal application. To understand the different conceptualizations of the minimum core, please see: Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', 126–48; Joie Chowdhury, 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective', *Cornell Law School Inter-University Graduate Student Conference Papers* 27 (2009): 4; Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection', 27.

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these conceptual differences, international human rights law has recognized the minimum core content, which is the focus of this subsection.

Under the ICESCR, the minimum core concept challenges the division between positive and negative obligations,[346] evolving through two concurrent approaches. The first approach focuses on the minimum essential levels of rights. The Maastricht Guidelines asserts that these do not depend available resources and must be complied with.[347] General Comment No. 3 echoes this, requiring states to ensure the minimum essential levels of rights, focusing on the basic protection of ESCR. Consequently, compliance is assessed in light of resources constraints, the sole acceptable justification for non-compliance.[348] Therefore, states must demonstrate the use of their maximum available resources to meet the minimum core.[349] Based on these documents, Chowdhury highlights a contradiction in the CESCR's definition, noting that it establishes a non-negotiable core that depends on resource availability.[350]

While General Comment No. 3 provides an open concept, subsequent general comments specify the essential levels of each right. For instance, the right to housing includes legal security of tenure, availability, affordability, habitability, accessibility, location, and cultural adequacy[351] and the right to social security entails availability, social risks and contingencies, adequacy, accessibility, and the relationship with other rights.[352] These general comments clarify each element in the context of the relevant right.[353] Even amid resource constraints like economic recession, states must ensure that "vulnerable members of society"[354] are protected

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[346] Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', 151–52.
[347] 'Maastricht Guidelines', para. 9.
[348] Victor Abramovich and Christian Courtis, *Los Derechos Sociales Como Derechos Exigibles*, 2 ed (Editorial Trotta, 2004), 90.
[349] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 10.
[350] Joie Chowdhury, 'Unpacking the Minimum Core and Reasonableness Standards', in *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, ed. Jackie Dugard et al., Research Handbooks in Human Rights Series (Edward Elgar Publishing, 2020), 253.
[351] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, General Comment E/1992/23 (Committee on Economic, Social and Cultural Rights, 1991), para. 8.
[352] *General Comment No. 19: The Right to Social Security (Art. 9)*, General Comment E/C.12/GC/19 (Committee on Economic, Social and Cultural Rights, 2008), paras 11–28.
[353] *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (Committee on Economic, Social and Cultural Rights, 2000), para. 12.
[354] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 12.

through cost-effective cheaper programs.[355] Hence, essential elements must be upheld regardless of context.

The second concept of minimum core refers to a concrete list of obligations that states must comply with immediately, rather than progressively realize.[356] In recent general comments, the CESCR has stipulated, alongside the essential elements of ESCR, a defined set of 'core obligations.[357] States must comply with these obligations and may avail themselves of international responsibility if they lack resources and have taken all necessary steps to utilize available resources.[358] These obligations are more tangible than the essential levels, as they prescribe obligations rather than standards. Thus, the two concepts of minimum core content are complementary.

The concept of the minimum core has attracted criticism in the literature. Craven argues that it unfairly spotlights developing states while overlooking the role of developed states in perpetuating poverty and deprivation.[359] Toebes cautions that the minimum core "poses the danger that the remainder of a right is subsequently considered unimportant and therefore may well be denied,"[360] resulting in minimalistic protection. Similarly, King adds that the concept "may well become quite central, rather than exceptional, to social rights adjudication."[361] Lehmann, drawing from CESCR documents, identifies another shortcoming: the lack of clarity around the minimum core's aim creates uncertainty as to whether it is an absolute core or subject to states' resources.[362] Lastly, Kende, responding to critiques of the South African

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[355] Abramovich and Courtis, *Los Derechos Sociales Como Derechos Exigibles*, 92.
[356] Chowdhury, 'Unpacking the Minimum Core and Reasonableness Standards', 252.
[357] See: *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, paras 43–44; *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 59.
[358] *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 19.
[359] Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, 143–44.
[360] Brigit Toebes, 'Right to Health', in *Economic, Social, and Cultural Rights: A Textbook*, 2 ed., ed. Asbjørn Eide et al. (Martinus Nijhoff, 2001), 176.
[361] King, *Judging Social Rights*, 115.
[362] Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core', *American University International Law Review* 22, no. 1 (2006): 182–93. The author

Constitutional Court, claims that scholars place excessive demands on adjudicators, who cannot feasibly assess resource availability for immediate obligations. He emphasizes that adjudication must respect the separation of powers, focusing on steps taken. Kende also asserts that defining the content of the minimum core is impractical due to divergent normative priorities.[363]

Scholarship on the incorporation and criticisms of the minimum core in the UN system is extensive.[364] Much like the discussion on progressive realization and non-retrogression, most of the analysis has unfolded within the UN system. Nevertheless, the CESCR has influenced some regional bodies to adopt the minimum core content, either directly or indirectly. In the African system, its development is uneven: while the ACmHPR has embraced a minimum core similar to the CESCR's, the ACtHPR has not yet invoked the concept.[365] As a result, focus remains largely on the ACmHPR. Its recognition of minimum core content significantly overlaps with the CESCR's, though differences exist. The ACmHPR adopts both essential levels and a complementary list of specific obligations.[366] In the Nairobi Principles, it guides states on defining the minimum core obligations and securing rights through national plans, policies, and systems,[367] thereby mirroring the CESCR's conceptual approach.

Regarding the differences, the ACmHPR deems the minimum core non-derogable and independent of resource availability. However, where non-compliance occurs, states must, as per the CESCR guidelines, demonstrate resource allocation to the minimum core. The ACmHPR further requires states to prioritize "members of vulnerable and disadvantaged

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advocates for a robust approach that focuses on justification of resource expenditure to ensure that resources are being allocated properly without courts becoming budget makers.

[363] Mark S. Kende, 'The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics', *Connecticut Journal of International Law* 19, no. 3 (2004): 622–24.

[364] See: David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio- Economic Rights Jurisprudence', *South African Journal on Human Rights* 19, no. 1 (2003): 1–26; Lisa Forman, 'Can Minimum Core Obligations Survive Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?', *Ottawa Law Review* 47, no. 2 (2016): 561–76.

[365] Chowdhury, 'Unpacking the Minimum Core and Reasonableness Standards', 258–60.

[366] Oliver Fuo and Anél du Plessis, 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere', *Law, Democracy and Development* 19 (2015): 6.

[367] The minimum core obligations is present throughout the *Nairobi Principles*.

groups."[368] This reveals a broader inconsistency in its treatment of non-derogable rights.[369] Consequently, the contradiction appears more pronounced than in the CESCR documents, as the ACmHPR conceptualizes the minimum core as an absolute core. Additionally, it treats the minimum core as a standalone assessment in its case law.[370] Hence, while the ACmHPR generally follows the CESCR's lead, it diverges in key aspects.

In the Inter-American system, discussion on the minimum core largely centers on the IACtHR, though it is less developed than in the UN system. The IACmHR incorporated the concept in the 1990s via its monitoring mechanism, explaining that the minimum core operates independently of economic levels.[371] The obligation to protect the minimum core derives from two ACHR provisions: the obligation to ensure rights in Article 1(1),[372] and Article 26 balancing the obligation to progressive realization.[373] Quispe's analysis of the IACtHR's case law on the right to health identifies essential levels—availability, accessibility, acceptability and quality—closely mirroring the CESCR's understanding.[374] The IACtHR has further clarified these levels by advancing standards such as psychological and social assistance and treatments.[375] Despite many ESCR cases, the minimum core concept has received limited attention. For instance, Rossi's review of Article 26 jurisprudence shows that the concept barely features.[376]

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[368] *Nairobi Principles*, para. 17.
[369] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, Oxford Commentaries on International Law (Oxford University Press, 2019), 40.
[370] Christian-Jr Kabange Nkongolo, 'The Justiciability of Socio-Economic Rights Under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades After Its Adoption', *African Journal of International and Comparative Law* 22 (2014): 501–2.
[371] Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, 170.
[372] Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, 170.
[373] Joaquín A. Mejía Rivera, 'Las Obligaciones Internacionales En Materia de Derechos Económicos, Sociales y Culturales a La Luz de La Convención Americana Sobre Derechos Humanos', *Revista Internacional de Derechos Humanos* 3 (2013): 97.
[374] Jorge Alexander Portocarrero Quispe, '¿Diálogo o Monólogos Paralelos? El Tribunal Constitucional Peruano y La Corte Interamericana Sobre La Justiciabilidad y La Efectivización Del Derecho Social a La Salud de Personas Con VIH', in *Interamericanización de Los DESCA: El Caso Cuscul Pivaral de La Corte IDH*, ed. Mariela Morales Antoniazzi et al. (Instituto de Estudios Constitucionales del Estado de Querétaro, 2020), 487.
[375] Quispe, '¿Diálogo o Monólogos Paralelos? El Tribunal Constitucional Peruano y La Corte Interamericana Sobre La Justiciabilidad y La Efectivización Del Derecho Social a La Salud de Personas Con VIH', 490–91.
[376] Julieta Rossi, 'Punto de Inflexión En La Jurisprudencia de La Corte Interamericana de Derechos Humanos Sobre DESCA. El Camino de La Justiciabilidad Directa: De "Lagos Del Campo" a "Asociación Lhaka Honhat"', *Pensar En Derecho* 16 (2020): 183–235. A similar tren is reflected in other ESCR literatura, see: Antoniazzi et al.,

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In contrast, the European system diverges significantly from the African and Inter-American systems—and from the CESCR. Neither the ECtHR nor the ECSR explicitly uses the language of the CESCR, prompting scholarly inquiry into conceptual overlap. While the ECSR does not apply the minimum core directly,[377] Costamagna argues that it uses a similar reasoning in cases concerning the reduction of the standard of living.[378] Scholars note that the ECSR treats the minimum core as a minimum threshold of acceptable living standards,[379] aligning with the CESCR's essential levels.[380]

As for the ECtHR, its engagement the minimum core is minimal, given that the ECHR does not directly protect ESCR. Nonetheless, some authors have explored the concept. Mola affirms that the ECtHR expects states to uphold a minimum level of protection during times of economic crisis, viewing the core as a threshold rather than essential levels or a list of obligations.[381] Leijten's work is pivotal here,[382] as she argues that the ECtHR's case law implies a minimum core centered on minimum social protection, even if not explicitly framed as such.[383] As in the preceding subsection, the European system diverges most notably by not referencing the minimum core, yet scholars continue to explore its implicit presence in ECSR and ECtHR jurisprudence.

Interamericanización de Los DESCA: El Caso Cuscul Pivaral de La Corte IDH. Although this book centers on ESCR obligations and the jurisprudential advancements of the Cuscul Pivaral case, the only chapter addressing the minimum core is authored by Jorge Alexander Portocarrero Quispe, as cited above.

[377] See: *Digest of the Case Law of the European Committee of Social Rights*.

[378] Francesco Costamagna, 'Riduzione Delle Risorse Disponibili e Abbassamento Dei Livelli Di Tutela Dei Diritti Sociali: Il Rispetto Del Nucleo Minimo Quale Limite All'Adozione Di Misure Regressive', *Diritti Umani e Diritto Internazionale* 8, no. 2 (2014): 376.

[379] Lorenza Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis an Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures', *Revista Jurídica de Los Derechos Sociales* 5, no. 1 (2015): 191.

[380] Claire Lougarre, 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights', *Netherlands Quarterly of Human Rights* 33, no. 3 (2015): 345.

[381] Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis an Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures', 191.

[382] Ingrid Leijten, 'Core Rights and the Protection of Socio-Economic Interests by the European Court of Human Rights', PhD dissertation, Leiden University, 2015; Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*.

[383] Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 217.

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In summary, the UN system introduced the concept of minimum core into international adjudication, later adopted by the ACmHPR, IACmHR and the IACtHR. While the ACtHPR has yet to incorporate the concept, the ECSR and the ECtHR apply a distinct conceptualization. Whether framed as essential levels or a list of obligations, the minimum core was integrated into international law to counterbalance progressive realization. As a result, inconsistencies among international bodies raise questions about the relationship between the minimum core and limitations.

2.4. Non-discrimination and substantive equality

Unlike the concepts discussed in the preceding subsections, non-discrimination and substantive equality extend beyond ESCR adjudication. Both appear in domestic and international law and have received significant scholarly attention.[384] Given the multiple lenses and the extensive literature, I focus on their role in international human rights law as part of states' obligations. Other way of looking at these concepts could be through the perspectives of principles[385] or rights,[386] which highlight key aspects of these concepts. Although relevant to all human rights, non-discrimination and equality are especially crucial for ESCR, given their role in protecting disadvantaged groups.

Equality has evolved through three phases: initially focusing on formal equality and eliminating legal impediments; then introducing anti-discrimination laws; and finally recognizing structural discrimination and addressing systemic inequality through the law.[387] These latter two phases reinforce the intrinsic connection between non-discrimination and

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[384] See for instance Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015), 23–24.
[385] See: Luisa Feline Freier et al., 'Non-Discrimination and Special Protection for Migrants and Refugees', *International Journal of Discrimination and the Law* 22, no. 3 (2022): 281–304.
[386] See: Susanne Baer, 'Equality', in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012).
[387] Fredman, *Discrimination Law*, 7–8.

equality.[388] Despite their overlap, conceptual clarity benefits from analyzing the two concepts separately.

Equality is typically categorized into formal equality, equality as results, equality of opportunity, and substantive equality, for the purpose of analytical clarity.[389] While all are important, equality as results and equality of opportunity receive less attention in scholarly and institutional discourse.[390] Accordingly, this section concentrates on formal and substantive equality.

Formal equality centers on equal treatment before the law, which aligns with the first phase of equality.[391] It is primarily invoked to curb state arbitrariness,[392] but has been criticized for disregarding individual circumstances.[393] As such, scholars argue that formal equality must be supplemented with broader conceptualizations.[394] Substantive equality offers a more comprehensive framework, integrating strengths of various models while addressing their limitations.[395] Fredman's framework is helpful for unpacking substantive equality. It includes four dimensions: redistribution (redressing disadvantage); recognition (addressing stigma, stereotype); participation (amplifying voices of disadvantaged individuals); and transformation (structural change and accommodation of differences).[396] This framework has been widely adopted by scholars to advocate comprehensive policies and judicial review.[397]

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[388] Baer, 'Equality', 984; Jarlath Clifford, 'Equality', in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford University Press, 2013), 426.
[389] Clifford, "Equality," 427 The author calls substantive equality as "transformative equality."; Fredman, *Discrimination Law*, 9–30.
[390] Concerning equality of results and equality of opportunity, please see: Clifford, 'Equality', 21–23; Fredman, *Discrimination Law*, 16–22.
[391] Fredman, *Discrimination Law*, 9.
[392] Clifford, 'Equality', 427–28.
[393] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', *Yale Journal of Law and Feminism* 20, no. 1 (2008): 2–5. The author goes in detail regarding the limits of formal equality. Also see: Fredman, *Discrimination Law*, 9–15.
[394] Clifford, 'Equality', 429.
[395] Atrey, 'The Intersectional Case of Poverty in Discrimination Law', 429.
[396] Fredman, *Discrimination Law*, 29–44.
[397] See: Atrey, 'The Intersectional Case of Poverty in Discrimination Law', 429–30; Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform', 1207–16; Colm O'Cinneide, 'New Directions Needed: Exponential Inequalities and the Limits of Equality Law', in *Exponential Inequalities: Equality Law in Times of Crisis*, ed. Shreya Atrey and Sandra Fredman (Oxford University Press, 2023), 137.

These dimensions are relevant for interpreting the case law of international bodies. Redistribution addresses disadvantage rather than promoting neutrality, specifically to prevent 'leveling down' rights protections. Recognition links equality to dignity and individual worth by examining how relationships are shaped by unequal power. Participation fosters dialogue and representation by including the voices of groups that were previously silenced. Transformation seeks structural change to eliminate stigma and discrimination, while preserving difference. Differences that are not a result of inequality are embraced as a value.[398]

The importance of equality in the context of ESCR is well recognized in the literature.[399] Scholars have criticized the limited understanding of equality, as it is a tool to tackle poverty. MacNaughton, for instance, argues that "greater economic equality is necessary to achieve the full realization of human rights – in particular economic and social rights,"[400] advocating for the inclusion of economic status in equality analyses. Furthermore, she argues for the need to take equality seriously as a component of ESCR.[401] As such, socioeconomic inequalities have been suggested as a lens to address poverty.[402] De Schutter urges for comprehensive assessment of equality and discrimination based on socioeconomic disadvantages.[403] Therefore, despite the broader legal relevance of equality, its unique significance in ESCR adjudication lies in addressing the multiple layers of inequality experienced by disadvantaged groups.

Non-discrimination operates as an allied concept to equality, focusing on its negative dimension. It requires states to avoid discriminating based on specific characteristics, such as race, gender, or nationality.[404] When discrimination occurs, non-discrimination provides tools

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[398] Fredman, *Discrimination Law*, 31–44. The author also acknowledges the challenges each dimension faces and how to overcome them.
[399] Gillian MacNaughton, 'Untangling Equality and Nondiscrimination to Promote the Right to Health Care for All', *Health and Human Rights Journal* 11, no. 2 (2009): 48–49; Baer, 'Equality', 996. See also: Salomon, 'Why Should It Matter That Others Have More? – Poverty, Inequality and the Potential of International Human Rights Law'.
[400] MacNaughton, 'Emerging Human Rights Norms and Standards on Vertical Inequalities', 36.
[401] MacNaughton, 'Emerging Human Rights Norms and Standards on Vertical Inequalities', 56.
[402] Atrey, 'The Intersectional Case of Poverty in Discrimination Law', 414.
[403] Olivier De Schutter, 'Combating Discrimination on Grounds of Socio-Economic Disadvantage: A Tool in the Fight against Poverty', *CRIDHO Working Paper 2022–7*, 2022, 10–17.
[404] Fredman, *Discrimination Law*, 168.

to evaluate whether such treatment was justified.[405] Khaitan identifies these characteristics as "personal characteristics that are technically called grounds"[406] of discrimination. Fredman outlines three legal models for defining these grounds: i. an exhaustive list; ii. a general equality guarantee that states (equality before the law); and iii. a non-exhaustive list.[407] To substantiate a discrimination claim, individuals must demonstrate that they fall within a protected ground and that the differential treatment constituted discrimination.[408]

To identify discrimination, scholars and practitioners rely on two main concepts: direct and indirect discrimination. Direct discrimination refers to the unequal treatment of individuals who should otherwise be treated equally, based a distinctive characteristic that informs the differential treatment. Although often seen as the most apparent form of discrimination, adjudicators may disagree on motive and intention. Despite its prominence in the case law, direct discrimination presents three notable pitfalls. First, it focuses solely on "consistent treatment,"[409] meaning that direct discrimination does not arise if everyone is treated equally poorly. Second, it relies on comparators, potentially excluding claims not directly tied to discrimination grounds. Third, it restricts the possibility of using differential treatment to address inequality.[410]

To rectify these shortcomings, the concept of indirect discrimination was introduced to ensure that equal treatment does not produce unequal outcomes across groups. Three elements must be present to assess indirect discrimination: equal treatment, unequal outcomes resulting from that treatment, and justification for the disparity.[411] The assessment of indirect discrimination presents several challenges. First, intention is not examined, resulting in seemingly neutral laws being deemed non-discriminatory. Second, measuring impact often

[405] Khaitan, *A Theory of Discrimination Law*, 23.
[406] Khaitan, *A Theory of Discrimination Law*, 49.
[407] Fredman, *Discrimination Law*, 171–72.
[408] Khaitan, *A Theory of Discrimination Law*, 49–50.
[409] Fredman, *Discrimination Law*, 251.
[410] Fredman, *Discrimination Law*, 250–51.
[411] Fredman, *Discrimination Law*, 280–84.

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relies on statistical evidence, shifting focus from the individual to the collective. This reliance is problematic, as data may overlook individual experiences and may be unavailable or ill-suited to the specific case. Third, the analysis depends on the justification for the measure, typically assessed through proportionality. Fredman argues that the most relevant criteria are legitimate aims and the appropriate means to reach them, urging strict application of the necessity criterion to ensure the least discriminatory option is chosen—which overlaps with limitations. Finally, by emphasizing outcomes, indirect discrimination can mislead adjudicators to focus solely on results rather than consider equality of opportunities.[412]

The final key concept for understanding discrimination is intersectional discrimination. Coined by Crenshaw, the term emerged from her critique of how claims of discrimination by Black women were assessed solely under the gender comparator, overlooking the simultaneous impact on both their race and their gender. To address this gap in US discrimination law, Crenshaw introduced the concept of intersectionality, recognizing that individuals may experience discrimination on multiple grounds simultaneously.[413] Although rooted in the US context, this concept has gained broader relevance, emphasizing that disadvantages arising from intersecting grounds constitute a distinct form of discrimination.[414] For example, Atrey argues that addressing poverty requires combining substantive equality with recognition of intersectional discrimination.[415] Put differently, adjudicators must consider the multiple axes through which individuals experience discrimination to effectively combat inequality.

The last relevant point in the literature on equality and non-discrimination concerns the groups of individuals who experience discrimination. One of the most commonly used terms to describe these individuals is 'vulnerable' groups. Fineman famously promotes the lens of

[412] Fredman, *Discrimination Law*, 286–306.
[413] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum* 1989, no. 1 (1989): 141–52.
[414] Fredman, *Discrimination Law*, 278.
[415] Atrey, 'The Intersectional Case of Poverty in Discrimination Law', 415.

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vulnerability to understand real-world social relations, arguing that all individuals possess vulnerabilities.[416] These vulnerabilities may be both "physically embodied and socially embedded,"[417] typically requiring state intervention to address or rectify them.[418] However, vulnerability has been criticized as an empty concept, often invoked when no other term applies.[419] Moreover, it has been argued that referring to groups as 'vulnerable' may reinforce stereotypes[420] and stigmatization,[421] inadvertently undermining its intended goals. Despite these critiques, as Timmer et al. note, the concept has been consistently employed by international human rights bodies and has evolved into a guiding principle.[422]

My dissertation is not the space to discuss whether 'vulnerability' is an appropriate framework. Yet, as human rights bodies use this terminology, along with "disadvantaged" or "marginalized" groups, to demand substantive equality, I apply it when needed to describe international jurisprudence. I do so, however, while acknowledging the pitfalls of this terminology. After examining the concepts of equality, non-discrimination, vulnerability and marginalization in general, I will address next how different treaties cover equality and non-discrimination and how international bodies deal with these two obligations.

In the UN system, the ICESCR contains a non-discrimination clause (Article 2(2)) and an equality clause (Article 3)—which focuses on equality between women and men. The Limburg Principles underscore that non-discrimination and equality deserve "special attention […] when assessing States parties' compliance with the Covenant."[423] In particular, Article 2(2)

[416] See for instance: Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition'; Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality', *Oslo Law Review* 4, no. 3 (2017): 133–49.
[417] Andrew Pilliar, 'Vulnerability Theory and Access to Justice: Elaborating Possibilities for Legal System Design', in *Law, Vulnerability, and the Responsive State: Beyond Equality and Liberty*, ed. Martha Albertson Fineman and Laura Spitz (Routledge, 2023), 39.
[418] Pilliar, 'Vulnerability Theory and Access to Justice: Elaborating Possibilities for Legal System Design', 45.
[419] Stephanie C Munari et al., 'Rethinking the Use of "Vulnerable"', *Australian and New Zealand Journal of Public Heal* 45, no. 3 (2021): 197b. The authors explain that there is an "inevitable deficit" linked to the concept.
[420] Munari et al., 'Rethinking the Use of "Vulnerable"', 197c.
[421] Drew B.A. Clark and Nina Preto, 'Exploring the Concept of Vulnerability in Health Care', *CMAJ* 190, no. 11 (2018): E308b.
[422] Alexandra Timmer et al., 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights', *Netherlands Quarterly of Human Rights* 39, no. 3 (2021): 194–97.
[423] *Limburg Principles*, para. 13.

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is immediately applicable and subject to judicial review. The grounds listed are non-exhaustive, requiring states to abolish both *de jure* and *de facto* discrimination. In addition, these Principles explicitly permit special measures to end discrimination, though such measures must be discontinued once equality is achieved.[424] This approach is further developed by the Maastricht Guidelines, which build upon the Limburg Principles—originally limited to racial discrimination[425]—by including gender discrimination.[426] Notably, the Guidelines recognize that "legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights [may be permitted if] done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups."[427] From a practical standpoint, Klerk argues that eliminating discrimination immediately is unfeasible, meaning that states may adopt programs to progressively end discrimination,[428] with substantive equality contingent on states' resources. Nonetheless, limited resources do not excuse inaction.[429]

To further clarify these obligations, the CESCR has issued two general comments. First, General Comment No. 16 addresses gender equality under Article 3, affirming that equality encompasses both formal and substantive dimensions, amounting to "equality in and before the law."[430] While equality in the law pertains to legislative functions, equality before the law relates to judicial and administrative review.[431] Moreover, this document prohibits direct and

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[424] *Limburg Principles*, paras 35–39.
[425] *Limburg Principles*, para. 41.
[426] 'Maastricht Guidelines', para. 12.
[427] 'Maastricht Guidelines', para. 14(d).
[428] Yvonne Klerk, 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9, no. 2 (1987): 256–57.
[429] Sandra Ratjen and Manav Satija, 'Realizing Economic, Social, and Cultural Rights for All', in *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, ed. Eibe H. Riedel et al. (Oxford University Press, 2014), 116–17.
[430] *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, E/C.12/2005/4, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Committee on Economic, Social and Cultural Rights, 2005), para. 9.
[431] *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, paras 6–9.

indirect discrimination[432] and endorses the adoption of temporary measures to achieve equality, provided such measures aim at equality—rendering them legitimate.[433] Second, General Comment No. 20 clarifies Article 2(2), which seeks to eliminate both formal and substantive discrimination.[434] Formal discrimination refers to explicit discrimination based on prohibited grounds, whereas substantive discrimination reflects unequal treatment stemming from "historical or persistent prejudice."[435] To remedy such disparities, states may adopt special measures, provided they are "reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved."[436] While typically temporary, such measures may require permanence depending on their nature.[437] Furthermore, discrimination can be direct or indirect,[438] and the grounds listed are non-exhaustive, with no internal hierarchy among them.[439]

In General Comment No. 20, the CESCR focused on additional aspects of discrimination. First, third parties might act discriminatorily against individuals, making states responsible for creating preventive measures. Second, the CESCR applies the concept of systemic discrimination, understood as "legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups."[440] Third, the list of prohibited grounds is extensive, including economic and social situation among many other grounds.[441]

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[432] *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, paras 10–14.
[433] *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, para. 15.
[434] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, General Comment E/C.12/GC/20 (Committee on Economic, Social and Cultural Rights, 2009), paras 8–9.
[435] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 8.
[436] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 9.
[437] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 9.
[438] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 10.
[439] Klerk, 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights', 259.
[440] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 12.
[441] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, paras 19–35.

Turning to the regional systems, the ACHPR contains a non-discrimination clause (Article 2) and an equality clause (Article 3)—encompassing equality before the law and equal protection. Although Article 2 uses the term 'distinction' instead of 'discrimination,' the ACmHPR clarifies its intent as discrimination clause.[442] Similar to obligations discussed in this previously, most literature focuses on the ACmHPR, as the ACtHPR has issued fewer decisions, especially on ESCR. Consequently, analysis centers on the ACmHPR.

In the Nairobi Principles, the ACmHPR clarifies that Article 2 lists non-exhaustive grounds of discriminations and covers "any conduct or omission which has the purpose or effect of nullifying or impairing [the access and enjoyment of rights]."[443] It highlights specific grounds such as "race, ethnicity, and religion"[444] due to high levels of discrimination but expects states to address sex/gender discrimination as well. Moreover, the ACmHPR acknowledges intersectional discrimination and demands steps to eliminate it.[445] Further reinforcing these standards, the ACtHPR, in an Advisory Opinion, explained that Article 2 of the ACHPR includes a list of prohibited grounds of discrimination, with "other status" allowing for additional grounds. It also clarified that not every difference in treatment is unlawful: for differentiation and distinction to be lawful, they must have objective and reasonable justification and be necessary and proportionate.[446] These criteria mirror some of the limitation assessment criteria discussed in the next chapter. Regarding equality, under Article 3, the ACmHPR explains that vulnerable and disadvantaged groups deserve special attention, including access to services and resources. These may be provided through special measures, which can be temporary efforts to "reduce or suppress conditions that perpetuate discrimination and to realise substantive equality."[447]

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[442] Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and Its Promotion and Protection of the Right to Freedom from Discrimination', *International Journal of Discrimination and the Law* 17, no. 2 (2017): 88.
[443] *Nairobi Principles*, para. 19.
[444] *Nairobi Principles*, para. 36.
[445] *Nairobi Principles*, paras 31–38.
[446] Advisory Opinion No. 001/2018 (African Court of Human and Peoples' Rights 4 December 2020), ¶ 67.
[447] *Nairobi Principles*, para. 34.

Despite these clarifications, the ACmHPR's practice has been subject to significant scholarly criticism. Mujuzi analyzes its jurisprudence on Article 2 and 3 and finds inconsistency in its definition of discrimination, citing five different approaches.[448] Murray critiques the erratic application of Article 2:[449] while non-discrimination is often considered in conjunction with rights, some cases overlook the provision or treat it as a standalone violation.[450] As for Article 3, both equality before the law and equal protection emphasize equal treatment.[451] This body of case law has prompted strong criticism of the ACmHPR's approach to equality. Basson argues that the ACmHPR is largely concerned with formal equality, with limited attention to substantive equality. Nevertheless, elements of its jurisprudence, such as references to dignity, leave room for further discussion on substantive equality.[452]

In the Inter-American system, the ADRDM and the ACHR frame equality as rights rather than obligations, both focusing on equality before the law—in Article II and Article 24, respectively. While both provisions mention the prohibition of discrimination, Article 24 additionally guarantees equality of protection. The ACHR also includes a broader prohibition of discrimination in Article 1(1), functioning as a general equality clause. The IACtHR clarified that Articles 1(1) and 24 overlap, Article 24 "restates to a certain degree the principle established in Article 1(1)."[453] The key distinction lies in Article 1(1) encompassing both formal and substantive equality, while Article 24 refers solely to formal equality.[454] The PSS similarly

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[448] Mujuzi, 'The African Commission on Human and Peoples' Rights and Its Promotion and Protection of the Right to Freedom from Discrimination', 91–93.
[449] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 48–49.
[450] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 53.
[451] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 94–97.
[452] Gideon Basson, '"Fortune" as a Ground of Discrimination under the African Charter on Human and Peoples' Rights', in *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems*, ed. Alejandro Fuentes and Annika Rudman (Pretoria University Law Press, 2023), 214–16.
[453] Advisory Opinion OC-4/84 (Inter-American Court of Human Rights 19 January 1984), ¶ 54.
[454] Anne-Claire Gayet, 'The Inter-American Court of Human Rights', in *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law Challenges and Innovative Tools*, ed. Marie Mercat-Bruns et al., Ius Comparatum – Global Studies in Comparative Law (Springer, 2018), 28:544.

includes a non-discrimination clause in Article 3, with language paralleling that of Article 1(1) ACHR.

Building on this framework, the IACmHR issued a compendium clarifying non-discrimination and equality. It distinguishes between the obligations to respect and guarantee. Under the respect obligation, non-discrimination requires identifying differential treatment and determining whether the justification is objective and reasonable. Grounds of discrimination, presumed incompatibility under strict scrutiny, are non-exhaustive, with both bodies of the Inter-American system recognizing unlisted grounds over time.[455] Under the obligation to guarantee, the emphasis shifts to substantive equality and affirmative action, aimed at preventing and reversing discrimination or its risk.[456] Although the IACtHR has not formally differentiated the respect and guarantee obligations in relation to non-discrimination and equality, it asserts that non-discrimination and equality permeate all rights enshrined in the Inter-American documents, recognizing them *jus cogens*.[457] Moreover, the IACtHR prohibits both direct or indirect discrimination and permits affirmative action to address either of them. In these cases, special protection should be implemented against third parties.[458]

Over time, Article 1(1)—initially viewed as a subordinate provision—has evolved into an autonomous provision. Applicants need not to link it to a substantive right to establish a violation. This shift led to three significant developments: recognition of new protected grounds; the acknowledgment of "discriminatory behaviour"[459] and even a "'culture of discrimination'"[460]; and, together with Article 24, a recognition that states engage in

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[455] *Compendium on Equality and Non-Discrimination. Inter-American Standards*, Compendium OEA/Ser.L/V/II.171 (Inter-American Commission on Human Rights, 2019), 47–58.
[456] *Compendium on Equality and Non-Discrimination. Inter-American Standards*, 66.
[457] Advisory Opinion OC-18/03 (Inter-American Court of Human Rights 17 September 2003), ¶¶ 82–101.
[458] *Advisory Opinion OC-18/03*, ¶¶ 102–104.
[459] Jose Luis Caballero Ochoa and Marisol Aguilar Contreras, 'New Trends on the Right to Non-Discrimination in the Inter-American System of Human Rights', *Inter-American and European Human Rights Journal* 8 (2016): 91.
[460] Ochoa and Contreras, 'New Trends on the Right to Non-Discrimination in the Inter-American System of Human Rights', 91.

stereotyping.[461] Additionally, the IACtHR also recognizes structural discrimination.[462] Overall, this jurisprudential evolution has prompted both the IACmHR and the IACtHR to confront discriminatory practices and promote special measures to ensure substantive equality.

In the European system, non-discrimination and equality clauses present differently in the ESC and the ECHR. Regarding the ESC system, the 1961 version did not include a non-discrimination clause. By contrast, the RESC introduced Article E as the non-discrimination clause. According to Besson, these regimes differ significantly. The ECSR recognized the existence of the principle of non-discrimination based on the preamble of the ESC, however, it applied it only to employment-related cases. Under the RESC, Article E applies to all rights, expending the protection scope.[463] In both versions, the ECSR considers discrimination grounds non-exhaustive and urges states to prevent direct or indirect discrimination.[464] A further distinction lies in Article 20 RESC, which includes gender equality clause.[465] Furthermore, despite the absence of a general equality clause, the ECSR views equality as a foundational value of the Charter and interprets it to promote substantive equality.[466]

Parallel to this, the ECtHR interprets the ECHR's non-discrimination clause—like Article E RESC—as non-autonomous,[467] requiring linkage to a substantive provision.[468] Nevertheless, it has grated limited autonomy to Article 14 ECHR, allowing assessments of

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[461] Ochoa and Contreras, 'New Trends on the Right to Non-Discrimination in the Inter-American System of Human Rights', 90–91.
[462] Ferrer Mac-Gregor and Möller, 'La Obligación de "Respetar" y "Garantizar" Los Derechos Humanos a La Luz de La Jurisprudencia de La Corte Interamericana: Análisis Del Artículo 1º Del Pacto de San José Como Fuente Convencional Del Derecho Procesal Constitucional Mexicano', 171.
[463] Samantha Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', *The American Journal of Comparative Law* 60, no. 1 (2012): 155–56.
[464] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 342.
[465] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 156.
[466] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 79.
[467] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 158.
[468] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 154.

discriminatory measures apart from substantive rights analysis.[469] The ECtHR's case law focuses on direct and indirect discrimination and emphasizes that prohibited grounds are non-exhaustive.[470] However, the ECtHR remains reluctant to adjudicate indirect discrimination, which would more openly promote substantive equality.[471] Timmer argues that the ECtHR emphasizes formal equality, while overlooking structural discrimination and stereotyping, falling short on substantive equality.[472] Though Timmer focuses on gender-bases cases, Möschel confirms this trend in other contexts,[473] particularly involving Roma communities.[474] Both scholars note progress but highlight the ECtHR's failure to address discrimination consistently.

To mitigate the analytical gap, Protocol 12 was created to enshrine equality before the law and equal protection. Article 1 includes a general limitation clause, but its key feature is its autonomy.[475] Despite efforts to broaden equality protections and facilitate adjudication, scholars point out that the protocol has been ratified by a few states.[476] Moreover, the ECtHR seldom relies on it, continuing to adjudicate through Article 14 ECHR.[477] As a result, Protocol 12 has not yielded the anticipated impact.

To sum up, the international bodies have focused on direct and indirect discrimination, alongside formal and substantive equality. For ESCR adjudication, these concepts are crucial,

[469] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention', European Court of Human Rights, 31 August 2024, 7.
[470] Mathias Möschel, 'European Convention of Human Rights/Council of Europe', in *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law Challenges and Innovative Tools*, ed. Marie Mercat-Bruns et al., Ius Comparatum – Global Studies in Comparative Law (Springer, 2018), 28:538.
[471] Mathias Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', *The Modern Law Review,* 80, no. 1 (2017): 123–27.
[472] Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', *Human Rights Law Review* 11, no. 4 (707): 713–14.
[473] Möschel, 'European Convention of Human Rights/Council of Europe', 541.
[474] See Andrea Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities', *International Journal of Discrimination and the Law* 15, nos 1–2 (2015): 101–22.
[475] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 157.
[476] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 157; Möschel, 'European Convention of Human Rights/Council of Europe', 531.
[477] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 157.

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given their role in assessing violations against groups that experience disadvantage and marginalization. Based on the descriptions provided, the evolution of the non-discrimination obligation and substantive equality considerations overlaps significantly with the limitation assessment. Discriminatory measures and the absence of equality interfere with individuals' rights, prompting an inquiry into how international bodies address interferences with discriminatory effect.

2.5. Synthesis

This section focused on states' obligations, given their centrality to ESCR adjudication. Scholars and international bodies have dedicated attention to clarifying how states should meet these obligations. The purpose of this section was to conceptualize the different types of states' obligations and outline the criteria used to adjudicate them in ESCR cases—ultimately, to demonstrate their potential linkages with limitations. Although scholarship on limitations and states' obligations has mostly developed separately, a conceptual connection exists, offering insights into how interferences are construed, which is developed in the next chapter.

The first subsection analyzed unspecific states' obligations, explaining that the positive and negative obligations typology is the most feasible for comparative analysis, as treaties and international bodies employ varied terms. The second subsection addressed progressive realization and non-retrogression obligations, and the controversies surrounding their conceptualization and criteria. Here, the relationship between these obligations and limitations serves as a lens for assessing violations, particularly whether a lack of progress or retrogressive measures are adjudicated as failures to fulfill states' obligations or under the limitation assessment.

Moreover, the third subsection examined the minimum core content as comprising essential levels and a set of states' obligations. International law establishes an immediate duty to implement it, posing a barrier to progressive realization. Nonetheless, the linkages between

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the minimum core and limitations remain unresolved. Lastly, the fourth subsection analyzed the non-discrimination and substantive equality obligations. The criteria for direct and indirect discrimination resemble the limitation assessment, while substantive equality considerations, such as special measures and emphasis on disadvantaged and marginalized groups, raise the question of how international bodies adjudicate interferences with discriminatory effects.

3. Conclusion

This chapter demonstrated that the main focus of the literature on ESCR adjudication has been justiciability and states' obligations. Additionally, it clarified that the ESCR jurisprudence is comparable, highlighting key conceptual linkages. The first section discussed justiciability, showing that quasi-judicial and judicial bodies are comparable and their differing approaches to justiciability do not hinder the adjudication of ESCR and comparative analysis of cases. The second section examined states' obligations, finding that positive and negative obligations typology is more suitable to compare ESCR jurisprudence. Moreover, it analyzed how the specific states' obligations are conceptualized and understood by the literature and international bodies.

Consequently, the "Analytical Framework" chapter builds on these discussions, exploring frameworks for interference assessment, their interrelations, and potential analytical methods. As such the literature on ESCR, introduced here, guides and informs the case law analysis in the "Forced Removals" and "Austerity Measures" chapters.

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Chapter 2. Analytical Framework for Assessing Interferences with Economic, Social, and Cultural Rights

The aim of my dissertation is to tease out how the international adjudication of interferences with ESCR is conceptualized. To achieve this goal, after addressing the main literature on ESCR, this chapter explains the analytical framework, together with the analytical method, employed in international adjudication of interferences.

Interferences with human rights may be addressed through various frameworks. Limitations are generally used for understanding and assessing interferences with CPR. In contrast, the realization of ESCR is largely understood through various states' obligations, which may also address interferences with these rights. Specific states' obligations include positive obligations such as progressive realization and substantive equality, negative obligations such as non-retrogression and non-discrimination, and those that include both negative and positive characteristics, such as minimum core obligations. While some scholars have dealt with these concepts separately, others have understood some states' obligations as either limitations or linked to limitations, even if not labeled as such.[478] This might be attributed to distinct conceptual evolutions of CPR and ESCR. However, the two frameworks of limitations and state's obligations, though historically and analytically separate, are linked in meaningful ways. I analyze my case law through the lens of limitation assessments as the main organizing framework. However, states' obligations feature in the case law, informing my analysis of interferences. Accordingly, this chapter presents the potential frameworks for assessing interferences and their linkages. In doing so, it contributes to answering the question of: '*What* framework do international bodies use to assess interference with ESCR?'

[478] Örücü, 'The Core of Rights and Freedoms: The Limit of Limits', 47–49; Scott, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', 99; Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 23; Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 582.

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In addition to unpacking the analytical framework to assess interferences, this chapter also addresses the analytical methods for assessing interferences, which are reasonableness and proportionality. Linking the analytical framework to the analytical methods, I demonstrate that the literature focused on limitations adopts both reasonableness and proportionality, though they link reasonableness to ESCR adjudication in national jurisprudence more specifically. Similarly, the scholarship on states' obligations considers reasonableness as the appropriate standard for ESCR in national and international adjudication. Despite this apparent linkage between ESCR and reasonableness, the most widely discussed and applied analytical method for assessing interferences remains the proportionality analysis. In addressing this discussion, I work towards answering the question of: '*How* do international bodies assess interference with ESCR?'

To clarify and link the different frameworks, this chapter is divided into two sections. The first section addresses the limitation assessment framework and the applicable analytical methods. The second section focuses on the aforementioned obligations, their potential linkages to limitations and their analytical methods. In each section, I draw on both constitutional and international law scholarship, as some aspects of the respective frameworks and analytical methods have been more extensively analyzed in national contexts and provide useful insights.

1. Analytical framework for interferences with economic, social, and cultural rights: the limitation assessment

In my dissertation, I chose to analyze the case law through the limitation assessment, structuring my substantive chapters accordingly. Limitations consist of interferences with human rights that can occur at any given moment and do not necessarily target an emergency. Contrary to derogations, limitations can be imposed indefinitely. In spite of the lack of a time

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limit, the scope of limitations can change over time, meaning that they are not immutable.[479] Since this framework is generally associated with interferences with CPR, I borrow from the literature on CPR, which has been heavily focused on national law. However, some scholars have also debated the limitations of ESCR in national law, especially regarding which analytical method is the most appropriate for ESCR adjudication.

The first subsection briefly explains the limitation assessment and how it presents itself in international treaties. The second subsection discusses the limitation clauses in international law, clarifying the meaning of proportionality analysis as the common analytical method.

1.1. Limitation assessment framework

The rules on limitations typically present themselves in three forms in state constitutions: i. Constitutions without a limitation clause, such as the US Constitution; ii. Constitutions with limitation clauses that provide limited guidance regarding how they ought to be applied, such as the Canadian Charter; and iii. Constitutions with detailed limitation clauses, such as the South African Constitution.[480] The possibility of limiting rights constitutes an external limitation of constitutional rights because the legislature can override rights based on public aims, leaving for the judges to conduct a judicial review of the measure.[481] Regardless of the existence of (a detailed) limitation clause, what the three constitutional law models have in common is the need for justification provided for the interference with rights, i.e., their limitation. This same need for justification informs the nature of limitations in international human rights law.

The international and regional human rights treaties represent a "heterogeneous picture"[482] regarding limitation clauses, as they contain (general or specific) limitation

[479] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 559–60.
[480] Webber, *The Negotiable Constitution: On the Limitation of Rights*, 59–62.
[481] Gardbaum, 'Limiting Constitutional Rights', 801–4.
[482] Weber, 'Limitation and Derogation of Fundamental Rights', 582.

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clauses.[483] General limitation clauses allow for the restriction of any right in the treaty, unless they are absolute, while specific limitation clauses relate exclusively to the right in which the clause is inserted.[484] The idea behind specific clauses is to tailor the limitation to the specificities of certain rights.[485]

The ICESCR, ACHPR, ACHR, and the PSS include both general and specific limitation clauses. By contrast, the ADRDM, ESC, and the RESC include a general limitation clause, while the ECHR only includes specific limitation clauses.[486] Consequently, the treaties can be divided into three groups. The first group of treaties contain general and specific limitation clauses, which can be divided into two sub-categories. First, the ICESCR and the PSS contain a general limitation clause at the beginning of the treaties, Article 4 and Article 5 respectively, while adding a specific limitation clause only to the right to join and form a trade union—Article 8 in both treaties. Second, the ACHPR and the ACHR contain general limitation clauses through jurisprudential interpretation. The drafters of the ACHPR did not intend to include a general limitation clause, but the African bodies understood Article 27(2) to be one.[487] As for the ACHR, the drafters divided the general clause's elements into two provisions—Articles 30 and 32(2)—which are understood as the general clause.[488] In addition, the ACHPR and the ACHR have specific limitation clauses attached to various rights, such as the right to property. The second group comprises treaties with only general limitation clauses, which are the ADRDM, ESC, and the RESC. In the ADRDM, the general limitation clause is present in

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[483] Marauhn and Strobel, 'Limitations and Restrictions of Rights', 428.
[484] James Jesse, 'Judicial Interpretation of Limitation Clauses at the International and Regional Human Rights Systems: Lessons for Domestic Courts', *Eastern Africa Law Review* 45, no. 1 (2018): 69; Artur Bilgorajski, 'Boundaries and Limitations of Human Rights. A Contribution to the Discussion', *Scientific Journal of Bielsko-Biala School of Finance and Law* 27, no. 3 (2023): 70.
[485] Bilgorajski, 'Boundaries and Limitations of Human Rights. A Contribution to the Discussion', 70a.
[486] Mohamed Elewa Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments', *The International Journal of Human Rights* 7, no. 4 (2003): 64; Ali, 'Economic, Social and Cultural Rights General Obligations in the African Charter on Human and Peoples' Rights', 81.
[487] Ali, 'Economic, Social and Cultural Rights General Obligations in the African Charter on Human and Peoples' Rights', 82.
[488] Daniel Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 2nd edn (Instituto de Investigaciones Jurídicas, 2016), 54.

Article XXVIII. Similarly, the drafters of the ESC and RESC opted to keep the text the same in Article 31 ESC and Article G RESC.[489] Finally, the third group consists of treaties with only specific limitation clauses, which is the ECtHR. The rights with specific clauses are known as qualified rights.[490]

Regardless of the differences between the treaties, they all contain limitation clauses, upon which the adjudication of interferences of rights depends. The limitations clauses share similarities regarding the structure of the clauses. Most treaties demand that a law be introduced to impose the limitation, that there exists a legitimate aim which must correspond to one of the aims listed in the respective treaty, and that the restriction conforms to the requirement of being 'necessary in a democratic society'. These requirements correspond to the principles of legality, legitimate aim, and proportionality,[491] which are part of the limitation assessment.

In the limitation assessment, proportionality stands out as a two-step process guided by a structured framework.[492] The first step involves determining whether the state interfered with a right. If so, the analysis shifts to assessing whether the interference is justified through proportionality.[493] The criteria used to establish whether an interference is justified have been subject to debate—some scholars claim that proportionality analysis comprises four criteria,[494] while others argue there are three.[495] Despite some variance regarding legitimacy as a part of the proportionality analysis—and hence the reliance on three or four criteria—, a structured test

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[489] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 347.
[490] Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, 6.
[491] Marauhn and Strobel, 'Limitations and Restrictions of Rights', 429a.
[492] Liebenberg, 'Reasonableness Review', 3.
[493] Möller, 'The Right to Justification and the Culture of Justification', 4.
[494] For instance: Rosalind Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies', *University of New South Wales Law Research Series*, 2018, 4; Möller, 'The Proportionality of Lockdowns', 3.
[495] For instance: Yutaka Arai-Takahashi, 'Proportionality', in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford University Press, 2013), 450–51; Alexy, 'Constitutional Rights and Proportionality', 52–54.

has been developed by numerous authors. These criteria include legitimacy, suitability, necessity and proportionality stricto sensu.[496]

Overall, international treaties have incorporated general or specific limitation clauses to guide adjudicators in assessing interferences with human rights. These clauses belong to a category of limitation clauses that provide limited guidance.[497] As such, scholarship has engaged in debate over the content of the clauses and each of their criteria. Accordingly, the following subsection explores the content of each criterion and their interpretations by the international bodies analyzed in my dissertation.

1.2. Limitation clauses

The general or specific limitation clauses in international treaties contain similar language regarding the criteria used to assess interferences. These clauses refer to three criteria, which will serve as the lens to examine the case law in my substantive chapters, which are legality, legitimacy and 'necessary in a democratic society.'[498] The third criterion equates to proportionality, which serves as the common analytical method in international adjudication. Hence, in what follows, I will explain each of these criteria—legality, legitimacy and proportionality—to lay the groundwork for my case law analysis.

1.2.1. Legality

The assessment of limitation begins with the legality criterion, which consists of the content and the format of the law. The content of legality contains both formal and substantive elements. The formal element focuses on whether an interference with a right is based on a

[496] See: Barak, *Proportionality: Constitutional Rights and Their Limitations*; Alexy, 'Constitutional Rights and Proportionality'; Möller, *The Global Model of Constitutional Rights*; Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies'.
[497] Webber, *The Negotiable Constitution: On the Limitation of Rights*, 59–62.
[498] See Articles 4 ICESCR, 27(2) ACHPR, XXVIII ADRDM, 32(2) ACHR, 5 PSS, 31 ESC, G RESC, and 8-11 ECHR.

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law.[499] This criterion is often conceptualized as the rule of law criterion within the limitations analysis,[500] as it primarily addresses concerns regarding arbitrariness.[501] The substantive element includes the requirements of legal foreseeability, accessibility, review and application of the law—which is the quality of the law.[502] Combining these two elements, Badar explains that "[n]o interference with a right protected under [treaties] is permissible, unless the citizen knows the basis for the interference because it is set out in an ascertainable law."[503] Beyond the content, the legality criterion also involves the analysis of the format of the law. In other words, the assessment involves which types of laws can impose limitations.[504]

Across international treaties, the language used to express the legality requirement is fairly consistent. Phrases such as "determined by law,"[505] "in accordance with laws,"[506] "prescribed by law,"[507] "provided by law,"[508] and "means of laws promulgated"[509] are commonly employed. Notably, some treaties, such as the ACHPR and the ADRDM, do not explicitly mention the legality criterion in their general limitation clause,[510] yet the criterion is analyzed.

Transitioning from the general commitment to legality to its specific conceptualization by international bodies, within the ICESCR, the principle of legality ensures that national laws

[499] Garibaldi, 'General Limitations on Human Rights: The Principle of Legality', 506.
[500] See: Martin Krygier, 'Rule of Law', in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012).
[501] Alison Doecke, 'The Principle of Legality as Protection for Human Rights', *Alternative Law Journal* 39, no. 4 (2014): 251a; Regina Valutytė et al., 'Legality of Human Rights Restrictions During the COVID-19 Pandemic under the European Convention on Human Rights', *Tilburg Law Review* 26, no. 1 (2021): 3.
[502] Valutytė et al., 'Legality of Human Rights Restrictions During the COVID-19 Pandemic under the European Convention on Human Rights', 4.
[503] Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments', 65.
[504] See: Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 200; Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 578; Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 348; Valutytė et al., 'Legality of Human Rights Restrictions During the COVID-19 Pandemic under the European Convention on Human Rights', 4–5.
[505] Article 4 ICESCR.
[506] Article 30 ACHR, Article 8 ECHR
[507] Articles 9, 10 and 11 ECHR, and Article 30 ESC and Article G RESC.
[508] Article 1 of Protocol 1 ECHR.
[509] Article 5 PSS.
[510] Article 27(2) ACHPR and Article XXVIII ADRDM.

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align with treaty obligations and that such laws exist when an interference with a right occurs. In addition to the formal requirement, Müller affirms that the ICESCR mandates laws imposing interferences to be "accessible, foreseeable and sufficiently clear."[511] Here, the concept of "law" extends beyond mere statutory law to include judge-made law, delegated law, etc.[512] However, the existence of administrative law alone is insufficient to justify a lawful interference.[513] As such, under the ICESCR, the legality criterion is understood to encompass both formal and substantive elements, as well as a broad format of law.

The general limitation clause in the ACHPR does not explicitly include the legality criterion. However, African bodies have integrated this criterion by drawing on the jurisprudence of other bodies, incorporating relevant rules to include the legality criterion into Article 27(2) ACHPR.[514] Notably, the ACmHPR evaluates legality even without directly addressing it.[515] In the Inter-American system, the legality criterion was clarified early on by the IACtHR and subsequently followed by the IACmHR.[516] Unlike other international bodies, the IACtHR enforces a strict definition of 'law' due to the inclusion of the term 'enacted' in Article 30 ACHR. In Advisory Opinion 6/86, the IACtHR clarified that 'laws', for the purposes of limitations, must align with the legal framework of the State Parties to the ACHR. Consequently, the restriction of human rights can only occur if it is imposed by the national legislature through statute.[517] For this reason, not every legal norm qualifies as a valid basis for limitations under the Inter-American system.[518] An exception to this formal definition arises when a national constitution delegates legislative authority to institutions other than the national

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[511] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 579.
[512] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 200.
[513] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 578.
[514] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 582.
[515] Anneth Amin, 'Assessing Violations of States' Socioeconomic Rights Obligations in the African Charter: Towards a Model of Review Grounded in the Teleological Approach', *African Human Rights Yearbook* 4 (2020): 35–38.
[516] Arai-Takahashi, 'Proportionality', 462.
[517] Advisory Opinion OC-6/86 (Inter-American Court of Human Rights 9 May 1986), ¶¶ 23–24.
[518] *Advisory Opinion OC-6/86*, ¶ 26.

legislature. In such cases, laws created through delegation meet the legality requirement.[519] In the scholarship on limitations, the Inter-American system's definition of legality is praised for ensuring a high threshold. This high threshold prevents arbitrariness and prohibits general norms from interfering with rights[520] or permitting implicit limitations.[521]

In the European system, the ESCR interprets legality in both versions of the ESC to encompass any type of law,[522] provided it is "sufficiently clear"[523]—a standard defined by "precision and foreseeability."[524] Judicial review plays a crucial role in assessing legality, ensuring laws are examined and applied by the judiciary.[525] Regarding the ECHR, the ECtHR clarifies that the law must align with the rule of law, incorporating accessibility, precision, clarity, and foreseeability—elements that define the quality of the law.[526] Additionally, courts contribute to the understanding of quality through interpretation and application of laws.[527] In terms of format, the ECtHR recognizes various types of law, including statutes and secondary legislation.[528] Thus, the European bodies understand the content of legality as comprising the existence of the law, its quality, and judicial review and application, as well as the format of the law.

To conclude, the legality criterion has been shaped by various international bodies through distinct yet complementary approaches. Across systems, it encompasses two

[519] *Advisory Opinion OC-6/86*, ¶ 36.
[520] Gabriela Rodríguez, 'Artículo 30. Alcance de las Restricciones', in *Convención Americana sobre Derechos Humanos: comentada* (Fundación Konrad Adenauer, 2014), 717; Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 56.
[521] Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 56.
[522] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 348.
[523] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 86.
[524] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 348.
[525] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 86.
[526] Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments', 68–69.
[527] Valutytė et al., 'Legality of Human Rights Restrictions During the COVID-19 Pandemic under the European Convention on Human Rights', 6.
[528] Valutytė et al., 'Legality of Human Rights Restrictions During the COVID-19 Pandemic under the European Convention on Human Rights', 4–5.

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fundamental dimensions: the content and the format of law. The content includes a formal element, which comprises the existence of the law, and a substantive element, which ensures the quality of those norms through clarity and foreseeability. Moreover, the format of law refers to the specific types of laws that may impose interferences. Together, these elements establish a rigorous framework for assessing legality, reinforcing both legal precision and the integrity of human rights protections.

1.2.2. Legitimacy

The second criterion of the limitation assessment is legitimacy, which examines the governments' justifications for interfering with rights.[529] Scholars emphasize that legitimate aims must be "sufficiently important,"[530] meaning that not all justifications qualify. The content of these aims varies across international treaties, influenced by historical content or the interpretative approach of adjudicatory bodies.

In the UN system, Article 4 of the ICESCR identifies 'general welfare' as the sole legitimate aim for interferences. Scholars analyzing the preparatory work of the ICESCR note that states deliberately excluded other possible aims, arguing that 'general welfare' should be interpreted narrowly.[531] As Müller explains, it primarily refers to "the economic and social well-being of the people and the community."[532] Consequently, interferences under the ICESCR can only occur in the name of the general welfare. In contrast, the regional treaties provide a broader list of legitimate aims. They share common legitimate aims, including the rights (and freedom) of others, general welfare, security, and public interest. While terminology varies—some

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[529] Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism', *Columbia Journal of Transna Tional Law* 47 (2009): 75.
[530] Matthias Klatt and Moritz Meister, 'Proportionality—a Benefit to Human Rights? Remarks on the I·CON Controversy', *I•CON* 10, no. 3 (2012): 690.
[531] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 202; Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 570–75.
[532] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 573.

treaties refer to public interest as general or common interest—the substantive meaning remains largely consistent.[533]

Among regional treaties, the European treaties recognize the widest range of legitimate aims, whereas the ACHR adopts the narrowest approach.[534] Despite these linguistic differences, regional bodies generally defer to states, allowing them to invoke aims that are not explicitly listed in the treaties, provided they relate to recognized aims.[535] Consequently, when states justify interferences based on treaty-prescribed aims, their justification is highly likely to satisfy the legitimacy criterion. However, such justifications remain essential in the limitation assessment. As Arai-Takahashi notes, the ECtHR requires "'sufficient reason'"[536] for interferences, an approach also followed by the IACtHR.[537] Thus, while international human rights bodies tend to grant states interpretative flexibility, they still impose a minimum threshold to ensure that rights are restricted only in pursuit of a genuinely legitimate aim.

1.2.3. Proportionality

In international law, legality and legitimacy precede proportionality analysis, which is incorporated in the limitation assessment through the phrase 'necessary in a democratic society.'[538] As proportionality is not explicitly mentioned in any treaty, alternative analytical methods, in theory, could be applied, such as reasonableness. Stemming from national law, reasonableness has been defined as "the courts' judgment as to whether the relative weight

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[533] See Articles 27(2) ACHPR, XXVIII ADRDM, 32(2) ACHR, 5 PSS, 31 ESC, G RESC, and 8-11 ECHR.
[534] See Articles 27(2) ACHPR, XXVIII ADRDM, 32(2) ACHR, 5 PSS, 31 ESC, G RESC, and 8-11 ECHR.
[535] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 85–86; Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 57; Ali, 'Economic, Social and Cultural Rights General Obligations in the African Charter on Human and Peoples' Rights', 113; Necdet Umut Orcan, 'Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness', *University of Bologna Law Review* 7, no. 1 (2022): 12.
[536] Arai-Takahashi, 'Proportionality', 455.
[537] Arai-Takahashi, 'Proportionality', 462.
[538] See Articles 27(2) ACHPR, XXVIII ADRDM, 32(2) ACHR, 5 PSS, 31 ESC, G RESC, and 8-11 ECHR.

given by the primary decision-maker to considerations that are relevant is reasonable or not."[539] While the level of scrutiny depends on the extent to which individuals are excluded from enjoying a right,[540] the decision to interfere must be coherent and comprehensive.[541] The main difference between reasonableness and proportionality is that the former is a one-step analysis,[542] while the latter is a multi-step test. Despite not being identical, these two standards comprise balancing as an inherent feature in assessing interferences with rights.[543]

In practice, proportionality has become the dominant analytical method for human rights adjudication.[544] Proportionality analysis stems from the recognition that rights naturally conflict, necessitating a method for balancing them.[545] This balancing exercise occurs not only when two rights clash but also when conflicts arise between rights and interests or between differing interests.[546] While proportionality analysis and balancing are closely related, they are not synonymous. Instead, proportionality, as theorized, encompasses balancing.[547] The concept of proportionality and its role in constitutional review has been extensively examined. Certain constitutional frameworks, such as those of Canada and Germany, have gained prominence for their application of proportionality.[548] Its use has become so widespread that scholars argue proportionality influences nearly all judicial argumentation, even in cases where adjudicators do not explicitly reference it.[549]

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[539] Paul Craig, 'The Nature of Reasonableness Review', *Current Legal Problems* 66 (2013): 136.
[540] Young, 'Proportionality, Reasonableness, and Economic and Social Rights', 9–10.
[541] Young, 'Proportionality, Reasonableness, and Economic and Social Rights', 10.
[542] Liebenberg, 'Reasonableness Review', 13.
[543] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 378.
[544] Arai-Takahashi, 'Proportionality', 448–50; Möller, *The Global Model of Constitutional Rights*, 178.
[545] Alexy, 'Constitutional Rights and Proportionality', 61–63.
[546] Aleinikoff, 'Constitutional Law in the Age of Balancing', 947. In this paper, the author demonstrates that even in the US, balancing is present in constitutional adjudication.
[547] Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies', 1.
[548] See: Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', *Education, Administration, and Justice: Essays in Honour of Frank Iacobucci* 57, no. 2 (2007): 383–97.
[549] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', *Law & Ethics of Human Rights* 4, no. 2 (2010): 150–52; Möller, 'The Right to Justification and the Culture of Justification', 5–7.

As mentioned, the number of criteria under the proportionality analysis varies, as some include legitimacy in it.[550] However, I consider legitimacy separately from proportionality since I follow the structure of the limitation clauses. In the literature, proportionality analysis consists of three criteria: suitability, necessity, and proportionality stricto sensu. Suitability refers to the rational connection between the aim and the measure chosen.[551] In other words, "the means must be appropriate to achieve or, at the very least, to promote that end."[552] This criterion is subject to a lower level of scrutiny than the others, receiving less attention from scholars and adjudicatory bodies.[553]

Necessity requires that the state selects the least or less restrictive measure among all the possible options.[554] If measures fail this criterion, they are deemed "broader and more burdensome than they need to be."[555] On the question of which measure to choose, Alexy argues that necessity involves choosing between equally suitable measures,[556] though this strict interpretation has faced criticism.[557] Bilchitz advocates for a moderate necessity in which courts would consider four factors: available measures (possibility); the degree of realization of the aim (instrumentality); the impact on the restricted right (impact); and the combination of the previous two aspects to compare which is the less intense measure (comparativity). This broader perspective integrates balancing into the necessity test, even if to a lesser degree when compared to the traditional understanding of necessity.[558]

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[550] See, for instance: Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies', 4.
[551] Arai-Takahashi, 'Proportionality', 452.
[552] Borowski, 'Absolute Rights and Proportionality', 389.
[553] Alexy, 'Constitutional Rights and Proportionality', 53.
[554] Arai-Takahashi, 'Proportionality', 452; Alexy, 'Constitutional Rights and Proportionality', 53.
[555] Beatty, *The Ultimate Rule of Law*, 165.
[556] Alexy, 'Constitutional Rights and Proportionality', 53.
[557] David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach', in *Reasoning Rights: Comparative Judicial Engagement*, ed. Liora Lazarus et al. (Bloomsbury Publishing, 2014), 44–46. See also: Möller, *The Global Model of Constitutional Rights*, 194–95; Virgílio Afonso da Silva, 'Standing in the Shadows of Balancing: Proportionality and the Necessity Test', *I•CON* 20, no. 5 (2022): 1744–47.
[558] Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach', 51–60.

Proportionality stricto sensu, or balancing,[559] focuses on whether the benefit of interfering outweighs its impact on individuals.[560] This criterion is considered the most important element of the proportionality analysis,[561] as balancing is fundamental for legal reasoning.[562] Alexy advanced the Weight Formula to assess the proportionality stricto sensu, evaluating the intensity of the interference with the right. He categorized the intensity as light, moderate, or severe to determine the impact of the limitation on a right.[563] Thereby, the difference between the three criteria of the proportionality analysis is that "suitability and necessity relate to the *factually* possible, whereas the principle of proportionality in the narrow sense relates to the *legally* possible."[564]

A few scholars have focused on the application of proportionality to interferences with ESCR, with most remaining within the realm of how adjudicators should apply proportionality, rather than how it is applied in practice. Some scholars argue that proportionality is the same regardless of whether the adjudication concerns CPR or ESCR,[565] while others advance that reasonableness[566] or balancing alone constitute more appropriate standards.[567] A separate group of scholars maintains that proportionality in cases involving ESCR is similar to CPR, but not equal. Some claim that balancing is the key difference—which encompasses specific ESCR-issues, such as the availability of resources[568]—while others assert that adjudicators have incorporated additional considerations to proportionality, such as individuals' 'vulnerability.'[569]

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[559] See Alexy, 'Constitutional Rights and Proportionality', 54; Möller, *The Global Model of Constitutional Rights*, 199. Alexy calls it Law of Balancing, while Möller prefers balancing stage.
[560] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 340; Arai-Takahashi, 'Proportionality', 452; Alexy, 'Constitutional Rights and Proportionality', 54.
[561] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 378.
[562] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 345.
[563] Alexy, 'Constitutional Rights and Proportionality', 54–57.
[564] Kai Möller, 'Balancing and the Structure of Constitutional Rights', *I•CON* 5, no. 3 (2007): 455.
[565] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 429–34; Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine', 738.
[566] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?', 12–22.
[567] Schlink, 'Proportionality (1)', 727; Möller, *The Global Model of Constitutional Rights*, 179.
[568] Alexy, 'On Constitutional Rights to Protection', 12–15; Klatt and Meister, *The Constitutional Structure of Proportionality*, 95–98; Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', 35–40; Duarte, 'Gains and Losses in Balancing Social Rights', 63–65.
[569] Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', 520.

Drawing on the preceding discussions, it is evident that scholarly work has devoted considerable attention to proportionality and its criteria, mainly in relation to CPR. The widespread application of proportionality has also attracted scholarly criticism,[570] mostly centered on normative claims. While these normative claims are important, the fact remains they do not change the fact that in practice, proportionality is the chosen analytical method. I now turn to how the literature has described the application of the proportionality analysis by the international bodies.

In the UN system, the CESCR has employed these three criteria in its case law.[571] Analyzing the jurisprudence of the CESCR, Liebenberg highlights that its primary focus has been the behavior of the applicant and the authorities, alongside the mechanisms available to individuals to mitigate the burden of interference and ensure judicial review.[572] In the regional systems, the application of these criteria vary. The African and Inter-American bodies apply a similar approach to proportionality analysis. In their case law, proportionality primarily focuses on necessity and proportionality stricto sensu, with minimal attention given to suitability.[573] Both the African and Inter-American bodies define necessity as the least restrictive measure,[574] differing only on their level of scrutiny of proportionality stricto sensu. For the ACmHPR and

[570] For criticisms on proportionality using empirical analysis to answer normative questions: Julian Rivers, 'Proportionality and Variable Intensity of Review', *The Cambridge Law Journal* 65, no. 1 (2006): 174–207; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *I•CON* 7, no. 3 (2009): 468–93; Webber, *The Negotiable Constitution: On the Limitation of Rights*; Iddo Porat, 'Some Critical Thoughts on Proportionality', in *Reasonableness and Law*, ed. Giorgio Bongiovanni et al. (Springer, 2009). For the debate in legal theory, please see: Frederick Schauer, 'Commensurability and Its Constitutional Consequences', *Hastings Law Journal* 45, no. 4 (1994): 785–812; Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer', *Hastings Law Journal* 45, no. 4 (1994): 813–24. Scholars answering these criticisms, please see: Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies'; Kai Möller, 'Proportionality: Challenging the Critics', *I•CON* 10, no. 3 (2012): 709–31.

[571] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 584; Nils-Hendrik Grohmann, 'Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR', *Human Rights Law Review* 22 (2022): 5–15.

[572] Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol', *Human Rights Quarterly* 42, no. 1 (2020): 65–82.

[573] Arai-Takahashi, 'Proportionality', 462; Ali, 'Economic, Social and Cultural Rights General Obligations in the African Charter on Human and Peoples' Rights', 114–17.

[574] Rodríguez, 'Artículo 30. Alcance de las Restricciones', 718; Amin, 'Assessing Violations of States' Socioeconomic Rights Obligations in the African Charter: Towards a Model of Review Grounded in the Teleological Approach', 37–38.

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the ACtHPR, proportionality stricto sensu entails balancing between rights and interests.[575] As for the IACmHR and the IACtHR, their focus shifts depending on the interest at stake. Despite this variation, the common feature is the balancing exercise,[576] which evaluates the intensity of the impact on the right, the significance of the interest, and whether the interest justifies the limitation in the Inter-American case law.[577]

The European bodies differ from other regional bodies in their approach to proportionality analysis. Their primary focus is on proportionality stricto sensu.[578] However, the ECSR and the ECtHR diverge in their interpretation of this concept. While the ECtHR considers 'pressing social need' as a necessary requirement alongside proportionality, the ECSR does not incorporate this criterion into its analysis.[579] For the ECtHR, 'pressing social need' is somewhat analogous to the necessity criterion, though its focus is not on identifying the least restrictive measure. Instead, the emphasis lies in assessing the adequacy of the state reasoning for the interference.[580] Only in rare cases has the ECtHR focused on the least restrictive measure.[581] Despite these differences, the 'proportionality' criterion equates to balancing,[582] with the ECSR adopting a less deferential approach.[583]

A key feature distinguishing European case law from other regional bodies is the doctrine of the margin of appreciation, which is widely applied in the European jurisprudence.

[575] Amin, 'Assessing Violations of States' Socioeconomic Rights Obligations in the African Charter: Towards a Model of Review Grounded in the Teleological Approach', 37–38.
[576] Lucas Lixinski, 'Balancing Test: Inter-American Court of Human Rights (IACtHR)', in *Max Planck Encyclopedia of International Procedural Law*, ed. Hélène Ruiz Fabri (Oxford University Press, 2019), 12–13.
[577] Laura Clérico, 'Hacia La Reconstrucción de Un Modelo Integrado de Proporcionalidad a La Luz de La Jurisprudencia de La Corte Interamericana de Derechos Humanos', in *Filosofía Del Derecho Constitucional. Cuestiones Fundamentales*, ed. Jorge Luiz Fabra Zamora and Leonardo García Jaramillo (Instituto de Investigaciones Jurídicas, 2013), 437–38.
[578] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 349.
[579] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 87; Please see the chapter on restrictions: Lukas, *The Revised European Social Charter: An Article by Article Commentary*.
[580] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *I•CON* 11, no. 2 (2013): 467–68.
[581] Arai-Takahashi, 'Proportionality', 455–56.
[582] Tsakyrakis, 'Proportionality: An Assault on Human Rights?', 484.
[583] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 87.

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The ECSR and the ECtHR implement this doctrine differently. The ECSR uses the margin of appreciation to balance it "against limiting principles such as reasonableness rather than against institutional checks and balances."[584] In contrast, in the ECtHR case law, the margin of appreciation has two dimensions. The substantial dimension refers to the level of deference granted to national authorities in matters concerning rights interference. The degree of deference can be wide or narrow depending on the right under scrutiny.[585] The structural dimension, on the other hand, "imposes limits on the powers of judicial review of the European Court."[586] While the structural margin of appreciation prevents the ECtHR from excessively restricting states' discretion, the substantial margin of appreciation is the practical manifestation of this limitation. Discussions on the margin of appreciation, thus, are only pertinent to the European bodies.

In conclusion, based on the scholarly discussion, the criterion of 'necessary in a democratic society' has effectively become synonymous with proportionality analysis, despite the absence of an explicit analytical method. Scholarly debates have extensively examined its substance, exploring the key components—suitability, necessity, and proportionality stricto sensu. However, according to scholars who analyze the jurisprudence of the international bodies, while acknowledging all three elements, the bodies seldom reference or examine suitability and necessity. Instead, their proportionality analysis primarily revolves around proportionality *stricto sensu*, understood as a balancing exercise.

1.3. Conclusion

The assessment of interferences has predominantly been discussed and applied through the lens of the limitation assessment. The rules governing this assessment derive from the

[584] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 89.
[585] George Letsas, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies* 26, no. 4 (2006): 709–15. In this paper, Letsas also criticizes the ECtHR's application of the Margin of Appreciation
[586] Letsas, 'Two Concepts of the Margin of Appreciation', 721.

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general or specific limitation clauses found in international treaties, and are applied through analyses of legality, legitimacy, and proportionality. Discussions on this framework have primarily focused on interferences with CPR, with proportionality serving as the analytical method. Conversely, relatively limited scholarly attention has been devoted to the limitations of ESCR, and consequently to the application of proportionality. Although the assessment of interferences with ESCR has been long neglected, international bodies have employed the limitation assessment as the primary framework to evaluate such interferences.

In my substantive chapters, on forced removal and austerity measures, I use the lens of the limitation assessment—through legality, legitimacy, and proportionality analysis—to understand how this framework is employed and the specific developments related to ESCR adjudication. In both case studies, the limitation assessment is not always explicitly invoked. As such, when the clauses or the criteria are mentioned in a case, I consider the assessment an explicit limitation assessment. In cases where neither are referenced, I examine the language used and compare it to the content developed under the explicit limitation assessment, to determine whether the assessment is implicit. The same applies to proportionality: not all cases explicitly use the terminology, but the focus on the impact of measures is implicitly understood as an application of proportionality.

2. The role of states' obligations in the assessment of interferences

As explained in the "Setting the Scene" chapter, ESCR have been conceptualized primarily through the lens of states' obligations. The literature has extensively discussed these obligations, recognizing them as intrinsic to the nature of ESCR, particularly in relation to progressive realization, non-retrogression, minimum core, non-discrimination and substantive equality. In spite of this specific characteristic of ESCR, as demonstrated in the preceding section, the limitation assessment remains the primary framework for analyzing interferences with ESCR. That said, as my case law analysis illustrates, states' obligations also feature in the

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adjudication of ESCR. Therefore, to fully conceptualize interferences with ESCR, states' obligations must be integrated into my analysis.

According to the literature, states' obligations function as standalone assessments for evaluating violations of ESCR. Since these standalone assessments carry out a function that is closely aligned to the limitation assessment, they are considered as either identical, similar, or distinct from the limitation assessment. The following subsections address how states' obligations can be used as analytical frameworks for assessing interferences, the applicable analytical methods for their assessment, and their relationship to the limitation assessment. Through this, I set the stage for determining whether states' obligations resemble limitations in terms of their assessment or whether they operate on an entirely different register. In my substantive chapters, I refer to these frameworks 'parallel.' This terminology reflects their shared aim of assessing interferences, despite differences in language, legal provisions, and structure.

2.1. Progressive realization

Among international treaties, the progressive realization obligation is explicitly included in the ICESCR, ACHR, PSS, and the ESC/RESC.[587] Some scholars frame progressive realization as an internal limitation of ESCR because,[588] unlike external limitations (discussed in the preceding section), it relativizes the discharge of states' obligations.[589] Progressive realization comprises two elements: (i) states must fully realize ESCR over time; and (ii) implementation must utilize the maximum of available resources. To assess this progress, scholars propose two complementary analytical methods: the proportionality analysis to assess

[587] The provisions are Article 2 ICESCR, Article 26 ACHR, Article 1 PSS, and throughout the ESC and the RESC.
[588] Kevin Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses', *South African Journal on Human Rights* 20, no. 3 (2004): 459; Vos, 'A New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights', 10; Young, *Constituting Economic and Social Rights*, 102. The scholars analyze the South African Constitution, and Vos extends this to the ACHPR.
[589] Young, *Constituting Economic and Social Rights*, 101.

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fulfillment over time,[590] and reasonableness for assessing the best use of available resources.[591] Hence, the lack of progress with ESCR overtime constitutes an interference.

According to Vázquez, litigation invoking progressive realization often focuses on limitations of rights rather than expanding rights protection, which leads adjudicators to overlook the advantages of progressive realization. In his perspective, assessing progressive realization rather than limitations would allow them to focus on aspects not discussed under the limitation framework, such as resource constraints.[592] Therefore, the scholarly distinction between progressive realization and limitations—as internal and external limitations, respectively—and their distinct focuses on the absence of progress and interferences demonstrates that scholars perceive them as parallel rather than conceptually linked.

Despite the scholarly distinction between progressive realization and limitations, soft law documents issued by various international bodies indicate that progressive realization and limitations are closely aligned. The CESCR issued a document outlining how the adjudication under the OP-ICESCR would function once in force, including the criteria for assessing progressive realization.[593] Measures must be non-arbitrary, represent the least restrictive option, be non-discriminatory, take into account disadvantaged groups, in addition to being "deliberate, concrete and targeted" within a defined time frame and based on resource allocation.[594] Notably, the non-arbitrariness and the least restrictive measure criteria reflects the limitation criteria, mirroring the legality criterion and the necessity component within proportionality analysis.

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[590] Young, 'Waiting for Rights: Progressive Realization and Lost Time', 674.
[591] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 178–79; Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review* 11, no. 2 (2011): 282.
[592] Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 162–64.
[593] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para. 8.
[594] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para. 8.

The remaining criteria align with non-discrimination and substantive equality, as well as those uniquely associated with progressive realization, respectively.

Additionally, the CESCR distinguished the obligation to take steps from the obligations to refrain from interfering (the obligation to respect). With regard to other obligations, the CESCR acknowledged that "positive budgetary measures"[595] must be adopted to protect against third parties' interference and to fulfill ESCR.[596] Consequently, the difference between interferences arising from a lack of progress and those stemming from more traditional forms of interferences relates to resource capacity. This suggests that progressive realization and limitations function as parallel frameworks due to considerations of resource allocation, although they share overlapping criteria. Since these insights are derived from a soft law document, the function of progressive realization and its relationship with the limitation assessment in the adjudication of interferences with ESCR remain unanswered.

Notably, in the regional systems, the African and Inter-American bodies are aligned with CESCR's criteria for progressive realization.[597] By contrast, the ECSR diverges from the CESCR's criteria. In most cases, progressive realization is assessed by time, measurable progress, and use of maximum available resources.[598] Thus, my dissertation examines how these international bodies apply progressive realization framework in interferences cases and what is the connection with the limitation assessment framework.

Concerning the analytical method, reasonableness is perceived as the appropriate standard for progressive realization. This understanding derives from the UN system, as Article 8(4) OP-ICESCR establishes reasonableness as the standard for assessing the realization of

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[595] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para. 7.
[596] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para. 7.
[597] *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt, Communication 323/06*, ¶ 264; *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin, Application No. 062/2019*, ¶ 136; *Jorge Odir Miranda Cortez et al. v. El Salvador*, ¶¶ 105–107; *Cuscul Pivaral et al. v. Guatemala*, ¶ 98.
[598] *Digest of the Case Law of the European Committee of Social Rights*, 34.

ESCR in individual complaints,[599] confirming the CESCR's role in determining whether state have taken reasonable steps to realize these rights.[600] In the regional systems, Viljoen advocates for applying reasonableness to assess progressive realization in the ACHPR,[601] while Cullen affirms that it is already utilized for determining progressive realization in the ECSR case law.[602] Thus, scholars acknowledge the potential of reasonableness as an analytical method for assessing the progressive realization of rights.

Based on the scholarly debate, progressive realization is conceptualized as an internal limitation linked to resource availability. Scholars frequently distinguish progressive realization from the limitation assessment, suggesting that these are separate legal concepts requiring distinct criteria and analytical methods.[603] However, documents issued by international bodies reveal that this understanding does not capture the full picture, as progressive realization contains similar criteria and rely on similar analytical methods. The main difference lies in the specific criteria unique to progressive realization. Consequently, progressive realization serves as a parallel framework to the limitation assessment. As such, in cases involving interferences due to the lack of progress, the specific criteria of progressive realization would be considered—such as resource allocation and time frame—in addition to the criteria that overlap with the limitation assessment, namely non-arbitrariness and the least restrictive measure.

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[599] Young, 'Proportionality, Reasonableness, and Economic and Social Rights', 31–32.
[600] Bruce Porter, 'Reasonableness and Article 8(4)', in *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, ed. Malcolm Langford et al. (Pretoria University Law Press, 2016), 187–88. The author explains that the source of inspiration for the reasonableness standard for steps taken is the case Grootboom from South Africa.
[601] Viljoen, 'Social Rights in the African System for the Protection and Promotion of Human and Peoples' Rights', 207.
[602] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 84.
[603] See for instance: Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses', 454; Young, *Constituting Economic and Social Rights*, 101; Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 162–64.

2.2. Non-retrogression

The non-retrogression obligation, a key concept complementing progressive realization, imposes a duty on states to refrain from decreasing access to and enjoyment of ESCR.[604] Conceptually, non-retrogression and limitations share similarities, as both require states to abstain from interfering with rights. Nonetheless, their underlying premises diverge while limitations are permitted when justified, non-retrogression is prohibited unless justified. The nature of this obligation has been debated over the years due to the absence of an explicit reference to the concept in international treaties. Consequently, scholars have undertaken extensive efforts to interpret and clarify its content.[605]

One group of scholars distinguishes non-retrogression from limitations based on two grounds. First, some argue that interferences with ESCR arising from resource scarcity should be governed by Article 2(1) concerning states' obligations, while other forms of interferences should be adjudicated through Article 4, the limitation clause.[606] Second, others emphasize that non-retrogression operates under a "strong presumption" of impermissibility,[607] which contrasts with limitations—generally deemed permissible, unless they are unlawful, illegitimate or disproportionate.

A second group of scholars equates the concept of non-retrogression and limitations. Leckie, for instance, argues that all retrogressive measures should be analyzed under the

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[604] Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression', 190; Katie Boyle et al., *Access to Social Justice* (Bristol University Press, 2025), 50.
[605] See, for instance: Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios'; Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law'; Nolan et al., 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights'; Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression'.
[606] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 205–6.
[607] Manisuli Ssenyonjo, *Economic, Social, and Cultural Rights in International Law*, 2 ed. (Hart Publishing, 2016), 93; Joe J. Wills and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse', Indiana Journal of Global Legal Studies', *Indiana Journal of Global Legal Studies* 23, no. 2 (2016): 640.

limitation clause, regardless of whether resource scarcity is invoked as a justification.[608] Some scholars identify similarities in goals and assessment methods, as both concepts aim to preserve "existing levels of rights enjoyment,"[609] and rely on similar analytical methods, such as balancing.[610] Courtis asserts that non-retrogression can be assessed through a modified version of the limitation assessment framework, which would include a fourth criterion: substantive due process. This additional criterion focuses on the discretionary power of political branches when interfering with a right.[611]

The literature has not reached a consensus on the conceptual equivalence between limitation and non-retrogression. Despite extensive discussions, the UN documents explaining the non-retrogression obligation provide little to no clarity to remedy the absence of a uniform understanding of the concept.[612] Warwick, who has dedicated extensive scholarship to understanding the nooks and crannies of non-retrogression, notes that in some documents non-retrogression overlaps with derogations,[613] while in others it overlaps with limitations,[614] contributing to its inadequate conceptualization. He argues that the concept lacks essence, evolving instead through inconsistent interpretations. The main features of these interpretations over the years are a focus on resource availability and the complementary nature of non-retrogression to the understanding of progressive realization.[615]

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[608] Scott, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', 99.
[609] Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation', in *The Future of Economic and Social Rights*, ed. Katharine G. Young, Globalization and Human Rights (Cambridge University Press, 2019), 541.
[610] Young, *Constituting Economic and Social Rights*, 104.
[611] Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 23.
[612] See: *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 9; *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, paras 9–10; *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 42; Ariranga G. Pillay, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights', 16 May 2012.
[613] Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression', 457–58.
[614] Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression', 453.
[615] Warwick, 'Concepts of Non-Retrogression in Economic and Social Rights', 134–35. The author advances four models for non-retrogression: component model, corollary model, composite model, and UN-coupled model.

To counter this inconsistency, Warwick develops a definition of retrogression with three elements: "1) an action, inaction, or contribution to a trend that is, 2) likely to negatively affect the progressive realization of, 3) individuals' ICESCR rights."[616] His conceptualization of non-retrogression does not directly engage with limitations, suggesting that the assumed linkage is not always recognized. However, the emphasis on actions or inactions that results in negative consequences mirrors the concept of limitations, differing in its connection to progressive realization within non-retrogression framework. This association might be explained by the fact that non-retrogression is intrinsically linked to ESCR, whereas the traditional understanding of limitations originates in CPR research. Despite extensive scholarly discussions, there remains a conceptual ambiguity regarding the obligation's function and its connection to limitations.

Regional systems also exhibit inconsistencies in defining non-retrogression, adopting four distinct approaches to its conceptualization. The first approach equates non-retrogression with limitations. The ACmHPR follows the criteria established in the CESCR's General Comment No. 19, which explains that the assessment of non-retrogression depends on reasonable justification, alternative measures, genuine participation, non-discriminatory measures, impact on realization of rights, and judicial review.[617] The main difference is that the ACmHPR adds deprivation "of access to the minimum essential level"[618] as a criterion. These criteria developed by the CESCR have been equated to a limitation assessment,[619] which the ACmHPR subscribes to.[620] Likewise, the IACmHR and the IACtHR equate non-retrogression to limitation,[621] despite a few inconsistencies from the IACtHR.[622]

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[616] Warwick, 'Concepts of Non-Retrogression in Economic and Social Rights', 137.
[617] *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 42; *Nairobi Principles*, para. 20.
[618] *Nairobi Principles*, para. 20.
[619] Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression', 453.
[620] Liebenberg, 'Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression', 190.
[621] *Acevedo Buendía et al. v. Peru*, ¶ 103; *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 140; *Cuscul Pivaral et al. v. Guatemala*, ¶ 143.
[622] *Acevedo Buendía et al. v. Peru*, ¶ 103; *Cuscul Pivaral et al. v. Guatemala*, ¶ 143.

The second approach, employed by the IACmHR, focuses on reasonable steps taken by states towards the realization of human rights, focusing on the minimum core.[623] The third approach stems from the ACtHPR's case law, which understands retrogressive measures as the suspension of rights, which is not allowed under the ACHPR.[624] Lastly, the fourth approach is found in the ECSR practice, which sidesteps non-retrogression altogether and adopts the framework of 'unjustified restrictions' when evaluating regressions of rights protection.[625] This choice suggests that the absence of non-retrogression under the ESC and the RESC can be attributed to the ECSR's exclusive focus on restrictions.

Regarding the analytical method, non-retrogression has been linked to reasonableness. In General Comment 19, the CESCR explained that retrogressive measures must be reasonably justified.[626] Some regional bodies have followed this approach. In the African system, the ACmHPR affirmed that justifications for retrogressive measures must be reasonable and that such measures must not produce unreasonable effects.[627] In the Inter-American system, the IACmHR emphasizes the importance of reasonable steps taken in light of the resources available.[628] In the literature, Courtis argues that the principle of reasonableness should apply to the assessment of retrogressive measures.[629] Thus, the language employed by international bodies aligns with the original meaning of reasonableness, which focuses on scrutinizing authorities' justifications for retrogression in the realization of ESCR.

Overall, the literature has framed non-retrogression either as equivalent to, or distinct from, limitations—treated as a parallel framework for accessing interferences. However, in the documents issued by the international bodies, the function of the non-retrogression obligation

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[623] *Jorge Odir Miranda Cortez et al. v. El Salvador*, ¶ 108.
[624] *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin, Application No. 062/2019*, ¶¶ 135–138.
[625] Lukas, 'Austerity and Human Rights: Reflections on the Jurisprudence of the European Committee of Social Rights', 31.
[626] *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 42.
[627] *Nairobi Principles*, para. 20.
[628] *Jorge Odir Miranda Cortez et al. v. El Salvador*, ¶ 108.
[629] Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 17.

and its relationship with limitations remain ambiguous, as they inconsistently interpret the obligation. Consequently, turning to their jurisprudence helps clarify and understand how interferences with ESCR are conceptualized.

2.3. Minimum core

Minimum core is another key concept that complements progressive realization, although its function remains contested. In national law, the minimum core has been characterized by some as serving to "limit legitimate limitations."[630] As such, limitations ought not to touch the core of rights, and if they do, they should be declared "unreasonable or demonstrably unjustified."[631] In international law, the minimum core has been connected to progressive realization instead of limitations.[632] The absoluteness of the minimum core in international law has been contested, as Müller points out, based on the contradictory information provided by the CESCR.[633] Accordingly, the function and nature of the minimum core are subjects of debate.

Scholars of the ICESCR argue that the minimum core is part of the limitation assessment, citing the phrase 'nature of these rights' in Article 4 as an implicit constraint on permissible interferences.[634] However, the CESCR's soft law documents distinguish the minimum core from limitations and progressive realization, emphasizing its capacity to establish standalone violations.[635] Such a violation is considered a prima facie breach, thereby precluding the need for further limitation assessments. In these cases, the core of the right must

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[630] Örücü, 'The Core of Rights and Freedoms: The Limit of Limits', 47.
[631] Örücü, 'The Core of Rights and Freedoms: The Limit of Limits', 49.
[632] Young, 'Waiting for Rights: Progressive Realization and Lost Time', 665–66.
[633] Amrei Müller, 'The Minimum Core Approach to the Right to Health: Progress and Remaining Challenges', in *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation*, ed. Sabine Klotz et al. (De Gruyter Brill, 2017), 4:61–62.
[634] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 201; Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 582.
[635] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 10.

not be limited, rendering unnecessary the proportionality analysis. However, the absolute or relative nature of the absolute core is not clearly established.

General Comment No. 3 allows resource constraints as a justification for non-compliance,[636] which challenges the notion of the minimum core as an absolute core.[637] Conversely, in specific general comments, the CESCR has imposed an absolute nature of the minimum core, stating that there is no justification for non-compliance since the core is non-derogable.[638] On the absolute nature of the minimum core, Müller argues that "not understanding the minimum core […] as an absolute standard would undermine the function of human rights should have in a democracy."[639]

Some scholars reject the minimum core as a standalone assessment of compliance with rights. Drawing on the CESCR documents, they argue that reasonableness should be applied in such cases,[640] advocating for a combined approach that incorporates both the minimum core and reasonableness. [641] By contrast, other scholars argue that reasonableness alone suffices to assess interferences with ESCR, thereby dispensing with the minimum core content.[642] On this point, Lehmann maintains that the minimum core is only meaningful if absolute; otherwise, existing standards can address concerns equally effectively.[643] In her opinion, limitation clauses already provide adequate tools for assessing interferences, rendering the minimum core

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[636] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 10; Abramovich and Courtis, *Los Derechos Sociales Como Derechos Exigibles*, 90.
[637] Chowdhury, 'Unpacking the Minimum Core and Reasonableness Standards', 253.
[638] *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, para. 47; Müller, 'The Minimum Core Approach to the Right to Health: Progress and Remaining Challenges', 61–62.
[639] Müller, 'The Minimum Core Approach to the Right to Health: Progress and Remaining Challenges', 74.
[640] Forman, 'Can Minimum Core Obligations Survive Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?', 571; Chowdhury, 'Unpacking the Minimum Core and Reasonableness Standards', 257.
[641] Chowdhury, 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective', 19.
[642] Kende, 'The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics', 622–24.
[643] Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core', 184.

redundant.[644] Altogether, some scholars position the minimum core either as a parallel framework to assess interferences in the context of resource constraint, while others consider it unnecessary, given that the limitation framework is sufficient.

The African and Inter-American bodies have incorporated the minimum core per the CESCR's guidance,[645] yet its absoluteness remains disputed. In the African system, the ACmHPR asserts it as non-derogable,[646] thereby treating it as absolute. However, the lack of available resources is cited as a reason for non-compliance,[647] effectively undermining non-derogability. Notably, throughout its jurisprudence, the ACmHPR has treated infringements of the minimum core as standalone violations, which has been criticized due to the advantages of combining the concept with reasonableness.[648]

In the Inter-American system, the IACmHR incorporated the minimum core as independent of resource availability,[649] meaning it is absolute. As for the IACtHR, it has incorporated the concept without clarifying whether it is absolute or relative.[650] In the Inter-American system, references made by regional bodies split scholarly opinion. Some scholars consider the minimum core absolute,[651] while others see it as relative, as the limitation of the minimum core may be justified depending on the circumstances.[652] In contrast, the European system focuses less on the minimum core than other regions due to the nature of the ECtHR

[644] Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core', 182–93. The author advocates for a robust approach that focuses on justification of resource expenditure to ensure that resources are being allocated properly without courts becoming budget makers.
[645] Fuo and Plessis, 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere', 6; Quispe, '¿Diálogo o Monólogos Paralelos? El Tribunal Constitucional Peruano y La Corte Interamericana Sobre La Justiciabilidad y La Efectivización Del Derecho Social a La Salud de Personas Con VIH', 478.
[646] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 40.
[647] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 40.
[648] Nkongolo, 'The Justiciability of Socio-Economic Rights Under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades After Its Adoption', 501–2.
[649] Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, 170.
[650] See: Case of Gonzales Lluy Et Al. v. Ecuador (Inter-American Court of Human Rights 1 September 2015), ¶¶ 192–207.
[651] Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, 170.
[652] Quispe, '¿Diálogo o Monólogos Paralelos? El Tribunal Constitucional Peruano y La Corte Interamericana Sobre La Justiciabilidad y La Efectivización Del Derecho Social a La Salud de Personas Con VIH', 478.

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and the ECSR's focus. The European understanding of minimum core differs from others by emphasizing minimum social protection rather than essential elements or a list of obligations.[653] Despite the core's absolute nature, proportionality remains compatible with the European view of the concept.[654] Therefore, whether the minimum core is understood as absolute or relative is crucial to discussions on limitations, as its conceptual nature directly influence its application as a framework and its interactions with the limitation assessment.

To conclude, the function and relationship between the minimum core and limitations remain unsolved. Some view the minimum core as an absolute core that serves as a limit to limitations, others regard it as relative and contingent upon resource availability. This divergence raises the question of whether the minimum core constitutes a standalone assessment or is integrated with other analyses, such as limitations.

2.4. Non-discrimination and substantive equality

In contrast to the previous obligations, non-discrimination and substantive equality are inherent to all human rights. Nonetheless, they are particularly fundamental to ESCR, as they ensure the protection of disadvantaged groups. Their broad application allows for the integration with other obligations. For instance, in one of the CESCR' conceptualizations of non-retrogression, it affirmed that retrogressive measures must not be discriminatory and must consider affected groups.[655] In other words, interferences with ESCR must not result in discrimination. Thus, non-discrimination and substantive equality can serve as criteria for evaluating other obligations, highlighting their crucial role in human rights litigation.

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[653] Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis an Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures', 191.
[654] Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, 231.
[655] *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 42.

Despite their recognized connection to states' obligations, the relationship between non-discrimination, substantive equality, and limitations remains ambiguous. Interferences with rights can lead to discrimination,[656] which may arise directly or indirectly.[657] When states interfere with ESCR, they may impose a limitation that results in discriminatory effects on individuals and groups, resulting in the potential application of multiple frameworks. Adjudicators can assess cases through limitations, or non-discrimination, or a combination thereof, the latter ensuring a holistic evaluation beyond treaty provisions. Indirect discrimination further clarifies this link since "even when a law is neutral on its face it may disparately impact particular groups or individuals, leading those affected to claim that the measure is discriminatory."[658]

In the UN system, the concept of discrimination is linked to the act of "impacting or nullifying rights"[659] of specific groups. Non-discrimination is an immediate obligation and independent of other states' obligations.[660] This analytical framework is applied when measures, whether directly or indirectly, target specific groups and interfere with their rights. There are two key differences between the limitation and non-discrimination frameworks. First, limitations are permissible interferences based on justified reasons, whereas discrimination is prohibited unless justified. Second, limitations are generally applicable, while non-discrimination arises when a measure targets a specific group.

In situations where general interferences have a discriminatory impact, Atalay argues that the nature of the action determines the appropriate framework. She explains this

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656 Dinah Shelton, 'Prohibited Discrimination in International Human Rights Law', in *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa*, ed. Aristotle Constantinides and Nikos Zaikos (Martinus Nijhoff Publishers, 2009), 275–78.
657 *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 7. The possibility of limitations leading to discriminatory measures is expressed in the International Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Elimination of All Forms of Discrimination against Women. See: Klerk, 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights', 253–54; Baer, 'Equality', 987.
658 Shelton, 'Prohibited Discrimination in International Human Rights Law', 262.
659 *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 7.
660 *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 7.

appropriateness through two scenarios. In the first scenario, where there is a discriminatory denial of access to a right, the CESCR's documents and case law indicate that a discriminatory limitation is at play, warranting the application of the combined approach. By contrast, in the second scenario, which involves a failure to realize a right, the chosen approach is non-discrimination, considered separately from the positive obligations under Article 2(1).[661] Consequently, in the UN system, the extensive explanation in General Comment 20 regarding non-discrimination[662] is applicable to both scenarios, depending on whether it is integrated with limitations or applied independently.

Regionally, discrimination and limitations are often assessed separately. In the African system, Article 2 ACHPR, the non-discrimination clause, explicitly states that restrictions must not be discriminatory. However, the African bodies analyze discriminatory measures independently from limitations.[663] Meanwhile, in the Inter-American system, the IACtHR has established that the non-discrimination clause in Article 1(1) is autonomous, meaning that a violation of a substantive provision is not required for its application.[664] As a result, these assessments can be conducted separately, although the IACtHR has recognized that limitations of rights may lead discrimination.[665] In the European system, the ECSR has integrated the non-discrimination obligation, as outlined in the Preamble of the ESC and Article E RESC, into the limitation assessment framework.[666] As for the ECtHR, it recognizes that discrimination is an interference with rights that requires 'weighty reasons' to be justified.[667] In its case law, the

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[661] Serde Atalay, 'For Whom Is the House Kept? Making ICESCR Work to Counter Discrimination against Migrants and Refugees in Access to Adequate Housing', *International Journal of Discrimination and the Law*, Special Issue: The Borders within: When the Right to Non- Discrimination Confronts Migration Law, vol. 0, no. 0 (2025): 15–20.
[662] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*.
[663] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 56.
[664] Ochoa and Contreras, 'New Trends on the Right to Non-Discrimination in the Inter-American System of Human Rights', 90–91.
[665] *Advisory Opinion OC-18/03*, ¶ 84.
[666] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 79.
[667] Oddný Mjöll Arnardóttir, 'The Differences That Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights', *Human Rights Law Review* 14 (2014): 653.

ECtHR's assessment of interferences can occur either through the non-discrimination clause in Article 14 or the limitation assessment, alternating the frameworks.[668]

A further connection between limitations and non-discrimination is the proportionality analysis as the analytical method. Direct discrimination relies on either hypothetical or real comparators to determine whether an individual has been discriminated against.[669] The international treaties provide non-exhaustive lists of prohibited grounds of discrimination.[670] Indirect discrimination, in contrast, focuses on seemingly neutral laws and their negative impact on individuals.[671] Hence, the distinction between direct and indirect discrimination lies in the presence of unequal treatment and the justification for such treatment. Notably, measures aiming to correct inequalities are not considered discriminatory.[672]

These two concepts correspond to distinct notions of equality: direct discrimination emphasizes formal equality, while indirect discrimination centers on substantive equality.[673] Their assessments differ due to their foundations. Indirect discrimination examines a neutral law and its disproportionate effect.[674] Lukas, in explaining the ECSR jurisprudence, describes indirect discrimination as the assessment of whether legislation has "disproportionately and unjustifiably affected a particular group."[675] Consequently, indirect discrimination employs proportionality but does not focus on its criteria. In contrast, direct discrimination entails more criteria and has been the focal point of most discussions, drawing criticism for its failure to address substantive equality.[676] To address direct discrimination, adjudicators rely on

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[668] Möschel, 'European Convention of Human Rights/Council of Europe', 531.
[669] Fredman, *Discrimination Law*, 254.
[670] Article 2(2) ICESCR, Article 2 ACHPR, Article II ADRDM, Article 1(1) ACHR, Article 3 PSS, Article E RESC, and Article 14 ECHR.
[671] Daniel Moeckli, 'Equality and Non-Discrimination', in *International Human Rights Law*, 2nd edn, ed. Daniel Moeckli et al. (Oxford University Press, 2013), 165; Fredman, *Discrimination Law*, 280–86.
[672] Fredman, *Discrimination Law*, 271–79.
[673] Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', 123.
[674] See for instance: Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform', 1204. For a comparative perspective: Moeckli, 'Equality and Non-Discrimination', 62–63.
[675] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 343.
[676] Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', 121–22; Fredman, *Discrimination Law*, 279–80.

comparators and the justification for the discriminatory treatment.[677] This approach remains consistent across international bodies, with differences appearing only in wording.

The CESCR clarifies that direct discrimination is only permissible if the justification is reasonable and objective, meaning it must align with legitimate aims and effects, in compatibility with the ICESCR, and for the general welfare. Additionally, any difference in treatment must be proportionate. A key aspect addressed by the CESCR is that the lack of resources cannot justify differential treatment. Such treatment is deemed discriminatory unless states demonstrate that they have made "every effort […] to use all resources that are at the State party's disposition."[678]

The regional bodies apply fewer criteria than the CESCR. In the African system, the test consists of establishing the existence of a right and determining whether individuals have been treated differently for a legitimate reason.[679] The ACmHPR has devised a three-pronged test to assess direct discrimination: the presence of differential treatment, objective and reasonable justification, and proportionate measures.[680] Similarly, the ACtHPR examines objective and reasonable justification alongside necessity and proportionality.[681] In the Inter-American system, the IACmHR considers differential treatment and the objective and reasonable justification. In this context, proportionality analysis encompasses legitimacy, suitability, necessity, and proportionality in strict senso.[682] The primary distinction between proportionality analysis in the context of limitations versus discrimination is that the IACmHR applies stricter scrutiny in discrimination cases.[683] Moreover, the IACtHR permits distinctions only if they are

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[677] Moeckli, 'Equality and Non-Discrimination', 60–62.
[678] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 13.
[679] Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, 56–57.
[680] Manisuli Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter', *Netherlands Quarterly of Human Rights* 39 (2011): 389.
[681] *Advisory Opinion No. 001/2018*, ¶ 67.
[682] *Compendium on Equality and Non-Discrimination. Inter-American Standards*, para. 56.
[683] *Compendium on Equality and Non-Discrimination. Inter-American Standards*, para. 58.

"reasonable, proportionate and objective."[684] In other words, the difference in treatment must serve a legitimate purpose and be proportionate.[685]

Finally, in the European system, the ECSR assesses direct discrimination based on the presence of differential treatment, legitimate aim, objective and reasonable grounds, and proportionality. By contrast, the ECtHR does not consistently distinguish between direct and indirect discrimination.[686] In its jurisprudence, the ECtHR has developed similar criteria for both concepts, evaluating whether the justification is objective and reasonable, which translates into legitimate aim and proportionality. These two criteria are sometimes conflated.[687]

Considering the criteria developed for direct and indirect discrimination, it is evident that proportionality plays a central role in both and constitutes the preferred analytical method. Moreover, limitations and direct discrimination are "very similar."[688] They overlap in their assessment due to the focus on states' justification (legitimate aim and reasonable justification) and the impact of the measure (proportionality). However, crucial differences remain. First, direct discrimination begins with the assessment of unequal treatment, whereas limitations do not necessarily include such component. Second, scrutiny is generally more rigorous in discrimination cases. Some prohibited grounds—such as race, gender, ethnicity—are regarded as 'suspect classifications', warranting heightened scrutiny.[689] Despite these differences, the evaluation of legitimate aims and proportionality across international jurisprudence illustrates that limitations and direct discrimination are linked through the notion of interference.

Considering the similarities and differences between limitations, non-discrimination, and substantive equality, the presence of such obligations within the assessment of interferences

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[684] *Advisory Opinion OC-18/03*, ¶ 84.
[685] *Advisory Opinion OC-18/03*, ¶ 91.
[686] Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', 121–22.
[687] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', 167.
[688] Moeckli, 'Equality and Non-Discrimination', 167.
[689] Anne F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law', *Human Rights Law Journal* 11 (1990): 18–24; Moeckli, 'Equality and Non-Discrimination', 64; Fredman, *Discrimination Law*, 272–73.

with ESCR facilitates discussions regarding their respective function and their relationship to limitations.

2.5. Conclusion

This section has demonstrated that states' obligations function as standalone assessments in the adjudication of ESCR violations. However, the content of these assessments remains contested in the academic literature and is addressed inconsistently by international bodies. For this reason, states' obligations mat be employed as parallel analytical frameworks to the limitation assessment. The ongoing debate on analytical methods—reasonableness and proportionality—further confirms that these obligations serve as analytical frameworks. Moreover, their relationship with the limitation assessment varies depending on the conceptual approach: such frameworks may be identical, similar or entirely distinct from the limitation assessment.

Given that ESCR are conceptualized through these obligations, I examine how they have been employed by international bodies: either as parallel frameworks or as elements that inform the limitation assessment. In analyzing my substantive chapters, I identify where these obligations have been referenced and evaluate the role they have played in the relevant jurisprudence. This focus enables me to explore the evolving connection between limitations and states' obligations in international jurisprudence and to trace the development of the content of the limitation assessment in the adjudication of ESCR.

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3. My analytical framework for assessing interferences with economic, social, and cultural rights

This chapter has examined the analytical frameworks used to assess interferences with human rights. The first section focused on the limitation assessment, explaining reasonableness and proportionality, while the second section investigated states' obligations frameworks,

particularly their function and relationship to the limitation assessment. In my case studies, the international bodies have consistently opted to assess interferences through the limitation assessment as the primary analytical framework, focusing on legality, legitimacy and proportionality. However, the application of the limitation assessment is not always explicit—through direct citation of the limitation clause or its criteria—but may instead be inferred from the language adopted by these bodies. I argue that the cases analyzed through the language of unspecific states' obligations constitute an implicit limitation assessment, as the focus mirrors that of the limitation assessment. States' obligations have been addressed in the jurisprudence through two avenues: either they have been incorporated into the limitation assessment—explicitly or implicitly—or they have been applied as parallel analytical frameworks.

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Chapter 3. Forced Removals

The first case study in my dissertation concerns the forced removal of individuals from their homes and lands. The cases under analysis pertain to the removal of homeowners, renters and occupiers, thereby covering the full breadth of relevant cases. The choice of this case study stems from the desire to highlight the workings of states' negative obligation to refrain from interfering with the enjoyment of human rights. The negative obligation perspective mandates that states should generally refrain from interfering with rights, and that if nonetheless they do, they must provide justifications and thereby ensure that their actions comply with human rights standards to prevent violations. As the chapter will detail, the removal of individuals from their homes and lands is justified on numerous grounds including economic interests or compliance with legal requirements. The chapter will analyze the treatment of these justifications by international bodies, thereby fleshing out the rules that they have established for ensuring lawful and proportionate measures on the part of states.

As noted in the "Analytical Framework" chapter, the overarching framework to analyze interferences is the limitation assessment, which comprises three criteria: legality, legitimacy, and proportionality analysis. In my dissertation, I consider the limitation assessment explicit when the international bodies analyze either the limitation clause or its criteria. This is evident in the recent jurisprudence of the CESCR, the Indigenous and Tribal cases from the ACmHPR and the ACtHPR, the case law from the IACmHR and the IACtHR, and the majority of cases from the ECtHR. However, the limitation clause and its criteria are not explicitly applied by all international bodies but are often present in an implicit manner. I consider that an implicit limitation assessment has been conducted when the focus of the decision overlaps with the limitation assessment framework, but the language used is that of states' obligations. Such an implicit assessment is present in earlier cases from the CESCR, the individual cases from the ACmHPR, and the jurisprudence of the ECSR.

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In addition to the limitation assessment, international bodies have adopted other frameworks to assess interferences. Two states' obligations have been occasionally employed as parallel frameworks: positive obligations—present in the case law of the ECtHR—and non-discrimination—invoked by the ACmHPR and the ECtHR. Despite this different choice of framework, the international bodies demonstrate significant overlap in the assessment of forced removal, consistently requiring similar states' obligations and accepting comparable justifications for the limitation. Thus, comparing these bodies contributes to a broader understanding of interferences with ESCR.

Beyond these differences in frameworks, forced removal cases involve varied rights provisions. Regarding rights analyzed in treaties that directly protect ESCR, the right to housing is explicitly protected under the ICESCR and the RESC, under Article 11 and Article 31, respectively. While the ACHPR and the ACHR do not explicitly mention housing, their respective competent bodies have recognized its protection through case law. Additionally, the right of the family to social, legal, and economic protection is codified solely in the ESC, which is also upheld in the RESC, under Article 16. Notably, the ECSR considers that these two rights overlap in their protective scope in removal cases.[690] Moreover, the right to dispose of wealth and natural resources is safeguarded under Article 21 ACHPR, while the rights to food, water, and participation in cultural life are implicitly protected by Article 26 ACHR.

As for the civil rights that encompass ESCR dimensions, the right to property is protected under Article 14 ACHPR,[691] Article 21 ACHR, and Article 1 of Protocol 1 ECHR, while the right to respect for private and family life, under Article 8 ECHR, has a broader protective scope and is exclusive to the European system. Considering all these rights, the right to property and the right to respect for private and family life contain specific limitation clauses

[690] *Digest of the Case Law of the European Committee of Social Rights*, 142.
[691] The right to property in the African system is considered an ESCR, see: *Nairobi Principles*, paras 51–55. I put the African system together with the rest for conciseness.

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under the ACHPR, ACHR, and the ECHR, whereas the rest of the rights follow the general limitation clauses found in the treaties under the ICESCR, ACHPR, ACHR, ESC and the RESC.

Throughout the chapter, the limitation assessment is the most common framework employed, consisting of legality, legitimacy and proportionality. Consequently, interferences consistently require authorization by law, justification, and adopt proportionate means. The legality criterion focuses on the concept of the law, both the formal element (the existence of the law) and the substantive element (the quality of the law). Notably, international bodies highlight the importance of interpretation and application of laws by national authorities, particularly by the judiciary. Both the ACmHPR and the IACtHR provide a substantial understanding of legality. While the ACmHPR focus on consultation and compensation, the IACtHR analyzed judicial review under legality. The legitimacy criterion encompasses various accepted aims, such as environmental protection and states' economic interests. Remarkably, formal equality is discussed under legitimacy, and substantive equality is employed to counter states' attempts to avoid creating specific measures based on formal equality.

Regarding proportionality, it focuses on non-negotiable obligations and the balancing exercise. The list of non-negotiable obligations is robust for some bodies, like the CESCR and the ECSR, and are more limited for others, such as the ECtHR. Despite the different styles of adjudication, they all focus on specific obligations to decide whether the interference is proportionate. Their common list of non-negotiable obligations comprises conducting judicial review, providing compensation, carrying out consultation, and providing alternative accommodation to the removed individuals. I attribute these shared non-negotiable obligations to recurring nature of the issues in this case study, which differs from the following chapter. The balancing exercise includes individuals' specific situation or good faith.

Throughout the limitation assessment, international bodies have incorporated states' obligations into the analysis. Progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality feature in the case law as part of the limitation

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assessment. Such incorporation results in a heightened level of scrutiny and contributes to the analysis of elements, such as discriminatory effects, that would otherwise not be assessed. Accordingly, the conceptualization of interferences with ESCR occurs through the interplay between limitations and states' obligations.

In cases where international bodies have employed alternative frameworks instead of limitations, their focus resembles the limitation assessment. While legality is not analyzed under the positive obligations and non-discrimination frameworks—despite the fact that all interfering measures are enacted by law—legitimacy and proportionality analysis feature in both frameworks. The analysis conducted under legitimacy and proportionality in the parallel frameworks overlaps with that of the limitation assessment, including the list of non-negotiable obligations and the balancing exercise. For this reason, the different choice of framework did not lead to a different legal reasoning, thereby confirming the connection between limitations and states' obligations.

To ensure a comprehensive case law analysis, this chapter is divided into two sections. Section 1 examines cases of forced removal involving individuals who have ownership of their homes or lands, further categorized into individual cases (Section 1.1) and Indigenous and Tribal communities (Section 1.2). Section 2 analyzes removals affecting individuals who do not own their homes or property but instead receive social housing and rent or occupy state or private property. The distinction between the two sections lies in the ownership of the home or land. Throughout the analysis, the focus remains on the limitation assessment criteria, while referencing states' obligations where relevant. The cases are analyzed together under the legality and legitimacy criterion in both sections. However, under the proportionality analysis, I separate the cases based on facts to tease out their nuances due to the diversity of cases.

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1. Forced removal of individuals living on their owned home and land

This first section focuses on cases concerning the forced removal of individuals from legally owned homes or land, adjudicated by the ACmHPR, ACtHPR, IACmHR, IACtHR, and ECtHR. The first subsection discusses the removal of individuals addressed by the ACmHPR and ECtHR, including expropriations under the right to property and housing and evictions of Roma families under the right to respect for private and family life. The second subsection examines the removal of Indigenous and Tribal communities from ancestral land in the African and Inter-American systems, primarily under the right to property, with the ACmHPR additionally adjudicating the right to dispose of wealth and natural resources, and the IACtHR ruling on the rights to food, water, and participation in cultural life.

Under such rights, the limitation assessment is the primary framework used to evaluate interferences. In some cases, this is evident through the application of limitation clauses or explicit reference to the criteria, while in others, the analysis is implicit, inferred from the focus of the case. Notably, some bodies are more consistent than others: the ACtHPR and ECtHR consistently employ the limitation framework, the IACmHR transitioned from implicit to explicit use, and the IACtHR references criteria without clarifying their content. By contrast, the ACmHPR applies multiple frameworks, such as the limitation assessment, states' obligations (an implicit limitation assessment), and non-discrimination.

Overall, international bodies focus on legality, legitimacy, and proportionality analysis. Regarding the legality of measures, international bodies analyze the existence (the formal element), quality (the substantive element), and application of the law. The ACmHPR and the IACtHR, exceptionally, address legality in a substantive manner, discussing obligations that are otherwise examined under proportionality, such as consultation. With respect to the legitimacy criterion, states' justifications are broadly accepted unless found to be discriminatory or lacking special protective measures. Although environmental protection is referenced, it has not been accepted as grounds for removing Indigenous and Tribal communities.

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Lastly, proportionality analysis receives the most attention, combining non-negotiable obligations with the balancing exercise. The non-negotiable obligation must be established prior to interfere, encompassing the conduct of consultation, the provision of compensation, and the conduct of judicial review with procedural safeguards. The provision of alternative accommodation or lands is central when homelessness arises, either directly or indirectly. In addition, during the balancing stage, the international bodies weigh the parties' behavior, which includes applicants' good faith and states' authorities' response, and the impact of the measure on the right.

Notably, the international bodies have incorporated states' obligations throughout the limitation assessment. Substantive equality is the most prominent obligation that has been incorporated, particularly into the proportionality analysis criterion. For instance, states must consult in accordance with customs and traditions of Indigenous and Tribal communities, consider impacts on community survival, and meet their specific needs in order for interference with their rights to be proportionate. Accordingly, the incorporation of states' obligations intensifies the level of scrutiny of the interference and introduces ESCR-specific elements into the assessment.

Beyond the incorporation of states' obligations into the limitation assessment, the non-discrimination obligation is employed as either the sole framework or a parallel framework in a few cases. In the ACmHPR case in which the non-discrimination framework is assessed, the analysis closely mirrors the limitation assessment. In the cases where the non-discrimination assessment is employed in parallel, the ACtHPR and the IACtHR analyzed similar aspects, while also addressing the question of (un)equal treatment.

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1.1. Individuals' homes and lands

The removal of individuals from the homes or land they own has been analyzed by the ACmHPR and the ECtHR. The case law involves two types of interferences: expropriations of

property for public purposes, and evictions of individuals who parked caravans on their own lands without the state's permission. The first type of interference has been addressed by both the ACmHPR and the ECtHR under the right to property, with the ACmHPR also assessing the right to housing in one case, while the second type of interference has been adjudicated exclusively by the ECtHR under the right to respect for private and family life.

Despite their overlapping focus on the right to property, the ACmHPR and the ECtHR differ in how they assess interferences. Regarding the frameworks, the ACmHPR has assessed interferences through the limitation assessment, states' obligations (as an implicit limitation assessment), and non-discrimination. As for the ECtHR, it consistently applies the limitation framework to interferences, regardless of which right is assessed. Owing to these differences in framework, the language they employ differs, while their conclusions are often similar.

Overall, the ACmHPR and the ECtHR focus on legality, legitimacy, and proportionality analysis, even if indirectly. The legality criterion includes analysis of the existence (the formal element), quality (the substantive element), and application of the law. With respect to legitimacy, the ACmHPR does not analyze it, either under the explicit or the implicit limitation assessment. By contrast, the ECtHR accepts various justifications for declaring interferences legitimate. Lastly, the proportionality analysis consists of non-negotiable obligations. While the ACmHPR prohibits the destruction of applicants' houses, the ECtHR examines the provision of compensation, and the conduct of judicial review with procedural safeguards. In the balancing stage, both regional bodies emphasize the behavior of the parties involved and the use of judicial apparatus to resolve the situation. Furthermore, the importance of avoiding homelessness is expressed differently by them, but it is reflected through considerations of the preservation of homes and access to available and affordable housing.

As for the interplay between limitations and states' obligations, the international bodies have adopted two avenues. First, they incorporate states' obligations throughout the limitation assessment, which heightens the scrutiny of the interference. Second, the ACmHPR has adopted

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the non-discrimination framework for assessing interferences. In this instance, the analysis conducted by the ACmHPR under the non-discrimination framework mirrors the limitation assessment, as it assesses the legitimacy of the interference.

1.1.1. Legality

The legality criterion in cases concerning the forced removal of individuals from the homes or land they own generally focuses on whether the state had a national law prescribing such interference, as well as the quality and application of the law. In these cases, the two regional bodies seldom analyze legality. In the few cases where they do, they focus on similar standards.

The jurisprudence of the ACmHPR has considerably evolved over the years, as the African body has gradually provided more substantive content on ESCR while adjudicating an increased number of cases.[692] As a result, the legality of the measure was not explicitly addressed in most of the ACmHPR's earlier decisions. In those cases, the ACmHPR merely referred to laws interfering with the right to property, thereby acknowledging their existence. Consequently, the ACmHPR tacitly accepted the legality of those laws.[693]

In Mbiankeu Geneviève v. Cameroon, the ACmHPR undertook an analysis of the legality of the measure. In this case, it explained that states must implement laws and safeguard the right to property through action. By failing to act, the state promoted legal uncertainty, which compromised the applicant's full capacity to enjoy her right to property for seven years.[694] The ACmHPR understood this failure and promotion of legal uncertainty as a breach of the obligations to fulfill and promote, despite its focus on the substantive element of legality.

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[692] Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter', 366.
[693] *MIDH v. Cote d'Ivoire*, ¶ 78; *Open Society Justice Initiative v. Côte d'Ivoire*, ¶ 170.
[694] *Mbiankeu Geneviève v. Cameroon*, ¶ 119.

In other words, it implicitly conducted a legality assessment through the language of obligations.

By contrast, the ECtHR addressed the legality criterion through the concept of lawfulness, as outlined in Article 1 of Protocol 1 ECHR for expropriation cases and Article 8 ECHR in eviction cases. With the exception of Akkus v. Turkey and Platakou v. Greece,[695] the ECtHR consistently referenced this criterion. However, in most cases, the ECtHR did not elaborate on its either under the right to property,[696] or the right to respect for private and family life.[697] The absence of discussion on legality derived from the fact that the applicants did not contest the legality, or both the applicants and states agreed that interferences were lawful. This marks a distinction between the ACmHPR and the ECtHR because the former acknowledges agreement or lack of contestation while the latter confine its analysis to the issues at hand.

Regarding the cases in which legality was analyzed, the ECtHR focused on the content of the law, both its formal (existence of the law) and the substantive elements (the quality of the law), which encompasses judicial review, and the format of the law. In Zvolský and Zvolská v. The Czech Republic, the ECtHR first accepted the format of the law, as it was an 'act' and there was "no reason to doubt" it,[698] and then emphasized the importance of adhering to the rule of law, a fundamental principle in the ECHR rooted in democracy. Based on such principles, the ECtHR explained that interferences must derive from national laws (formal aspect of the law), and national authorities must "interpret and apply the domestic law and to decide on issues of constitutionality."[699] In this case, the ECtHR included judicial review into legality. Moreover, in Velikovi and others v. Bulgaria, the ECtHR focused on the quality of the law because the applicants raised this point. The expropriations and evictions occurred after the end of

[695] In these cases, the ECtHR focused exclusively on the proportionality assessment. It did not mention legality or legitimate aim. See *Akkus v. Turkey*, ¶¶ 27–31; *Platakou v. Greece*, ¶¶ 55–57.
[696] *Pincová and Pinc v. the Czech Republic*, ¶ 46; *Bistrović v. Croatia*, ¶ 32; *Kozacioğlu v. Turkey*, ¶ 65.
[697] *Buckley v. the United Kingdom*, ¶ 61; *Beard v. the United Kingdom*, ¶ 90; *Chapman v. the United Kingdom*, ¶ 79; *Coster v. the United Kingdom*, ¶ 93; *Jane Smith v. the United Kingdom*, ¶ 86; *Lee v. the United Kingdom*, ¶ 81.
[698] *Zvolský and Zvolská v. the Czech Republic*, ¶ 66.
[699] *Zvolský and Zvolská v. the Czech Republic*, ¶ 65.

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communism in Bulgaria, leading to a transition of systems. While legal uncertainty is generally incompatible with the clarity and foreseeability required by the ECHR, the ECtHR noted that the "special transitional period at the relevant time and the individual circumstances of each case"[700] must be taken into consideration when assessing lawfulness.[701] Thus, the analysis of the quality of the law was intrinsically linked to other criterion of the limitation assessment: the former case focused on a non-negotiable obligation (the conduct of judicial review), while the former emphasized the justification of the interference.

Comparing the jurisprudence from the ACmHPR and the ECtHR, the legality is barely analyzed. While the ECtHR acknowledged the criterion and, without further discussion, recognized that states met the legality requirement, the ACmHPR did not address it in most cases. In cases where both bodies addressed legality, they converge regarding the quality of the law, particularly legal certainty. Moreover, the ECtHR explicitly recognized the existence of the law and its format. Notably, the ECtHR analyzed aspects that traditionally belong to legitimacy (the justification for legal uncertainty) and proportionality (the inclusion of a non-negotiable obligation). Overall, the legality criterion is seldom discussed by the two regional bodies because either the applications did not claim a violation or because the legality criterion was met tacitly.

1.1.2. Legitimacy

The legitimacy criterion appears in the case law of the ACmHPR and the ECtHR. However, they differ in the level of scrutiny they apply. The ACmHPR is less deferential to states' justification, scrutinizing the intentions behind the adoption of certain laws and outright rejecting states' arguments. By contrast, the ECtHR adopts a deferential stance, accepting states'

[700] *Velikovi and Others v. Bulgaria*, ¶ 166.
[701] *Velikovi and Others v. Bulgaria*, ¶ 166.

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justifications regardless of the specific ECHR provision under analysis. Consequently, the two regional bodies offer distinct perspectives on justification.

Under Article 14 ACHPR, interferences with the right to property are allowed only in the name of public need or general interest. In the Nairobi Principles, the ACmHPR clarified that these two aims must serve a "legitimate public interest objective,"[702] citing economic reforms and the achievement of social justice as examples.[703] Thus, based on this soft law document, states must interfere with property only for the greater good. In the two cases in which the ACmHPR discussed legitimacy, it applied different frameworks. In the first case, it assessed the violation under the non-discrimination framework, combining Article 2 with Article 14 ACHPR.[704] By contrast, in the second case, it analyzed the interference under the limitation framework, exclusively under Article 14.[705] Notably, the ACmHPR applied the same substantive assessment regardless of the framework.

In the first case, Mouvement Ivoirien de Droits de l'Homme v. Cote d'Ivoire, the ACmHPR found that the expropriation sanctioned by the law was based solely on origin, which constitutes a prohibited grounds for discrimination under Article 2. As a result, the violation of Article 14 stemmed from the discriminatory treatment of the law, assessed in conjunction with Article 2. The state failed to provide reasoning based on the legitimate aims that would "exceptionally justify a violation to the right to property."[706] The wording of the ACmHPR is rather curious. Usually, the existence of legitimate aims deems the interference legitimate and leads to a finding of non-violation. However, in this case, the ACmHPR implied that even if states presented legitimate aims, the right to property would be violated; though, this violation could be exceptionally justified.

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[702] *Nairobi Principles*, para. 55.c.
[703] *Nairobi Principles*, para. 55.c.
[704] *MIDH v. Cote d'Ivoire*, ¶¶ 75–78.
[705] *Open Society Justice Initiative v. Côte d'Ivoire*, ¶¶ 170–175.
[706] *MIDH v. Cote d'Ivoire*, ¶ 78.

In the second case, Open Society Justice Initiative v. Côte d'Ivoire, the ACmHPR held that the discriminatory nature of the law still impacted the right to property. The applicants in this case were classified as a distinct category of residents and lacked Ivorian nationality, which prevented them from owning land, potentially leading to expropriation.[707] Referring to its earlier case against Côte d'Ivoire, the ACmHPR clarified that the state had not justified its legal prohibition on land ownership. It ruled that the "risk of expropriation" was unfair and discriminatory because it derived from the applicants' status as non-Ivorians.[708] Therefore, the absence of legitimate aims—which were intrinsically discriminatory—led to a violation of the right to property.

These two cases demonstrate how the limitation assessment and the non-discrimination are connected. Both cases had the same outcome because the justifications were discriminatory. The incorporation of the non-discrimination obligation into the limitation assessment heightens the analysis of legitimacy, bringing in all the strengths of the non-discrimination framework—namely, its focus on prohibited grounds and its attention to the impact on specific groups. Consequently, these cases further my argument that international bodies should incorporate states' obligations into the limitation assessment to heighten the scrutiny and focus on aspects that would otherwise be overlooked.

As for the ECtHR, it assessed the expropriation cases under Article 1 of Protocol 1 ECHR, which allows deprivation of possession only in the public interest and the control of the property in the general interest. Despite the potential distinction between these terms, the ECtHR does not distinguish between them because any interference with the right is justifiable "if it pursues a legitimate aim in the general (public) interest."[709] Thus, in practice, the distinction between these expressions is inconsequential.

[707] *Open Society Justice Initiative v. Côte d'Ivoire*, ¶ 171.
[708] *Open Society Justice Initiative v. Côte d'Ivoire*, ¶¶ 172–174.
[709] Aida Grgić et al., *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and Its Protocols*, Human Rights Handbooks (Council of Europe, 2007), 10:13.

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Among the cases involving individuals removed from their lands, the ECtHR explicitly engaged with legitimacy in four of them: one concerning cultural heritage and three focusing on restitution of lands expropriated during communist times. On cultural heritage, the ECtHR found that expropriation to protect it is justifiable under public interest. Since such decision involves legislature discretion over social and economic policies, the ECtHR grants a wide margin of appreciation and intervenes only when an aim is "manifestly without a foundation."[710] Accordingly, the preservation of cultural heritage through expropriation was deemed legitimate.

As for expropriation to restitute lands, the ECtHR explained that public interest is an extensive concept, as expropriation involves "political, economic and social issues."[711] Given these issues, especially during the transition from communism to democracy, the ECtHR granted a wide margin of appreciation to the state.[712] In Velikovi and others v. Bulgaria, the ECtHR recognized the importance of "restor[ing] justice and respect[ing] for the rule of law."[713] In this case, the applications raised the fact that the national law did not differentiate between irregularities caused by individuals and authorities. In this regard, the ECtHR rejected this claim, emphasizing that the overall aim of the law was legitimate.[714] Thus, the ECtHR adopted a deferential stance in these cases.

In the eviction cases under Article 8 ECHR, all the applicants were Roma families who illegally parked caravans in their own lands. These cases confirm the ECtHR's deferential approach. In one case, the ECtHR did not analyze legitimacy in only one case, simply affirming that it did not doubt the state's justification,[715] while in another, it accepted that the lack of planning permission derived from the risk of accidents on a highway due to the lack of visibility,

[710] *Kozacioğlu v. Turkey*, ¶ 53.
[711] *Pincová and Pinc v. the Czech Republic*, ¶ 48; *Zvolský and Zvolská v. the Czech Republic*, ¶ 67; *Velikovi and Others v. Bulgaria*, ¶ 169.
[712] *Pincová and Pinc v. the Czech Republic*, ¶¶ 49–51; *Zvolský and Zvolská v. the Czech Republic*, ¶ 68; *Velikovi and Others v. Bulgaria*, ¶¶ 169–170.
[713] *Velikovi and Others v. Bulgaria*, ¶ 172.
[714] *Velikovi and Others v. Bulgaria*, ¶¶ 175–176.
[715] *Buckley v. the United Kingdom*, ¶ 63.

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linking this concern to environmental protection and public health.[716] Notably, in Chapman, Coster, Jane, and Lee, all against the United Kingdom, the ECtHR acknowledged that the government had not justified the interference under a specific legitimate aim but still accepted that environmental policies warranted protection of the countryside.[717] In other words, the ECtHR effectively justified the interference on behalf of the state. Based on these cases, it is evident that the ECtHR broadly accepts legitimate aims under Article 8, allowing states to provide general statements on their justifications.

To sum up, the difference between the ACmHPR and the ECtHR is striking. While the ACmHPR is less deferential, the ECtHR favors deference, readily accepting states' justification. The ACmHPR applied the non-discrimination and the limitation assessments to evaluate interferences with ESCR, reaching the same conclusion in both—that the discriminatory reasoning was not legitimate. These cases illustrate the benefit of incorporating states' obligations into the limitation assessment, given the overlap in focus between the two frameworks. As for the ECtHR, it accepted all the justifications provided. In expropriation cases, the deference granted to states was linked to the wide margin of appreciation under Article 1 of Protocol 1. As for eviction cases, the ECtHR accepted environmental protection as a legitimate aim, even offering explanations on behalf of states when they provided only general statements.

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1.1.3. Proportionality

The proportionality analysis is the richest criterion in the limitation assessment. The ACmHPR analyzes it in only one case, through an implicit limitation assessment. Without using the language of proportionality, the ACmHPR assesses the impact of the measure through the language of unspecific states' obligations. In contrast, the ECtHR is explicit and consistent in

[716] *Beard v. the United Kingdom*, ¶ 93.
[717] *Chapman v. the United Kingdom*, ¶ 82; *Coster v. the United Kingdom*, ¶ 96; *Jane Smith v. the United Kingdom*, ¶ 89; *Lee v. the United Kingdom*, ¶ 84.

its application of the proportionality analysis throughout its case law. Given the specificities of the cases examined in this subsection, I begin by analyzing those concerning expropriation, followed by the eviction cases. This structure allows for a precise exploration of the nuances of the case law. In both cases, the proportionality analysis encompasses the non-negotiable obligations and the balancing exercise.

1.1.3.1. Expropriation cases

In Mbiankeu Geneviève v. Cameroon, the ACmHPR assessed interferences under the rights to property and housing. Under property, it reaffirmed the importance of legal title for landowners, citing its jurisprudence on Indigenous and tribal communities. In this case, the title was annulled due to fraud committed by the vendor, unknown to the applicant, who acted in good faith. The ACmHPR emphasized that the state must refrain from issuing defective titles, meaning it must ensure that the vendor is the legitimate owner. In this instance, the state did not challenge the legality of the applicant's proceedings to obtain the title but instead questioned her failure to pursue legal action against the fraudulent vendor.[718]

To determine whether the violation occurred, the ACmHPR focused on states' obligations. First, the state violated its obligation to respect the right by failing to refrain from violating a right. The applicant complied with the law, and the authorities, who supervised the process, granted her the title. However, they failed to act with due diligence, and the applicant should not bear the consequences of this oversight, having acted in good faith.[719] These findings overlap with the analysis in the following subsection, where the African and the Inter-American bodies weighed positively the good faith of individuals in cases involving encroachment on Indigenous and Tribal lands. Second, although the applicant could have initiated legal proceedings against the vendor, the state was obliged to protect her right by verifying the

[718] *Mbiankeu Geneviève v. Cameroon*, ¶¶ 107–113.
[719] *Mbiankeu Geneviève v. Cameroon*, ¶¶ 115–117.

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credibility of the ownership and pursuing legal action against its own employees and the fraudulent vendor.[720] Regarding the right to housing, the ACmHPR found that the destruction of the applicant's home, built with her family, "frustrated the project to realise the right to adequate housing."[721]

Without explicitly using the language of proportionality, the ACmHPR addressed key aspects commonly analyzed by other bodies under this criterion. First and foremost, security of tenure is essential for protecting individuals' rights, promoting stability for those who own a home or land. This is part of the minimum core essential levels advanced by the CESCR and followed by the ACmHPR.[722] Second, the destruction of homes is prohibited, as it severely impacts the core of the right to housing. Third, states must comply with and oversee national law to safeguard rights. They must also hold accountable their employees and individuals who contravene the law, considering individuals' good faith. As such, the non-negotiable obligations are ensuring security of tenure, prohibiting home destruction, and complying with law, while the balancing exercise weighs the applicant's good faith and the conduct of national authorities.

As for the ECtHR, proportionality analysis is explicitly applied within the limitation assessment. Under Article 1 of Protocol 1, it emphasized that expropriation is "the most serious interference with the applicants' right guaranteed under [this provision]."[723] In the cases under analysis, the ECtHR primarily examined two requirements: the compensation awarded, and the judicial review conducted, even when not explicitly referenced. These constitute the non-negotiable obligations in expropriation cases. While a few cases centered exclusively on compensation,[724] most concerned judicial review.

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[720] *Mbiankeu Geneviève v. Cameroon*, ¶ 118.
[721] *Mbiankeu Geneviève v. Cameroon*, ¶ 124.
[722] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8; *Nairobi Principles*, paras 54, 79b, 79q, and 79gg.
[723] *Bistrović v. Croatia*, ¶ 36.
[724] *Akkus v. Turkey*; *Kozacioğlu v. Turkey*.

The first requirement under Article 1 of Protocol 1 is the payment of compensation in cases involving interferences with the right to property. Two key aspects of compensation are the valuation system, and the amount awarded. Previously, the ECtHR refrained from "rul[ing] on the valuation of the land,"[725] leaving national authorities to determine the value of the property. However, even in such cases, compensation must not be delayed to the extent where inflation causes substantial financial loss.[726] The ECtHR later shifted its stance, ruling that the fact that laws accounting only for factors that depreciate property value, while disregarding those that could increase it, created an unfair valuation system.[727] Thus, reasonable compensation is typically tied to the market value of the property "at the time of the expropriation."[728]

In cases without full compensation, the ECtHR accepted both partial and total lack of compensation when justified by legitimate aims. Such outcomes do not necessarily deem the law arbitrary or unlawful. In cases involving partial compensation, the ECtHR accepted that the aims of the law justified reduced amount, such as cultural heritage preservation,[729] and the motorway construction.[730] A notable example is Velikovi and Others v. Bulgaria, where courts awarded reduced compensation for land expropriation acquired during communism due to violations of substantive law,[731] absence of the abuse of power from the communist state[732] and cases where owners had not suffered any error or negligence by the authorities,[733] all accepted by the ECtHR. As for the complete absence of compensation, the ECtHR explained that exceptional circumstances may warrant it, such as expropriations during the transition from communism to democracy.[734]

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[725] *Akkus v. Turkey*, ¶ 28.
[726] *Akkus v. Turkey*, ¶¶ 29–31.
[727] *Kozacioğlu v. Turkey*, ¶ 70.
[728] *Pincová and Pinc v. the Czech Republic*, ¶ 53.
[729] *Kozacioğlu v. Turkey*, ¶ 67.
[730] *Bistrović v. Croatia*, ¶ 32.
[731] *Pincová and Pinc v. the Czech Republic*, ¶¶ 211–213.
[732] *Velikovi and Others v. Bulgaria*, ¶¶ 201–202.
[733] *Velikovi and Others v. Bulgaria*, ¶ 195.
[734] *Zvolský and Zvolská v. the Czech Republic*, ¶ 70.

Based on the rulings, compensation within the proportionality analysis must follow a fair system, award reasonable amounts and pay in time to prevent financial losses. Additionally, partial compensation or a complete absence of compensation can be justified by legislation's aims without making the law unlawful or arbitrary. The balancing aspect is evident in these two elements since the ECtHR weighs competing interests alongside the broader legal system.

The second requirement in proportionality analysis is judicial review. This obligation goes beyond proportionality analysis since the ECtHR has clarified that judicial review is part of states' positive obligations under Article 1 of the ECHR, which may require states to "take the measures necessary to protect the right of property."[735] Consequently, states must ensure individuals have access to judicial procedures with procedural safeguards, guaranteeing effective and fair adjudication that assesses fair balance in cases of state interference or inaction.[736]

Regarding the concept of judicial review, the ECtHR has not always been explicit about its significance under the right to property. In some cases, it highlighted the lack of judicial considerations of the actual value of expropriated buildings, and the failure to conduct a weighing exercise.[737] Additionally, the ECtHR noted the lack of respect for procedural rules.[738] On this point, the ECtHR clarified that judicial proceedings must follow the rule of law, which requires courts to provide the reasons for their decisions. Otherwise, the rights enshrined in the ECHR "would be illusory and theoretical."[739] National courts must respond to essential claims,[740] ensuring that every argument raised is adequately addressed and important questions and facts of cases are not disregarded.[741] Given that expropriation is the ultimate interference

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[735] *Bistrović v. Croatia*, ¶ 33.
[736] *Bistrović v. Croatia*, ¶¶ 33–43.
[737] *Kozacioğlu v. Turkey*, ¶¶ 71–72; *Bistrović v. Croatia*, ¶ 44.
[738] *Platakou v. Greece*, ¶¶ 55–57.
[739] *Bistrović v. Croatia*, ¶ 37.
[740] *Bistrović v. Croatia*, ¶¶ 32–37.
[741] The ECtHR pointed out that it has two types of jurisprudence regarding partial expropriation. On the one hand, there is no disproportionate interference in partial expropriation if national courts only award compensation based on the plots expropriated. On the other hand, the ECtHR found that partial expropriation is disproportionate when

with the right to property, national courts must make efforts to adequately protect the right, which they failed to do so.[742]

The other cases decided by the ECtHR and analyzed in this subsection concern expropriations resulting from the transition from communism to democracy. A common feature among these cases is that land acquisition occurred during communist times, and expropriation aimed at restoring the land to its original owners. The primary focus of the ECtHR was the behavior of judicial authorities while assessing the expropriation and the need for compensation. States enjoy a wide margin of appreciation to interfere with the right to property, granting discretion in implementing measures and weighing the consequences as justified. In these circumstances, the ECtHR's task is to review the preservation of fair balance.[743] As Arai-Takahashi explains, proportionality analysis is the other side of the coin of the margin of appreciation, as the ECtHR must prevent states from exceeding this margin, whether wide or narrow.[744]

In these cases, the issue with judicial review concerned the national law's failure to allow for a case-by-case assessment of how individuals had obtained land.[745] In other words, judicial review should have allowed for proportionality analysis, especially balancing. The applicants' specific circumstances required such exercise. In one case, national courts should have considered that the applicants paid for the property, the land was not given by the state, and they acquired it in good faith in agreement with the owner.[746] In another case, national courts should have considered that the applicants had acquired the land in good faith, unaware

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the limitation created by it deems the enjoyment of the rest of the possession impossible to use, leading to a substantial depreciation.

[742] *Bistrović v. Croatia*, ¶¶ 38–44.

[743] *Zvolský and Zvolská v. the Czech Republic*, ¶¶ 70–73.

[744] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia Press, 2002), 14.

[745] *Zvolský and Zvolská v. the Czech Republic*, ¶ 73; *Pincová and Pinc v. the Czech Republic*, ¶ 63.

[746] *Zvolský and Zvolská v. the Czech Republic*, ¶¶ 72–74.

that the state had confiscated it before selling.[747] The ECtHR found that national courts failed to consider the "personal and social situation"[748] of the applicants.

In Velikovi and Others v. Bulgaria, the most complex case due to the number of applicants and the variety of circumstances, the ECtHR determined that partial compensation was appropriate, considering both the conduct of applicants and the actions of national authorities. This case differs from the preceding ones in its approach to the general principles, as the ECtHR explicitly listed the proportionality elements. The first element was the classification of the acts leading to the expropriation within the legitimate aims of national law. The second element was the burden imposed on the applicants, alongside procedures and forms of the compensation offered.[749] In its ruling, the ECtHR established that applicants must surpass a "threshold of hardship" for a breach the right to property to occur, given the complexity of transitioning from communism to democracy.[750] Nevertheless, for most applicants, partial expropriation complied with Article 1 of Protocol 1 ECHR.

The ECtHR only found a breach of Article 1 of Protocol 1 in cases where applicants faced a disproportionate burden due to administrative irregularities. It noted that the Constitutional Court had recognized this issue, but the legislature had not revised the law to allow for reasonable compensation. Consequently, some applicants did not receive reasonable compensation despite having taken all necessary steps. Their good faith contrasted with the state's reprehensible actions, which played a significant role in the proportionality analysis.[751] In cases where national courts considered the irregularities and granted full compensation, the ECtHR found that their situation did not exceed the threshold of hardship, as compensation was above the real value of the property.[752] As demonstrated by this case, the ECtHR pays close

[747] *Pincová and Pinc v. the Czech Republic*, ¶ 58.
[748] *Pincová and Pinc v. the Czech Republic*, ¶ 63.
[749] *Velikovi and Others v. Bulgaria*, ¶ 190.
[750] *Velikovi and Others v. Bulgaria*, ¶ 192.
[751] *Velikovi and Others v. Bulgaria*, ¶¶ 217–222.
[752] *Velikovi and Others v. Bulgaria*, ¶¶ 230–234.

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attention to who bears the responsibility for the error. If a title was granted by an incompetence body or property sold by fraudulent vendor before communism, the applicant's good faith and the legal uncertainty created by the state became key factors in determining proportionality.[753] Notably, legal uncertainty (discussed under legality) is also analyzed within proportionality analysis.

In addition to compensation and judicial review, another element mentioned in a few cases was the risk of becoming homeless. While the ECtHR did not require states to provide alternative accommodation, it considered whether the individuals could afford housing with the compensation awarded. In Pincová and Pinc v. The Czech Republic, the ECtHR noted that the uncertainty created by expropriation was exacerbated by the applicants' inability to purchase another house.[754] Although it did not explicitly require alternative accommodation, it indirectly considered the risk homeless. In contrast, in Velikovi and Others v. Bulgaria, the ECtHR emphasized that one group of applicants did not face such risk, as they were able to buy a house with the compensation awarded. This influenced the decision since the state could not be held accountable for the applicants' inaction.[755]

Some conclusions emerge from the ECtHR's expropriation cases. The two key requirements of the proportionality analysis are the provision of compensation and the conduct of judicial review, which are non-negotiable obligations. Compensation is a requirement under Article 1 of Protocol 1, and the ECtHR demands a fair valuation system that considers both factors increasing and decreasing property value. Partial or total absence of compensation may be justified by legitimate aims, though the complete absence of compensation is accepted only in exceptional circumstances. National courts must fully assess cases, respond to all the claims, and consider the specific circumstances, including the applicants' good faith and the states' conduct. Additionally, the risk of homelessness was considered in two cases. The ability of

[753] *Velikovi and Others v. Bulgaria*, ¶¶ 236–249.
[754] *Pincová and Pinc v. the Czech Republic*, ¶ 62.
[755] *Velikovi and Others v. Bulgaria*, ¶¶ 211–213.

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individuals to purchase alternative housing with the compensation influenced the ECtHR's ruling. However, alternative accommodation cannot be considered as a requirement of the proportionality analysis in expropriation cases.

To summarize the proportionality analysis, both the ACmHPR and the ECtHR relied on this analytical method. However, the ACmHPR applied it implicitly and the ECtHR did so explicitly. Both bodies analyzed non-negotiable obligations and the balancing exercise. The non-negotiable obligations they emphasized are distinct. While the ACmHPR focused on the provision of security of tenure, the prohibition against the destruction of houses, and the compliance with national law, the ECtHR analyzed the provision of compensation and the conduct of judicial review, with a few cases examining the risk of homelessness. The balancing exercise for both bodies encompassed applicants' good faith and the conduct of national authorities. Additionally, the ECtHR considered whether the balancing exercise was conducted in national law.

1.1.3.2. Eviction of caravans parked in the applicants' land

The eviction cases before the ECtHR involve solely Roma families who wanted to park their caravans in their plot of land but did not get the planning permission, resulting in illegal parking. The main focus of the proportionality analysis under Article 8 ECHR was the conduct of judicial review.

Buckley v. The United Kingdom was the first case decided on the topic, followed by five subsequent cases with similar reasoning. In this initial case, the ECtHR established that national authorities have a margin of appreciation to determine the necessity of a legislative framework and the implementation of specific measures. However, the ECtHR retains the authority to review whether these decisions comply with the ECHR.[756] The scope of the margin

[756] *Buckley v. the United Kingdom*, ¶ 74.

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of appreciation depends on the right in question, including "its importance for the individual and the nature of the activities concerned."[757] Planning schemes fall within the community's interest, and the ECtHR does not determine which planning policy is the best or most appropriate. Thus, national authorities enjoy a wide margin of appreciation in these cases.[758] Nevertheless, competing interests must be balanced, and the importance of the right impacts that balancing. As such, procedural safeguards must be in place, as "measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual."[759]

In Buckley, the ECtHR emphasized three points to find the measure proportionate. First, the applicant appealed to the Secretary of State about the eviction decision, which had procedural safeguards in place, and declined appealing to the High Court regarding such decision.[760] Second, the state offered a space at a caravan site, but the applicant refused the alternative accommodation, finding it unsatisfactory. On this point, the ECtHR explained that Article 8 does not cover "individuals' preferences as to their place of residence to override the general interest."[761] Third, despite the fines imposed by the government, the applicant "has not been forcibly evicted from her land but has continued to reside there."[762] Thus, the ECtHR found that the applicant was afforded procedural safeguards, and the authorities had balanced the interests at hand. Moreover, it emphasized that it could not rule on the merits of the case as an appeal court. The ECtHR explained that although the national outcome could have been different, the justifications presented were "relevant and sufficient,"[763] making the interference justified and proportionate under Article 8.

In my opinion, the ECtHR overlooked two critical aspects in this case. First, the applicant was the legal owner of the land, meaning she was not establishing a caravan site for

[757] *Buckley v. the United Kingdom*, ¶ 74.
[758] *Buckley v. the United Kingdom*, ¶ 75.
[759] *Buckley v. the United Kingdom*, ¶ 76.
[760] *Buckley v. the United Kingdom*, ¶ 79.
[761] *Buckley v. the United Kingdom*, ¶ 81.
[762] *Buckley v. the United Kingdom*, ¶ 83.
[763] *Buckley v. the United Kingdom*, ¶ 84.

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Roma communities but building a home for her family. Second, the ECtHR failed to account substantive equality when assessing the arguments presented by national authorities. The inspector justified the refusal of planning permission based on the view that the number of caravan sites should be kept minimal to ensure that the Roma people "are more readily accepted by the local community."[764] This justification was rooted in prejudice rather than the actual needs of the family, which the ECtHR did not weigh in its decision.

In 2001, the ECtHR ruled on five additional cases with similar facts—Beard, Chapman, Coster, Jane, and Lee, all against the United Kingdom. Considering the decision in Buckley, the ECtHR explained that, while it is not bound by precedent, it would follow its prior decisions due to "legal certainty, foreseeability and equality before the law."[765] It would depart from previous judgments if justified, such as in cases of emerging European consensus.[766] Ultimately, in these cases, the ECtHR found no violation of Article 8 ECHR, concluding that the interference was proportionate, consistently with Buckley v. The United Kingdom.

The five newer cases differ from Buckley in four key aspects. First, the ECtHR introduced the concept of 'pressing social need' within the criterion of 'necessary in a democratic society.'[767] Pressing social need is linked to the margin of appreciation granted to national authorities because interferences must be justified,[768] and is incorporated into proportionality analysis. Second, the creation of the Framework Convention for the Protection of Minorities. This Council of Europe Convention "[reduces] the margin of appreciation accorded to States in light of the recognition of the problems of vulnerable groups, such as

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[764] *Buckley v. the United Kingdom*, ¶ 80.
[765] *Beard v. the United Kingdom*, ¶ 81; *Chapman v. the United Kingdom*, ¶ 70; *Coster v. the United Kingdom*, ¶ 84; *Jane Smith v. the United Kingdom*, ¶ 77; *Lee v. the United Kingdom*, ¶ 72.
[766] *Beard v. the United Kingdom*, ¶ 81; *Chapman v. the United Kingdom*, ¶ 70; *Coster v. the United Kingdom*, ¶ 84; *Jane Smith v. the United Kingdom*, ¶ 77; *Lee v. the United Kingdom*, ¶ 72.
[767] *Beard v. the United Kingdom*, ¶ 101; *Chapman v. the United Kingdom*, ¶ 90; *Coster v. the United Kingdom*, ¶ 104; *Jane Smith v. the United Kingdom*, ¶ 97; *Lee v. the United Kingdom*, ¶ 92.
[768] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 11–12.

gypsies."[769] Although the ECtHR acknowledged a growing consensus among European countries in protecting Roma interests and preserving cultural diversity,[770] it concluded that the consensus was not strong enough, as the Framework Convention is a broad document with goals and lacks means of implementation.

On the question of the protection of minorities, the ECtHR's position on equality is worth noting. The ECtHR affirmed that, although Roma people are part of a minority, granting special treatment to individuals who unlawfully parked their caravan would violate Article 14 ECHR.[771] Despite acknowledging Roma people's 'vulnerability' and the positive obligation "to facilitate the [Roma] way of life,"[772] Roma individuals are not exempted from following general law. In the ECtHR's opinion, the creation of special measures for Roma people would lead to inequality towards the rest of the population. Although the United Kingdom failed to provide enough caravan sites that were acceptable or affordable, the ECtHR concluded that Article 8 does not demand states to provide "suitably equipped sites"[773] to everyone, as such obligation would be excessively intrusive, imposing a general social policy. Moreover, Article 8 does not include "a right to be provided with a home,"[774] and the ECtHR does not recognize such a right. Decisions on fund allocation fall within the competence of political branches, not judicial ones.[775]

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[769] *Beard v. the United Kingdom*, ¶ 104; *Chapman v. the United Kingdom*, ¶ 93; *Coster v. the United Kingdom*, ¶ 107; *Jane Smith v. the United Kingdom*, ¶ 100; *Lee v. the United Kingdom*, ¶ 95.
[770] *Beard v. the United Kingdom*, ¶ 104; *Chapman v. the United Kingdom*, ¶ 93; *Coster v. the United Kingdom*, ¶ 107; *Jane Smith v. the United Kingdom*, ¶ 100; *Lee v. the United Kingdom*, ¶ 95. The United Kingdon ratified the Convention by the time of the cases.
[771] *Beard v. the United Kingdom*, ¶ 106; *Chapman v. the United Kingdom*, ¶ 95; *Coster v. the United Kingdom*, ¶ 109; *Jane Smith v. the United Kingdom*, ¶ 102; *Lee v. the United Kingdom*, ¶ 97.
[772] *Beard v. the United Kingdom*, ¶ 107; *Chapman v. the United Kingdom*, ¶ 96; *Coster v. the United Kingdom*, ¶ 110; *Jane Smith v. the United Kingdom*, ¶ 103; *Lee v. the United Kingdom*, ¶ 98. The original phrase mentions the outdated term to refer to Roma people.
[773] *Beard v. the United Kingdom*, ¶ 109; *Chapman v. the United Kingdom*, ¶ 98; *Coster v. the United Kingdom*, ¶ 112; *Jane Smith v. the United Kingdom*, ¶ 105; *Lee v. the United Kingdom*, ¶ 100.
[774] *Beard v. the United Kingdom*, ¶ 110; *Chapman v. the United Kingdom*, ¶ 99; *Coster v. the United Kingdom*, ¶ 113; *Jane Smith v. the United Kingdom*, ¶ 106; *Lee v. the United Kingdom*, ¶ 101.
[775] *Beard v. the United Kingdom*, ¶ 110; *Chapman v. the United Kingdom*, ¶ 99; *Coster v. the United Kingdom*, ¶ 113; *Jane Smith v. the United Kingdom*, ¶ 106; *Lee v. the United Kingdom*, ¶ 101.

Concerning the claim of unequal treatment towards the rest of the population, the ECtHR has applied exclusively the formal concept of equality, in which all individuals are treated equally before the law.[776] However, these two groups are not in the same position, which is recognized by the ECtHR when it mentioned Roma's 'vulnerability' and the obligation to facilitate their lifestyle. Consequently, this formalistic approach to equality refrained the ECtHR from furthering the protection of Roma rights. As a result, these cases failed to address patterns of discrimination and advance substantive equality.

Considering states' obligations, Pastrana and Vols conducted a study on the right to housing and the obligations arising from interference with rights protected under the ECHR.[777] According to the authors, the ECtHR has not sufficiently expanded the obligation to protect, thereby failing to grant individuals a preference over their place of residence. Furthermore, they argue that these cases have not established a general obligation to fulfill, as housing policies fall within a wide margin of appreciation, leaving funding decisions to national authorities.[778] As a result, the ECtHR has developed a procedural framework for assessing interferences with residence while remaining deferential to states' policy choices. It has prioritized the obligation to respect without due consideration for the obligation to protect, and the obligation to fulfill is entirely absent from the ECtHR's legal reasoning.

Third, returning to the differences between the Buckley case and the five subsequent cases, the lawfulness of the establishment of the home was added into the analysis. The ECtHR ruled that if the establishment of the home was lawful, this would weigh in favor of the individual when balanced against the legitimate aim. Conversely, if the home was unlawfully established, the balance would shift against the individual. The ECtHR adopted this reasoning

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[776] Clifford, 'Equality', 427–28; Fredman, *Discrimination Law*, 9.
[777] This paper also discusses the CESCR – which is analyzed in the next section.
[778] Andrei Quintiá Pastrana and Michel Vols, 'Tracing the Right to Access to Housing: Insights from Human Rights Theory and Practice', *European Journal of Homelessness* 18, no. 2 (2024): 58.

to avoid encouraging unlawful acts.[779] Fourth, the ECtHR assessed alternative accommodation. It considered the absence of alternative housing a serious interference, whereas the existence of suitable alternative accommodation made the interference less severe. The suitability of the alternative accommodations depends on both the needs of the individuals and environmental protection, which serves as a legitimate aim.[780]

In these cases, which concerned Roma individuals' right to park caravans in their *own* land, the ECtHR found that applicants had the opportunity to present any fact that could influence the inspectors, including their opinions on suitable alternative accommodation and the time needed to secure it.[781] It noted that the reasons for denying planning permissions were strong, and the inspectors had taken the applicants' circumstances into account when deciding. Additionally, the applicants chose not to seek judicial review.[782] The lack of alternative sites within the county was acknowledged by the ECtHR. However, it is reasoned that since many families continued an itinerant life, new spots might become available. It also considered the applicants' financial conditions, including their ability to pay for sites.[783] It is worth noting that British law required the government to provide alternative accommodation to Roma families based on their needs. As such, the lack of suitable accommodation in these cases constituted a violation of domestic law, an aspect that was not considered by the ECtHR. Instead, in Chapman, Coster, and Lee, the ECtHR placed the responsibility on the applicants to identify an alternative site,[784] despite having previously acknowledged the sites were insufficient.

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[779] *Beard v. the United Kingdom*, ¶¶ 113–114; *Chapman v. the United Kingdom*, ¶¶ 102–103; *Coster v. the United Kingdom*, ¶¶ 116–117; *Jane Smith v. the United Kingdom*, ¶¶ 109–110; *Lee v. the United Kingdom*, ¶¶ 104–105.
[780] *Beard v. the United Kingdom*, ¶¶ 113–114; *Chapman v. the United Kingdom*, ¶¶ 102–103; *Coster v. the United Kingdom*, ¶¶ 116–117; *Jane Smith v. the United Kingdom*, ¶¶ 109–110; *Lee v. the United Kingdom*, ¶¶ 104–105.
[781] *Beard v. the United Kingdom*, ¶ 117; *Chapman v. the United Kingdom*, ¶ 106; *Coster v. the United Kingdom*, ¶ 120; *Jane Smith v. the United Kingdom*, ¶ 113; *Lee v. the United Kingdom*, ¶ 108.
[782] *Beard v. the United Kingdom*, ¶¶ 118–122; *Chapman v. the United Kingdom*, ¶¶ 107–110; *Coster v. the United Kingdom*, ¶¶ 121–124; *Jane Smith v. the United Kingdom*, ¶¶ 114–116; *Lee v. the United Kingdom*, ¶¶ 109–112.
[783] *Beard v. the United Kingdom*, ¶¶ 123–124; *Chapman v. the United Kingdom*, ¶¶ 111–112; *Coster v. the United Kingdom*, ¶ 125; *Jane Smith v. the United Kingdom*, ¶¶ 117–118; *Lee v. the United Kingdom*, ¶¶ 113–114.
[784] *Chapman v. the United Kingdom*, ¶ 112; *Coster v. the United Kingdom*, ¶ 125; *Lee v. the United Kingdom*, ¶ 114.

These findings are relevant for several reasons. First, the ECtHR viewed the weighing of interests by the inspectors as a positive safeguard, highlighting that applicants' circumstances had been examined. Second, similar to its rulings in other cases, the ECtHR regarded judicial review as a crucial requirement, and the applicants' choice not to appeal the inspectors' decisions weighed against them. Third, the absence of information from the applicants also tipped the scale for the state. Notably, in some cases, the ECtHR placed the burden of finding alternative sites on the applicants. However, given that the applicants were removed from land they legally purchased, and the state had an obligation to provide alternative parking sites, the applicants' individual efforts to find suitable accommodation should have been less relevant. Moreover, the ECtHR clearly prioritized the balancing exercise in a national context—even when conducted by inspectors—alongside judicial review and the conduct of the applicants.

Beyond these elements, the ECtHR confirmed its precedent, Buckley v. The United Kingdom. It held that Article 8 does not extend to individuals' preferences regarding residency, stating that such preferences cannot "override the general interest."[785] The applicants' inability to find affordable accommodation placed them in the same position as other individuals facing financial difficulties.[786] As a result, the ECtHR concluded that the applicants had procedural safeguards and that national authorities weighed their interests accordingly. It emphasized that its role was not to review the merits of the decisions, but rather to attest that they "were based on reasons which were relevant and sufficient."[787]

Finally, the ECtHR ruled that "humanitarian considerations which might have supported another outcome at national level cannot be used as the basis of a finding by the Court which would […] [exempt] the applicant from the implementation of national planning laws and

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[785] *Beard v. the United Kingdom*, ¶ 125; *Chapman v. the United Kingdom*, ¶ 113; *Coster v. the United Kingdom*, ¶ 126; *Jane Smith v. the United Kingdom*, ¶ 118; *Lee v. the United Kingdom*, ¶ 114.
[786] *Beard v. the United Kingdom*, ¶ 125; *Chapman v. the United Kingdom*, ¶ 113; *Coster v. the United Kingdom*, ¶ 126; *Jane Smith v. the United Kingdom*, ¶ 118; *Lee v. the United Kingdom*, ¶ 114.
[787] *Beard v. the United Kingdom*, ¶ 126; *Chapman v. the United Kingdom*, ¶ 114; *Coster v. the United Kingdom*, ¶ 127; *Jane Smith v. the United Kingdom*, ¶ 119; *Lee v. the United Kingdom*, ¶ 115.

[oblige] governments to ensure that every [Roma] family has available for its use accommodation appropriate to its needs."[788] Thus, the ECtHR did not view the national obligation as a significant factor in the public interest when balanced against individuals' interests. It confined states' obligations to procedural ones, without engaging with the substantive dimensions of Article 8.

To sum up, the proportionality analysis in cases of evictions of Roma families encompassed non-negotiable obligations and the balancing exercise. The non-negotiable obligations were the conduct of judicial review, which must encompass procedural safeguards, and the provision of alternative accommodation. Despite the recognition of the alternative accommodation obligation, the ECtHR overlooked Roma's specific needs and the suitability of such housing, breaching substantive equality. At the balancing stage, the ECtHR considers whether national authorities engaged in balancing, the lawfulness of the housing, and the applicants' behavior. Although the ECtHR recognized the obligation to facilitate and Roma's 'vulnerability,' it did not demand measures from the United Kingdom, arguing they would breach equality with the rest of the population. Such a formalistic stance disregards the discrimination experienced by Roma communities and the need of adopting specific measures to achieve substantive equality. Therefore, these cases illustrate the detrimental impact on individuals' rights when international bodies fail to incorporate states' obligations into their limitation assessment.

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1.1.4. Synthesis

This subsection examined cases of forced removal of individuals from legally owned homes and land. Both the ACmHPR and the ECtHR have ruled on expropriations under the right to property—and on housing in the case of the ACmHPR—with the ECtHR adjudicating

[788] *Beard v. the United Kingdom*, ¶ 127; *Chapman v. the United Kingdom*, ¶ 115; *Coster v. the United Kingdom*, ¶ 128; *Jane Smith v. the United Kingdom*, ¶ 120; *Lee v. the United Kingdom*, ¶ 116.

evictions of individuals through the right to respect for private and family life. While the ACmHPR adopted various frameworks—limitation assessment, states' obligations (an implicit limitation assessment), and non-discrimination—the ECtHR consistently employed the limitation assessment. Despite differences in frameworks chosen, their legal reasoning is similar.

Considering the limitation assessment criteria, legality was the least discussed. In the few cases addressing it, the analysis centered on the existence, the quality and the application of the law. Notably, the application of the law aspect reinforced the role of judicial review. In one case, the ECtHR mentioned the format of the law. With respect to legitimacy, the analyses differed between the two regional bodies. The ACmHPR found the justifications for interference under the limitation assessment and non-discrimination frameworks to be discriminatory. In contrast, the ECtHR accepted all justifications in expropriation and eviction cases.

The proportionality analysis was central to legal reasoning. Both bodies emphasized the non-negotiable obligations and the balancing exercise. Their non-negotiable obligations differ: the ACmHPR addressed the provision of security of tenure, the prohibition against the destruction of houses, and the compliance with national law, while the ECtHR examined the provision of compensation, the conduct of judicial review with procedural safeguards, and the provision of alternative accommodation. Their balancing exercise were similar, focusing on the applicants' good faith and the conduct of national authorities. The ECtHR also considered whether balancing occurred nationally and the lawfulness of the residence.

The incorporation of states' obligations has proven to be crucial in this section. The ACmHPR incorporated the minimum essential levels to analyze interference with the right to property, demonstrating that this incorporation strengthens the assessment of interferences. By contrast, the ECtHR focused on formal equality instead of substantive equality in cases involving interference with the rights of Roma families. The absence of substantive equality in

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its analysis has weakened the protection afforded to Roma families, with the ECtHR primarily focusing on procedural protections. Furthermore, the ACmHPR applied the non-discrimination framework in one case involving expropriation. In comparison, the limitation assessment and non-discrimination frameworks addressed the same elements, reaching the conclusion that the measures were discriminatory. The incorporation of non-discrimination into the limitation illustrates the benefit of such incorporation, as it intensified the analysis of the legitimacy criterion. Consequently, the two parallel frameworks converged in their analytical focus. Therefore, states' obligations are crucial for the conceptualization of interferences with ESCR.

1.2. Indigenous and tribal lands

The removal of Indigenous and Tribal communities from their land has been addressed by the ACmHPR, ACtHPR, IACmHR and the IACtHR. The jurisprudence covers three types of interferences: the creation of nature reserves, state concession for resource exploitation, and third-party encroachments. While the ACmHPR and the IACtHR ruled on all three, the IACmHR and the ACtHPR addressed one or two, resulting in overlapping case law. These regional bodies have primarily adjudicated the right to property, though the ACmHPR also examined the right to dispose of wealth and natural resources, and the IACtHR ruled on the rights to food, water and participation in life. Regardless of the right adjudicated, their reasoning remains largely aligned.

A key similarity lies in the framework applied, with most bodies explicitly relying on the limitation assessment. The ACmHPR initially employed the unspecific states' obligations framework (which constitutes an implicit limitation assessment) but later explicitly adopted the limitation assessment framework. The ACtHPR, IACmHR and the IACtHR consistently applied the limitation assessment, though with variation: the ACtHPR clearly articulates the criteria; IACtHR references the criteria without detailing them; and the IACmHR evolved from

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initially not clarifying the limitation assessment content to clearly setting out its constituent criteria.

Regarding the limitation assessment criteria, the bodies converge in their analysis. The legality of the measures is seldom analyzed. When discussed, the primary focus is on the quality of the law (substantive element), particularly on legal certainty. The ACmHPR and the IACtHR offer a substantial understanding of legality by examining states' obligations such as provision of compensation and the conduct of judicial review. As for legitimacy, environmental protection and economic interests are common justifications. However, environmental protection is considered a valid justification but not to remove Indigenous and Tribal communities. One key aspect under legitimacy is states invocation of formal equality to justify their actions or lack of actions. They argue that they cannot respect and protect Indigenous and Tribal rights because it would lead to unequal treatment of the rest of the population. However, the regional bodies, applying substantive equality, reject such arguments.

Lastly, the proportionality analysis includes both the non-negotiable obligations and the balancing exercise. The non-negotiable obligations' slightly changes depending on the interference analyzed. In removals due to nature reserves, they include the conduct of consultation and participation—and occasionally consent. In states concession cases, the focus is on conducting consultation, providing compensation, and performing impact assessments are key elements, and judicial review and the pursuit of consent are sometimes considered. In third-encroachment interferences, they assess the provision of compensation and either alternative accommodation or land. In the Inter-American system, restitution, judicial review and consultation appear, but only restitution is assessed consistently. Consultation is the most frequent obligation, which must be guided by the communities' customs and traditions. The balancing exercise consistently focuses on the negative impact of the interference, particularly its effect on the survival of the communities and its impact on cultural identity. The incorporation of substantive equality plays a significant role in these removal cases, as states'

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must create special measures and consider Indigenous and Tribal communities' specific needs when interfering with their rights.

This subsection follows the limitation assessment criteria: legality, legitimacy, and proportionality analysis. I analyze all the cases together under legality and legitimacy, discussing the types of interferences separately under proportionality analysis due to factual distinctions.

1.2.1. Legality

The legality criterion in cases regarding the removal of Indigenous and Tribal communities from their land focuses on the existence of the law (formal element) and the quality of the law (substantive element). Although legality is not explicitly mentioned in most cases, a few that do address it provide detailed analysis of its content. The case law of the ACmHPR and the IACtHR stand out for their comprehensive analysis of legality, incorporating elements typically assessed under proportionality analysis.

In the African system, only the ACmHPR ruled on legality, while the ACtHPR neither mentioned nor assessed it.[789] In one case concerning the creation of nature reserves, the ACmHPR explained that legality under Article 14 ACHPR requires states to comply with both national and international law.[790] Accordingly, it held that the state did not "prove without a doubt that the eviction"[791] complied with either legal framework, particularly since national law provided detailed procedures for the removal of Indigenous and Tribal people from land.[792]

Notably, the ACmHPR assessed consultation and compensation for removals as part of the legality criterion, as both were mandated by law. Under consultation, it explained that an adequate consultation involves seeking the consent of affected communities, which represents

[789] *Ogiek v. Kenya*, ¶ 129.
[790] *Endorois v. Kenya*, ¶ 219.
[791] *Endorois v. Kenya*, ¶ 224.
[792] *Endorois v. Kenya*, ¶ 224.

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a higher threshold. In this case, the state failed to meet that threshold, as the community did not participate in the decision-making. As for compensation, it clarified that it must reflect the full amount owed.[793] However, in this case, the compensation was paid only to a few members, excluding others. Accordingly, the state did not satisfy this requirement, demonstrating a lack of "common sense and fairness."[794]

This interpretation of legality differs from other bodies, as it provides a substantial content to legality, rather than focusing solely on the formal and substantive elements of legality. Although assessing compensation and consultation under legality is innovative, other bodies typically address these elements under proportionality. Consequently, while the elements analyzed are similar, they are situated within different criteria. In cases involving other types of interferences with Indigenous and Tribal Rights, the ACmHPR departed from this approach. It either did not address legality,[795] or merely acknowledged its existence.[796] In one case concerning third-party encroachment on land, the ACmHPR focused on the formal aspect of legality—the existence of the law. It clarified that Article ACHPR requires evictions to be conducted in accordance with the law. However, the state had failed to establish a legal framework for such evictions,[797] thereby violating the right to property.

In the Inter-American system, the IACmHR did not assess the legality of interfering measures.[798] By contrast, the IACtHR ruled on legality, particularly in cases involving the creation of nature reserves and third-party encroachment on land, focusing on legal certainty. In one case concerning nature reserves, the IACtHR focused on the quality of the law through the lens of legal certainty. The state enacted two contradictory pieces of legislation: while the older legislation prohibited fishing and hunting inside any reserves, a more recent law protected

[793] *Endorois v. Kenya*, ¶¶ 225–231.
[794] *Endorois v. Kenya*, ¶ 236.
[795] *SERAC and CESR v. Nigeria*, ¶¶ 55–63.
[796] *Endorois v. Kenya*, ¶ 267.
[797] *Nubian v. Kenya*, ¶¶ 153 and 165.
[798] *Isseneru v. Guyana*, ¶¶ 188–193.

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the lifestyle of Indigenous and Tribal people. Under the second legislation, the state did not mention the communities whose rights the IACtHR was assessing, leading to a complete prohibition on conducting their lifestyle. As a consequence, these laws created legal uncertainty for affected communities.[799]

In cases involving third-party encroachment, the content of legal certainty was expanded beyond the preceding case. In one case, the IACtHR explained that legal certainty derives from the principle of the rule of law, which ensures stability and trust in democratic institutions. This trust is rooted in the belief that national jurisdictions respect and uphold human rights, including the guarantee that Indigenous and Tribal ancestral territories remain free from interferences. Furthermore, equality and non-discrimination demand that states take actions towards communities which differ from the rest of the population. The removal of encumbrances from ancestral territory entails the eviction of innocent (bona fide) third parties or squatters, and the assurance of peaceful possession and clear title of the land. Thus, legal certainty encompasses the delimitation, demarcation, and titling of the land, as well as its clearance of third parties.[800]

This understanding of legal certainty is particularly robust, as it places on states the responsibility to take steps to protect rights. The incorporation of non-discrimination and substantive equality into the assessment strengthens this protection by requiring specific and targeted measures. The obligation to limit, demarcate and title equates to security of tenure over ancestral land, which is also debated under the proportionality analysis. Notably, security of tenure forms part of the minimum essential levels,[801] indicating that the IACtHR has incorporated the minimum core as well.

In the specific case, the IACtHR found that although the state attempted to free Indigenous land, it failed to ensure legal certainty due to significant delays on the part of the judiciary. The state not only failed to limit, demarcate, and title the land, but also took 19 years

[799] *Kaliña and Lokono v. Suriname*, ¶¶ 193–194.
[800] *Xucuru v. Brazil*, ¶¶ 121–124.
[801] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8.

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to respond to the applicants' claims.[802] In this case, another crucial element, also discussed under proportionality, is the importance of judicial review to ensure legal certainty. Consequently, this comprehensive understanding of legal certainty confirms not only key components of the proportionality analysis while also incorporating specific states' obligations, namely, non-discrimination and substantive equality.

This interpretation of legal certainty was reinforced by a more recent case, where the IACtHR assessed whether the recognition of the right to property of Indigenous communities was grounded in legal certainty, given the presence of third parties—Criollo community—living in the territory. In this case, the IACtHR found that the state had taken positive steps, including recognizing the collective right to property, attempting to transfer the Criollo community, and establishing an agreement mechanism.[803] However, the state failed to uphold legal certainty due to the absence of a legal framework ensuring protection against third-party interference.[804] The inadequacy of the states' legislation safeguarding Indigenous claims was further exacerbated by a prolonged delay in recognizing their rights.[805]

Overall, legality was addressed solely by the ACmHPR and the IACtHR. The two bodies focus on distinct aspects of legality, offering substantial interpretations. The ACmHPR incorporated consultation and compensation into legality, as domestic and international laws required states to fulfill these obligations in eviction cases. The IACtHR, on the other hand, assessed legal certainty in relation to interferences. In its jurisprudence, the IACtHR conducted a comprehensive analysis of legal certainty, encompassing judicial review, the obligation to delimit, demarcate, and title lands (i.e., security of tenure), and the creation of a legal framework to protect Indigenous claims—free from contradictory legislations. Additionally, the IACtHR incorporated non-discrimination and substantive equality, which require states to adopt specific

[802] *Xucuru v. Brazil*, ¶¶ 153–162.
[803] *Lhaka Honhat v. Argentina*, ¶¶ 123–139.
[804] *Lhaka Honhat v. Argentina*, ¶¶ 140–150.
[805] *Lhaka Honhat v. Argentina*, ¶¶ 158–166.

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measures for Indigenous and Tribal peoples and take their particular needs into consideration. Thus, legality in these cases centered on components typically examined under proportionality analysis, demonstrating that similar elements can be analyzed through different criteria without altering the overall assessment of interferences. Moreover, incorporating states' obligations into the legality analysis intensifies the level of scrutiny, thereby deepening the overall assessment.

1.2.2. Legitimacy

The legitimacy of interfering measures encompasses various justifications, depending on the type of interference analyzed. The most topical legitimate aim is environmental protection in cases involving the creation of nature reserves, as demonstrated in this subsection. In cases concerning state concessions, the aims relate to economic interests, while instances of third-party encroachment of the land involve the reasons presented for not evicting third parties or for granting title of ancestral land to individuals. Notably, non-discrimination and substantive equality have been incorporated into these criteria, thereby deepening the scrutiny of states' justifications.

Beginning with the creation of nature reserves for environmental protection, the African and Inter-American bodies discuss this aim extensively. In the African system, the ACmHPR issued the landmark case Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, also known as the Endorois case. In this case, the state presented two justifications, one regarding the lack of title and one regarding the removal.

The first concerned the alleged impossibility of implementing special measures for Indigenous communities (titling their land), as the state explained would be discriminatory towards the rest of the population.[806] This reflects a formal understanding of equality. The

[806] *Endorois v. Kenya*, ¶ 196.

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ACmHPR, however, found that "positive discrimination or affirmative action"[807] is essential for addressing inequalities, and that treating individuals in different situation differently can be legally permissible. Because the Indigenous community lacked land title, the mere access to the land exacerbated their inequality and heightened the risk of removal by the state or private actors.[808] Although the ACmHPR did not explicitly find a violation of discriminatory treatment, it advanced the notion of an "obligation to consider preferential treatment" as means to eliminate discrimination and achieve substantive equality.[809] In other words, the ACmHPR incorporated non-discrimination and substantive equality into the analysis of legitimacy.

As for the justification to evict the Indigenous community, the state based the removal on the protection of the forest within their territory. The ACmHPR established that in cases involving interferences with the right to property of Indigenous land, public interest requires a higher threshold due to the community's connection with the land.[810] The establishment of a higher threshold for the aim to be legitimate is consistent with substantive equality, as the connection with the land is a significant element to establish the legitimacy, confirming the aforementioned discussion on special measures. However, the ACmHPR did not elaborate further environmental protection.[811]

By contrast, the ACtHPR closely examined the environmental protection as a legitimate aim. In the case African Commission on Human and People's Rights v. Kenya, known as the Ogiek case, the Indigenous community was evicted to protect the Mau Forest, despite the fact that they have been living there for "time immemorial."[812] Rather than declaring the aim legitimate or illegitimate under Article 14 ACHPR, the ACtHPR focused on reports indicating that the Ogiek people were not responsible for the environmental degradation, which was

[807] *Endorois v. Kenya*, ¶ 196.
[808] *Endorois v. Kenya*, ¶¶ 196–204.
[809] Amin, 'Assessing Violations of States' Socioeconomic Rights Obligations in the African Charter: Towards a Model of Review Grounded in the Teleological Approach', 25.
[810] *Endorois v. Kenya*, ¶ 212.
[811] *Endorois v. Kenya*, ¶ 215.
[812] *Ogiek v. Kenya*, ¶ 128.

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instead attributable to the state and third parties.[813] Based on the language of the case, the ACtHPR concluded that the aim failed the legitimacy criterion, as the state unfoundedly blamed the community for environmental degradation, despite never explicitly declaring the aim illegitimate.

Separately, the ACtHPR also analyzed eviction of the Indigenous community under Article 2 ACHPR, the non-discrimination clause. As a result, it complemented the limitation assessment with the non-discrimination assessment. The community requested that their indigeneity be recognized by the state in order to have their rights protected, such as the title of the land. However, the state did not grant such status, despite having granted it to other communities in similar circumstances. The ACtHPR held that although states must enact laws that prohibit discrimination and act without discrimination, the state violated the latter by failing to refrain from evicting the community after national courts issued judgments in favor of the community.[814] Moreover, environmental protection was not a reasonable and objective justification, as the community was evicted due to the absence of their Indigenous status. Instead, the state granted the title of the land to third parties, which were degrading the environment. Hence, the lack of status led to unequal treatment of communities in comparable situations.[815]

In this case, the ACtHPR assessed the removal of the community under two frameworks: limitations and non-discrimination. Their content overlapped, as environmental protection was deemed insufficient justification to evict the community. Under the non-discrimination framework, the ACtHPR focused on the fact that the eviction that was grounded on the lack of Indigenous status which impacted the absence of legal title to the land. The main difference between the two frameworks, hence, lies in the focus on the non-recognition of Indigenous status as the basis for discriminatory treatment, as Rösch explains that indigeneity

[813] *Ogiek v. Kenya*, ¶ 130.
[814] *Ogiek v. Kenya*, ¶ 144.
[815] *Ogiek v. Kenya*, ¶¶ 136–146.

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is a recognized ground for discrimination.[816] Thus, this case reinforces the convergence between the two frameworks and their overlapping legal reasoning, in which the non-discrimination assessment complemented the limitation assessment.

In the Inter-American system, only the IACtHR addressed environmental protection as a legitimate aim for creating nature reserves. In Kaliña and Lokono Peoples v. Suriname, the IACtHR clarified that environmental protection is a legitimate aim for limiting the right to property, which is a right in itself. However, the IACtHR found that Indigenous communities may positively contribute to environmental preservation, demonstrating that protecting these rights is not inherently exclusionary.[817] Hence, Indigenous communities advance the state's environmental objectives and cannot be used as a justification for their removal.

Without explicitly addressing the limitation assessment, scholars have examined the environmental protection as justification for interferences. Petersmann compares the cases Endorois, Ogiek, and Kaliña and Lokono, explaining that states often attempt to diminish the indigeneity of the communities to justify their dispossession. Without assessing the actual environmental impact of these communities, states claim that these communities are not truly Indigenous. In her analysis, she argues that the regional bodies' reliance on expert evidence strengthens the protection of Indigenous communities.[818] By contrast, Lixinski criticizes the IACtHR's arguments regarding the environment. First, he argues that the assumption that Indigenous people help conservation "reinforces a myth of the Noble Savage, who in their wisdom harmoniously engage with nature."[819] Second, he asserts that assuming compatibility

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[816] Ricarda Rösch, 'Indigenousness and Peoples' Rights in the African Human Rights System: Situating the Ogiek Judgement of the African Court on Human and Peoples' Rights', *Law and Politics in Africa, Asia and Latin America*, Self-Determination and Indigenousness, vol. 50, no. 3 (2017): 250–51.
[817] *Kaliña and Lokono v. Suriname*, ¶ 192.
[818] Marie-Catherine Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts', *Human Rights Law Review* 21 (2021): paras 135–141.
[819] Lucas Lixinski, 'Rights of Indigenous Peoples - Collective Rights - Recognition of Legal Personality - Right to Communal Property - Conflict between Nature Reserves and Indigenous Land - Free, Prior, and Informed Consultation - Environmental Impact - Restitution and Reparation', *American Journal of International Law* 111, no. 1 (2017): 154.

between human rights and environmental law can be detrimental to Indigenous communities by essentializing their identities.[820]

Despite these differing views, both Petermann and Lixinski advocate for a substantive assessment of the legitimate aim. One that does not simply accept states' justification but instead analyzes the supporting documents presented and the lived realities of the communities. Consequently, when comparing the Ogiek case from the ACtHPR and the Kaliña and Lokono from the IACtHR, the ACtHPR relied on party-submitted reports regarding environmental conservation and degradation. In contrast, the IACtHR did not evaluate the actual environmental degradation of the area. Despite this divergence and the criticism of the IACtHR's approach, the acceptance of environmental protection as a legitimate aim is recognized across jurisdictions, including the ECtHR case law, as discussed in the preceding subsection. This reflects the growing concern and potential tension between housing and environmental rights.

In cases concerning state concessions based on economic interests, the analysis of the legitimacy criterion is less emphasized. The ACmHPR was the only body that issued a decision on the interferences arising state concession in the African system but did not evaluate the legitimacy in its case law.[821] In one case, it affirmed the state failed to meet the legitimacy criterion without providing further explanation.[822]

In the Inter-American system, the IACmHR issued two cases: one that combined property and equality provisions under the limitation assessment; and another that considered interferences solely under property through the limitation assessment. In the first case, the IACmHR explained that interferences must serve a "valid public purpose."[823] Although it did

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[820] Lixinski, 'Rights of Indigenous Peoples - Collective Rights - Recognition of Legal Personality - Right to Communal Property - Conflict between Nature Reserves and Indigenous Land - Free, Prior, and Informed Consultation - Environmental Impact - Restitution and Reparation', 154.
[821] *SERAC and CESR v. Nigeria*, ¶¶ 55–63; *Endorois v. Kenya*, ¶¶ 267–268.
[822] *Endorois v. Kenya*, ¶¶ 267–268.
[823] *Mary and Carrie Dann v. United States*, ¶ 144.

not explicitly reference the legitimacy criterion, the IACmHR held that "encouraging settlement and agricultural development"[824] on Indigenous land was unacceptable, as the state extinguished the Indigenous community's right to property.[825] In the second case, the IACmHR clarified that interferences must pursue public utility or social interest.[826] It concluded that the legislations in question did, in fact, aim to protect Indigenous and Tribal communities.[827]

In the IACtHR's case law, the analysis of the legitimate aim remains similarly underdeveloped. In nearly all cases involving state concession under the right to property, the IACtHR did not evaluate this criterion.[828] Two cases stand out. In Saramaka People v. Suriname, a landmark case on state concession, the IACtHR affirmed that "if the state wants to restrict, legitimately, the Saramaka's right to communal property, it must [fulfill the safeguards]."[829] In this case, Suriname had not enacted legislation recognizing the community's right to collective property. Regarding this legislation gap, the state argued that it could not extend such protections due to the complexity of the matter and the risk of discriminating against the rest of the population.[830] Although not explicitly framed in these terms, this reasoning reflected a formal equality approach. The IACtHR rejected the first justification, emphasizing that the complexity of an issue did not relieve a state of its international obligations. Moreover, international law supports a concept of equality that permits individuals in different circumstances to be treated unequally. Accordingly, special measures may be required to safeguard the survival of Indigenous and Tribal communities, such as legislation granting them the right to collective property. Suriname failed to implement such measures.[831] Consequently, the IACtHR applied the concept of substantive equality to require measures from the state,

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[824] *Mary and Carrie Dann v. United States*, ¶ 145.
[825] *Mary and Carrie Dann v. United States*, ¶ 145.
[826] *Isseneru v. Guyana*, ¶ 199.
[827] *Isseneru v. Guyana*, ¶ 248.
[828] *Kichwa v. Ecuador*; *Punta Piedra Garifuna v. Honduras*; *Kaliña and Lokono v. Suriname*; *Maya Q'eqchi' Agua Caliente v. Guatemala*; *Garifuna Community of San Juan and Its Members v. Honduras*; *Rama and Kriol People, Afro-Criollo Indigenous Community of Bluefields and others v. Nicaragua*.
[829] *Saramaka v. Suriname*, ¶ 143.
[830] *Saramaka v. Suriname*, ¶¶ 102–103.
[831] *Saramaka v. Suriname*, ¶ 103.

rejecting formal equality as a valid justification for inaction. Furthermore, in case concerning a bridge construction, the IACtHR acknowledged the project's significance for international trade and the national economy but again refrained from assessing the legitimacy of the aim, concentrating instead on consultation.[832] Taken together, this limited engagement with states' justification suggests that interferences arising from state concession receive less judicial scrutiny than those related to the creation of nature reserves. However, the incorporation of substantive equality into the legitimacy criterion strengthened the analysis.

Lastly, in cases concerning third-party encroachment of ancestral land, the analysis of the legitimate aim is even more limited. The ACmHPR, in Nubian Community in Kenya v. The Republic of Kenya (the Nubian case), stated that interferences must aim at "public or general interest"[833] in relation to the right to property, despite Article 14 referring to "public need or general interest." Regardless of the wording, the ACmHPR found that the states' justification for the eviction—that the land belongs to the state and the community is squatting there—did not fall under public interest.[834]

In the Inter-American system, the IACmHR did not reference the legitimacy criterion, instead focusing on proportionality.[835] In one case, the IACmHR focused on the state's refusal to grant special protection to Indigenous and Tribal communities. It argued that protecting collective property would be contrary to equality, as it would treat the rest of the population unequally.[836] In other words, the state used formal equality to avoid its international obligations.

The IACmHR responded to such argument through non-discrimination and substantive equality. It reinforced that states must ensure equality among people, and in cases involving Indigenous and Tribal peoples, they must "adopt special and specific measures aimed at

[832] *Lhaka Honhat v. Argentina*, ¶ 182.
[833] *Nubian v. Kenya*, ¶ 153.
[834] *Nubian v. Kenya*, ¶ 165.
[835] *Isseneru v. Guyana*, ¶¶ 188–193.
[836] *Isseneru v. Guyana*, ¶ 183.

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protecting, favoring and improving the exercise of [their] human rights."[837] The need for special measures stems from the pattern of marginalization, 'vulnerability', and discrimination Indigenous and Tribal experienced by the communities. Consequently, states must "take positive, effective measures"[838] toward their right to collective property, which is compatible with the ACHR. Notably, the IACmHR clarified that special measures are not discriminatory against the rest of the population since individuals in different circumstances can be treated unequally, which ensures the survival of communities. Failing to take special measures, by contrast, leads to discriminatory treatment. In this case, the state failed to create special measures to grant "prompt and secure access to legal property,"[839] thereby discriminating against the community.

As for the IACtHR, most cases did not mention legitimacy.[840] In Yakye Axa Indigenous Community v. Paraguay, the IACtHR briefly mentioned that the justification must fall under the public interest, which is a collective interest.[841] Moreover, in Sawhoyamaxa Indigenous Community v. Paraguay, the IACtHR explained, without explicitly referencing the legitimate aim criterion, that land ownership by third parties, the lack of productivity of the land by Indigenous people, and bilateral agreements for land use are not valid justifications for denying Indigenous people the return of their ancestral property.[842] In other words, these three justifications are not accepted as grounds to avoid the obligation to return the land free from third parties.

To sum up, the legitimate aim most frequently discussed in the cases examined in this subsection is environmental protection in relation to the creation of nature reserves. This aim is examined in depth by the ACmHPR, ACtHPR and the IACtHR. The analysis on environmental

[837] *Isseneru v. Guyana*, ¶ 184.
[838] *Isseneru v. Guyana*, ¶ 186.
[839] *Isseneru v. Guyana*, ¶ 187.
[840] *Xákmok Kásek v. Paraguay*; *Kuna and the Emberá v. Panama*; *Punta Piedra Garifuna v. Honduras*; *Garífuna Community of Triunfo de la Cruz and Its Members v. Honduras*; *Kaliña and Lokono v. Suriname*; *Lhaka Honhat v. Argentina*.
[841] *Yakye Axa v. Paraguay*, ¶ 145.
[842] *Sawhoyamaxa v. Paraguay*, ¶¶ 138–140.

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protection carries significant implications for the broader discussion on limitations. First, heightened scrutiny of states' justifications becomes possible, as these regional bodies critically assessed the reasoning provided by states for the removal of communities. Second, non-discrimination and substantive equality were incorporated into the analysis of the legitimacy criterion, thereby enabling more rigorous scrutiny and imposing additional requirements on states. Third, the limitation assessment and non-discrimination frameworks overlap in their substance, reflecting similar legal reasoning. In contrast, in cases involving state concessions and third-party encroachment, the analysis of the legitimacy criterion is less developed, with some bodies rejecting the justifications provided, albeit with less detailed reasoning than in cases involving the creation of nature reserve.

1.2.3. Proportionality

The proportionality of the measure is the primary focus of the analysis of the interference in cases involving Indigenous and Tribal communities. As mentioned in the introduction of this subsection, the bodies differ in their choice of language. For instance, the early cases of the ACmHPR focus on states' obligations, which I consider an implicit limitation assessment, while the IACtHR mentions the criteria for the limitation assessment without explicitly clarifying their content. However, the language chosen by the regional bodies does not influence the comparison in this subsection because the content of the proportionality analysis is similar throughout the jurisprudence, focusing on non-negotiable obligations and the balancing exercise. As the proportionality analysis' focus differs based on the type of interference, I analyze proportionality first in cases concerning the creation of nature reserves, then in relation to state concessions, and lastly in cases of third-party encroachment on the land.

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1.2.3.1. The creation of nature reserves

The ACmHPR, ACtHPR, and the IACtHR have issued decisions regarding the creation of reserves. The African bodies explicitly reference and assess proportionality analysis, while the IACtHR refers to it without clearly articulating its content. Nevertheless, all three bodies emphasize the impact of the interfering measure, particularly through the non-negotiable obligations of conducting consultation and providing compensation.

In the African system, the ACmHPR undertook a detailed assessment of proportionality. In the Endorois case, it explained that interfering measures must be "proportionate to a legitimate need and should be the least restrictive measure possible."[843] In this case, the state failed the proportionality analysis because i. alternative means could have been employed to achieve the aim; ii. state inaction rendered the right to property illusory, destroying the essence of the right;[844] and ii. the use of force to carry out the eviction constituted a more severe violation greater violation.[845] As for the ACtHPR, in the Ogiek case, it found that the eviction was neither necessary nor proportionate to the aim, without offering further explanation.[846] In addition to the lack of necessity and proportionality, the ACtHPR clarified that the absence of consultation with the Ogiek people and the failure to respect "conditions of expulsion in the interest of public need"[847] violated their right to property.

Before both African bodies, the least restrictive measure played a role, demonstrating that the eviction was not an appropriate measure of achieving environmental preservation. While the ACmHPR focused on essence of the right and violence perpetrated by the state, the ACtHPR focused on the absence of consultation and states' behavior during removal. As explained under the legality criterion in this subsection, the ACmHPR addressed the lack of

[843] *Endorois v. Kenya*, ¶ 214.
[844] *Endorois v. Kenya*, ¶¶ 214–215.
[845] *Endorois v. Kenya*, ¶ 218.
[846] *Ogiek v. Kenya*, ¶¶ 129–130.
[847] *Ogiek v. Kenya*, ¶ 131.

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consultation under that criterion rather than under proportionality. Consequently, regardless of under which criteria these elements are discussed, they emerge within the limitation assessment.

In the Inter-American system, the creation of nature reserves was assessed exclusively by the IACtHR. In Kaliña and Lokono Peoples v. Suriname, the IACtHR conducted the most comprehensive assessment of proportionality analysis. It referred to the limitation assessment, including necessity and proportionality.[848] Although neither necessity nor proportionality were conceptually defined in the case, the IACtHR evaluated the impact of the interfering measure. It explained that despite lacking competence to hear on the creation of nature reserve itself, it was possible to rule on the right to seek restitution of parts of the Indigenous land. In such cases, the state must balance the indigenous' rights to collective property against the aim of environmental protection.[849]

To determine whether the right to property had been interfered with, the IACtHR identified three guarantees: "effective participation, access and use of their traditional territories, and the possibility of receiving benefits from conservation."[850] To fulfill these guarantees, states must establish mechanisms that uphold "the right to a dignified life and to cultural identity."[851] In nature reserves, states maintain the responsibility of administering them, while still implementing the three guarantees. In one of the reserves created, the IACtHR held that the state failed to meet the participation guarantee, as it did not demonstrate that the communities were involved in its creation. Combined with the right to participate in government, the IACtHR concluded that Suriname failed to establish mechanisms ensuring effective participation, a requirement rooted in public interest and Indigenous rights.[852] As a result, the absence of participatory mechanisms negatively affected the Indigenous communities' right to collective property.

[848] *Kaliña and Lokono v. Suriname*, ¶ 165.
[849] *Kaliña and Lokono v. Suriname*, ¶¶ 165–168.
[850] *Kaliña and Lokono v. Suriname*, ¶ 181.
[851] *Kaliña and Lokono v. Suriname*, ¶ 181.
[852] *Kaliña and Lokono v. Suriname*, ¶¶ 190–197.

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In other cases, the IACtHR's primary focus was on effective participation, though with less detailed analysis as in the Kaliña and Lokono case. In one case, the IACtHR emphasized that effective participation must be "in accordance with [the communities'] customs and traditions,"[853] particularly because their survival cannot be denied.[854] In that instance, the state failed to address Indigenous land claims and to inform them about the plans to create the reserve, thereby impacting their lifestyle. Regarding the former, the IACtHR noted that the unconstitutional claim filed against the creation of the reserve was never addressed.[855] Consequently, this case raises two fundamental points. First, substantive equality is essential to ensure a proportionate measure: i. participation must respect Indigenous traditions, and ii. their survival must not be compromised. In other words, proportionality incorporates substantive equality to ensure interferences do not undermine Indigenous rights. Second, judicial review is critical to uphold the proportionality of measures, as judicial authorities should have adjudicated the matter.

In another case, the state neither ensured nor respected the community's right to participate in the creation of a park, and the community lacked access to the information necessary for effective participation. However, when the state later initiated a "process of cadastral regularization,"[856] it included community leaders, thereby ensuring their right to consultation.[857] As such, while the creation of the park violated the right to collective property, but the regularization did not.

Regarding the effective participation requirement, MacKay explains that participation and consultation are equivalent concepts. He argues that focusing on participation or consultation leads to procedural rather than substantive guarantees, and thus advocates a shift

[853] *Xákmok Kásek v. Paraguay*, ¶ 157.
[854] *Xákmok Kásek v. Paraguay*, ¶ 157.
[855] *Xákmok Kásek v. Paraguay*, ¶¶ 158–161.
[856] *Garífuna Community of San Juan and Its Members v. Honduras*, ¶ 132.
[857] *Garífuna Community of San Juan and Its Members v. Honduras*, ¶¶ 130–132.

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toward consent.[858] In this regard, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes that states must obtain the free, prior and informed consent of Indigenous groups when undertaking reallocations or legislative or administrative measures that impact them, through processes of consultation and cooperation.[859] The International Labour Organization (ILO) Convention 169, ratified by several Latin American states, stipulates that consultations must generally aim to achieve agreement or consent. Reallocations may occur only in exceptional circumstances and only following free and informed consent—and if consent is not obtained, the Convention requires public hearings with representation from the affected communities.[860]

Despite the emphasis on consent by international Indigenous rights instruments, only the ACmHPR has explicitly addressed it under the legality criterion.[861] In contrast, the ACtHPR and the IACtHR have not analyzed the issue of consent. In the Ogiek case, the applicants argued that the state did not obtain their consent for their removal; however, the ACtHPR focused on participation.[862] Similarly, the IACtHR interpreted the absence of consultation and participation as negatively impacting Indigenous property rights, without engaging with the question of consent.

Overall, the proportionality analyses in these cases focus on non-negotiable obligations, such as the conduct of consultation or participation and judicial review. The balancing exercise considered the behavior of states' authorities, such as the use of force, and the respect for Indigenous traditions during consultation processes, as well as their survival. This final dimension reflects substantive equality, aiming to amplify Indigenous voices and accommodate their cultural practices.

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[858] Fergus MacKay, 'The Case of the Kalina and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence, and Mutual Reinforcement', *Erasmus Law Review* 11, no. 1 (2018): 40b.
[859] Articles 10 and 19 UNDRIP.
[860] Articles 6 and 16 ILO Convention 169.
[861] *Endorois v. Kenya*, ¶¶ 225–226.
[862] *Ogiek v. Kenya*, ¶ 131.

1.2.3.2. State concessions

The ACmHPR, IACmHR and the IACtHR have adjudicated cases involving interferences arising from state concessions. While the ACmHPR initially did not reference proportionality in its earlier cases, it began to do so later. As for the Inter-American bodies, they refer to proportionality but do not explicitly explain what it entails. For this reason, in most cases, the emphasis on the impact of measures guides the interpretation of proportionality.

In the African system, the ACmHPR earlier cases provide less explanation of standards than more recent ones. This stems from the lack of "normative content of ESCR rights"[863] in the early 2000s. Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, known as the Ogoni case, was the first ESCR-related decision in which the ACmHPR expanded the scope of protection of the ACHPR to include the rights to housing and shelter.[864] The adjudication of the removal occurred under the right to housing and the right to dispose of wealth and natural resources, in contrast with the previous part that discussed solely property.

Under the right to housing, through an implicit limitation assessment, the ACmHPR explained that the obligation to respect encompasses non-destruction and non-obstruction of efforts to rebuild houses, while the obligation to protect requires the state to prevent third-party interferences. In the event of further interference by third parties, legal remedies must be provided. Within this framework, the ACmHPR found that the right to housing includes "a roof over one's head."[865] In this case, the state destroyed houses and perpetrated violence against the community, violating the right to shelter.[866] Additionally, relying on General Comments No. 4

[863] Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter', 366.
[864] Frans Viljoen, *International Human Rights Law in Africa*, 2nd edn (Oxford University Press, 2012), 327.
[865] *SERAC and CESR v. Nigeria*, ¶ 61.
[866] *SERAC and CESR v. Nigeria*, ¶ 62.

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and No. 7 from the CESCR,[867] the ACmHPR reinforced that states must ensure security of tenure and protection against forced evictions. It concluded that the destruction of houses and prohibition on rebuilding violated the right to housing.[868] Regarding the right to dispose wealth and natural resources, the ACmHPR briefly noted that the government allowed a private oil company and other third parties to destroy land belonging to the Ogoni people. This contravened the obligation to protect, as the state failed to prevent interferences from third parties and "facilitated the destruction of Ogoniland."[869]

In this case, the ACmHPR emphasized non-negotiable obligations, including the provision of legal remedies and the prohibition against the destruction housing. On the question of what the ACmHPR demanded from the state, Pentassuglia argues that the Ogoni case involved not only the destruction of houses, but also the absence of participation and material benefits for the Ogoni.[870] However, although the ACmHPR referred to both elements—participation and benefits—under the rights to health and clean environment, it ultimately centered its analysis on the destruction of homes. It found that the lack of protection against third parties and the destruction of Ogoniland violated these rights.[871] Therefore, the primary violation stemmed from the destruction of houses and land, in breach of the obligation to avoid rendering individuals homeless, as established in General Comment No. 7.[872]

In recent cases, the ACmHPR adopted explicit language regarding proportionality, as it explicitly applied the limitation assessment. In the Endorois case, which also discussed nature reserves, the ACmHPR analyzed interferences with the right to dispose of wealth and natural resources. Referring to the jurisprudence of the IACtHR, the ACmHPR emphasized that the

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[867] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*; *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*.
[868] *SERAC and CESR v. Nigeria*, ¶ 63.
[869] *SERAC and CESR v. Nigeria*, ¶ 58.
[870] Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law* (Martinus Nijhoff Publishers, 2009), 210; Gaetano Pentassuglia, 'Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples' Rights: Some Reflections', *UCL Human Rights Review* 3 (2010): 156.
[871] *SERAC and CESR v. Nigeria*, ¶¶ 53–54.
[872] *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*.

state must "evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community."[873] On the question of proportionality, the ACmHPR found a violation of Article 21 ACHPR due to the absence of consultation, compensation for the removal, and restitution of the land.[874] These constitute non-negotiable obligations required under proportionality. Therefore, both the Ogoni and the Endorois cases emphasized the importance of non-negotiable obligations in analyzing the impact of interfering measures.

In the Inter-American system, the IACmHR decided two cases concerning the removal of Indigenous communities. In the first case, the IACmHR conducted an implicit limitation assessment, jointly analyzing the rights to property, fair trial and equality before the law to assess the interference under the ADRDM. First, regarding property and fair trial, the IACmHR affirmed that the titling and delimitation of Indigenous lands require "fully informed and mutual consent […] of the community as a whole."[875] However, the community was not collectively consulted, and the state did not attempt to engage with them, leading to the extinguishment of their property rights. Moreover, the national courts failed to assess the situation, ignoring the lack of "informed and mutual consent."[876] Here, seeking consent and providing judicial review were central to establishing violations.

Second, the IACmHR analyzed the right to equality under Article II ADRDM. It explained that states may treat individuals distinctively, provided they offer an objective and reasonable justification that furthers a legitimate aim based on the principles of democratic societies, using reasonable and proportionate means.[877] However, without clarifying whether the state failed to meet these requirements, the IACmHR assessed the confiscation of Indigenous land under the right to property. Notably, the IACmHR analyzed the interference

[873] *Endorois v. Kenya*, ¶ 267.
[874] *Endorois v. Kenya*, ¶ 268.
[875] *Mary and Carrie Dann v. United States*, ¶ 140.
[876] *Mary and Carrie Dann v. United States*, ¶ 141.
[877] *Mary and Carrie Dann v. United States*, ¶ 143.

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based on the criteria established in the national constitution, rather than on the specific limitation clause in Article XXIII. The national constitution stipulated that removals may only occur if the state provides notice, just compensation, and judicial review.[878] The state had created an Indian Claims Commission to decide on property matters; however, it lacked the competence to extinguish property rights of Indigenous communities—a power reserved for national courts. Consequently, the state failed to comply with the constitutional requirements, resulting in a violation of the right to property.[879]

Overall, the IACmHR held that the rights to equality and property were violated due to the state's failure to respect the interests of the Indigenous community.[880] Additionally, the violation stemmed from the absence of consultation, which encompasses consent, compensation, and judicial review—as national courts did not review the merits of the case. Hence, despite the narrow focus on the limitation assessment prescribed by the national constitution, the IACmHR's reasoning aligns with the jurisprudence of other international bodies, encompassing similar non-negotiable obligations.

In a second case concerning removal of Indigenous people from their land due to state concessions, the IACmHR assessed the matter exclusively based on the right to property, applying the limitation assessment framework. Before addressing the interference, the IACmHR outlined the standards governing the use of natural resources and ancestral territories. It established that states must refrain from interfering with Indigenous rights, including third-party interferences. Consequently, states are obliged to recognize their rights and protect these rights, particularly against business,[881] as both states and non-state actors "could affect the integrity of the land and natural resources."[882] To protect these rights, the IACmHR identified four safeguards: compensation, real participation, reasonable benefits, and environmental and

[878] *Mary and Carrie Dann v. United States*, ¶ 144.
[879] *Mary and Carrie Dann v. United States*, ¶ 144.
[880] *Mary and Carrie Dann v. United States*, ¶ 145.
[881] *Isseneru v. Guyana*, ¶ 197.
[882] *Isseneru v. Guyana*, ¶ 198.

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social impact assessments.[883] While compensation is explicitly required under Article 21(2) ACHR, the additional safeguards are essential due to the "special relationship between Indigenous people and their territory,"[884] which is crucial for their survival. The inclusion of safeguards, grounded in that special relationship, promotes substantive equality, as it advances the specific needs of Indigenous communities and ensures their continued existence.

Regarding the content of each safeguard, the IACmHR clarified them throughout its case law. Beginning with consultation, it must be "prior, free and informed,"[885] and must include constant participation of the Indigenous and Tribal communities through their own mechanisms. This duty cannot be delegated to the company exploiting the land. If a project affects the survival of the communities, states must obtain "prior, free and informed consent."[886] Notably, the IACmHR emphasized that consent is only required in extreme cases of interferences.[887] However, in the preceding case, consent was deemed necessary throughout all processes involving Indigenous land.

Furthermore, the impact assessments must be conducted by experts under the supervision of the state. These assessments must occur before the commencement of the project, be carried out by independent entities, consider cumulative impacts, and include affected individuals. The participation of communities in the impact assessment differs from the safeguard of consultation, as the latter encompasses a wider scope. Finally, Indigenous and Tribal individuals must receive a reasonable benefit from the project, and this benefit must be defined with their participation.[888]

In this case, the IACmHR compared the existing legislation with the Inter-American standards. For small- and medium-scale mining projects, the law exhibited four shortcomings:

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[883] *Isseneru v. Guyana*, ¶ 198.
[884] *Isseneru v. Guyana*, ¶ 200.
[885] *Isseneru v. Guyana*, ¶ 201.
[886] *Isseneru v. Guyana*, ¶ 202.
[887] *Isseneru v. Guyana*, ¶ 202.
[888] *Isseneru v. Guyana*, ¶¶ 201–204.

no requirement for consultation with communities; the delegation of consultation, consent, benefit-sharing decisions to private companies; state failure to conduct the legally mandated impact assessment; and lack of state oversight, leaving companies solely responsible for respecting the environment and the communities. For large-scale projects, there was no real consent requirement, as the state retained the power to override communities' refusal and approve the project.[889] As a result, the state failed to uphold all required safeguards.

Although the IACmHR did not explicitly use the term 'proportionate' in this case, the three safeguards—consultation, impact assessment, and benefit-sharing—are designed to ensure that mining projects do not negatively impact the Indigenous and Tribal communities. Accordingly, they consist of non-negotiable obligations.

After discussing these safeguards, the IACmHR further analyzed the issue of untitled Indigenous lands. It explained that such safeguards must be in place even when the territory is not formally titled. Before granting a concession, states must first demarcate, limit and title lands, ensuring consultation and participation.[890] In this case, beyond failing to title the land, the state also granted private parties the right to exploit it.[891] In assessing specific mining concessions, the IACmHR concluded that not only did the state fail to meet the aforementioned safeguards, but national courts also failed to assess the underlying conflict of rights, which includes the importance of the land and resources for the community's survival. Instead, the high court prioritized economic interests over those of the Indigenous population.[892]

This part of the case adds two layers to the discussion. First, the IACmHR calls for a balancing exercise at the national level. Such balancing must incorporate the significance of the land for the community and their survival, thereby advancing substantive equality—as the specific needs of the community must be considered. Consequently, substantive equality

[889] *Isseneru v. Guyana*, ¶¶ 248–250.
[890] *Isseneru v. Guyana*, ¶ 252.
[891] *Isseneru v. Guyana*, ¶¶ 252–255.
[892] *Isseneru v. Guyana*, ¶ 259.

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heightens the scrutiny applied to the interference. Second, this case reinforces the earlier finding that judicial review (a non-negotiable obligation) is crucial in cases of interference, which is present in other international bodies' jurisprudence.

State concession was also assessed by the IACtHR under the right to property. Saramaka People v. Suriname is the landmark case on this topic, in which the IACtHR established the rules governing interferences. The IACtHR explained that natural resources within ancestral land are included in the right to property. However, this right is not absolute and is subject to restrictions—including the exploitation of said resources. While only referencing necessity and proportionality, the IACtHR clarified that in cases involving ancestral lands, the limitation assessment must analyze whether the interference denies their lifestyle in a manner that impacts their survival.[893] This consideration forms part of the proportionality analysis.[894] To ensure that interferences do not deny the survival of communities, three safeguards must be guaranteed: effective participation, reasonable benefits and an impact assessment of the environment and social consequences of the project.[895]

The IACtHR elaborated on each of these safeguards. Consultation entails the effective participation of the communities in accordance with their own customs. It must begin prior to the granting of any concession and must include information on the risks involved. In the context of large development projects, the state must obtain "free, prior and informed consent."[896] Benefit-sharing aligns with Article 21(2) ACHR, which prescribes compensation in cases of limitations. The amount must be just, meaning a reasonable share of benefits from the projects.[897] Regarding the impact assessment, it must be conducted by "independent and technically capable entities, with the State's supervision."[898] In the Saramaka case, the IACtHR

[893] *Saramaka v. Suriname*, ¶¶ 126–128.
[894] Thomas Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', *University of Pennsylvania Journal of International Law* 35, no. 1 (2013): 153.
[895] *Saramaka v. Suriname*, ¶ 129.
[896] *Saramaka v. Suriname*, ¶ 134.
[897] *Saramaka v. Suriname*, ¶ 139.
[898] *Saramaka v. Suriname*, ¶ 129.

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concluded that Suriname had failed to meet all safeguards in relation to logging concessions,[899] and small-scale gold mining projects.[900] Although the IACtHR did not explicit use the language of proportionality, it found that the absence of these safeguards impacted the Indigenous' right to property negatively.

After the Saramaka case, the IACtHR adjudicated numerous cases involving state concessions in Indigenous and Tribal lands. These decisions follow the landmark case, adding nuanced interpretation to the safeguards. Most cases centered on the consultation safeguard, particularly on is absence. In one case, the IACtHR emphasized that consultation must be guaranteed through various means, including legislation. Given the special relationship between communities and their ancestral territory, states are required to adopt special measures to ensure their rights.[901] Consequently, states must uphold substantive equality, which is incorporated into the consultation safeguard. However, as pointed out by MacKay, the IACtHR does not analyze the survival aspect. In his perspective, the mere fact that the mining would have affected the survival of the community was enough to consider the restriction impermissible,[902] which the IACtHR did not engage with in its cases.

Two cases stand out on this point. First, in Kichwa v. Ecuador, the IACtHR briefly acknowledged that the right to cultural identity, as part of the right to property, aligns with the non-discrimination principle,[903] although it did not incorporate this concept its assessment. In Maya Q'eqchi' Agua Caliente, the violation of adequate consultation stemmed from the state's failure to respect the community's customs and organization. The IACtHR determined that the lack of adequate consultation constituted discrimination.[904] In this case, non-discrimination was incorporated, much like substantive equality, to intensify the scrutiny of the interference.

[899] *Saramaka v. Suriname*, ¶¶ 147–154.
[900] *Saramaka v. Suriname*, ¶¶ 155–157.
[901] *Kichwa v. Ecuador*, ¶¶ 166–171.
[902] MacKay, 'The Case of the Kalina and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence, and Mutual Reinforcement', 40a.
[903] *Kichwa v. Ecuador*, ¶ 213.
[904] *Maya Q'eqchi' Agua Caliente v. Guatemala*, ¶ 266.

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However, also like substantive equality, most cases have not engaged with the concept in a meaningful depth.

Moreover, consultation must be prior, appropriate, accessible, informed, conducted in good faith to reach an agreement, and accompanied by an environmental impact assessment.[905] Regarding the final requirement, Lixinski criticizes the IACtHR's inclusion of the environmental and social impact assessment safeguard within the consultation safeguard. He argues that this conflation of safeguards results in a lowering of the consultation threshold.[906]

In another case, the IACtHR clarified that maintenance projects do not require consultation at every stage; otherwise, it would impose "an unreasonable or excessive understanding of State's obligations."[907] However, for construction projects, consultation with affected Indigenous peoples is essential to prevent negatively impacting their survival, a requirement the state failed to fulfill.[908]

Beyond the content of this safeguard, consultation is also closely linked to judicial review. In one case, relying on the national Constitutional Court's analysis of the consultation safeguard, the IACtHR determined that the state had not conducted an adequate consultation process with the Indigenous community regarding mining concessions.[909] Furthermore, one crucial aspect not addressed by the IACtHR is the need for consent, even when both the national constitution and the ILO Convention 169 mandate it.[910] Besides the Saramaka case, the only other case in which consent was assessed is Rama and Kriol People, Afro-Criollo Indigenous Community of Bluefields and others v. Nicaragua. In this case, the IACtHR affirmed that consent is intrinsically linked with the consultation process. Therefore, if the consultation was

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[905] *Kichwa v. Ecuador*, ¶ 178.
[906] Lixinski, 'Rights of Indigenous Peoples - Collective Rights - Recognition of Legal Personality - Right to Communal Property - Conflict between Nature Reserves and Indigenous Land - Free, Prior, and Informed Consultation - Environmental Impact - Restitution and Reparation', 153.
[907] *Lhaka Honhat v. Argentina*, ¶ 179.
[908] *Lhaka Honhat v. Argentina*, ¶¶ 180–183.
[909] *Maya Q'eqchi' Agua Caliente v. Guatemala*, ¶¶ 262–284.
[910] *Kichwa v. Ecuador*, ¶ 185; *Maya Q'eqchi' Agua Caliente v. Guatemala*, ¶ 275.

inadequate, so was the consent, even if the state and communities reached an agreement.[911] Nonetheless, scholars have observed that the IACtHR often overlooks consent, focusing predominantly on the conduct of consultation and participation.[912]

Although the IACtHR occasionally references consent as a vital component of consultation under the UNDRIP and the ILO Convention 169, its jurisprudence rarely engages with the concept substantively. The ILO Convention 169 serves as the source of inspiration for the IACtHR's case law.[913] It generally requires consent through consultation as the general rule for interferences.[914] The UNDRIP goes further, explicitly stating that "projects affecting [Indigenous] lands or territories and other resources"[915] must involve consultation and cooperation to obtain consent. Consequently, the IACtHR's limited engagement with consent reflects a lower threshold for consultation than what is envisioned by international documents on Indigenous rights.

The other two safeguards—benefit-sharing and impact assessment—receive limited attention in the case law. While none of the decisions following the Saramaka case have expanded the concept of benefit-sharing, one case has addressed the issue of environmental and social impact assessment. In Kaliña and Lokono, the IACtHR confirmed that both assessing and monitoring the impact of concession activities must be conducted by the state. Although the company undertook rehabilitation measures in the mining area, they proved to be insufficient. Moreover, the state is obligated to protect Indigenous and Tribal territories and prevent potential damages. In this case, as a result of the mining concession, the state failed to

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[911] *Rama and Kriol People, Afro-Criollo Indigenous Community of Bluefields and others v. Nicaragua*, ¶¶ 275-282.
[912] Lixinski, 'Rights of Indigenous Peoples - Collective Rights - Recognition of Legal Personality - Right to Communal Property - Conflict between Nature Reserves and Indigenous Land - Free, Prior, and Informed Consultation - Environmental Impact - Restitution and Reparation', paras 153–154; MacKay, 'The Case of the Kalina and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence, and Mutual Reinforcement', 40b–41a.
[913] For instance, in the Saramaka case, the IACtHR explained that collective property rights derive from the ILO Convention 169. See: *Saramaka v. Suriname*, ¶¶ 92–93.
[914] Articles 6 and 16 ILO Convention 169.
[915] Article 32 UNDRIP.

conduct the required impact assessment and did not mitigate the damage to the land.[916] Therefore, an impact assessment must go beyond a report written prior to the project; it should be a holistic evaluation that continues throughout the duration of the project to safeguard the survival of the Indigenous communities.

Based on the aforementioned analysis, the IACtHR analyzes three safeguards in cases involving state concessions: consultation, sharing benefit, and impact assessment. The most significant safeguard is the consultation of Indigenous and Tribal communities regarding projects, with consent being included in some cases. Notably, the consultation safeguard has incorporated substantive equality through various considerations, such as the communities' survival. The other two safeguards are often mentioned but seldom discussed in detail. These safeguards represent non-negotiable obligations under the proportionality analysis, as they mitigate the negative impact on communities, including threats to their survival.

Comparatively, the explicit content of proportionality is not laid out by the regional bodies. However, they all focused on the impact of interferences deriving from state concessions. The ACmHPR, IACmHR and the IACtHR emphasize non-negotiable obligations throughout their jurisprudence, with the Inter-American bodies referring to them as safeguards. The common non-negotiable obligations recognized by these bodies are the conduct of consultation, provision of compensation (sharing benefits), and conduct of judicial review. Consultation is by far the most thoroughly discussed obligation.

One notable discrepancy in the jurisprudence is the inconsistency regarding consent. While the ACmHPR did not reference consent at all, the IACmHR at times demanded it and in at other times mentioned it only in passing. As for the IACtHR, despite its extensive reliance on the ILO Convention 169, consent is referenced in very few cases and substantively assessed in even fewer. On this issue, Antkowiak argues that the absence of consent weakens the

[916] *Kaliña and Lokono v. Suriname*, ¶¶ 214–222.

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consultation safeguard, allowing most interferences deriving from state concession to pass as permissible limitations.[917] By contrast, others contend that viewing consent as a veto is counterproductive to real participation. Instead of emphasizing consent, they advocate for a focus on government accountability.[918] In practice, the lack of discussion on consent has not impacted the findings of the regional bodies, as states have been found in violation of the ACHPR and the ACHR regardless. However, Antkowiak has a point: if Indigenous rights are to be protected, consent must be demanded and analyzed. Otherwise, Indigenous right to collective property becomes illusory.

The balancing exercise is less prominent in cases regarding state concession. The regional bodies are less concerned with aspects to be balanced than with the concrete actions undertaken by states. The Inter-American bodies incorporate balancing in two ways. First, they require national courts to conduct the balancing exercise when assessing conflicts between rights. Second, substantive equality and non-discrimination have been incorporated into the analyses of interferences. These two obligations introduced additional considerations, such as the survival of communities and special measures to ensure their rights, which must be adopted and considered when determining whether the interference is proportionate. Consequently, they heighten the scrutiny of the assessment and ensure that the specific needs of Indigenous and Tribal communities are properly considered.

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1.2.3.3. Third parties' encroachment

The ACmHPR, IACmHR, and the IACtHR have ruled on third-party encroachments on ancestral lands. While the IACmHR references proportionality analysis, the ACmHPR and the IACtHR do not explicitly elaborate on the content of proportionality. Consequently, the focus is on the impact of the measures.

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[917] Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', 165–70.
[918] S. James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', *University of Toronto Law Journal* 67, no. 4 (2017): 454–55.

In the African system, the ACmHPR ruled on third-party interferences in the Nubian case. The ACmHPR focused on the elements that the state failed to guarantee. In this case, the community lacked legal title due to colonial modifications of the territory. The ACmHPR emphasized that states must take steps to ensure the legal security of tenure, asserting that the complexity of the issue cannot justify the persistent insecurity experienced by the community. The insecurity of their title led to constant interference with their property rights.[919] The recurring threat of evictions faced by the community was described as "one of the worst forms of injustices."[920] Relying on General Comment No. 7 from the CESCR,[921] the ACmHPR found that the state had violated the right to property by failing to provide alternative accommodation, compensation, or notice to the community.[922] Although the proportionality analysis was not explicitly referenced, the requirements demanded by the ACmHPR reflect an assessment of the negative impact of the measure, thereby indirectly assessing proportionality. The provision of security of tenure, alternative accommodation, compensation, and notice represent the non-negotiable obligations demanded by the ACmHPR.

In the Inter-American system, the IACmHR assessed the interference through explicit proportionality analysis. Returning to the discussion on the state justification to interfere—namely, the impossibility to create special measures for Indigenous communities—the IACmHR reinforced the discriminatory nature of legislation that did not protect Indigenous rights. It clarified that "any legal distinction that privileges the property rights of third parties over the property rights of indigenous peoples is incompatible with [the ADRDM]."[923] If the state has granted titles of Indigenous land to non-Indigenous individuals, the community has the right to restitution or alternative lands of equal size and quality. The difference between

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[919] *Nubian v. Kenya*, ¶ 160.
[920] *Nubian v. Kenya*, ¶ 163.
[921] *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*.
[922] *Nubian v. Kenya*, ¶ 165.
[923] *Isseneru v. Guyana*, ¶ 188.

restitution and alternative lands rests on the good faith of non-Indigenous individuals. If good faith is present, the community must receive alternative lands.[924]

Furthermore, the IACmHR explained that states must conduct an assessment when conflicts of rights occur, which must consider the impact the interference would have on the Indigenous community, their survival, and their cultural identity.[925] In this decision, the IACmHR confirmed the significance of judicial review and the application of proportionality analysis at the national level. Such proportionality must incorporate substantive equality, where considerations of survival and cultural identity are part of the assessment.

In this case, the IACmHR found that the national legal system violated human rights standards for two reasons. The first reason relates to the assessment of the conflict of rights. The national law prescribed greater weight to third party interests in cases of conflict with Indigenous rights. Since judges must weigh cases on a case-by-case basis, the IACmHR found that the third-party interference was disproportionate: the judicial review failed to consider the importance of the land to Indigenous communities.[926] The second reason was the lack of provision of land restitution for Indigenous communities. The IACmHR explained that the law failed to mandate the return of ancestral land of Indigenous peoples, regardless of the good or bad faith of third parties. Moreover, it did not require judges to assess such cases.[927] Hence, the lack of proper judicial review and the absence of restitution violated the collective right to property of the community.

Stemming from this disproportionate interference, the IACmHR found that the system in place resulted in racial discrimination, as Indigenous communities received less protection of their rights when compared to non-Indigenous people. According to the IACmHR, the right of Indigenous peoples to property was "subordinated in its extent to those of private titles and

[924] *Isseneru v. Guyana*, ¶ 189.
[925] *Isseneru v. Guyana*, ¶ 189.
[926] *Isseneru v. Guyana*, ¶¶ 190–191.
[927] *Isseneru v. Guyana*, ¶ 192.

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economic interests,"[928] was not perceived as a right, and depended on a "unilateral and overbroad decision-making process"[929] to be formalized. Moreover, since third parties' property rights did not suffer from these limits, the IACmHR found that their rights had an absolute character, which violated the obligation to non-discrimination.[930] This case is an example of the incorporation of substantive equality and non-discrimination into the limitation assessment, thereby heightening the level of analysis and adding aspects, such as the lack of special measures, that would be overlooked. The non-negotiable obligations in this case include the provision of restitution or alternative lands, as well as the conduct of judicial review, while the balancing exercise focuses on balancing conducted at the national level, the good faith of individuals, and non-discrimination and substantive equality obligations.

The IACtHR also adjudicated third-party encroachments on land, aiming to limit the "ability to contract over the lands of indigenous population."[931] Interferences in such cases are possible, as the right to property is not absolute, but they must comply with necessity and proportionality.[932] In its jurisprudence, the IACtHR ruled against Paraguay in three cases, in which it established the rules governing interferences in instances of encroachment on Indigenous and Tribal lands. Since these cases overlap, I address the first case decided by the IACtHR and subsequently highlight the differences in the remaining two.

In Yakye Axa Indigenous Community v. Paraguay, the IACtHR clarified that necessity refers to states' measures that "are geared toward satisfying an imperative public interest,"[933] while proportionality requires that states interfere "as little as possible with […] the right."[934] In cases of conflicting rights, states must assess the interference on a case-by-case basis, bearing in mind the restrictions that result from one right prevailing over another. In this evaluation, the

[928] *Isseneru v. Guyana*, ¶ 192.
[929] *Isseneru v. Guyana*, ¶ 192.
[930] *Isseneru v. Guyana*, ¶¶ 192–193.
[931] Gayet, 'The Inter-American Court of Human Rights', 549.
[932] Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press, 2017), 274.
[933] *Yakye Axa v. Paraguay*, ¶ 145..
[934] *Yakye Axa v. Paraguay*, ¶ 145.

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connection between Indigenous and Tribal peoples and the land, together with their dependence on it, must be considered.[935] This special relationship lies at the heart of the collective property and is shaped by the communities' long-standing inhabitation of the land.[936]

Since Indigenous rights do not always prevail over individuals' rights, if, based on "concrete and justified reasons,"[937] the land cannot be returned to the community, the state must provide compensation that reflects the significance of the land to the community.[938] This compensation must be fair, which equates to "prompt, adequate, and effective"[939] compensation. Based on the ILO Convention No. 169, the IACtHR stated that monetary compensation is not the only solution; states must also offer alternative lands, in agreement with the Indigenous communities and in accordance with their own norms.[940] In this case, the interference was disproportionate because the state failed to offer alternative lands to the community.[941] Additionally, Paraguay had not taken steps to ensure the right to property, disregarding the close connection between the community and the land, alongside their traditions, customs, and non-material culture.[942] Therefore, based on this explanation, the non-negotiable obligations consists of the conduct of judicial review and the provision of compensation, while the balancing exercise encompasses proportionality at the national level and substantive equality—which has been incorporated into the limitation assessment.

In the other cases against Paraguay, the IACtHR addressed the interferences slightly differently than in the Yakye Axa case. In Sawhoyamaxa Indigenous Community v. Paraguay, focusing first on the possession of lands, the IACtHR articulated four rules governing possession of Indigenous land. These are: i. possession of land is equivalent to full ownership; ii. such possession entitles the community to request official recognition and registration; iii.

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[935] *Yakye Axa v. Paraguay*, ¶ 146.
[936] Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', 140.
[937] *Yakye Axa v. Paraguay*, ¶ 149.
[938] *Yakye Axa v. Paraguay*, ¶ 149.
[939] Antkowiak and Gonza, *The American Convention on Human Rights: Essential Rights*, 275.
[940] *Yakye Axa v. Paraguay*, ¶¶ 150–151.
[941] *Yakye Axa v. Paraguay*, ¶ 152.
[942] *Yakye Axa v. Paraguay*, ¶¶ 153–155.

lands must be delimited, demarcated, and titled; and iv. the loss of possession or forced removal due to external factors does not extinguish ownership rights, regardless of title, unless "lands have been lawfully transferred to innocent third parties."[943] In such cases, the community has the right to restitution or to alternative lands "of equal extension and quality."[944] The following case, Xákmok Kásek Indigenous Community v. Paraguay, contained only two differences. First, the IACtHR employed the expression "third parties in good faith"[945] to describe individuals who received Indigenous land; and second, the IACtHR recognized the right to restitution or alternative lands as a fifth rule governing possession.[946]

These cases clarify the content of the right to return ancestral land and the obligation to provide alternative lands. In the Sawhoyamaxa case, the IACtHR reaffirmed that restitution of ancestral lands is only extinguished when the community's relationship to the land ceases to exist. If the relationship is disrupted by external factors, such as violence, the right remains intact, as these factors did not allow the community to keep the relationship.[947] Consequently, the denial of access to ancestral land does not eliminate the obligation to restitute the land. Following the Yakye decision, the IACtHR held that states must balance conflicts between Indigenous and non-Indigenous rights.[948]

In the Xákmok Kásek case, the discussion centered on alternative lands. Regarding the quality, the IACtHR stated that the communities' perspective must be considered to establish that the land is of same quality. As for the size, in Paraguay, the legislation established what constituted an adequate size for land. However, the state disregarded its national law when allocating land to the Indigenous community. As a result, the IACtHR concluded that the most appropriate land for the community was its traditional land. In other words, the state should

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[943] *Sawhoyamaxa v. Paraguay*, ¶ 128.
[944] *Sawhoyamaxa v. Paraguay*, ¶ 128.
[945] *Xákmok Kásek v. Paraguay*, ¶ 109.
[946] *Xákmok Kásek v. Paraguay*, ¶ 109.
[947] *Sawhoyamaxa v. Paraguay*, ¶¶ 131–132.
[948] *Sawhoyamaxa v. Paraguay*, ¶ 138.

have returned the land.[949] Notably, without directly mentioning consultation and participation, the IACtHR underscored the importance of including Indigenous communities in the decision-making.

In addition to the limitation assessment conducted, the IACtHR also analyzed the non-discrimination obligation separately. Citing the precedent Yakye, the IACtHR affirmed that Indigenous peoples require effective protection that considers their specific needs and circumstances.[950] Such effective protection belongs to substantive equality. Moreover, the IACtHR stated that states have a "special obligation of protection […] with regard to acts and practices of third parties who, with its tolerance and acquiescence, create, maintain or promote [discrimination]."[951]

The IACtHR found that the lack of legal remedies, the absence of state institutions to promote Indigenous rights, the priority given to private property rights over Indigenous rights (which impacted their cultural identity and subsistence), and the lack of consultation and the failure to consider territorial claims rendered the situation of the community 'vulnerable.' Such a situation constituted *de facto* discrimination.[952] Comparing the non-discrimination framework to the analysis conducted under the limitation assessment framework, there is significant content overlap, and the elements examined are similar. The main difference is the greater emphasis on discrimination under the former, rather than substantive equality. The IACtHR did not use the non-discrimination framework in other cases. In one case where the applicants claimed similar violations to the Xákmok, the IACtHR found that they failed to demonstrate differential treatment and therefore left the analysis for the limitation assessment.[953]

Considering these Paraguayan cases, Correia argues that their core issue lies in the fact that Paraguayan law permits the expropriation of unexploited land, whereas Indigenous

[949] *Xákmok Kásek v. Paraguay*, ¶¶ 118–121.
[950] *Xákmok Kásek v. Paraguay*, ¶¶ 268–170.
[951] *Xákmok Kásek v. Paraguay*, ¶ 271.
[952] *Xákmok Kásek v. Paraguay*, ¶¶ 273–274.
[953] *Kuna and the Emberá v. Panama*, ¶¶ 199–204.

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communities do not follow the same logic of exploitation of the state. In his view, the IACtHR's emphasis on the special relationship between Indigenous peoples and their land should be used to counter the exploitation argument.[954] As Fuentes points out, denying Indigenous communities access to their land threatens their very existence, leading to erosion of their cultural identity.[955] Consequently, substantive equality should be employed to support a comprehensive analysis of interferences, as ancestral lands are necessary for the survival of communities.

The subsequent cases decided by the IACtHR followed the same rules as established in these three Paraguayan cases. Beginning with cases in which non-Indigenous reside in Indigenous land, the IACtHR emphasized that states are obliged "to remove any type of interference on the territory,"[956] thereby freeing the territory of encumbrances. In such situations, states must free the land by a formal procedure, compensating for the improvements made to the land and for the reallocation of the individuals to another place. This obligation arises the moment the state becomes aware of the situation, and the titling of the land is necessary to ensure it is free.[957] Citing General Comment No. 7 from the CESCR,[958] the IACtHR further clarified that, although Indigenous and Tribal territories must be freed, states must still protect the rights of third parties.[959] The IACtHR reaffirmed such finding in another case, where it found that third parties have the right to compensation or indemnification.[960] Accordingly, freeing the Indigenous and Tribal territories must comply with requirements governing evictions.

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[954] Joel E. Correia, 'Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought against Paraguay: Indigenous Land Rights', *Erasmus Law Review* 11, no. 1 (2018): 52b–54a.
[955] Alejandro Fuentes, 'Jurisprudential Developments and Adjudication of Indigenous Peoples' Rights: Culturally Sensitive Systemic Integration of International Human Rights Law in the Americas', *International Journal on Minority and Group Rights* 30 (2023): 531–35.
[956] *Punta Piedra Garifuna v. Honduras*, ¶ 181.
[957] *Punta Piedra Garifuna v. Honduras*, ¶¶ 180–187.
[958] *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*.
[959] *Punta Piedra Garifuna v. Honduras*. Footnote 227.
[960] *Garifuna Community of Triunfo de la Cruz and Its Members v. Honduras*, ¶¶ 149–152.

In cases where the state granted title to non-Indigenous individuals, the IACtHR focused on several key aspects. In one instance, the state had granted alternative lands to Indigenous people, later titling it to a private company. As a result, the IACtHR held that the titling could not have been undertaken in good faith. The third parties who could be considered acting in good faith are the individuals whose titles preceded the granting of alternative lands to the community.[961] In another case, the IACtHR focused on the special relationship between the communities and the land. It explained that first it would determine whether this relationship still existed, based on whether the Indigenous community have expressed this relationship in their own way and whether maintaining this relationship remains possible. Despite the presence of third parties and continuous allocation of land titles by the state, the restrictions imposed did not break the special relationship because they constituted external factors.[962] Notably, the good faith of non-Indigenous individuals was not included in the analysis.

Even in such cases, Indigenous rights do not always prevail over third-party rights. If the state presents "objective, specific and justified reasons,"[963] it can grant alternative lands, after addressing the possibility of expropriating the third parties. The solution must be reached peacefully, involving both the communities and third parties and respecting the communities' customs. Notably, the IACtHR mentioned that participation by both parties is necessary to determine whether to return the land or provide alternative lands. Despite not mentioning the consultation safeguard explicitly, it was implicitly invoked. Accordingly, in one case, the IACtHR found that the state had violated the right to property due to its failure to free the Indigenous and Tribal lands of third parties, its dismissal of relevant claims, and its lack of a domestic remedy.[964]

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[961] *Kuna and the Emberá v. Panama*, ¶¶ 141–145.
[962] *Kaliña and Lokono v. Suriname*, ¶¶ 149–156.
[963] *Kaliña and Lokono v. Suriname*, ¶ 158.
[964] *Kaliña and Lokono v. Suriname*, ¶¶ 157–160.

One case worth mentioning is Lhaka Honhat (Our Land) Association v. Argentina, which stands out for two reasons. First, the IACtHR adjudicated the rights to food, water and take part in cultural life under Article 26 ACHR. The interference with property failed the legality criterion, meaning that in this case, the assessment of proportionality occurred under other rights.[965] Notably, this was the first cases in which the IACtHR addressed cultural identity separately from the right to collective property.[966] Second, this case involved the settlement of a Criollo community on Indigenous land, marking the first "interethnic recognition conflicts."[967]

Under Article 26, the IACtHR clarified that despite the mention of progressive realization in the provision, the case concerned immediate obligations. Without explicitly employing the language of proportionality, the IACtHR found that the interference in the Indigenous territory had impacted their way of living, which "affected [their] natural or environmental resources"[968] in relation to their food and water. Moreover, there was direct harm to their cultural identity due to the presence of the Criollo community.[969] Although the state attempted to stop the Criollo community's activities, these efforts proved insufficient, as the Indigenous community's claims remained unresolved. The IACtHR held that the fact that the Indigenous community could not decide, "freely or by adequate consultation, the activities in their territory" violated Article 26.[970] In this case, the activities of the Criollo communities negatively impacted the rights to food, water and cultural identity, a situation worsened by the lack of consultation.

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[965] The IACtHR also analyzed the right to healthy environment. However, this right does not enter the ESCR classification.
[966] Sebastián López Escarcena, 'Propiedad Colectiva e Identidad Cultural Indigena En Pueblo Xucuru Con Brasil y En Asociación Lhaka Honhat Con Argentina', *Revista de Derecho Universidad de Concepción* 252 (2022): 202.
[967] Angel Gabriel Cabrera Silva and Lorenza B. Fontana, 'Indigenous vs. Peasants' Rights? Lhaka Honhat v. Argentina and the Role of the Inter-American Human Rights System in Communal Interethnic Conflicts', *Journal of Human Rights* 23, no. 5 (2024): 497.
[968] *Lhaka Honhat v. Argentina*, ¶ 284.
[969] *Lhaka Honhat v. Argentina*, ¶¶ 272–284.
[970] *Lhaka Honhat v. Argentina*, ¶¶ 287–289.

Furthermore, the IACtHR confirmed its precedents regarding the need to free the territory in a manner that takes into consideration the third parties involved. It explicitly demanded that the state take into account the vulnerability of the Criollo community when removing them.[971] However, the IACtHR did not address upfront the conflict between the two communities directly and did not "[set] any clear standard regarding the scope of indigenous and peasant rights."[972]

Under the IACtHR's case law, the proportionality encompasses, as non-negotiable obligation, the restitution of lands and the provision alternative lands. Although not explicitly framed as an obligation, the conduct of consultation and judicial review are recurring elements throughout. Freeing the territory of encumbrances also entails respecting third-party's rights and providing compensation in accordance with established eviction rules. The balancing exercise primarily concerns the good faith of individuals, and the balancing conducted at the national level. As in other cases, substantive equality has proven essential to the balancing exercise, requiring that the specific needs of Indigenous and Tribal communities be considered alongside their customs and traditions. The incorporation of substantive equality has proven essential to the proportionality analysis, as it strengthens the scrutiny of interferences.

Overall, the proportionality analysis conducted in the case law of the ACmHPR, IACmHR and the IACtHR was not always explicit. However, all three bodies consistently focused on the impact of the interfering measures. The proportionality analysis encompasses non-negotiable obligations and the balancing exercise. Concerning the non-negotiable obligations, the focus is comparable across the bodies, though they apply distinct terminology. While the ACmHPR analyzed the provision of compensation and alternative accommodation, the IACmHR and the IACtHR focused on the provision of alternative lands or the restitution of lands. Moreover, the IACmHR emphasized the importance of judicial review, while the

[971] *Lhaka Honhat v. Argentina*, ¶ 137.
[972] Silva and Fontana, 'Indigenous vs. Peasants' Rights? Lhaka Honhat v. Argentina and the Role of the Inter-American Human Rights System in Communal Interethnic Conflicts', 506.

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IACtHR implicitly required consultation and judicial review. As for the balancing exercise, the good faith of individuals, balancing conducted at the national level, and the consideration of survival and cultural identity, alongside the special relationship between the community and the land, played a central role. These last two elements of the balancing exercise demonstrate the incorporation of substantive equality into the limitation assessment, thereby intensifying the scrutiny applied by the regional bodies to interferences.

1.2.4. Synthesis

This subsection examined how the ACmHPR, ACtHPR, IACmHR and the IACtHR have addressed interferences with Indigenous and Tribal communities, including the creation of nature reserves, state concessions and third-party encroachments. Most cases have been adjudicated under the right to property by all four regional bodies. However, the ACmHPR has also ruled on the right to dispose of wealth and natural resources under the ACHPR, and the IACtHR has analyzed the rights to food, water and participation in cultural life under the ACHR. These distinctions did not influence the frameworks chosen by the regional bodies to assess interferences, nor did they affect the focus of the analysis.

In terms of framework, the ACmHPR and the IACmHR evolved in their approaches over the years. The ACmHPR began by applying an implicit limitation assessment through the unspecific states' obligations framework and later transitioned to an explicit limitation assessment framework, while the IACmHR initially applied the limitation assessment framework without clarifying its criteria and later adopted it with greater clarity. The ACtHPR and the IACtHR consistently operated within the limitation assessment framework. While the ACtHPR is explicit about the framework's criteria, the IACtHR has referenced them without elaborating on their individual components.

Regarding the limitation assessment criteria, the analysis of legality in the Indigenous and Tribal cases has been discussed only by the ACmHPR and the IACtHR, both bodies

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assessing it robustly. The ACmHPR assessed consultation and compensation under legality, explaining that the existing national and international laws demand so. As for the IACtHR, it examined legal certainty in cases and in one case, it considered judicial review, security of tenure, and the need to create a protective framework for communities. Additionally, it analyzed non-discrimination and substantive equality under legality, demanding states to create specific measures and take the communities' needs into consideration. All these elements are usually analyzed under proportionality, demonstrating that the content of the criteria can be applied fluidly. Regarding legitimacy, the international bodies have analyzed them and rejected some of them. Environmental protection is the most discussed aim, being rejected as a justification to remove Indigenous and Tribal communities. Moreover, states attempted to argue their actions or inactions based on formal equality, which was rejected due to substantive equality. The discussion on legitimacy highlighted two important aspects: aims can be analyzed in-depth, contrary to the usual deferential approach, and non-discrimination and substantive equality also integrated the legitimacy discussion.

The proportionality analysis was the focal point of the limitation assessment, consisting of non-negotiable obligations and the balancing exercise. The non-negotiable obligations include the conduct of consultation and participation, the provision of compensation, the conduct of judicial review, and the provision of alternative accommodation or lands. As for balancing, the international bodies have focused on the impact of the measures on affected communities. One foundational element of the balancing exercise was substantive equality, as international bodies demand states to consider the impact of measures on the survival of communities and demand the creation of measures that target their specific needs. As such, substantive equality is an essential element of the proportionality analysis—similarly to the other criteria—heightening the scrutiny discharged by international bodies.

Beyond the incorporation of obligations throughout the limitation assessment, states' obligations have been examined as parallel frameworks. Non-discrimination obligation was

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assessed by the ACtHPR and the IACtHR independently of the substantive provisions on the right to property. In comparing the assessment of limitations and non-discrimination, the ACtHPR concentrated on the justification provided, while the IACtHR focused on the non-negotiable obligations, both concluding that the interferences were discriminatory. The main difference between the two frameworks lies in the question of (un)equal treatment. However, the incorporation of substantive equality into the limitation assessment illustrates that such issues may also be addressed within the limitation assessment.

1.3. Synthesis

This section examined decisions concerning the removal of individuals from legally owned homes or land issued by the ACmHPR, ACtHPR, IACmHR, IACtHR, and the ECtHR. The first subsection focused on cases involving individuals removed, while the second subsection addressed Indigenous and Tribal communities removed from their ancestral lands. In most cases, the limitation assessment served as the principal framework for assessing interferences. In exceptional instances, the ACmHPR employed the non-discrimination framework to assess interferences, while other bodies used it parallelly to the limitation assessment.

In the jurisprudence of these bodies, the analyses of legality, legitimacy, and proportionality analysis have been conducted, even if implicitly. The legality criterion emerged as the least analyzed. In cases where it was addressed, legality involved the existence, quality, application, and format of the law. Notably, the application of the law, especially by judicial authorities, proved pivotal in demonstrating that legality demands more than formal compliance to ensure effective judicial review. Additionally, the ACmHPR and the IACtHR advanced substantial content to the interpretation of legality. While the ACmHPR evaluated consultation and compensation—as required by national and international laws—the IACtHR assessed security of tenure, judicial and the need to create a protective framework for communities,

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incorporating non-discrimination and substantive equality into the legality criterion. The emphasis on elements typically analyzed under proportionality illustrates the fluidity of the substantive content of the criteria.

As for legitimacy, various aims have been scrutinized. The rejection of justifications advanced by states stand out across distinct cases. First, justifications rooted in discriminatory reasoning were identified and dismissed under both the limitation and non-discrimination assessment, demonstrating a shared focus of these frameworks. Second, environmental protection as a justification was rejected by the ACtHPR and the IACtHR, which engaged in a detailed examination of the reasoning provided by states. Additionally, non-discrimination and substantive equality were incorporated into the legitimacy analysis, as states justified action or omission based on formal equality—a position countered by the application of non-discrimination and substantive equality obligations. Hence, the analysis of states' justifications reveals that the legitimacy criterion is robust and capable of facilitating a critical evaluation of interferences, which is heightened by the incorporation of states' obligations.

The proportionality analysis criterion received the most attention from international bodies. Across jurisprudence, proportionality comprises non-negotiable obligations and the balancing exercise. The common non-negotiable obligations included the conduct of consultation, the provision of compensation, the conduct of judicial review with procedural safeguards, and the provision of alternative accommodation or land. The balancing exercise considered the conduct of parties—the applicants' good faith and responses from states' authorities—as well as the impact on rights. Substantive equality also played a role in the balancing exercise, through the requirement that states take action to address individuals' needs based on special measures and consider their 'vulnerability' and survival. This incorporation heightens the scrutiny applied in the proportionality analysis, as it does with the other criteria.

In a few cases, international bodies have employed parallel frameworks to assess interferences. In this section, international bodies applied non-discrimination in two avenues:

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either as the sole framework—which was used in one case by the ACmHPR—or as a complement to the limitation assessment—which appeared in the case law of the ACtHPR and the IACtHR. Under the first avenue, the assessment conducted by the ACmHPR under the two frameworks was identical, as it rejected states' justifications on the grounds of discrimination based on origin. As for the second avenue, the ACtHPR and the IACtHR focused on similar elements under both limitations and non-discrimination, particularly because, under the limitation assessment, substantive equality was incorporated. Consequently, the choice of framework did not impact the legal reasoning, thereby demonstrating that the conceptualization of interferences with ESCR derives from the interplay between limitations and states' obligations.

2. Forced removal of individuals living on state and private property

This second section examines the removal of individuals from state or private property by the CESCR, IACmHR, ECSR and the ECtHR. The contrast between this section and the previous one lies in the ownership of the property, as in these cases the applicants occupy the property either legally or illegally. The cases involving individuals living on state property include social housing, state-owned flats, state sites, or the illegal occupation of state land. Regarding private property, the private actors are either individuals or companies, such companies are real estate agencies, banks, or financial institutions. In these cases, the residency was established either through tenancy agreement or through illegal occupation of private property. The main rights adjudicated are the rights to property and housing, with the IACmHR ruling on the right to life, the ECSR on the right to right of the family to social, legal, and economic protection and the ECtHR on the right to the right to respect for private and family life.

The primary framework employed is the limitation assessment, whether applied explicitly or implicitly. The CESCR initially adjudicated cases under an implicit limitation

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assessment and subsequently transitioned to a more explicit application of the limitation assessment framework. As for the IACmHR and the ECSR, they employ an implicit limitation assessment through language reflecting unspecific states' obligations. Finally, the ECtHR explicitly applies the limitation assessment framework, though it occasionally relies on the positive obligations and non-discrimination frameworks instead.

As for the criteria of the limitation assessment, the legality criterion is primarily discussed by the IACmHR and the ECtHR, with an occasional reference by the CESCR and the ECSR. In these cases, the legality analysis focuses on the existence, quality and application of the law. Notably, the IACmHR includes the conduct of judicial review within the legality criterion. Concerning legitimacy, the international bodies accept most of the aims presented. As with legality, the conduct of judicial review is also analyzed under legitimacy. Lastly, proportionality receives the greatest attention, encompassing both non-negotiable obligations and the balancing exercise. The common non-negotiable obligations are the conduct of judicial review, the existence of procedural safeguards and the provision of alternative accommodation. As for the balancing exercise, the applicant's good faith, and the behavior of national authorities are the main points of focus.

Similarly to the preceding section, the incorporation of states' obligations is evident in the cases. Progressive realization, non-retrogression, minimum essential levels, non-discrimination, and substantive equality appear in the case law. They intensify the scrutiny conducted by international bodies, thereby ensuring that specific ESCR aspects are present in the analysis. For instance, available resources are analyzed due to the non-retrogression obligation. Accordingly, these specific states' obligations ensure that the limitation assessment is thorough.

Beyond the incorporation of specific states' obligations into the limitation assessment, they have been employed as parallel frameworks. The ECtHR applies positive obligations and non-discrimination frameworks in place of the limitation assessment. Both frameworks focus

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on legitimacy and proportionality, with the mere existence of laws being recognized. The assessment under these frameworks closely mirrors the limitation assessment, examining the conduct of judicial review and the existence of procedural safeguards. Therefore, the legal reasoning does not differ, which underscores the interconnection between limitations and states' obligations.

The division of this section follows the limitation assessment, addressing states' obligations when necessary. The first subsection focuses on legality, which is the least analyzed criterion of the limitation assessment. The second subsection examines legitimate aims and demonstrates that international bodies tend to accept a range of justifications despite the language of the treaties. The third and last subsection explores the proportionality analysis, which is organized according to the various types of cases discussed in this section.

2.1. Legality

The analysis of legality in cases of forced removal of individuals residing on state and private property centers on the existence, quality, application, and format of the law. The CESCR and the ECSR refer to the legality criterion in only some cases, typically limiting their analysis to a recognition of the existence of the laws. By contrast, the IACmHR and the ECtHR adopt a more comprehensive analysis. The IACmHR considers both the existence and application of relevant laws, while the ECtHR conducts a broader assessment encompassing the existence, quality, application, and format of the law.

In the UN system, the CESCR did not analyze the legality criterion when analyzing interferences with the right to housing under the ICESCR. In its earlier cases, the CESCR applied an implicit limitation assessment under the unspecific states' obligation framework. In these cases, the CESCR assessed the consequences of the eviction without discussing the

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existence, quality, or format of the law.[973] In more recent cases, it explicitly applied the limitation framework, stating that evictions must be prescribed by law, without further elaboration.[974] Thus, the lack of discussion on legality points to an implicit acceptance that the criterion was met in all the cases.

In these cases, the applicants did not challenge the legality of the interference, focusing on other aspects, as discussed under proportionality analysis. In General Comment No. 7, the CESCR clarifies that legality is only assessed when the law is incompatible with the ICESCR,[975] without providing further clarification as to what this incompatibility entails. Consequently, the content of legality in cases of interferences under the ICESCR is still unclear. Therefore, in cases involving evictions from both state and private property, states must have a legal basis for interfering with the right to housing.

In the Inter-American system, the IACmHR adjudicated cases involving evictions from private land through the unspecific states' obligations framework—which consists of an implicit limitation assessment. Both cases were adjudicated under the right to life. In Corumbiara v. Brazil, the IACmHR found that evictions carried out by the police must only occur pursuant to a court order, as mandated by law.[976] Additionally, in Sebastião Camargo Filho v. Brazil, armed landowners extrajudicially evicted individuals, who the IACmHR found to lack legal authorization to evict—only the state has the authority to conduct evictions.[977] Therefore, although the IACmHR did not explicitly define the legality criterion, it clearly focused on the existing law to determine whether the agents conducting evictions could have done so. In both cases, the evictions failed the legality criterion due to the noncompliance with

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[973] *I.D.G. v. Spain*, ¶ 11.1-13.7; *Ben Djazia et al v. Spain*, ¶ 13.1-17.8; *López Albán et al. v. Spain*, ¶ 8.1-12.2; *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 9.1-10.4.
[974] *Rosario Gómez-Limón Pardo v. Spain*, ¶ 9.4; El Ayoubi et al v. Spain, Communication No. 54/2018, E/C.12/69/D/54/2018 (Committee on Economic, Social and Cultural Rights 19 February 2021), ¶ 11.3; *El Goumari et al v. Spain*, ¶ 8.3; *Soraya Moreno Romero and Children v. Spain*, ¶ 10.3; *Lorne Joseph Walters v. Belgium*, ¶ 9.3; *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.3; *Infante Díaz v. Spain*, ¶ 7.8; *Vázquez Guerreiro v. Spain*, ¶ 8.3; *Hamid Saydawi and Masir Farah v. Italy*, ¶ 8.3.
[975] *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*, para. 11.
[976] *Corumbiara v. Brazil*, ¶ 169.
[977] *Sebastião Camargo Filho v. Brazil*, ¶¶ 80–83.

relevant legislation, with the first case confirming the importance of judicial review for removals.

In the European system, approaches to the legality criterion vary across European bodies. The ECSR assessed the violations under the right to housing or the right of the family to social, legal and economic protection, consistently employing an implicit limitation assessment. In such cases, it focused on the impact of state law on individuals, meaning that the existence of a law permitting evictions is a prerequisite for the analysis. In some cases, the ECSR stated that the legal protection against forced evictions "must be prescribed by law."[978] Like the CESCR and the IACmHR, the ECSR acknowledged that states may interfere with rights only through the law. However, the ECSR did not analyze its content of format.

Scholars have analyzed the ECSR's case law regarding other violations, identifying its interpretative tendencies. Cullen explains that the legality criterion requires that the law exists and is "sufficiently clear."[979] Likewise, Lukas clarifies that the ECSR accepts various legal instruments as law, including case law from national courts. She further explains that 'sufficiently clear' implies "precision and foreseeability."[980] Therefore, in eviction cases, the ECSR did not focus on the existence, quality or format of the law. In a few cases, it briefly affirmed the need to follow existing law without elaborating on it, suggesting an implicit focus on the existence of the law aspect of legality.

The ECtHR differs from these international bodies because it explicitly conceptualized the legality criterion in cases involving evictions from state property under the rights to property and respect for private and family life. The ECtHR employed three different frameworks in the case law—limitations, positive obligations, and non-discrimination. However, the legality criterion was exclusively assessed under the limitation framework.

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[978] *Médecins du Monde - International v. France*, ¶ 75; *ERRC v. Ireland*, ¶ 136; *ERTF v. the Czech Republic*, ¶ 81; *ERRC v. Belgium*, ¶ 85.
[979] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 86.
[980] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 348.

In cases related to the right to property, the legality criterion was analyzed in both removal from state and private property, with emphasis on the quality, application, and format of the law. The ECtHR held that laws must be both precise and accessible to the population, and national courts must interpret and apply the law to avoid arbitrary interference.[981] This interpretation and application of the law are linked to the importance of judicial review. Although judicial review is part of the proportionality, its mention under legality highlights the importance of this element to deem an interference valid. The ECtHR and the IACmHR, as described above, recognize this element as important in their legality analysis. Moreover, the ECtHR, without mentioning legality, accepted that the mere existence of a statute allowing such interference was sufficient.[982] This acceptance of a statute as satisfying the legality criterion pertains to the format of the law.

In cases concerning the right to respect for private and family life, the ECtHR reaffirmed its understanding of legality, finding that the state met the legality criterion because the legal codes allowed evictions, the "provisions [were] accessible and foreseeable,"[983] and the national courts applied the law.[984] One case decided by the ECtHR stands out, as the state failed to meet the legality criterion. In Prokopovich v. Russia, the ECtHR emphasized that the law in Russia permitted evictions only based on specific grounds and with a court order, without exceptions. Even though the applicant established her home unlawfully, the state was required to follow the eviction procedure established by the law. Consequently, the ECtHR found the interference to be unlawful because the state failed to comply with its own existing law.[985] This case therefore underscores the necessity of both the existence of the law and its proper application.

The ECtHR also addressed interferences under the positive obligations and non-discrimination frameworks instead of the limitation assessment. In such cases, all interferences

[981] *Wittek v. Germany*, ¶¶ 47–49.
[982] *Brosset-Triboulet and Others v. France*, ¶ 83; *Depalle v. France*, ¶ 80.
[983] *Winterstein and Others v. France*, ¶ 72.
[984] *Winterstein and Others v. France*, ¶ 72.
[985] *Prokopovich v. Russia*, ¶¶ 43–45.

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stemmed from existing laws, yet the legality criterion was neither explicitly mentioned nor substantively analyzed.[986] Notably, under the positive obligations framework, the ECtHR affirmed that, within the scope of Article 8, this framework and the limitation assessment share overlapping criteria. However, the legality is not identified as one of the shared criteria.[987] Therefore, as with the CESCR's cases, it can be inferred that under these two frameworks, the ECtHR considered the mere existence of the law sufficient to satisfy the legality criterion. The ECtHR did not engage in a detailed examination of legality but rather acknowledged that the laws in question interfered with rights.

Overall, the legality is not subject to detailed analysis by the CESCR and the ECSR, which implicitly acknowledged that interferences derived from existing laws. By contrast, the IACmHR, when assessing interferences through an implicit limitation assessment framework, examined the existence of the relevant legislation and the compliance with the law, including the absence of judicial review in eviction procedures. Consequently, the lack of explicit reference to the legality criterion did not affect the substance of the analysis. The ECtHR primarily applied the limitation assessment framework, focusing on the existence, quality, application, and format of the law, thereby conducting the most comprehensive analysis of the legality criterion. However, under the positive obligations and non-discrimination frameworks, the ECtHR adopted an approach similar to that of the CESCR and the ECSR, acknowledging only the existence of laws without conducting further examination.

Furthermore, among the elements examined, the focus on the application of the law emerges as particularly significant. Both the IACmHR and the ECtHR evaluated whether national courts had reviewed the matter and rendered a decision, as mandated by national laws in cases involving removal. Judicial review is typically analyzed under the proportionality analysis. However, its inclusion under legality underscores its importance in evaluating

[986] *Larkos v. Cyprus*, ¶¶ 29–32; *Novoseletskiy v. Ukraine*, ¶ 69; *J.D. and A v. the United Kingdom*, ¶ 91.
[987] *Novoseletskiy v. Ukraine*, ¶ 69.

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interferences and highlights that the boundaries between the criteria within the limitation assessment framework are not strictly delineated.

2.2. Legitimacy

The legitimacy analysis in cases involving state and private property centers on various justifications, but the overall focus is often aligned. Most cases concern either damages to property or non-payment of rent. Despite the application of various frameworks to assess interferences—including explicit and implicit limitation assessments, positive obligations, and non-discrimination—the aims are largely consistent, and the legal reasoning employed by international bodies is closely interconnected.

Under the ICESCR, general welfare is listed as the sole legitimate aim for limitations under Article 4. In cases involving the removal of individuals from property, the CESCR did not necessarily link the justifications to the legitimate aim. In cases involving state property, the CESCR accepted the removal of individuals based on the lack of title to reside in the property as a justification for evictions,[988] the occupation of property by force,[989] and a conviction of encroachment.[990] In such instances, the CESCR did not use the language of legitimate or illegitimate aim, instead acknowledged the illegality of occupation.

In cases regarding private property, in its earlier jurisprudence, the CESCR did not refer to the legitimacy criterion, as it analyzed the matters through an implicit limitation assessment. It simply stated that the reasons provided were sufficient to justify an eviction, such as the non-payment of rent or damage to the property without just cause,[991] the protection of the right to property insofar as it did not conflict with the rights enshrined in the ICESCR,[992] and the

[988] *Hamid Saydawi and Masir Farah v. Italy*, ¶ 10.1.
[989] *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 8.3.
[990] *Vázquez Guerreiro v. Spain*, ¶ 7.5.
[991] *Ben Djazia et al v. Spain*, ¶ 15.1.
[992] *López Albán et al. v. Spain*, ¶ 11.5.

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conviction of a minor offense for unlawful occupation.[993] In more recent cases, under the explicit limitation assessment, similar justifications were explicitly accepted under the legitimacy criterion, which was expressly referenced as a criterion.[994] The only additional justification in cases involving private property is the protection of such right as a justification for removal. Therefore, when assessing interferences, no significant distinction arises between cases, regardless of property ownership or the explicit application of the limitation assessment, as the same justifications are consistently accepted.

One notable aspect of the case law is the use of alternative expressions for legitimate aims. The CESCR referred to the 'common good'[995] and 'public welfare'[996] as justifications for interfering with the right to housing. This divergency is particularly noteworthy. The term 'general welfare' was considered vague and weak during the drafting of the ICESCR.[997] On this point, Alston and Quinn observed that although general welfare can be broadly defined, its interpretation should remain narrow. During the preparatory work, states sought to ensure that Article 4 served a "protective [rather] than [a] permissive function."[998] Consequently, general welfare is understood to relate to "the economic and social well-being of the people and the community."[999] Thus, in light of this narrow interpretation, it can be inferred that the CESCR regarded common good and public welfare as synonymous with general welfare, as it is the sole permissible aim under the ICESCR.

In contrast to the CESCR, the ECSR case law engaged with the legitimacy criterion in only a few cases. Since the ECSR applied an implicit limitation assessment to assess interferences arising from removals, the absence of its explicit reference to legitimacy is

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[993] *López Albán et al. v. Spain*, ¶ 11.5.
[994] *Rosario Gómez-Limón Pardo v. Spain*, ¶ 9.2; *El Goumari et al v. Spain*, ¶ 10.2; *Lorne Joseph Walters v. Belgium*, ¶ 11.2-11.3; *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 10.2.
[995] *El Ayoubi et al v. Spain*, ¶ 11.3; *Soraya Moreno Romero and Children v. Spain*, ¶ 12.4.
[996] *Infante Díaz v. Spain*, ¶ 7.8.
[997] Ben Saul et al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014), 242.
[998] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 202.
[999] Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 573.

unsurprising. In some cases, the ECSR explained that housing issues fall under the 'general interest,' which grants states a margin of appreciation in deciding how to comply with the ESC.[1000] Lukas notes that this margin of appreciation is afforded to states provided that "an appropriate level of protection"[1001] is ensured.

Notably, 'general interest' is not listed as a legitimate aim in either of the two Charters' general limitation clauses, which are exhaustive in nature.[1002] For this reason, the reference to an unlisted aim is likely connected to the absence of the limitation clause in the cases, which may have provided the ECSR with greater flexibility to consider justifications more broadly. In addition to referencing general interest, the ECSR stated that substantial damage to unlawfully occupied property[1003] and "illegal occupation of a site or dwelling"[1004] constituted legitimate grounds for evictions. However, illegal occupation must be narrowly defined by national law.[1005] Thus, the absence of a limitation clause or explicit reference to the legitimacy criterion did not preclude the ECSR from analyzing the criterion when it deemed such analysis necessary.

In contrast to the CESCR and the ECSR, the ECtHR has only assessed cases related to state property under both the right to property and the right to respect for private and family life. The ECtHR employed three different frameworks in these cases: the limitation assessment, positive obligations, and non-discrimination. Notably, the legitimacy criterion is analyzed monthly under the limitation assessment, with some cases discussing the legitimacy criterion under non-discrimination.

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[1000] European Roma Rights Centre v. Bulgaria. Complaint No. 31/2005 (European Committee of Social Rights 18 October 2006), ¶ 54; *COHRE v. France*, ¶ 42; *ERTF v. France*, ¶ 95.
[1001] Lukas, *The Revised European Social Charter: An Article by Article Commentary*, 348.
[1002] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 86.
[1003] *ERRC v. Ireland*, ¶ 140.
[1004] *ERRC v. Greece*, ¶ 51; *ERRC v. Bulgaria*, ¶ 51; *INTERIGHTS v. Greece*, ¶ 56; *ERRC v. France*, ¶ 67; *FIDH v. Belgium*, ¶ 161; *COHRE v. France*, ¶ 41; *ERTF v. France*, ¶ 120; *Médecins du Monde - International v. France*, ¶ 74; *ERTF v. France*, ¶ 120; *ERRC v. Ireland*, ¶ 135; *ERTF v. the Czech Republic*, ¶ 80.
[1005] *ERRC v. Greece*, ¶ 51; *ERRC v. Bulgaria*, ¶ 51; *INTERIGHTS v. Greece*, ¶ 56; *ERRC v. France*, ¶ 67; *FIDH v. Belgium*, ¶ 161; *COHRE v. France*, ¶ 41; *Médecins du Monde - International v. France*, ¶ 74; *ERRC v. Ireland*, ¶ 135; *ERTF v. the Czech Republic*, ¶ 80.

Interferences with the right to property arising from removal from state property were analyzed under both the limitation and non-discrimination frameworks. Under the right to property, the specific limitation clause establishes two types of interferences and their corresponding aims: deprivation of property may occur only in the public interest, while control of the use of property must serve objectives of general interest. Although these interferences are based on distinct aims, the ECtHR recognizes that their scope overlaps.[1006] Accordingly, the terminology is treated as interchangeable. In the cases assessed under the limitation assessment framework, the accepted justifications varied considerably. The ECtHR accepted Germany's reunification and the uniformization of properties as serving the public interest[1007] and included the protection of the environment as falling under general interest, given that environmental concerns have become a pervasive societal issue.[1008]

With respect to the non-discrimination framework, legitimacy is also integral to the analysis. According to the ECtHR, Article 14 ECHR, the non-discrimination clause, permits distinction among individuals, provided that states present an objective and reasonable justification, encompassing both a legitimate aim and proportionality.[1009] Furthermore, it affirmed that general policy schemes may differentiate between individuals if such distinctions are properly justified under the ECHR.[1010] Comparatively, under Article 1 of Protocol 1 alone, the ECtHR grants states a wide margin of appreciation in matters involving economic or social policies. However, when Article 14 is invoked in conjunction, this margin of appreciation cannot be used to justify discriminatory treatment. Regardless of how wide or narrow the margin may be, the ECtHR will only assess the legislature's choice if it is deemed manifestly

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[1006] Grgić et al., *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and Its Protocols*, 10:13.
[1007] *Wittek v. Germany*, ¶¶ 50–51.
[1008] *Brosset-Triboulet and Others v. France*, ¶ 84; *Depalle v. France*, ¶ 81.
[1009] *J.D. and A v. the United Kingdom*, ¶ 83.
[1010] *J.D. and A v. the United Kingdom*, ¶¶ 80–81.

without reasonable foundation. In cases involving Article 14, discrimination itself may constitute an unreasonable foundation for differential treatment.[1011]

In J.D. and A v. the United Kingdom, the ECtHR assessed a claim of indirect discrimination.[1012] On the question of states' justifications, it accepted the rationale provided by the state. First, it noted that national courts reviewed and accepted the states' aims of cutting public expenditures and relocating working-age tenants to smaller residences. Second, the ECtHR observed that the applicants did not challenge the state's aims. Consequently, although the ECtHR affirmed that it demanded "very weighty reasons […] to justify the impugned measure"[1013] and acknowledged that the policy did not seek to correct factual inequality, it ultimately deferred to the state.

When comparing the analysis of the legitimacy criterion across different frameworks, the primary distinction lies in the depth of scrutiny applied by the ECtHR under the non-discrimination framework. This is evident from the fact that, even though the applicants did not challenge the state's justification, the ECtHR verified the outcome of the national judicial review, relying on the assessment of national courts regarding the state's argument. As a result, the non-discrimination obligation intensifies the review of the interference's legitimacy, rather than resulting in the mere acceptance of the justifications presented by states.

In relation to the right to respect for private and family life, the cases concerned individuals who were either state tenants or residing in Roma and Travelers camps. In cases of state tenants, the ECtHR employed three frameworks: the limitation assessment, positive obligations, and non-discrimination. Under the limitation assessment, the ECtHR accepted all the legitimate aims advanced by states. It recognized that both the recovery of state property from individuals[1014] and the preservation of state property[1015] fell under the aim of protecting

[1011] *J.D. and A v. the United Kingdom*, ¶¶ 87–88.
[1012] *J.D. and A v. the United Kingdom*, ¶ 90.
[1013] *J.D. and A v. the United Kingdom*, ¶ 97.
[1014] *McCann v. the United Kingdom*, ¶ 48.
[1015] Case of Ćosić v. Croatia, Application No. 28261/06 (European Court of Human Rights 15 January 2009), ¶ 19.

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rights and freedom of others. This finding is particularly noteworthy, as the ECtHR extended the definition of 'others' to include the state itself. The justification for this inclusion stemmed from the fact that access to social housing schemes was available to all individuals, thereby aligning with the state's broader interest.[1016]

Additionally, the ECtHR emphasized the role of judicial review in evaluating legitimate aims, consistent with the case discussed above. It explained that national courts had reviewed the state's aim,[1017] and had issued a judicial order for eviction.[1018] Consequently, judicial review was central to determining the legitimacy of the aim. This reliance illustrates that the ECtHR includes elements, such as judicial review, that are typically assessed under proportionality, thereby blurring the boundaries between the criteria.

Under the positive obligations framework, the ECtHR explained that the criteria for assessing interferences under this framework and the limitation assessment framework are largely aligned, as the legitimate aims outlined in Article 8 ECHR apply equally to both.[1019] Despite this important acknowledgement, the ECtHR did not engage with the state's justification, instead proceeding directly to the proportionality analysis.[1020] Regarding the non-discrimination assessment, the ECtHR examined Article 14 in conjunction with Article 8. As previously noted, 'objective and reasonable justification' encompasses both the pursuit of a legitimate aim and the proportionality of the measure, thereby granting states a certain margin of appreciation.[1021] In Larkos v. Cyprus, the applicant argued that he was in a comparable position to private tenants but had been treated differently. Consequently, the ECtHR focused on the reason behind the differential treatment of individuals in similar circumstances. Although

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[1016] *McCann v. the United Kingdom*, ¶ 48.
[1017] *McCann v. the United Kingdom*, ¶ 48.
[1018] *Ćosić v. Croatia*, ¶ 19.
[1019] *Novoseletskiy v. Ukraine*, ¶ 69.
[1020] *Novoseletskiy v. Ukraine*, ¶¶ 73–88.
[1021] *Larkos v. Cyprus*, ¶ 29.

the ECtHR did not explicitly categorize the case as one of direct discrimination, its reasoning effectively aligned with such a definition.[1022]

In Larkos, Cyprus justified the distinction based on the constitution. However, the ECtHR found that the state had not "provided any convincing explanation of how the general interest will be served by evicting the applicant."[1023] According to the ECtHR, the state had allocated the apartment to the applicant in a private capacity, without considering the community or acting in its public capacity. Additionally, the state could have opted to charge a higher rent, and the applicant was not benefiting from a preferential rent rate. The law aimed to protect private tenants while excluding those living on state property. Yet, the state failed to offer a specific justification for this exclusion.[1024] In this instance, the violation arose from a discriminatory measure that did not pursue a legitimate aim. This case underscores the ECtHR's heightened scrutiny of states' justifications under the non-discrimination framework.

The second group of cases involves Roma families living on state sites and has been solely examined through the limitation assessment framework. Under the legitimacy criterion, in Connors v. The United Kingdom, the ECtHR held that the parties agreed that the eviction aimed at "protection of the rights of other occupiers of the site."[1025] In Winterstein and others v. France, the ECtHR followed the Chapman case—discussed in the preceding section—and accepted the government's justification that the eviction was necessary to protect the landscape where the individuals were residing. Consequently, environmental protection was recognized as falling within the scope of the rights of others.[1026]

The ECtHR's analysis of the legitimacy criterion introduces multiple dimensions to the overall discussion. First, the ECtHR's analysis of legitimacy under the non-discrimination framework involves heightened scrutiny when compared to the limitation assessment. Second,

[1022] Fredman, *Discrimination Law*, 250–51.
[1023] *Larkos v. Cyprus*, ¶ 31.
[1024] *Larkos v. Cyprus*, ¶¶ 30–31.
[1025] *Connors v. The United Kingdom*, ¶ 69.
[1026] *Winterstein and Others v. France*, ¶ 74.

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in both the limitation assessment and the non-discrimination frameworks, the ECtHR considered whether judicial review had taken place and its outcome, relying on the national courts' interpretation of legitimacy. Third, under the positive obligations framework, it referenced the legitimacy criterion but did not substantially engage with it. Fourth, the ECtHR has analyzed legitimacy in depth, even when accepting the aims presented.

Therefore, two conclusions are possible in the ECtHR jurisprudence. The legitimacy criterion has incorporated elements that are typically part of the proportionality analysis. In addition, its assessment under different frameworks tends to overlap. While the positive obligations frameworks merely noted its resemblance with the limitation assessment framework, the non-discrimination framework evidently shared common components—with the key distinction being the more rigorous scrutiny applied under non-discrimination.

To conclude, the analysis of the legitimacy criterion is consistently present, regardless of the framework applied—be it explicit or implicit limitation assessment, positive obligations, or non-discrimination. The CESCR, ECSR, and the ECtHR's focus under each framework is often aligned, irrespective of rights invoked or the ownership of the property—whether by the state or a third-party. Two key aspects stand out. The first concerns the inclusion of national courts' assessment in the discussion of legitimacy, focusing on judicial review. Such consideration is typically a component of the proportionality analysis, thereby illustrating that the boundaries between the criteria are blurred by international bodies in some cases. The second is the heightened scrutiny of the legitimacy criterion under the non-discrimination framework, attributable to the discriminatory reasoning presented by states. Nonetheless, a few cases under the limitation assessment also feature a detailed analysis of legitimacy, demonstrating that the heightened scrutiny under non-discrimination can also emerge under the limitation assessment.

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2.3. Proportionality

The proportionality of the interfering measure is the central focus of the cases discussed in this section. The language of proportionality is not always explicitly mentioned by international bodies. In such cases, I derive the content based on their focus on the impact of the measure. As with the previous section, the proportionality analysis in cases involving state and private property consists of non-negotiable obligations and the balancing exercise.

To elucidate the content of proportionality analysis, I have structured this part according to the types of property and living arrangements. Accordingly, I discuss cases concerning social housing and state-owned flats; Roma, Travelers and Sinti sites; individuals with revoked authorization to live on state land; illegal occupation of state land; and private property. This categorization is intended to facilitate the discussion of the cases.

2.3.1. Social housing and state-owned flats

The CESCR and the ECtHR have ruled on the removal of individuals from social housing, with only the ECtHR adjudicating cases involving state-owned flats. Three key distinctions emerge between their decisions. The first relates to the framework adopted: the CESCR initially employed an implicit limitation assessment (through unspecific states' obligations) before shifting to the limitation assessment explicitly, while the ECtHR relied on the limitation assessment, positive obligations, and non-discrimination frameworks. The second difference concerns the legal status of the occupation: in the CESCR's rulings, the applicants were unlawfully occupying social housing, whereas the ECtHR's case involved beneficiaries of social housing and state tenants. Third, while the CESCR listed all the requirements under proportionality before addressing the violation, the ECtHR focused on the core issue. Despite these differences, the international bodies converge regarding their focus during the proportionality analysis: ensuring access to procedural safeguards and the adequacy of alternative housing.

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Beginning with cases related to social housing, in the jurisprudence of the CESCR, the two social housing cases present notable differences: the earlier case concerned individuals who were aware of their unlawful occupation,[1027] while in the most recent case, the applicants were unaware of their unlawful occupation due to a fraudulent rental contract.[1028] The former was analyzed through an implicit limitation assessment, while the latter was examined under an explicit limitation assessment. The difference between these two lies in the level of detail provided in the cases: the explicit limitation assessment framework provides more detail than the implicit one. However, their analysis substantially overlaps.

In El Mourabit Ouazizi and Boudfan v. Spain, the CESCR examined the housing policies in place. Based on Article 2(1), the provision listing states' obligations, the CESCR affirmed that states must comply with progressive realization, which relies on programs or plans, reaffirming the criteria established for progressive realization - "deliberate, concrete and targeted [measures] towards the fulfillment of the right to housing within a reasonable framework."[1029] Despite explaining this obligation, the CESCR shifted its focus to the conduct of the applicants. It affirmed that although states have obligations, individuals must exercise a certain degree of diligence and inform authorities about their needs. This expected diligence is not the same for all individuals, as those in 'vulnerable' situations may not be able to act as diligently as others. In such situations, states must create mechanisms that allow information to reach administrative authorities. Without placing an undue burden on individuals and discriminating against them, individuals must take steps to request alternative housing. For this reason, the individuals' behavior was considered in determining whether states had failed their obligations.[1030]

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[1027] *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 2.1-2.5.
[1028] *Vázquez Guerreiro v. Spain*, ¶ 2.1-2.3.
[1029] *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 9.1.
[1030] *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 9.2-9.3.

Due to the applicants' lack of due diligence, the CESCR did not find a violation. In this case, the CESCR reviewed the steps taken by the state and found them satisfactory. It noted that the applicants did not explain why they failed to apply for housing or request assistance from administrative authorities following the criminal proceedings against them. Moreover, even though the CESCR acknowledged that both the proposed alternative accommodation and the emergency housing were inadequate, the applicants did not justify their refusal of other available accommodations. Consequently, the CESCR concluded that the applicants did not take steps to find alternative accommodation in cooperation with the state authorities.[1031] Notably, while the CESCR identified two key states' obligations—progressive realization and non-discrimination—it did not undertake a detailed examination of them. As a result, it focused on the positive obligation to take steps under Article 2(1), which includes ensuring access to authorities and providing alternative accommodation.

In Vázquez Guerreiro v. Spain, the CESCR explicitly applied the limitation assessment. Notably, the CESCR combined the states' obligations provision with the limitation clause, affirming that evictions must follow the states' obligations in Article 2(1) and the requirements in Article 4.[1032] In other words, states must fulfill their obligations and comply with limitation rules when interfering with rights. In this case, the CESCR outlined the components of the proportionality analysis, affirming that measures must be suitable to the aim; they must be necessary, meaning the least interfering measure must be chosen; and "the benefits […] must outweigh the impact on the enjoyment of the right."[1033] Nonetheless, the CESCR developed a long list of considerations that must be included in the proportionality analysis, ranging from content to form.

Regarding the content, the CESCR examined various elements. The seriousness of the impact requires greater scrutiny, and the assessment of the interference must consider crucial

[1031] *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 10.1-10.2.
[1032] *Vázquez Guerreiro v. Spain*, ¶ 8.2.
[1033] *Vázquez Guerreiro v. Spain*, ¶ 8.3.

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factors—including the existence of alternative accommodation, the personal circumstances of the applicants and the cooperation with authorities to find a solution. These authorities must help mitigate the effects of evictions. As such, a distinction must be made between evictions from private property where owners need the property for their own housing or income, and those belonging to private institutions.[1034] Moreover, evictions must be chosen only if there is no other measure that interferes less with the right and they must not expose or maintain individuals in a precarious situation, particularly by avoiding homelessness. To ensure these requirements are met, authorities must adequately consult with affected individuals.[1035]

As for the form, proportionality must be conducted by an impartial and independent authority, judicial or otherwise, that has the competence to end the violation and grant an effective remedy, bearing in mind Article 4 ICESCR. Notably, an eviction deemed unreasonable at one point does not preclude a future eviction. However, authorities must consider a postponement or a stay of an eviction to avoid "destitution or violations of other rights."[1036] Moreover, the CESCR established a list of procedural safeguards that must be in place. These include: genuine consultation regarding alternative housing—if no other option is available due to lack of resources, the state must ensure that individuals do not become homeless; notice of the eviction in an adequate and reasonable manner; timely information regarding evictions and alternative housing options; the presence of states' officials during the eviction, particularly for groups; identification of the individuals carrying out the eviction; prohibition of evictions at night or in bad weather without the consent of those affected; and legal remedies and legal aid.[1037]

Beyond the content and form of the proportionality analysis, the CESCR also addressed evictions as punitive measures and the importance of considering the 'vulnerability' of specific

[1034] *Vázquez Guerreiro v. Spain*, ¶ 8.1-8.4.
[1035] *Vázquez Guerreiro v. Spain*, ¶ 8.5 and 8.7.
[1036] *Vázquez Guerreiro v. Spain*, ¶ 8.4.
[1037] *Vázquez Guerreiro v. Spain*, ¶ 8.6.

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groups. Regarding punitive measures, the CESCR explained that evictions must not be used as a form of punishment. The criminalization of individuals constitutes a discriminatory measure, which contradicts the right to housing and states' obligations. Criminal law should be the last resort, and the disproportionate practice of criminalizing homelessness is unjustifiable. Instead, states must resolve the housing shortage and provide low-income individuals with decent housing. In cases where individuals occupy property due to housing shortages, they must have the means to challenge both the eviction and the criminalization of the illegal occupation.[1038] Closely linked to this issue, the CESCR clarified that some groups suffer disproportionately from forced evictions, with women being one of them. Their 'vulnerability' stems from multiple forms of discrimination, resulting in intersectional discrimination that combines gender and other factors. For this reason, states must ensure that gender-neutral laws do not create indirect discrimination, leading to the obligation to take steps that ensure equal access to ESCR for both women and men.[1039] In this case, the CESCR incorporated non-discrimination and substantive equality into the proportionality analysis, thereby intensifying the scrutiny of the impact of the measures.

Before assessing the proportionality of the eviction in this case, the CESCR emphasized that states must provide alternative accommodation based on the maximum available resources based on the affected persons' needs. Such accommodation must be adequate, taking into account various factors, such as social and economic conditions. Additionally, states must consider the core elements of the right to adequate housing established in General Comment No. 4, such as security of tenure, availability, habitability, etc.[1040] Alternative accommodation is connected to the obligation to avoid homelessness, which exists independent of who initiated the eviction proceedings—the state or third parties.[1041] If no alternative accommodation is

[1038] *Vázquez Guerreiro v. Spain*, ¶ 8.8.
[1039] *Vázquez Guerreiro v. Spain*, ¶ 8.9-8.10.
[1040] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8.
[1041] *Vázquez Guerreiro v. Spain*, ¶ 9.1-9.3.

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granted, the state must demonstrate that it had considered the situation and, despite using all available resources and taking all possible steps, it was unable to provide alternative housing. States have discretion in choosing the policies for the right to housing, as long as they take "deliberate, concrete and targeted [steps] as clearly as possible."[1042]

Despite the extensive list of states' obligations to be fulfilled in eviction cases, the CESCR found a violation due to the absence of a proportionality analysis in the national judicial review and the lack of consultation regarding alternative housing. Regarding proportionality analysis in national judicial review, the CESCR specified what would constitute an appropriate judicial review and identified all relevant factors to be considered, such as the applicant's 'vulnerability' and the existence of alternatives solutions.[1043] Concerning the absence of consultation, the state failed to establish genuine consultation mechanisms within the judiciary.[1044]

The Vázquez case demonstrates that the proportionality analysis conducted by the CESCR is comprehensive. First, it enumerates a vast list of non-negotiable obligations for states to implement proportionate measures. Second, the balancing exercise consists of proportionality conducted at the national level, and the application of non-discrimination and substantive equality when deciding whether to interfere with rights. The incorporation of these obligations was crucial to determining the proportionality of the eviction. Moreover, the CESCR referred to progressive realization and the minimum core essential levels of the right to housing. Despite not fully elaboration on these concepts, the CESCR clarified that they must be accounted for when granting alternative accommodation to those in need. Thus, the incorporation of states' obligations into the proportionality analysis ensures a detailed examination of the interference, thereby ensuring that individuals' rights are fully protected.

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[1042] *Vázquez Guerreiro v. Spain*, ¶ 9.2.
[1043] *Vázquez Guerreiro v. Spain*, ¶ 10.2-10.6.
[1044] *Vázquez Guerreiro v. Spain*, ¶ 11.1-11.3.

This is evidenced by the focus on the 'vulnerability' of the applicant and her children, who required social housing to avoid the deterioration of their human rights.

The ECtHR's social housing case differs from those before the CESCR cases, as the European body examined the interference under the non-discrimination framework and did not develop a comprehensive list of obligations under proportionality. The interference with the right to property arose from the removal of the applications from their flats and their subsequent reallocation to smaller units owing to budget constraints.[1045] Under the proportionality criterion, the ECtHR assessed the impact of the measure on each applicant.

The first applicant obtained the social housing on account of a disability, while the second applicant was a survivor of domestic violence. The ECtHR determined that the first applicant did not suffer disproportionate interference because the housing scheme had sufficient safeguards and the reallocation to a smaller apartment constituted a proportionate measure in line with the aim of the interference.[1046] In doing so, the ECtHR emphasized aspects akin to those in other cases, notably the presence of safeguards. Conversely, regarding the second applicant, the interference was deemed disproportionate because the sanctuary scheme was designed to ensure stability for domestic violence survivors. Consequently, the ECtHR concluded that the objectives of the two schemes were in conflict, and that reallocation to a smaller apartment failed to fulfill the sanctuary scheme's aim. Furthermore, the state offered no justification for privileging one aim over the other, rendering the measure unjustified and discriminatory.[1047] In this instance, the ECtHR centered its analysis on the conflicting aims—a matter typically examined under the legitimacy criterion rather than proportionality.

Additionally, the ECtHR also examined cases concerning the removal from state-owned flats, all under the right to respect private and family life. In such cases, two frameworks were employed: the limitation assessment and positive obligations. Under both frameworks, the

[1045] *J.D. and A v. the United Kingdom*, ¶ 97.
[1046] *J.D. and A v. the United Kingdom*, ¶¶ 101–102.
[1047] *J.D. and A v. the United Kingdom*, ¶¶ 101–105.

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primary focus was procedural safeguards, focusing on whether applicants were able to present their cases to national courts. In these cases, judicial review was crucial, as national courts must have the opportunity to decide the matter.[1048]

Under the limitation assessment, the ECtHR focused primarily on the absence of proportionality analysis conducted by national courts. In one case, the eviction occurred through summary proceedings, which did not include proportionality analysis. As such, the applicant could not question the removal,[1049] as these safeguards are intended to ensure judicial review and scrutiny regarding "lawfulness and reasonableness."[1050] In another case, the ECtHR reinforced that losing a home is the most extreme form of interference, requiring an independent tribunal to review the proportionality of the measure. This requirement applies even if the "right to occupation has come to an end."[1051] However, in the given case, national courts did not conduct a proportionality analysis, which is a requirement under Article 8(2) ECHR. Consequently, the lack of procedural safeguards led to a disproportionate interference.[1052]

Under the positive obligations framework, the ECtHR confirmed that limitations and positive obligations framework overlap, both requiring a fair balance of the interfering measure.[1053] In Novoseletskiy v. Ukraine, the ECtHR focused on both national courts and administrative authorities. Regarding the national courts, it held that they did not use all available means to protect the applicant's rights while hearing the case nor did they consider all aspects claimed by the applicant. Although the state restored the flat to the applicant, it took a long time and did not restore the right itself.[1054] The analysis overlaps with the one under the limitation assessment framework regarding the importance of judicial review and safeguards.

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[1048] Fick and Vols, 'Best Protection against Eviction? A Comparative Analysis of Protection against Evictions in the European Convention on Human Rights and the South African Constitution', 47–48.
[1049] *McCann v. the United Kingdom*, ¶¶ 52–55.
[1050] *McCann v. the United Kingdom*, ¶ 53.
[1051] *Ćosić v. Croatia*, ¶ 22.
[1052] *Ćosić v. Croatia*, ¶¶ 21–23.
[1053] *Novoseletskiy v. Ukraine*, ¶ 69.
[1054] *Novoseletskiy v. Ukraine*, ¶¶ 73–78.

As for the administrative authorities, the Teaching Institute that removed the applicant from the flat did not consider the situation at hand or the fact that the applicant had to move far from his teaching place. The ECtHR explained that the Institute could have provided temporary accommodation without a court order since it managed many properties. Although the state was required to protect the rights of the applicant and the individual living in his flat, it has not provided details on how it balanced both. Additionally, the Institute did not repair the flat, and it became uninhabitable.[1055] Hence, the state did not discharge its "positive obligation to restore and protect."[1056] In this case, the absence of adequate judicial review and the failure of the administrative authorities to carefully assess the situation led to disproportionate interference.

In the cases above, judicial review—including the application of proportionality analysis—is a central aspect of the proportionality conducted by the ECtHR under Article 8. Beyond this obligation, one relevant aspect is alternative accommodation mentioned under the positive obligation framework. In the Novoseletskiy case, the ECtHR demanded alternative accommodation for the applicant based on the multiple properties owned by the Institute and the contractual obligation to provide accommodation for its staff.

This reference to alternative accommodation is worth discussing. Fick and Vols argue that alternative accommodation is part of the substantive protection of Article 8. While analyzing the ECtHR case law, they emphasize that the lack of accommodation, which could lead individuals to homelessness, is a key factor in the balancing exercise, notwithstanding their status as unlawful occupiers.[1057] However, Binder and Schobesberger observe that the ECtHR frequently defers to national authorities, prioritizing procedural safeguards rather than substantive standards.[1058] Consequently, they argue that the ECtHR imposes substantive

[1055] *Novoseletskiy v. Ukraine*, ¶¶ 73–88.
[1056] *Novoseletskiy v. Ukraine*, ¶ 89.
[1057] Fick and Vols, 'Best Protection against Eviction? A Comparative Analysis of Protection against Evictions in the European Convention on Human Rights and the South African Constitution', 48–49.
[1058] Binder and Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence', 57.

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obligations in relation to homelessness only in "confined situations."[1059] These observations are confirmed across the ECtHR's cases examined in this chapter, as alternative accommodation is not required in most cases.

When comparing the cases before the CESCR and the ECtHR, multiple frameworks are employed to assess interferences: the limitation assessment, positive obligations, and non-discrimination. The CESCR's proportionality analysis, conducted under both the explicit and implicit limitation assessment, centered on a comprehensive list of obligations. By contrast, the ECtHR's proportionality analysis, under the limitation assessment, positive obligations and non-discrimination frameworks, is notably concise. Despite the different frameworks, both bodies similarly focused on judicial review—with procedural safeguards—and the provision of alternative accommodation. Such requirements constitute non-negotiable obligations, since states must ensure their implementation when interfering with rights. Both bodies also addressed the absence of proportionality analysis at the national level, a component of the balancing exercise. Consequently, neither the choice of framework nor the level of analytical detail impacted the shared focus of the cases. Moreover, in its jurisprudence, the CESCR incorporated non-discrimination and substantive equality obligations into its analysis, thereby heightening the scrutiny of the proportionality analysis.

2.3.2. State sites for Roma, Travelers, and Sinti

The ECSR and the ECtHR analyzed cases concerning evictions of Roma, Travelers, and Sinti families living on state-owned sites, most of whom lawfully occupy these locations. The two European bodies differ regarding the framework applied, which influenced the degree of explicitness in their proportionality analysis. The ECSR assesses the cases through the states' obligations framework, in combination with the non-discrimination obligations—which

[1059] Binder and Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence', 68.

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amounts to an implicit limitation assessment. By contrast, the ECtHR applies the limitation assessment framework throughout. Regardless of the framework chosen, they converge in terms of detail, as both provide comprehensive assessments, and they emphasize that the applicants are minorities in Europe.

Beginning with the ECSR, the European body is similar to the CESCR in its extensive listing of states' obligations to assess interference. The ECSR first outlines how a removal should happen and then explains how states failed to meet these standards. Despite not using the proportionality terminology in most of its cases, the ECSR aligns with other bodies regarding states' obligations when interfering with rights. The first eviction case decided by the ECSR stands out for not listing many obligations or explaining the violation. The ECSR simply stated that evictions must follow procedural rules and that these should protect the rights of evicted people. Without explaining these rules, the ECSR concluded that the situation was unsatisfactory.[1060]

Throughout the years, the ECSR has exhibited inconsistency in structuring its case law. From 2003 until early 2012, the ECSR focused on identifying crucial issues within the legislation in question. In mid-2012, it introduced a list of obligations governing evictions, both before and during the procedure. However, in 2023, the ECSR reverted to its previous approach, once again emphasizing legislative shortcomings. The combination of such obligations with non-discrimination is also inconsistent, as the ECSR sometimes addresses non-discrimination after discussing the obligations required for interferences. Irrespective of whether states' obligations are articulated as a structured list or mentioned sporadically and whether non-discrimination is assessed, the ECSR requires extensive protections for individuals facing removal from state-owned sites. To ensure clarity, I first examine the cases in which the ECSR explicitly set forth the structured list of obligations, thereby highlighting its legal reasoning.

[1060] *ERRC v. Greece*, ¶ 51.

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In the mid-2012 cases, the explicit list of obligations demanded by the ECSR was divided into those required prior to and during the eviction. Prior to the eviction, states must consult the individuals to find solutions, give notice of the eviction before it takes place, avoid evictions during winter or at night, ensure legal remedies, grant legal aid, and offer compensation if the eviction is deemed illegal. During the eviction, states must respect human dignity, follow the rules of procedure, and provide proposals for alternative accommodation.[1061] In some of these cases, the ECSR cited General Comment No. 7 from the CESCR to explain that procedural safeguards include to genuine consultation, notice prior to the eviction, and the presence of national authorities during the evictions.[1062] Thus, the ECSR, like the CESCR, evaluated the list of states' obligations to determine whether there had been a breach of the ESC. In these cases, the legislation violated various obligations, including the lack of alternative accommodation[1063] and judicial review combined with the lack of legal aid.[1064] In European Roma and Travellers Forum v. the Czech Republic, the ECSR also found a violation where evictions were conducted without following the law. However, the ECSR did not apply the terms 'unlawfulness' or 'arbitrariness.'[1065] Therefore, the ECSR' focus significantly overlaps with that of other international bodies.

After finding that states failed to meet the obligations listed above, the ECSR then focused on non-discrimination and substantive equality. In two instances, the ECSR determined that Travelers and Roma must receive equal treatment, which includes appropriate measures to guarantee their right to housing and protect them as a 'vulnerable' group.[1066] Considering indirect discrimination, though not explicitly stated, the ECSR explained that travelers have a caravan lifestyle, which requires differentiated treatment. Since they face a higher risk of being

[1061] *FIDH v. Belgium*, ¶ 163; *Médecins du Monde - International v. France*, ¶ 75; *ERRC v. Ireland*, ¶¶ 136–137; *ERTF v. the Czech Republic*, ¶¶ 81–82.
[1062] *ERRC v. Ireland*, ¶ 139; *ERTF v. the Czech Republic*, ¶ 84.
[1063] *FIDH v. Belgium*, ¶ 165; *Médecins du Monde - International v. France*, ¶ 80; *ERRC v. Ireland*, ¶ 140; *ERTF v. the Czech Republic*, ¶ 85.
[1064] *ERRC v. Ireland*, ¶¶ 141 and 146.
[1065] *ERTF v. the Czech Republic*, ¶ 86.
[1066] *FIDH v. Belgium*, ¶ 165; *Médecins du Monde - International v. France*, ¶ 80.

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evicted, the failure to account for their circumstances constituted discrimination.[1067] As for the Roma, the ECSR found that their situation had not improved since previous cases, thus maintaining a violation of the ESC due to discrimination.[1068] However, in one case, the ECSR rejected the discrimination claim. While examining various state legislations, it concluded that the discriminatory nature of the Acts did not disproportionately impact the applicants. The ECSR acknowledged that the lack of alternative accommodation did not include "Travellers specific accommodation,"[1069] which could be considered an element of substantive equality. Nevertheless, the claim of discrimination was dismissed.[1070]

The incorporation of non-discrimination and substantive equality, following the finding that states failed to meet their obligations, demonstrates the necessity for states to consider the impact of measures on specific groups and how to avoid such negative consequences based on their needs. As such, non-discrimination and substantive equality intensify the scrutiny conducted by the ECSR, ensuring that the implicit limitation framework incorporates ESCR-specific elements into its adjudication. Additionally, the absence of progress from previous cases also contributed to the finding of a violation.

In the cases where an explicit list of obligations is absent, the ECSR nevertheless focuses on obligations similar to those in cases that do include such a list, thereby demonstrating its consistency in overall findings. Moreover, the incorporation of progress, non-discrimination, and substantive equality remains evident.

In two cases against France, the ECSR affirmed that although the legislation prescribed a two-month formal eviction notice and the prohibition of evictions during winter or at night, the absence of rehousing before evictions and the lack of financial measures to prevent them constituted violations of the ESC. Despite the establishment of committees intended to prevent

[1067] *FIDH v. Belgium*, ¶ 166.
[1068] *Médecins du Monde - International v. France*, ¶ 81.
[1069] *ERRC v. Ireland*, ¶ 140.
[1070] *ERRC v. Ireland*, ¶¶ 142–156.

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evictions, there was no evidence of prevention.[1071] In one of them, referencing a previous case against France, the ECSR found that safeguards had already been evaluated, requiring a shift in focus to police behavior. The law allowed evictions without court or landowners' agreement based on distinct reasons. However, the police acted violently to remove individuals, as confirmed by the police commission, who described these actions as "unjustified and disproportionate acts of violence."[1072] This violence violated human dignity and therefore breached the ESC.[1073]

In a case against Greece, the ECSR found that the legislation lacked consultation, reasonable notice, and alternative accommodation. Although legal remedies existed for evictions, Roma families were unaware of them or how to exercise their rights to appeal an eviction and receive legal aid.[1074] Consequently, the remedies were not "sufficiently accessible."[1075] Since the evictions targeted Roma families, the state must ensure that "special support [is] available including targeted advice on the availability of legal aid and on appeals."[1076] This final element underscores the ECSR's concern with substantive equality, recognizing that the Roma are in a disadvantaged position and require accessible remedies. However, the ECSR failed to address the discriminatory effects of evictions against Roma families even in cases indicating that they were targeted or in a 'vulnerable' position in both the French and Greek contexts.

In other cases, where no explicit list of obligations is provided, the ECSR addressed states' discriminatory practice in combination with the analysis of impact of evictions. In Centre on Housing Rights and Evictions v. Italy, the ECSR highlighted the importance of non-discrimination when interfering with rights. In this case, Italy failed to grant alternative

[1071] *International Movement ATD Fourth World v. France*, ¶¶ 79–82; *FEANTSA v. France*, ¶¶ 87–90.
[1072] *ERRC v. France*, ¶ 69.
[1073] *ERRC v. France*, ¶¶ 70–71.
[1074] *INTERIGHTS v. Greece*, ¶¶ 62–68.
[1075] *INTERIGHTS v. Greece*, ¶ 69.
[1076] *INTERIGHTS v. Greece*, ¶ 69.

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accommodation and respect human dignity, particularly because evictions were violent—involving systematic raids and the destruction of belongings. Notably, the ECSR found that, based on national authorities' declarations to the media, the Roma and Sinti people experienced stigmatization, which is discriminatory. Moreover, Italy targeted them without considering their needs. Since the state did not investigate or protect individuals from violence, the ECSR considered that it bore an 'aggravated responsibility.' This concept applies when state violations specifically target and affect 'vulnerable' groups, while national authorities remain passive, fail to punish perpetrators, and instead contribute to the violence.[1077] Referencing a previous case, the ECSR found that the situation in Italy had worsened, thereby constituting a breach of the Council of Europe standards.[1078] The persistent violence against Roma families was present throughout evictions in Italy, which contributed to violating the non-discrimination obligation.[1079]

Regarding this case, Nolan argues that the ECSR missed the opportunity to analyze Italian legislation through the non-retrogression obligation. She attributes this omission at the time of the decision to the lack of content and standards from the CESCR, the body from which the ECSR draws inspiration.[1080] However, so far, the ECSR has not applied the non-retrogression obligation, opting instead for the limitations framework when deemed appropriate.[1081] Despite such criticisms, the Italian case contributes to the discussion on the importance of incorporating states' obligations into the assessment of interferences. As such, the focus on stigmatization and targeting of groups intensifies the scrutiny conducted by the ECSR, thereby addressing core issues of interferences. Moreover, the notion of absence of progress in protecting individuals from evictions is also a critical factor in the scrutiny of

[1077] *COHRE v. Italy*, ¶¶ 67–77.
[1078] *COHRE v. Italy*, ¶ 78.
[1079] *ERRC v. Italy*, ¶ 42.
[1080] Aoife Nolan, '"Aggravated Violations", Roma Housing Rights and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System', *Human Rights Law Review* 11, no. 2 (2011): 357–58.
[1081] Lukas, 'Austerity and Human Rights: Reflections on the Jurisprudence of the European Committee of Social Rights', 31.

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interferences. Although this is not conceptually equivalent to progressive realization, it is evident that the lack of progress over time weighs against the state.

In a more recent case against Italy, Amnesty International v. Italy, reinforced the importance of incorporating states' obligations into the assessment of interferences. The ECSR went further so as to affirm that racial discrimination requires "special vigilance and vigorous reaction."[1082] The recognition of racial discrimination is not present in most cases from the ECSR, thereby demonstrating the severity of the systemic discrimination experienced by the Roma people. Although Italy improved the system, an aspect that featured in the ECSR's analysis, it held that the ongoing housing conditions were nonetheless discriminatory. Even during the COVID-19 pandemic, when a Decree was introduced to suspend evictions, Roma and Sint were evicted repeatedly. Not only were they targeted, but they were also not granted alternative accommodation. Moreover, the state did not consider their 'vulnerability.'[1083] For all of these reasons, the incorporation of states' obligations intensified the level of scrutiny, thereby ensuring a holistic assessment of the interfering measure.

This pattern is present in other cases as well. Against France, the ECSR used similar arguments and found that France bore an 'aggravated responsibility,' calling for urgent measures to address the situation.[1084] The main difference between this French case and the Italian one is that the ECSR identified a direct discrimination violation based on ethnic origin, emphasizing that the state failed to consider the "distinct features of the group,"[1085] and specifically targeted them through ethnic discrimination, stigmatization, and threats of expulsion.[1086] Moreover, in another case, it found that the execution of evictions involving illegally parked caravans exposed them to a higher risk of homelessness because available

[1082] *Amnesty International v. Italy*, ¶ 69.
[1083] *Amnesty International v. Italy*, ¶¶ 66–77.
[1084] *COHRE v. France*, ¶¶ 51–54.
[1085] *COHRE v. France*, ¶ 48.
[1086] *COHRE v. France*, ¶ 47.

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parking spots were scarce, and no alternative accommodation was offered.[1087] The ECSR found that laws directly and indirectly discriminated against Roma people, and France was found to have committed an aggravated violation.[1088]

Furthermore, in European Roma Rights Centre v. Bulgaria, the ECSR examined how the state legislation disproportionately impacted Roma families, finding that it failed to consider their living conditions—the state had not intervened for a lengthy period to legalize dwellings—and judicial redress did not address the specific circumstances of Roma families. Following the evictions, some families received alternative accommodation or compensation, but these were not provided to all affected parties.[1089] After reinforcing the respect for human dignity, the ECSR found that the discrimination occurred due to the state failure to consider the precarious situation of Roma families and their heightened risk of evictions.[1090]

Overall, the ECSR employed an implicit limitation assessment through the unspecific states' obligations framework. Although there is some inconsistency regarding how obligations are mentioned—either as an explicit list or in terms of positive and negative aspects of legislation—the ECSR focused on what the states must do to mitigate the impact on rights. The most common non-negotiable obligation is the provision of alternative accommodation. Beyond such obligations, the ECSR analyzed progress, non-discrimination and substantive equality to determine the intensity of the impact. The concern with progress, including case comparisons and improvement over time, demonstrates that progressive realization has been incorporated into the assessment in a specific form, departing from its traditional understanding. Moreover, in most cases, non-discrimination was incorporated into the analysis. Consequently, the assessment of interferences conducted by the ECSR is significantly concerned with the discriminatory impact of evictions, with substantive equality contributing to the analysis. These

[1087] *ERTF v. France*, ¶ 124.
[1088] *ERTF v. France*, ¶¶ 130–134.
[1089] *ERRC v. Bulgaria*, ¶ 56.
[1090] *ERRC v. Bulgaria*, ¶¶ 55–56.

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obligations, when incorporated into the assessment of interferences, intensify the level of scrutiny applied, thereby ensuring that ESCR-specific elements are addressed.

In contrast to the ECSR, the ECtHR explicitly applies the limitation assessment under the right to respect for private and family life. Instead of focusing on a comprehensive set of obligations, the ECtHR identifies the problematic elements of the national safeguards. As explained in my methodology section in the "Introduction", two cases address this topic: Connors v. The United Kingdom and Winterstein and Others v. France. Although Connors is recognized as the landmark case on housing, and evictions of Roma people, scholarly debate has centered on Yordanova and others v. Bulgaria.[1091] As explained, this case was not included because it was classified as priority 2 in the ECtHR database. However, given the importance of Yordanova and the fact that Winterstein draws heavily from it, scholarly discussions on the Bulgarian case remain relevant and applicable when assessing the ECtHR's findings and trends.

In Connors and Winterstein, the ECtHR's explanation of the general principles for determining whether interference was necessary in a democratic society substantially overlaps. The ECtHR held that this criterion encompasses a pressing social need and the proportionality of the measure, without further explaining the meaning of 'pressing social need.'[1092] In interference cases, national authorities choose the interfering measure, while the ECtHR reviews its necessity under the ECHR. Considering the doctrine of the margin of appreciation, the margin tends to be wider in cases involving social and economic policies, but this varies depending on the right under review, the importance of this right to individuals, the nature and purpose of the interference.[1093] Generally, housing policies fall under wider margin of appreciation. However, this margin is narrower in cases involving Article 8 because this provision is "of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the

[1091] *Yordanova and others v. Bulgaria*.
[1092] *Connors v. The United Kingdom*, ¶ 81; *Winterstein and Others v. France*, ¶ 75.
[1093] *Connors v. The United Kingdom*, ¶ 82; *Winterstein and Others v. France*, ¶ 76.

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community."[1094] This interpretation stands in contrast to the protection offered by Article 1 of Protocol 1, as explained throughout this chapter. Moreover, procedural safeguards are also necessary to determine how wide or narrow the margin will be. The ECtHR focuses on whether "the decision-making process leading to measures of interference was fair and such as to afford due respect."[1095]

In Winterstein, the ECtHR's general principles went further by explaining that the loss of a home is "[the] most extreme form of interference,"[1096] which requires an independent tribunal to analyze the proportionality of the measure, irrespective of whether the individuals have a right of occupation. The assessment of proportionality by judicial authorities must be conducted in detail when raised by individuals and must provide adequate reasons in response. The ECtHR affirmed that some factors must be taken into account. First, the lawfulness of the residence matters: when the establishment of the home was lawful, it outweighs the legitimate aim; if unlawful, the individuals' claim is weaker.[1097] On this point, the ECtHR has established in other cases that unlawful occupation is protected by Article 8, albeit weakly.[1098] Second, the lack of alternative accommodation constitutes a serious interference—the suitability of the accommodation should reflect the persons' needs and the aim in question.[1099]

Lastly, in both cases, the ECtHR discussed the 'vulnerable' position of the Roma people. It affirmed that their needs and different lifestyle must be taken into special consideration, which must occur within the legal framework and the decisions issued by the authorities. The ECtHR understands these as a positive obligation under Article 8, deriving from the obligation to "facilitate the way of life of the Roma and travelers."[1100] In comparing the general principles,

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[1094] *Connors v. The United Kingdom*, ¶ 82; *Winterstein and Others v. France*, ¶ 76.
[1095] *Connors v. The United Kingdom*, ¶ 83; *Winterstein and Others v. France*, ¶ 76.
[1096] *Winterstein and Others v. France*, ¶ 76.
[1097] *Winterstein and Others v. France*, ¶ 76.
[1098] 'Guide on Article 8 of the European Convention on Human Rights', European Court of Human Rights, 28 February 2025, 119.
[1099] *Winterstein and Others v. France*, ¶ 76.
[1100] *Connors v. The United Kingdom*, ¶ 84; *Winterstein and Others v. France*, ¶ 76. In Connors, the wording of the quote is different because the ECtHR was still referring to the Roma people as 'Gypsies'. This term is derogatory,

the Winterstein case included substantive protection, while both cases shared a focus on procedural protection and substantive equality. Yet, on the merits of both decisions, the ECtHR similarly emphasized the conduct of judicial review and the provision of alternative accommodation.

In Connors, the ECtHR granted a narrow margin of appreciation, given that states must grant procedural protection for a "particular category of persons."[1101] In contrast to the Chapman case—regarding illegally parked caravans on her own land—discussed in the previous section, the Connors' case concerned a family living in a state-run site with different procedures from those for individuals living in private sites or social housing. The government claimed that the different procedures were necessary due to the nomadic life and the need for flexibility. The ECtHR, however, was not convinced, noting that only a few individuals still remained nomadic, and they had specific spots reserved.[1102]

Interestingly, the ECtHR addressed the reasons of the state under the proportionality analysis rather than legitimacy. In light of the narrower margin of appreciation, the ECtHR emphasized the seriousness of the interference, requiring that the justification based on public interest be weighty.[1103] The summary evictions for Roma sites were rejected by the ECtHR. The state advanced four reasons to justify the summary eviction of the family: summary evictions were necessary due to the nomadic lifestyle of the Roma; national authorities required flexibility; such evictions helped control anti-social behavior; and legal proceedings would increase the overall cost of the sites for the Roma.[1104]

To these arguments, the ECtHR responded that the nomadic lifestyle had declined over time and that only a minority of Roma families required flexibility, necessitating only a few

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and I opted to use the quote from the Winterstein case. Nevertheless, the idea of the obligation to facilitate is the same.

[1101] *Connors v. The United Kingdom*, ¶ 86.
[1102] *Connors v. The United Kingdom*, ¶ 88.
[1103] *Connors v. The United Kingdom*, ¶ 86.
[1104] *Connors v. The United Kingdom*, ¶ 87.

sites with a transitory characteristic. Not only did the Roma people fail to benefit from these summary evictions, but they were also excluded from planning permissions—as established by the ECtHR's precedents. Furthermore, anti-social behavior did not justify summary evictions, as judicial review must be conducted to "review […] the justification for the measure."[1105] Lastly, the national courts failed to analyze law's impact on individuals, which could not serve as "strong support for the justification of the current regime."[1106] Consequently, despite accepting the legitimate aim, the ECtHR challenged the arguments submitted by the state due to its lack of awareness of Roma needs and the absence of adequate judicial review.

The Connors case deviates from the Chapman case for four reasons. First, the ECtHR provided a better definition of the obligation to facilitate, demanding proportionality analysis at the national level. Second, the ECtHR integrated procedural safeguards into Article 8 to protect individuals from evictions. Third, it acknowledged the Roma as a 'vulnerable' group. This 'vulnerability' must be factored into the proportionality test conducted by national courts.[1107] Such recognition represents an incorporation of substantive equality into the proportionality analysis, which is crucial to address individuals' needs. Fourth, a key aspect of Connors is the importance of justification for removing individuals from their homes. The ECtHR was not convinced the state had a justification for the eviction. In this case, the absence of justification for summary procedures also weighed against the state in the proportionality analysis. Consequently, the focus on reasoning in the proportionality criterion demonstrates that the boundaries between the limitation assessment criteria may be blurred – as reflected by other bodies when discussing judicial review under legality or legitimate aim.

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[1105] *Connors v. The United Kingdom*, ¶ 89.
[1106] *Connors v. The United Kingdom*, ¶ 91.
[1107] Darren O'Donovan, 'Breaking the Cycle of Discrimination? Traveller/Roma Housing Exclusion and the European Convention on Human Rights', *International Journal of Discrimination and the Law* 16, no. 1 (2016): 14–15.

In Winterstein, the facts of the case differed from those in Connors because not all families were living legally on the land. However, relying on the Yordanova case,[1108] the ECtHR reinforced that the proportionality of interferences varies between cases involving the eviction of entire communities illegally occupying state property that had been tolerated for years and cases involving individuals unlawfully occupying land. Again, focusing on reasons, the ECtHR explained that local authorities had not provided reasons to evict individuals besides the unlawful occupation. During judicial review, courts "refused to hear arguments about proportionality and the lengthy period during which the applicants and their families had lived there undisturbed."[1109] Notably, the ECtHR held that land ownership (public or private) the land was irrelevant for the assessment of the case.[1110]

The ECtHR pointed out in Winterstein that national courts had not assessed the specific situation while analyzing the violation of the land-use plan. The ECtHR emphasized that removing individuals from their dwelling is the "most extreme form of interference."[1111] As such, national courts must examine proportionality in detail and offer adequate reasoning, especially "where arguments concerning the proportionality of the interference have been raised."[1112] National courts failed to conduct this analysis because they did not weigh the legal violation against the arguments presented by the applicants. This omission breached the proportionality criterion, as the courts had not assessed the existence of pressing social need. Moreover, national authorities failed to provide an explanation for the 'necessity' of the measure since land was considered a natural zone—it was neither municipal property nor subject to third-party rights.[1113]

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[1108] *Yordanova and others v. Bulgaria*.
[1109] *Winterstein and Others v. France*, ¶ 79.
[1110] *Winterstein and Others v. France*, ¶¶ 8 and 80. The main difference between Yordanova and Winterstein was that the former related to municipal land and the latter concerned state-owned or private land.
[1111] *Winterstein and Others v. France*, ¶ 83.
[1112] *Winterstein and Others v. France*, ¶ 83.
[1113] *Winterstein and Others v. France*, ¶¶ 79–86.

Another element considered by the ECtHR was the provision of alternative accommodation. While the ECHR does not grant a right to housing to everyone, the ECtHR held that the risk of becoming homeless in this case had to be taken into account in the analysis. It also highlighted that other Council of Europe documents require the provision of alternative accommodation in case of forced evictions of Roma people—except in instances of force majeure. This obligation stems from their position as a "vulnerable minority,"[1114] for which states must give "special consideration […] to their needs and their different lifestyle"[1115] within national laws and decisions. Such considerations fall under substantive equality.

In this case, one group of families chose social housing as alternative accommodation which was granted by the state four years following the eviction order. For these families, the ECtHR found that national authorities had taken their needs into consideration. A second group requested family plots. Although the municipality promised them land, it was ultimately allocated to travelers instead. Consequently, despite the government having taken steps towards alternative accommodation, these applicants were ultimately forgotten. They remained active during this period, pursuing alternative housing, and they could not "be criticized for failing to request or accept social housing which did not correspond to their lifestyle."[1116] As a result, most of the families remained in precarious conditions because they were unable to secure accommodation. The ECtHR thus found that the national authorities had not sufficiently considered the families' needs with respect to reallocation.[1117]

Considering the two cases above, several conclusions emerge. First, judicial review is a crucial safeguard to protect the rights of individuals under Article 8: independent tribunals must review the situation and analyze all the arguments presented. For this reason, authorities

[1114] *Winterstein and Others v. France*, ¶ 88.
[1115] *Winterstein and Others v. France*, ¶ 76.
[1116] *Winterstein and Others v. France*, ¶ 91.
[1117] *Winterstein and Others v. France*, ¶¶ 87–94. National documents have demonstrated that France does not have enough accommodation for Roma families, and the ECtHR cited the ECSR's findings regarding France concerning this aspect.

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requesting evictions must present their reasons, and courts must weigh the interests at stake through proportionality. Second, the provision alternative accommodation helps determine whether authorities have adequately considered applicants' needs. In contrast to other bodies, it is not an obligation but a factor to be weighed, stemming from the risk of homelessness. Abbie explains that in other ECtHR's cases, it held that evictions should be delayed until individuals have secured an alternative housing or the state provides one—the ECtHR perceives this as "an obligation to consider 'arrangements for alternative shelter.'"[1118]

The general rule is that alternative accommodation is only decisive in cases involving the eviction of lawful occupiers. One exception was Yordanova v. Bulgaria, confirmed by Winterstein, where long-term unlawful occupation tolerated by the state influenced the ECtHR's proportionality analysis.[1119] However, the ECtHR perceives Roma cases differently than other housing cases, as in the latter cases, the personal capacity to obtain alternative accommodation or the state's ability to provide it is weighted.[1120] This case, and by extension others in this section, suggests that the ECtHR is considering positive obligations within the "inner core of housing-related rights,"[1121] especially because of the obligation to prevent homelessness.[1122] These elements form the substantive protection under the proportionality criterion, which is less common in the ECtHR jurisprudence[1123] than in that of other international bodies.

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[1118] Tania Abbiate, 'A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction', *Journal of Comparative Law in Africa* 1 (2014): 105.
[1119] Fick and Vols, 'Best Protection against Eviction? A Comparative Analysis of Protection against Evictions in the European Convention on Human Rights and the South African Constitution', 45–46.
[1120] Abbiate, 'A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction', 105; Fick and Vols, 'Best Protection against Eviction? A Comparative Analysis of Protection against Evictions in the European Convention on Human Rights and the South African Constitution', 49–50.
[1121] Binder and Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence', 68.
[1122] Binder and Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence', 67–68.
[1123] Abbiate, 'A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction', 104.

Third, the ECtHR has not directly addressed discrimination in these cases, even though they are both concerning Roma families. While analyzing the anti-discrimination case law of the ECtHR, Möschel clarifies that after the 2000s, the ECtHR began applying the non-discrimination clause to cases, especially concerning "race, gender and sexual orientation."[1124] Examining this jurisprudence, Möschel points out that the non-discrimination clause is applied in Roma cases connected to school segregation and police violence.[1125] Nevertheless, discrimination remains absent in housing cases. O'Donovan explains that "[t]here remains however a missing link in the Court's approach: the failure to frame cases before it in terms of indirect discrimination."[1126]

The absence of non-discrimination does not preclude the ECtHR from considering substantive equality throughout its case law. Despite not mentioning it explicitly, substantive equality is the primary element of the proportionality analysis. Compared to the Chapman case, the ECtHR has incorporated a substantial focus on 'vulnerability' in its proportionality analysis in Winterstein. Based on the acknowledgment of Roma families' 'vulnerability,' the ECtHR also required states to take this 'vulnerability' into account during the national application of the proportionality analysis, especially when assessing the consequences of evictions and providing alternative accommodation that meets their needs. Accordingly, the ECtHR has changed its approach to Roma housing cases to protect their lifestyle and avoid rendering them homeless.[1127]

However, the ECtHR does not go beyond these aspects to inform states how to end discrimination. One criticism has been the lack of engagement with the "redistributive aspect of substantive equality"[1128] to include accommodation and positive steps to correct inequalities

[1124] Möschel, 'European Convention of Human Rights/Council of Europe', 532.
[1125] Möschel, 'European Convention of Human Rights/Council of Europe', 534.
[1126] O'Donovan, 'Breaking the Cycle of Discrimination? Traveller/Roma Housing Exclusion and the European Convention on Human Rights', 18.
[1127] O'Donovan, 'Breaking the Cycle of Discrimination? Traveller/Roma Housing Exclusion and the European Convention on Human Rights', 14–15.
[1128] Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities', 103.

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as requirements under the ECHR.[1129] Moreover, Kostadinova argues that substantive equality in minority rights law is broader than in human rights instruments, as the former aims at protecting groups. Consequently, its primary goal is to abolish systemic and structural discrimination through positive measures.[1130] Hence, the ECtHR gives significant importance to substantive equality, but without providing guidance to states on how to address the broader discrimination experienced by Roma people.

Comparatively, the ECSR and the ECtHR applied the limitation assessment implicitly and explicitly, respectively. With respect to the content of the proportionality analysis, the ECSR clarified which states' obligations must be met to remove individuals, focusing on the impact of the measures, particularly their discriminatory effects. Although the ECSR requires various non-negotiable obligations, the most common among them is alternative accommodation. As for the ECtHR, its general principles are comprehensive. On the merits of the decisions, the conduct of judicial review is the principal non-negotiable obligation, with alternative accommodation considered as part of the balancing exercise.

Beyond non-negotiable obligations and the balancing exercise, both bodies incorporated specific states' obligations into the proportionality analysis. The ECSR explicitly used the non-discrimination obligation to assess whether the measures were discriminatory, focusing on prohibited grounds in a few cases. Additionally, substantive equality informed the analysis of interferences. Notably, progressive realization has also been incorporated, albeit through a slightly different concept. Instead of the traditional understanding of progressive realization, the ECSR compared previous cases to decide whether there was any change or deterioration of conditions surrounding evictions, weighing such (lack of) progress. By contrast, the ECtHR only incorporated substantive equality into the proportionality analysis primarily through

[1129] Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities', 103.
[1130] Galina Kostadinova, 'Minority Rights as a Normative Framework for Addressing the Situation of Roma in Europe', *Oxford Development Studies* 39, no. 02 (2011): 176.

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considerations of 'vulnerability' and the specific needs of affected individuals. Similar to other bodies, such incorporation has intensified the scrutiny conducted by the European bodies regarding the impact of interferences, thereby enhancing the analysis.

2.3.3. Revoked authorization to live on state land

Another group of cases involves individuals living on state land who had authorization to do so, which was revoked due to changes in the law. The ECtHR was the only body that adjudicated such cases, all under the right to property, focusing primarily on the provision of compensation.

In one case, the revocation of the authorization occurred due to the German reunification. The ECtHR found that the administrative court examined all the facts and arguments, producing a "sound"[1131] decision. While the applicants only had usufruct of state land and were not the owners, the state paid them for the constructed house. Consequently, they did not bear a disproportionate burden.[1132] Without using these expressions, the ECtHR found that the applicants had a proper administrative review and received compensation, both considered non-negotiable obligations.

In two French cases, the proportionality analysis focused on the content of the law, the behavior of national authorities and of the applicants, and the lack of compensation. Under Article 1 of Protocol 1, states have a wide margin of appreciation for choosing the means of interference. Consequently, the proportionality analysis conducted by the ECtHR centered on the individual and excessive burden suffered by applicants. In these cases, the applicants lived on coastal property for years. While the state argued that the constructions on the property were illegal, the ECtHR dismissed it, based on the fact that the applicants proved they possessed the land in good faith, and that national authorities granted them permission to live there based on

[1131] *Wittek v. Germany*, ¶ 57.
[1132] *Wittek v. Germany*, ¶¶ 55–61.

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the law.[1133] Notably, the reasoning provided by the state was analyzed again under proportionality, to be partially rejected. The ECtHR clarified, however, that the withdrawal of authorization to live on state property required individuals to return the land to its original status, meaning that the demolition of the houses was necessary.[1134]

Also focusing on legality aspects, the ECtHR clarified that since the content of the law was clear, the applicants knew that the authorization was precarious and revocable. As a result, national authorities did not contribute to any legal uncertainty. On the contrary, they behaved adequately in accordance with the law. Considering the vast range of possible measures to interfere with rights, the ECtHR considered that it was not tasked with the competence to determine which interference measure is appropriate for the general interest in place of the measure chosen by state. Although demolition is a radical interference, the state had signaled to the applicants that it would happen through the Coastal Act. Moreover, the state could not exempt the applicants from the law because it would go against the legitimate aim.[1135]

In these cases, the reexamination of questions of legality and legitimacy demonstrates that the content of the proportionality analysis is not confined to the aspects solely linked to the impact of measures. As such, the content of each criterion is not rigid, with boundaries blurred by international bodies. Here, the ECtHR combined the adequate behavior of the national authorities with legality and legitimacy, thereby underscoring that this element of the balancing exercise must be considered in light of legal certainty and the purpose of the laws.

Furthermore, the ECtHR focused on the applicants' behavior. While the state provided reasonable alternatives to their situation, the applicants rejected all the proposals, which was considered unfavorably. Regarding the compensation, although the lack of compensation usually makes the interference disproportionate, the ECtHR explained that this does not apply in cases where individuals live on public property based on authorization. Hence, the

[1133] *Brosset-Triboulet and Others v. France*, ¶¶ 89–94; *Depalle v. France*, ¶¶ 86–91.
[1134] *Brosset-Triboulet and Others v. France*, ¶¶ 89–94; *Depalle v. France*, ¶¶ 86–91.
[1135] *Brosset-Triboulet and Others v. France*, ¶¶ 89–92; *Depalle v. France*, ¶¶ 86–89.

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interference was not disproportionate due to the proper application of the law, authorities' behavior, unreasonable expectations of the applicants, and the absence of a requirement for compensation for removal from public property. [1136]

These cases confirm the overall focus of the ECtHR in its jurisprudence regarding property and housing-related issues. Within non-negotiable obligations, national authorities' review and compensation are crucial. The balancing exercise comprises of the behavior of national authorities and the applicants, especially their good faith. In these cases, the focus on legality and legitimacy under the proportionality illustrates that the limitation assessment is a mode of analysis rather than a rigid tool.

2.3.4. Illegally occupation of state land

The removal of individuals illegally occupying state land has been decided only by the CESCR in Hamid Saydawi and Masir Farah v. Italy. This case is distinct from other cases regarding state-owned property because the applicant was not living in social housing, a state flat, or a site. Instead, the applicants occupied the block of flats owned by a state company without authorization and were tolerated for years on the property. In this case, the CESCR employed the limitation assessment framework, listing a set of comprehensive states' obligations. The explanation provided by the CESCR regarding the proportionality analysis closely aligns with Vázquez Guerreiro v. Spain, as explained in the part on the proportionality of removal from social housing,[1137] including the explanation on the alternative accommodation obligation.[1138]

In Hamid Saydawi and Masir Farah v. Italy, the CESCR found a violation of the ICESCR for three reasons. First, the national judicial authorities did not conduct a proper proportionality analysis. The proportionality analysis should have assessed the fact that the

[1136] *Brosset-Triboulet and Others v. France*, ¶¶ 86–89; *Depalle v. France*, ¶¶ 83–86.
[1137] *Hamid Saydawi and Masir Farah v. Italy*, ¶ 8.2-8.7.
[1138] *Hamid Saydawi and Masir Farah v. Italy*, ¶ 9.1-9.4.

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applicants had lived in the house for many years, and that the property belonged to a state railway company rather than an individual who needed the property and the applicants' socioeconomic vulnerability and precarious situation. Second, the applicants requested social housing and were not granted alternative accommodation. Third, the judicial authorities did not genuinely and effectively consult the applicants, nor did they ask the administrative authorities to provide information on social housing.[1139]

This case diverges from the other state property cases—and also the private property cases analyzed in the next part—for two reasons. First, this is the only case in which the CESCR considered the ownership by a state company as a factor weighing against the state. Even in the private property cases in which the property belonged to banks and real estate agencies, the CESCR did not use the ownership status to tip the balance in favor of the applicants. Second, the entire focus of this case was on judicial authorities and their responsibilities in conducting judicial review. The fact that the applicants did not receive alternative accommodation was regarded as a judicial failure rather than a shortcoming of social services.

These two distinguishing features are especially significant because this is the most recent case decided by the CESCR that is included in my dissertation. As a consequence, the case raises the question of whether the CESCR will revise its assessment of the proportionality analysis conducted by the judicial authorities, and whether it will require a broader role from them during evictions. Beyond this potential shift in interpretations, the CESCR's focus remains on non-negotiable obligations—the conduct of judicial review, the conduct of consultation, and the provision of alternative accommodation—combined with the balancing exercise, particularly emphasizing the behavior of judicial authorities and the ownership of the property.

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[1139] *Hamid Saydawi and Masir Farah v. Italy*, ¶ 10.1-10.5.

2.3.5. Residing on private property

Regarding individuals removed from private property, only the CESCR and the IACmHR have ruled on such cases. In some cases, the individuals were unlawfully occupying the property, while in a few others the individuals were tenants. The illegality of the occupation does not, however, affect the proportionality analysis conducted by the two bodies. The main differences between the two bodies lie in the frameworks chosen, the level of detail of the proportionality analysis and the rights adjudicated. The CESCR employed an implicit limitation assessment through unspecific states' obligations in earlier cases and the explicit limitation assessment in more recent ones, detailing proportionality with respect to the right to housing. By contrast, the IACmHR relies solely on an implicit limitation assessment, providing less detail regarding the impact of the measure on the right to life. Irrespective of such differences, they similarly focus on the conduct of judicial review, the prohibition against violent evictions, and the presence of authorities during evictions as non-negotiable obligations.

The CESCR has changed the language employed in interference cases, shifting from unspecific states' obligations[1140] to the explicit limitation assessment.[1141] Despite this shift, the focus within the cases remains consistent, regardless of whether they mention proportionality or not. For this reason, I argue that the unspecific states' obligations constitute an implicit limitation assessment, which I have also demonstrated in the social housing cases discussed in this section. The main difference between the cases lies in the language adopted and the level of detail. However, these differences do not alter the overall similarity between the cases, as I demonstrate below.

Since these cases often follow a repetitive line of reasoning and do not differ considerably from other CESCR decisions discussed above, I first examine the cases in which

[1140] *I.D.G. v. Spain*, ¶ 11.1-13.7; *Ben Djazia et al v. Spain*, ¶ 13.1-17.8; *López Albán et al. v. Spain*, ¶ 8.1-12.2.
[1141] *Rosario Gómez-Limón Pardo v. Spain*, ¶ 8.1-10.3; *El Goumari et al v. Spain*, ¶ 8.1-11.5; *El Ayoubi et al v. Spain*, ¶ 11.1-14.7; *Soraya Moreno Romero and Children v. Spain*, ¶ 10.1-12.6; *Lorne Joseph Walters v. Belgium*, ¶ 9.1-12.9; *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.1-10.6; *Infante Díaz v. Spain*, ¶ 7.7-7.13.

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the limitation assessment was explicit, followed by those in which the limitation assessment was implicit, highlighting their similarities and differences. The rationale for beginning with the explicit limitation assessment cases—despite their more recent rulings—is their greater level of detail and the fact that the obligations listed under the proportionality criterion are also reflected in the cases governed by the implicit framework, albeit in lesser detail.

To avoid repetition, I focus on the case Hernández Cortés and Rodríguez Bermúdez v. Spain as a representative case for the CESCR's reasoning, particularly as it was recently decided. After discussing this case, I then highlight how the other cases under the limitation assessment differ from it. In this case, the CESCR explained that evictions must follow both Article 2(1), which outlines states' obligations, and Article 4 ICESCR, the limitation clause, when interfering with the right to housing.[1142] Proportionality analysis under these provisions encompasses suitability, necessity, and proportionality stricto sensu.[1143] These two aspects, the combination of the provisions and the proportionality analysis criteria, are also present in cases concerning social housing and the illegal occupation of state land, as decided by the CESCR and discussed above.

Similarly, the CESCR focused on the form and content of proportionality. Regarding content, the CESCR confirmed that the greater the impact on a right, the greater the scrutiny must be. Additionally, crucial factors must be considered: available accommodation, the personal circumstances, and the cooperation between affected individuals with national authorities.[1144] States must ensure "genuine prior consultation […], no less onerous alternative means or measures available […],"[1145] and the prevention of exposure to or continuation of human rights violations.[1146] In some cases, the presence of authorities during evictions might be required to mitigate their consequences. Notably, immediate evictions without considering

[1142] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.2.
[1143] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.3.
[1144] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.3.
[1145] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.4.
[1146] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.1-8.4.

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individuals' circumstances constitute a violation of the ICESCR. Furthermore, the CESCR underlined the need to distinguish between property belonging to individuals who require it for their income or housing, and property owned by institutions.[1147] As for the form of the proportionality analysis, the CESCR clarified such analysis must be conducted by an impartial and independent body, judicial or otherwise, that has the competence to cease the violation and redress it through effective remedies. Evictions should be postponed if they render individuals in "situations of indigence or [violate] other rights."[1148]

In this case, the CESCR also elaborated on the obligation to provide alternative accommodation in eviction cases. States must take all necessary steps, using their maximum available resources, to resettle evicted individuals, regardless of whether the eviction was initiated by state authorities or third parties. The absence of alternative accommodation is acceptable only when the state demonstrates that it took all the necessary steps, based on the maximum available resources, and considered all aspects of the specific situation. Furthermore, Article 2(1) requires these steps to be "deliberate, concrete and targeted as clearly as possible towards fulfilling this right as swiftly and efficiently as possible."[1149]

Housing policies must be shaped by the needs and urgency within the state, respecting human dignity. The housing provided should encompass various factors and include the minimum core elements of the right to housing.[1150] Temporary housing is permissible when permanent housing cannot be provided, provided that it protects human dignity, safety, and security and does not become a permanent solution. Temporary housing should not separate families and must ensure privacy.[1151] Although this case did not address procedural safeguards

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[1147] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.3.
[1148] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 8.3.
[1149] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 9.2. See also: *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 2.
[1150] The minimum core elements of the right to housing are explained in: *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8.
[1151] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 9.1-9.4.

in the same depth as the cases concerning state property, it did refer to consultation and effective remedy, both of which form part of the list of procedural safeguards.[1152]

The Hernández Cortés and Rodríguez Bermúdez v. Spain case is an evident example of the benefits of incorporating states' obligations into the limitation assessment. The application of Article 2(1) in combination with the limitation clause ensures that specific ESCR elements are considered when assessing the proportionality of the measure. In this case, the CESCR considered the steps taken by the state based on its resources—giving particular importance to the minimum income support provided to the applicants—and the proper conduction of the proportionality analysis by national authorities based on socioeconomic needs.[1153] The first aspect of the analysis is only possible due to the incorporation of states' obligations, while the second confirms that the balancing exercise has been conducted at the national level. However, the CESCR found that the evictions were incompatible with the ICESCR because the absence of alternative accommodation led to constant eviction threats and their subsequent suspensions, which violated security of tenure[1154]—a component of the minimum essential levels of the right to housing.[1155] Therefore, specific states' obligations have intensified the scrutiny of the assessment of proportionality.

Most other cases under the limitation assessment framework followed the same logic as the Hernández Cortés and Rodríguez Bermúdez case. The difference stemmed from the reasons for finding the interferences disproportionate. In most of them, the absence of a proportionality analysis at the national level resulted in a violation of the ICESCR. Notably, in these cases, Article 2(1) was also breached because the judicial authorities lacked the competence to bring the violation to an end or provide redress.[1156] In two of these cases, the CESCR also addressed

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[1152] See part about removals from social housing.
[1153] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 10.3.
[1154] *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 10.4.
[1155] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8.
[1156] *Rosario Gómez-Limón Pardo v. Spain*, ¶ 9.7; *El Goumari et al v. Spain*, ¶ 10.3; *El Ayoubi et al v. Spain*, ¶ 14.6.

the applicants' 'vulnerability' and temporary accommodation. Regarding the former, it found that national courts failed to consider the applicants' 'vulnerability' when assessing the evictions.[1157] As for the latter, the CESCR held that the shelter provided was inadequate. Although it was not intended as a permanent solution, the applicants faced constant threats of evictions from the shelter, undermining their dignity, safety and security.[1158] In these cases, minimum core and substantive equality were incorporated into the limitation assessment.

On the question of 'vulnerability', the case Infante Díaz v. Spain stands out. The CESCR explained how 'vulnerability' and alternative accommodation are intertwined. The applicant was undocumented, which was known by both social services and the courts. However, the state refused to grant her alternative accommodation. Given the gravity of the consequences of the eviction, the CESCR affirmed that her "socioeconomic vulnerability [was] more serious than the harm to the legal right that the State party seeks to protect."[1159] Although the CESCR did not use the explicit language of proportionality, it is evident that the decision to evict without providing alternative housing failed to adequately weigh the consequences of the evictions for the applicant.

Additionally, in Soraya Moreno Romero and Children v. Spain the eviction occurred through criminal proceedings. Although the CESCR affirmed that criminal law should not be the norm and the state must justify its choices based on the less onerous option, it found that the applicant had failed to demonstrate any issue related to the eviction or to prove that the temporary accommodation breached human dignity. On the contrary, the CESCR concluded that the state had taken all necessary steps based on its maximum available resources.[1160]

Within the limitation assessment framework, the CESCR has incorporated states' obligations to intensify the scrutiny applied. Such obligations encompass the minimum

[1157] *El Goumari et al v. Spain*, ¶ 10.3; *El Ayoubi et al v. Spain*, ¶ 14.3.
[1158] *El Goumari et al v. Spain*, ¶ 11.1-11.5.
[1159] *Infante Díaz v. Spain*, ¶ 7.12.
[1160] *Soraya Moreno Romero and Children v. Spain*, ¶ 12.1-12.6.

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essential levels and substantive equality. Among all the cases under the limitation assessment framework, Lorne Joseph Walters v. Belgium is the only one that clearly incorporates non-discrimination into the limitation assessment. This case is significant because the CESCR addressed the criteria present in both limitations and non-discrimination.

In the Walters case, the CESCR explained that the state had followed the law, ensured procedural safeguards, and conducted proper judicial review. The issue of the interference was the discriminatory effects of the existing legislation, which the CESCR explained under the proportionality criterion. Before addressing non-discrimination, the CESCR also incorporated the minimum core and substantive equality. It explained, based on affordability (essential level of housing),[1161] that states must take steps to ensure that housing costs are proportionate to income levels. While states may adopt various policies, such as rental-control schemes,[1162] these policies cannot deny access to housing.[1163] As such, accessibility is also an essential level of housing.[1164] Additionally, states must protect individuals against unreasonable rent and "undesirable effects that such legislation may have on vulnerable groups, such as older persons."[1165] In adopting such schemes, special measures are required to ensure that older people can fully realize their rights. These measures aim to prevent a disproportionate impact on the rights of older persons, particularly those in difficult economic situations. Furthermore, older individuals' continued residence in their homes is especially important, given the existing support network and potential changes may be disruptive.[1166]

On the non-discrimination obligation, the CESCR found that the law permitting the termination of leases without cause provided sufficient safeguards, such as allowing judges to grant extensions to protect individuals in 'vulnerable' situations. The key issue, therefore, was

[1161] See: *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8.
[1162] *Lorne Joseph Walters v. Belgium*, ¶ 11.4.
[1163] *Lorne Joseph Walters v. Belgium*, ¶ 11.5.
[1164] See: *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8.
[1165] *Lorne Joseph Walters v. Belgium*, ¶ 11.4.
[1166] *Lorne Joseph Walters v. Belgium*, ¶ 11.6.

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not the compatibility of the legislation with the ICESCR per se, but rather how older persons were disproportionately affected by lease terminations and the laws' inflexibility—resulting in a disproportionate impact on "low-income older people."[1167] In such cases, states have two obligations: (i) to establish a monitoring mechanism to ensure that legislation does not disproportionately impact marginalized individuals; and (ii) to guarantee "mechanisms and flexibility"[1168] to prevent such disproportionate effects.[1169] Consequently, the CESCR concluded that judicial authorities and social services failed to consider the disproportionate impact of moving an elderly person and his circumstances, which could have been mitigated through other alternatives based on the state's maximum available resources. Additionally, the state failed to provide adequate alternative accommodation tailored to his needs, which would have ensured his security of tenure.[1170]

The Walters case highlights the benefits of incorporating states' obligations into the limitation assessment. Each state obligation contributed to intensifying the analysis of proportionality, focusing on the specific needs of individuals.[1171] Such incorporation still requires consistency. Notably, the CESCR did not refer to its own established assessment for discrimination, as set out in General Comment 20,[1172] nor did it cite any of the prohibited grounds listed therein.[1173]

Overall, the proportionality analysis conducted under the limitation assessment framework reinforces the findings of previous cases. First, the proportionality analysis consists of non-negotiable obligations—such as the provision of alternative accommodation, the conduct of judicial review, and the existence of procedural safeguards—and the balancing

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[1167] *Lorne Joseph Walters v. Belgium*, ¶ 12.2.
[1168] *Lorne Joseph Walters v. Belgium*, ¶ 12.3.
[1169] *Lorne Joseph Walters v. Belgium*, ¶ 12.3.
[1170] *Lorne Joseph Walters v. Belgium*, ¶ 12.4-12–7.
[1171] See: Grohmann, 'Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR', 19.
[1172] *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 13.
[1173] Although 'age' is a prohibited ground of discrimination, the CESCR did not mention. See: *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, para. 29.

exercise. Second, the proportionality analysis incorporates states' obligations. The minimum essential levels, non-discrimination and substantive equality permeate the proportionality analysis, thereby intensifying the scrutiny of the criterion. This incorporation strengthens the assessment by integrating the benefits of states' obligations, resulting in a more robust analysis.

Moving to the earlier cases decided by the CESCR, these were adjudicated based on states' obligations, which consist of an implicit limitation assessment since the cases contain a similar legal reasoning. As mentioned previously, the main difference between the two types of cases is that the level of detail in the implicit limitation assessment is less extensive compared to the explicit limitation assessment. In one of its first cases, the CESCR focused exclusively on adequate notice instead of enumerating all the obligations required in eviction cases. It held that public posting of eviction notices did not qualify as adequate notice because it was neither posted for a sufficient period nor sufficiently visible.[1174] The applicant was not afforded legal remedies because she did not see the notice and could not defend herself. The fact that national courts tolerated such insufficient notice violated procedural safeguards.[1175]

In another case, the CESCR articulated several key obligations without listing them comprehensively, such as prior consultations, the prohibition against exposing or maintaining human rights violations,[1176] and the obligation to provide alternative accommodation. In this case, despite not invoking the limitation clause, the CESCR undertook an analysis of the proportionality of the measure. It found that national courts failed to conduct a proportionality analysis of the situation, and the state did not provide a judicial mechanism to challenge the eviction, which had been ordered as immediate—a violation of the right to housing. The CESCR called for a legal change to oblige judicial authorities to consider individuals' good faith, personal circumstances, and cooperation with authorities.[1177] In other words, the CESCR

[1174] *I.D.G. v. Spain*, ¶ 13.3.
[1175] *I.D.G. v. Spain*, ¶ 13.6-13.7.
[1176] *López Albán et al. v. Spain*, ¶ 8.3.
[1177] *López Albán et al. v. Spain*, ¶ 11.1-11.7.

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demanded that national authorities conduct the balancing exercise when analyzing interferences.

In addition to procedural safeguards and judicial review, the CESCR explained that the absence of alternative accommodation also violated the ICESCR. The applicant was denied access to social housing due to previous illegal occupation, yet the state failed to justify this rejection. The CESCR concluded that requiring the applicant to relocate to a shelter imposed an excessive burden on her and her children.[1178] Notably, in this case, the CESCR recognized that national authorities "must avoid perpetuating the systemic discrimination."[1179] Such recognition is particularly significant.[1180] Nevertheless, this aspect was not assessed, and the applicant's 'vulnerability' was not accorded sufficient importance in the analysis. As explained by Sánchez, the absence of such analysis represents a shortcoming, given that the CESCR should address indirect discrimination and the disproportionate impact of legal frameworks on individuals.[1181]

The two cases above demonstrate that the CESCR focused on the same aspects under both the explicit and implicit limitation assessment, particularly the conduct of judicial review, the existence of procedural safeguards, and the provision of alternative accommodation. Notably, these cases did not focus on specific states' obligations to the same extent as those under the limitation assessment. One plausible explanation is that the CESCR gradually refined its legal reasoning over time, expanding its interpretative tools.

One case worth mentioning is Ben Djazia and Bellili v. Spain. In this case, the CESCR focused on the state policies in a different manner than the Walters case. The CESCR found that, although procedural safeguards were in place and national courts had suspended the

[1178] *López Albán et al. v. Spain*, ¶ 12.1-12.2.
[1179] *López Albán et al. v. Spain*, ¶ 10.1.
[1180] Juan Carlos Benito Sánchez, 'The UN Committee on Economic, Social and Cultural Rights Decision in López Albán V. Spain: The Need for a Proportionality Assessment in Eviction Procedures', *Revista Jurídica de Los Derechos Sociales* 10, no. 1 (2020): 378.
[1181] Sánchez, 'The UN Committee on Economic, Social and Cultural Rights Decision in López Albán V. Spain: The Need for a Proportionality Assessment in Eviction Procedures', 379.

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eviction, evictions must not be ordered in the absence of alternative accommodation.[1182] Notably, the judicial authorities requested alternative housing for the applicants, but the state denied social housing on the grounds of insufficient resources. The CESCR found this justification unconvincing because the state failed to demonstrate that its resources were being directed toward "a general policy or an emergency plan to be implemented by the authorities with a view to progressively realizing the right to housing, especially for persons in a particularly vulnerable situation."[1183] Instead, the state had sold public housing in an effort to balance the state budget, despite high demand.[1184]

On the question of resources, the CESCR recognized that states retain discretion in budgetary decisions, and depending on the circumstances, "they may take deliberately retrogressive measures."[1185] However, to adopt retrogressive measures, states must demonstrate that they were based on "the most thorough consideration possible and [were] justified in respect of all the rights under the Covenant and that all available resources were used."[1186] Additionally, budgetary adjustments during crises must be "temporary, necessary, proportional and non-discriminatory"[1187] In this specific case, the state failed to justify the sale of social housing during a housing crisis. As a result, the only alternative accommodation offered to the family consisted of separate units, which the CESCR considered inadequate. Accordingly, the state failed to explain the lack of available options.[1188]

The Ben Djazia and Bellili case is the only one in which the CESCR explicitly refers to the non-retrogression obligation, incorporating it into the analysis. Such incorporation intensified the scrutiny applied by the CESCR in two distinct manners. First, the robust understanding of the obligation ensured that the CESCR thoroughly analyzed the state's

[1182] *Ben Djazia et al v. Spain*, ¶ 16.4-16.5.
[1183] *Ben Djazia et al v. Spain*, ¶ 17.5.
[1184] *Ben Djazia et al v. Spain*, ¶ 17.5.
[1185] *Ben Djazia et al v. Spain*, ¶ 17.6.
[1186] *Ben Djazia et al v. Spain*, ¶ 17.6.
[1187] *Ben Djazia et al v. Spain*, ¶ 17.6.
[1188] *Ben Djazia et al v. Spain*, ¶ 17.1-17.8.

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justification,[1189] applying a stricter proportionality analysis.[1190] Second, the incorporation of non-retrogression ensured that available resources were considered within the proportionality analysis, contributing to a deeper examination of the alternative accommodation. The criteria mentioned in the case are those addressed in the letter of the Chairperson of the CESCR following the 2008 financial crisis.[1191] Although the CESCR did not assess any of the criteria mentioned the incorporation of non-retrogression into the limitation assessment contributed to a heightened scrutiny.

Comparatively, the CESCR has analyzed most cases under the limitation assessment framework. The few cases decided under the implicit limitation assessment follow the same legal reasoning but with less detail. In its jurisprudence, the CESCR has created an extensive list of states' obligations that must be met when interferences with the right to housing occur, in conjunction with the balancing exercise. The most common non-negotiable obligations in the cases are procedural safeguards, judicial review, and alternative accommodation. The balancing exercise in these cases has focused on how the national judicial authorities have conducted the proportionality analysis.

The case law of the CESCR thoroughly outlines the interplay between limitations and specific states' obligations. Non-retrogression, minimum core, non-discrimination and substantive equality have been incorporated into the limitation assessment through proportionality analysis. Such incorporation has heightened the scrutiny applied by the CESCR, thereby ensuring that ESCR-specific elements, such as available resources, are considered when determining the proportionality of the measure.

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[1189] Ben TC Warwick, 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights', *Human Rights Law Review* 19 (2019): 481.
[1190] Liebenberg, 'Reasonableness Review', 10–11.
[1191] Ariranga G. Pillay, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights', 16 May 2012, 1–2.

In the Inter-American system, the IACmHR applied an implicit limitation assessment without relying on a comprehensive list of obligations. Instead, it focused on specific issues raised in the case law. In one case, the IACmHR explained that although the state followed the law requiring a court order to evict, state agents must refrain from using force to remove individuals, even if the applicants were not authorized to occupy the land. However, the national authorities employed excessive force, particularly considering that the police had control of the land. Such violent eviction resulted in the death of individuals.[1192] Using the language of obligations, the IACmHR found violations of the obligations to respect and prevent, as well as the obligation to investigate, sanction and redress—all of which form part of the obligation to ensure.[1193]

In another case, the IACmHR reinforced that violent evictions violate the ACHR. In this case, the violence was perpetrated by armed third parties. The IACmHR explained that third parties cannot evict individuals. Based on the ECtHR case law, the IACmHR clarified that states could be responsible for third parties if they knew about "a real and immediate threat and failed to adopt reasonable measures to prevent it."[1194] In this case, the state knew that individuals were preparing a forced eviction and that the individuals squatting on the land received "threats of violent removal."[1195] While a state agent requested protection for the individuals on the land, the military police chose not to intervene. Consequently, multiple state police officers and authorities were aware of the eviction plan and that third parties were armed, which led to an illegal eviction.[1196]

Although the IACmHR provided fewer details regarding the analysis of the measure, its legal reasoning shares key commonalities with other international bodies. In these cases, the IACmHR required that state authorities be involved—through judicial review and their

[1192] *Corumbiara v. Brazil*, ¶¶ 178–180.
[1193] *Corumbiara v. Brazil*, ¶¶ 183–223.
[1194] *Sebastião Camargo Filho v. Brazil*, ¶ 80.
[1195] *Sebastião Camargo Filho v. Brazil*, ¶ 83.
[1196] *Sebastião Camargo Filho v. Brazil*, ¶¶ 88–89.

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presence during the eviction—and not be carried out by third parties. This mitigates the impact of the eviction. Additionally, evictions must not be violent. Both obligations fall within the category of non-negotiable obligations. Overall, such findings align with the case law of CESCR and the ECSR, among others.

When comparing the cases from the CESCR and the IACmHR, they both applied an implicit limitation assessment, with the CESCR shifting toward an explicit one. The proportionality analyses conducted by both international bodies differ in the level of detail provided. However, they converge in their main focus. In terms of the level of detail, the CESCR prescribed a comprehensive list of states' obligations, required proportionality at the national level and incorporated various specific states' obligations into the analysis. The incorporation of the non-retrogression, minimum core, and non-discrimination strengthened the analysis conducted, thereby adding ESCR-specific elements. By contrast, the IACmHR focused on the issues at stake rather than listing what was required from states.

Regarding the analysis of the violations, the CESCR primarily focused on the conduct of judicial review, the existence of procedural safeguards, and the provision of alternative accommodation. One significant aspect of the CESCR jurisprudence is its incorporation of specific states' obligations—namely, the non-retrogression, minimum core, substantive equality, and non-discrimination—which intensify the scrutiny conducted by adding ESCR-specific elements. As for the IACmHR, it focused on the conduct of state authorities—through judicial review and their presence during evictions—as well as the violence perpetrated by the state and third parties.

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2.4. Synthesis

This section analyzed decisions involving the removal of individuals from state and private property issued by the CESCR, IACmHR, ECSR, and the ECtHR. The main analytical framework employed was the limitation assessment, both explicitly and implicitly. In addition,

the ECtHR applied two parallel frameworks in a few cases, namely positive obligations and non-discrimination.

Regarding the criteria present in the limitation assessment, the analysis of legality centered on the existence, quality, application, and format of the law. The IACmHR addressed the absence of judicial review under the discussion of legality, highlighting the importance of following national law when interfering with rights. As for legitimacy, the international bodies recognized a wide variety of justifications linked to property. Notably, the assessment conducted by national courts was also included in the discussion of legitimacy, placing significant weigh on the fact that national courts reviewed and agreed with the justification to remove individuals. Proportionality analysis, as the analytical method, received detailed examination. As in the previous section, proportionality consists of non-negotiable obligations and the balancing exercise. The common non-negotiable obligations included the conduct of judicial review, the existence of procedural safeguards, and the provision of alternative accommodation. The balancing exercise emphasized the behavior of national authorities and the applicants' good faith.

In this section's cases, the incorporation of states' obligations into the limitation assessment proves to be significant. Progressive realization, non-retrogression, minimum essential levels, non-discrimination, and substantive equality featured prominently throughout the analysis conducted by international bodies. This incorporation highlights the positive aspects of combining the limitation assessment with states' obligations: the international bodies incorporated discussions that are generally encompassed within such obligations, such as discriminatory effects and individuals' 'vulnerabilities', to intensify the scrutiny of the limitation assessment. As such, states' obligations contribute to a robust assessment of interferences when the limitation assessment is applied.

In addition to the incorporation of states' obligations into the limitation assessment, some specific states' obligations have been applied as parallel frameworks. The ECtHR has

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applied positive obligations and non-discrimination as parallel frameworks to assess interferences. Under these two frameworks, the ECtHR explicitly focused on legitimacy and proportionality, noting that the interferences derived from laws—without analyzing legality. Consequently, the adoption of parallel frameworks did not impact the overall analysis conducted, as the ECtHR continued to examine the same aspects, such as the conduct of judicial review and the existence of procedural safeguards as non-negotiable obligations and the balancing exercise at the national level.

3. Conclusion

This chapter analyzed the forced removal of individuals from their homes or lands. This case study is connected with the obligation to refrain from interfering with rights—i.e., negative obligations. The organization of the chapter was based on cases where individuals were removed from the home or land they owned, and cases where individuals were removed from state and private property. In this chapter, I demonstrate that the limitation assessment served as the primary analytical framework applied by international bodies. This is evident in the explicit limitation assessment conducted, which appeared through references to the limitation clause or its criteria, and in an implicit limitation assessment, which I identified when neither the clause nor the criteria were mentioned but the focus remained the same. Notably, specific states' obligations, such as positive obligations and non-discrimination, have been employed as parallel frameworks.

This chapter reinforced that, although the limitation assessment is the primary framework, states' obligations are crucial for assessing interferences with ESCR. I demonstrate that the limitation assessment criteria—legality, legitimacy, and proportionality—have incorporated states' obligations, thereby heightening the level of scrutiny conducted by the international bodies. The proportionality analysis comprised two components: the non-negotiable obligations and the balancing exercise. As such, both components are impacted by

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the incorporation of states' obligations. For instance, available accommodations, a non-negotiable obligation, must be adequate, which is part of the minimum essential level; and the balancing exercise conducted by national authorities must consider the 'vulnerability' of individuals, which falls under substantive equality. Evidently, the incorporation of states' obligations into the limitation assessment embraces the obligations' benefits, which marks a departure from the traditional limitation assessment.

Moreover, in cases where parallel frameworks have been applied, their content resembled that of the limitation assessment. In most of them, legality is not discussed, but the existence of laws is acknowledged. The justifications and the proportionality of the measures closely resemble the limitation assessment, demonstrating that the legal reasoning employed in different frameworks is similar and centered on the specific aspects of states' obligations, such as unequal treatment.

Therefore, the international bodies have conducted a robust limitation assessment that closely examines aspects that belong to states' obligations due to their incorporation and linkage. As such, it is not possible to conceptualize interferences with ESCR through limitations without states' obligations. Despite this positive development, the incorporation and linkage remain inconsistent. Thus, international bodies should expand this practice cohesively to guarantee the full realization of ESCR.

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Chapter 4. Austerity Measures

The second case study in my dissertation examines the adoption of austerity measures that reform existing systems to reduce public expenditure. Such measures are implemented on the basis of economic justifications throughout the case law. This case study was selected due to states' positive obligations to ensure the full realization of ESCR. These obligations require that states act to guarantee ESCR; the failure to do so results in interference with the enjoyment of these rights. Austerity measures, therefore, either interfere through the loss of such rights or their reduction. Accordingly, this chapter investigates how such interferences are adjudicated and the methods that have been developed.

In line with the "Analytical Framework" chapter, the limitation assessment serves as the common framework for analyzing interferences with ESCR, comprising legality, legitimacy, and proportionality analysis. While not all cases explicitly reference these criteria, their content appears implicitly. As such, the cases that use the language of unspecific states' obligations constitutes an implicit limitation assessment, as it focuses on the same criteria without referencing them. Importantly, in addition to the limitation assessment, international bodies have adopted parallel frameworks. In the Inter-American system, IACmHR analyzed the non-retrogression obligation. As for the European system, the ECSR utilized the minimum core and the non-discrimination obligations as parallel frameworks, whereas the ECtHR applied only the non-discrimination obligation. Despite these variations, the cases demonstrate that the content of the limitation assessment overlaps with all the other frameworks, except for the minimum core.

These frameworks are used to assess austerity measures under various rights. Beginning with the rights that directly protect ESCR, the right to social security is implicitly protected under Article 26 ACHR and explicitly under Article 12(3) ESC and RESC. Moreover, the right to work is also invoked under the same provision of the ACHR. The rights to fair remuneration and collective bargaining are prescribed under Articles 4 and 6(2), respectively, in both the ESC

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and the RESC. Regarding civil rights that encompass ESCR dimensions, the right to property is safeguarded under Articles 21 ACHR and Article 1 of Protocol 1 ECHR. Among these rights, the right to property under the ACHR and the ECHR contains specific limitation clauses, while the other rights can be limited based on the general limitation clauses present in the ACHR, ESC, and the RESC.

Despite variations in frameworks and rights, the cases in this chapter address two types of interferences. The first, adjudicated by the IACmHR, IACtHR, ECSR, and the ECtHR, concern the complete loss or reduction of social benefits, such as pensions. The second, ruled by the IACtHR, ECSR, and the ECtHR, involves the reduction or non-compliance with employment-related matters, such as salary payments. Based on these two types of interferences, this chapter is organized according to them: section 1 discusses social benefit cases, while section 2 analyzes employment matters.

Throughout the chapter, the most frequently employed framework is the limitation assessment. Consequently, for austerity measures to be valid, states must implement them through laws, pursue a legitimate aim, and apply proportionate means. The legality of the measure focuses on the content of the law, encompassing both a formal element (existence of the law) and a substantive element (quality of the law). Contrasting with the other international bodies, the IACtHR interprets legality as having a substantial content, centering its analysis on legal authorization and execution of judicial decisions. The legitimacy criterion includes several justifications, such as financial stability and public expenditure. At this stage, states' justifications are rarely rejected. Notably, the IACmHR recognized progressive realization and substantive equality as legitimate aims in case involving pension cuts, demonstrating the incorporation of states' obligations into the limitation assessment.

Finally, the proportionality analysis addresses non-negotiable obligations and the balancing exercise. In this chapter, non-negotiable obligations are less commonly identified due to the limited number of cases and their factual diversity. Nevertheless, common content

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emerges. First, the complete loss of a social benefit or the lack of compliance with judicial decisions granting employment-related matters is unacceptable. Such situations violate the essence of rights, which constitutes their core. The essence represents the minimum core with an absolute character. Second, in case involving the reduction of rights, states must ensure that individuals have alternative means of subsistence, and information and participation, in addition to the conduct of judicial review and the execution of judicial decisions. These constitute the non-negotiable obligations. Regarding the balancing exercise, the international bodies consider the impact of the measure, lengthy delays, financial burden, increase of the benefit over time—linked to progressive realization—and national-level balancing. The IACtHR and the ECSR also incorporate non-discrimination and substantive equality into this stage, requiring either special measures or the consideration of the impact on 'vulnerable' individuals, while the ECSR incorporates progressive realization into the proportionality analysis.

Similarly to the preceding chapter, the limitation assessment conducted by international bodies has departed from its traditional form. Although the criteria within the limitation assessment are conceptually distinct, their boundaries are sometimes blurred by some international bodies. This indicates that the limitation assessment is a holistic analytical framework, focusing on law, reasoning, and impact of measures through a set of obligations and balancing. Moreover, the case law demonstrates that international bodies incorporate progressive realization, minimum core, non-discrimination and substantive equality into the limitation assessment. This incorporation strengthens the scrutiny conducted in the limitation assessment by incorporating ESCR-specific elements into the analysis. Accordingly, the conceptualization of ESCR interferences occurs through the interplay between limitations and states' obligations.

The linkages between limitation and states' obligations extend beyond this incorporation. In some cases, in addition to conducting a limitation assessment under one right, international bodies also evaluate interference with another right using a parallel framework.

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Non-retrogression, non-discrimination, and minimum core are applied as the analytical framework to assess interferences with ESCR. Notably, the non-retrogression and non-discrimination frameworks resemble the limitation assessment framework, particularly in their legitimacy and proportionality analyses. Exceptions occur in cases where international bodies focus solely on prohibited grounds, omitting legitimacy and proportionality in the non-discrimination framework. The minimum core framework stands an outlier, sharing no commonality with the limitation assessment framework. This is because it prescribes specific thresholds below which states must not fall, thereby establishing an absolute minimum core. However, the decision on minimum core flows from the discussion on the limitation assessment, demonstrating that the minimum core intensifies the assessment of interferences

To capture all the nuances of the case law, this chapter is divided into two sections, as previously mentioned. Both sections follow the limitation assessment criteria: legality, legitimacy, and proportionality analysis. The pertinent rights are discussed to highlight similarities and differences in legal reasoning, and states' obligations are analyzed as they appear in the case law. In both sections, the analysis is separated based on the rights at issue, with the sole purpose of enhancing organization and avoiding repetition.

1. Social benefits

This first section examines cases involving the adoption of measures that reduce social benefits, including pensions, unemployment benefits, and other entitlements. In each instance, states maintained a social security system but opted to reform it to reduce public expenditure. The IACmHR, IACtHR, ECSR and the ECtHR have adjudicated such cases under the rights to property and social security. In most cases, the limitation assessment serves as the primary framework employed by the regional bodies. In addition to this framework, the IACmHR assesses the interference of the right to social security through the non-retrogression obligation. This framework is complementary to the limitation assessment conducted under the right to

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property. Similarly, the ECtHR evaluates the interference through the limitation assessment and subsequently through the non-discrimination framework. Therefore, the social benefits' cases provide the opportunity to compare different frameworks and their interplay.

Overall, the international bodies concentrate on legality, legitimacy, and proportionality analysis. Regarding the legality of the measure, the international bodies predominantly focus on the existence of the law—the formal element of the content of legality. The IACtHR is the exception, as it provided a substantial concept, focusing on judicial review and the essence of the right. The legitimacy criterion covers various states' justifications. The IACmHR innovatively introduced progressive realization of rights and substantive equality as legitimate aims. Lastly, the proportionality analysis addresses the complete loss of benefits and their reduction. Complete loss of benefits is not allowed, as it infringes the essence of the right, while reductions are permissible provided that individuals do not suffer a negative impact, there are alternative means of subsistence, there is an increase over time of the benefit, information and participation are guaranteed, and judicial review is in place. The impact of the measure belongs to the balancing exercise, whereas the other obligations represent the non-negotiable obligations.

The cases in this section add crucial elements to the conceptualization of interferences with ESCR. First, international bodies incorporate states' obligations, such as progressive realization, minimum core, and substantive equality into the limitation assessment, especially under the proportionality criterion. Second, in cases where states' obligations, such as non-retrogression and non-discrimination, have been chosen as the framework, the content of the assessment often overlaps with the limitation assessment framework, especially regarding legitimacy and proportionality analysis. Therefore, this section shows the intrinsic connection between the limitation assessment and states' obligations, offering a robust analysis of interferences.

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The section is divided into the limitation assessment criteria: legality, legitimacy and proportionality analysis. To avoid repetition and ensure clarity, I analyze each criterion through the lens of the relevant rights provision. I begin with the right to property and then proceed to the right to social security. Although the assessment of interferences with these rights often overlaps, separating them allows me to highlight the nuances of the international bodies' jurisprudence.

1.1. Legality

The analysis of legality in cases concerning social benefits centers mainly on the content of legality, focusing on the existence of the law (formal element). The IACmHR and the ECtHR examine whether an existing law allowed the interference, while the IACtHR analyzed the law substantially. Finally, the ECSR does not discuss or reference legality in most of its cases.

In the property cases, the IACmHR, IACtHR and the ECtHR applied an explicit limitation assessment. Considering the existence of the law, the IACmHR and the ECtHR briefly assessed legality criterion since, in most cases, the parties did not dispute it. The IACmHR accepted the existence of national law as fulfilling legality when it "was passed in accordance with the constitutional system in force."[1197] The ECtHR linked legality to the rule of law under the ECHR,[1198] recognizing national legislation as compliant.[1199] While both regional bodies accepted existing legislation as fulfilling the legality criterion, the IACmHR also relied on the constitutional court's decision affirming the legality of the law.[1200] The interpretation and application of national legislation by states' authorities, particularly courts, have proven to be crucial in the legality criterion, as demonstrated by the preceding chapter and confirmed by this case.

[1197] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 113.
[1198] *Béláné Nagy v. Hungary*, ¶ 112; *Fábián v. Hungary*, ¶ 65.
[1199] *Béláné Nagy v. Hungary*, ¶ 120; *Fábián v. Hungary*, ¶ 66.
[1200] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 113.

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In contrast, the IACtHR has developed a substantial concept of legality in some cases. The IACtHR focused on arbitrary interference with property, explaining that arbitrariness arises when i. measures reduce benefits or ii. owed amounts remain unpaid.[1201] Social security, as part of the right to property, "must be protected against [such] arbitrary interference."[1202] To avoid arbitrariness, reductions must be supported by legal proceedings or a decision authorizing it.[1203] If either the legal proceeding or the decision is absent, the reductions are illegal.[1204] Notably, these requirements are linked to judicial review. To prevent arbitrary interferences, states must first execute administrative decisions related to such benefits. In case there is also a judicial decision, states must prioritize judicial rulings over administrative ones.[1205] Therefore, legality is not only about the existence and the quality of the law, but it is also about its compliance and judicial review.

In the cases, the IACtHR found that the reductions occurred without executing administrative decision and prioritizing judicial orders,[1206] citing "extended and unjustified nonobservance of the domestic judicial orders."[1207] Compliance with national judgments is thus crucial to the legality criterion in benefit reductions.[1208] Beyond judicial review and authorization, the IACtHR also focused on protecting the essence of the right in question, though not explicitly named it as such. The IACtHR explained that failure to pay owed benefits denies the right to property.[1209] Non-payment and non-compliance with judgments negatively affected individuals' patrimony, preventing them from fully enjoying their rights.[1210] In other words, there is a *de facto* loss of a benefit. Hence, when a law provides for a social benefit,

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[1201] *Acevedo Buendía et al. v. Peru*, ¶ 85.
[1202] *Muelle Flores v. Peru*, ¶ 214.
[1203] Case of the "Five Pensioners" v. Peru (Inter-American Court of Human Rights 28 February 2003), ¶ 109.
[1204] *Acevedo Buendía et al. v. Peru*, ¶¶ 87–88.
[1205] *Case of the "Five Pensioners" v. Peru*, ¶ 117.
[1206] *Case of the "Five Pensioners" v. Peru*, ¶ 118.
[1207] *Acevedo Buendía et al. v. Peru*, ¶ 90.
[1208] *Case of the "Five Pensioners" v. Peru*, ¶ 121; *Muelle Flores v. Peru*, ¶ 217; *Teachers of Chañaral and other municipalities v. Chile*, ¶ 191.
[1209] *Acevedo Buendía et al. v. Peru*, ¶ 89.
[1210] *Muelle Flores v. Peru*, ¶ 217.

states can only interfere with them if authorized through (administrative or judicial) review, and if the execution of the decision preserves the essence of the right.

Compared to other international bodies, the IACtHR's understanding of legality in this case diverges significantly because it did not focus on the content or format of the law. Instead, it assessed the existence of national review, its compliance and the impact on rights. This understanding of legality goes beyond the one advanced in Advisory Opinion 06-86,[1211] where the IACtHR explained that lawful interference requires laws to be formally proclaimed and adopted through functioning systems to ensure their application and control of states' powers.[1212] Here, formal proclamation refers to the enactment of the law,[1213] emphasizing the formal element of legality. On the question of the content of legality, Gonza, analyzing the case law of the IACtHR, argues that the IACtHR's understanding of arbitrariness in property cases focuses on the conditions present in the legal system to support ESCR through property,[1214] resulting in a less deferential approach. Consequently, the assessment of legality in cases focusing on ESCR diverge from traditional property cases, intensifying the scrutiny of interferences.

Another crucial aspect of the IACtHR's decisions is the focus on the essence of rights. Although it has not been discussed in all cases,[1215] it considered the loss of the essence a significant aspect to weigh in the assessment of the interfering measure.[1216] Without explicitly using this language, the IACtHR incorporated the minimum core into its limitation assessment,

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[1211] *Advisory Opinion OC-6/86*. This advisory opinion focuses on the concept of law of Article 30, the general limitation clause. Nevertheless, it is possible to extend the interpretation to specific limitation clauses because the IACtHR clarified the meaning of 'laws' under the ACHR system.
[1212] *Advisory Opinion OC-6/86*, ¶¶ 23–24.
[1213] *Advisory Opinion OC-6/86*, ¶ 29.
[1214] Alejandra Gonza, 'Artículo 21. Derecho a La Propiedad Privada', in *Convención Americana Sobre Derechos Humanos: Comentada*, ed. Christian Steiner and Patricia Uribe (Suprema Corte de Justicia de la Nación, 2014), 510. Gonza explains that the IACtHR considers the material understanding of the law together with the formal one.
[1215] *Case of the "Five Pensioners" v. Peru*, ¶¶ 102–121; *Teachers of Chañaral and other municipalities v. Chile*, ¶¶ 189–191.
[1216] *Acevedo Buendía et al. v. Peru*, ¶¶ 84–91; *Muelle Flores v. Peru*, ¶¶ 212–219.

attributing it an absolute nature. This reasoning is similar to the decisions of the ECSR, and the ECtHR discussed in this chapter.

This comprehensive focus under the legality criterion overlaps with the content of the proportionality analysis conducted by other bodies, discussed in the third subsection of this section. However, the IACtHR has been criticized for not focusing on other criteria of the limitation assessment. Melish critiques the IACtHR's first pension case, arguing it failed to examine essential elements of the right to property. She notes that the limitation clause in Article 21 clearly defines limitation parameters. Since the state reformed the legislation to protect other pensioners, the IACtHR should have considered "the social function of a pension in a democratic society."[1217] Instead, it ignored the text of the provision. In her view, the reasons for imposing a social security reform and the relative nature of the right to property should have led to a non-violation finding, which she considered a stain in the IACtHR's jurisprudence.[1218] Despite this relevant point, which is similar to the arguments raised by the IACmHR as discussed below, the IACtHR relied on this case to rule similarly in others, many of them against the same state due to analogous reforms.

When comparing social benefit cases under property, the IACtHR's jurisprudence differs significantly from that of the IACmHR and the ECtHR. While these two bodies have focused primarily on the existence of the law and its application, the IACtHR has analyzed the authorization of interferences and (administrative or judicial) review, as well as the execution of such review. Despite these differences, the IACmHR and the ECtHR address these elements under proportionality analysis, demonstrating that the content of each criterion is not rigidly defined.

Beyond the right to property, the Inter-American bodies and the ECSR have adjudicated the right to social security. Under Article 26 ACHR, the IACmHR and the IACtHR did not

[1217] Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity (Updated Version)', 50.
[1218] Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity (Updated Version)', 51.

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reference or explain the legality criterion.[1219] The IACmHR has adjudicated this violation under the non-retrogression framework,[1220] while the IACtHR has applied an implicit limitation assessment.[1221] These choices explain the lack of analysis of certain criteria, such as legality. The IACtHR briefly mentioned that states and non-state actors must follow the law when imposing an interference with social benefits,[1222] as rights cannot be limited arbitrarily or unreasonably.[1223] However, it did not clarify further whether the criterion had been violated, focusing instead on the state's actions.

In cases under the ESC and the RESC, the ECSR generally did not reference legality. The ECSR frequently relied on general limitation clauses, both Article 31 ESC[1224] and Article G RESCR,[1225] with only a few decisions departing from this approach.[1226] In cases linked to Article G RESCR, the ECSR briefly acknowledged that the state fulfilled the legality criterion in one instance,[1227] while in others, it analyzed the laws in detail, examining their relevance to the subject.[1228] This choice implies that, despite lacking a definition, the ECSR regarded the existence of applicable legislation and its textual details as sufficient to satisfy the legality criterion. However, the discussion on the existence of the law in the ECSR's case law on social security is less evident than that of the IACmHR and the ECtHR in property cases. Therefore, in these cases, the legality criterion remains largely underdiscussed.

Based on these cases, most regional bodies focused on the existence of the law imposing interferences—even if not explicitly stated—demonstrating a concern with the formal element

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[1219] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 134–147; *Muelle Flores v. Peru*, ¶¶ 178–207.
[1220] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 141–147.
[1221] *Muelle Flores v. Peru*, ¶¶ 194–207.
[1222] *Muelle Flores v. Peru*, ¶ 189.
[1223] *Muelle Flores v. Peru*, ¶ 187.
[1224] *IKA-ETAM v. Greece*; *POPS v. Greece*; *I.S.A.P. v. Greece*; *POS-DEI v. Greece*; *ATE v. Greece*.
[1225] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*; *Sindacato autonomo Pensionati Or.S.A. v. Italy*; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*.
[1226] *GENOP-DEI and ADEDY v. Greece*; *PAP-OTE v. Greece*; *Finnish Society of Social Rights v. Finland (II)*.
[1227] *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 41.
[1228] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶¶ 66–67; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶¶ 121–124.

of the legality criterion. This finding is evident in the jurisprudence of the IACmHR, ECSR, and the ECtHR. In contrast, the IACtHR in property cases has provided a substantial understanding of arbitrariness, emphasizing legal, judicial and administrative authorization of benefit reduction and compliance with judicial rulings. Moreover, the minimum core, through the essence of the right, was incorporated into the legality criterion. The different frameworks chosen by the IACmHR and the IACtHR in social security cases—non-retrogression and states' obligations, respectively—influence their choices of not discussing all the limitation assessment criteria. Overall, the legality criterion is not widely discussed, even though it is a criterion included in limitation clauses. Since all benefit reductions and cuts were made through legislation, it can be affirmed that states met the legality criterion—either because applicants did not raise any claims regarding legality or because international bodies tacitly considered that states had fulfilled this criterion.

1.2. Legitimacy

The analysis of the legitimacy of interferences resulting from the reduction of social benefits is relatively consistent among the regional bodies. The IACmHR, the IACtHR, the ECSR and the ECtHR consider similar states' justification as appropriate aims for interfering with ESCR. Notably, they have accepted various aims as legitimate grounds for interfering with property and social security, such as financial stability and principles of equity within the system,[1229] the public purse,[1230] as well as maintenance[1231] and sustainability[1232] of the social security system. The analysis conducted by these international bodies is pertinent to the broad discussion on limitations. However, while the IACmHR, the ECtHR, and the ECSR provided

[1229] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 115.
[1230] *Béláné Nagy v. Hungary*, ¶ 121; *Fábián v. Hungary*, ¶ 67.
[1231] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 65.
[1232] *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 42; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 126.

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an in-depth explanation of acceptable legitimate aims, the IACtHR offered only limited attention to the aims underlying such interferences.

Regarding the right to property, the specific limitation clause in Article 21 ACHR allows interferences based on public utility or social interest. Following the criterion, in a case concerning the reduction of pensions, the IACmHR recognized that financial stability and the principle of equity are legitimate aims for interfering with social benefits, as the social security system faced diverse challenges.[1233] On the principle of equity, the IACmHR considered it a legitimate aim because some pensioners received up to 26 times the amount granted to the lowest beneficiaries.[1234] The reduction of pensions for the applicants meant increase for other pensioners. The IACmHR linked this aim to progressive realization, as it creates "possibilities of accessing a social security system on an equal footing."[1235] Notably, the IACmHR affirmed that progressive realization "must guide all state actions." As such, progressive realization was a factor supporting the legitimacy of the interference.

In addition to the incorporation of progressive realization into the legitimacy assessment, the analysis also incorporated substantive equality by recognizing that the changes would enhance individuals' benefits, particularly in light of the excessively high pension amounts of a group of pensioners.[1236] Therefore, the IACmHR incorporated two states' obligations into the legitimacy criterion, rather than treating them as parallel frameworks. This incorporation strengthens the interference analysis, as it ensures that the crucial aspects of ESCR are addressed in the limitation assessment.

In contrast, the IACtHR referred to legitimate aims in only one case. It explained that states may limit rights only if there is a public utility or social interest, as determined by Article

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[1233] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 115. The IACmHR lists the reasons presented by the state and mentions the national rulings regarding the disparity of the social security system.
[1234] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 115–116.
[1235] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 116.
[1236] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 115–116.

21. Under this explanation, it linked the ACHR to the PSS, noting that although it applies Article 21 ACHR in pension cases, Article 5 PSS—the general limitation clause—also establishes rules for limitations.[1237] In another case, the IACtHR mentioned that the state did not justify its failure to comply with national judicial rulings, which was assessed in detail under the legality criterion.[1238] However, the IACtHR did not connect the reduction of benefits or their non-payment to the failure to prove a public utility or social interest. Despite mentioning aims or justifications, the IACtHR does not assess the legitimacy of the interference. The absence of discussion on legitimacy arises from the emphasis on legality, which was addressed in the preceding subsection.

In the European system, the ECtHR relied on the margin of appreciation doctrine to explain that under the right to property, the public interest is an extensive concept since social benefits laws involve "consideration of economic and social issues,"[1239] thereby granting a wide margin of appreciation. Based on prior rulings, the ECtHR clarified that the protection of the public purse, reallocation of funds, or austerity measures stemming from an economic crisis warrant a deferential approach.[1240] Moreover, the sustainability of the social security system and the reduction of public debt are compatible with the ECHR.[1241] Notably, under the criterion of legitimate aim, the ECtHR stated it is not competent to determine whether the method chosen by the legislature is optimal or whether the exercise of the legislature's discretion was proper.[1242] The ECtHR's language is relevant, as it overlaps with the concept of necessity in the proportionality analysis—the least restrictive measure.[1243] However, the ECtHR chose to address alternative measures within the legitimate aim criterion, thereby distancing itself from the necessity criterion and reinforcing its deferential approach toward national authorities.

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[1237] *Case of the "Five Pensioners" v. Peru*, ¶ 116.
[1238] *Acevedo Buendía et al. v. Peru*, ¶ 90.
[1239] *Béláné Nagy v. Hungary*, ¶ 113.
[1240] *Béláné Nagy v. Hungary*, ¶ 121; *Fábián v. Hungary*, ¶ 67.
[1241] *Fábián v. Hungary*, ¶ 67.
[1242] *Fábián v. Hungary*, ¶ 68.
[1243] Arai-Takahashi, 'Proportionality', 452; Alexy, 'Constitutional Rights and Proportionality', 53.

In one case, the ECtHR also applied the non-discrimination framework combined with property, after analyzing the interference through the limitation assessment. Under the non-discrimination framework, the ECtHR assessed the legitimacy of the measure as part of the 'objective and reasonable' criterion.[1244] It explained that the margin of appreciation is wide regarding the organization of public service, concluding that different rules for public and private sectors are compatible with the ECHR, especially given inherent differences in pensions regimes.[1245] The ECtHR would only intervene with the margin of appreciation if the measure is "manifestly without reasonable foundation."[1246] Thus, individuals working in public and private sectors may be treated differently. Regarding the legitimacy of this unequal treatment, "financial difficulty and crises"[1247] are managed differently by the public and private sectors due to distinct sources of fundings. As the state enacted a reform to reduce state expenditure in response to public debts, the suspension of pension for an individual also belonging to the public sector is not discriminatory, since both sources of income originated from the state.[1248]

Comparatively, the legitimacy criterion in property cases offers valuable insights. The IACmHR has adopted an innovative approach: progressive realization enhances the legitimacy of interfering measures, particularly when the system aims to increase benefits of individuals receiving lower amounts—in line with substantive equality. Moreover, the ECtHR's jurisprudence demonstrates a deferential stance toward states' justifications to interfere with social benefits, granting a wide margin of appreciation. Notably, this applies to both the legitimacy criterion under the limitation assessment and the non-discrimination frameworks, where the ECtHR placed emphasis on the justifications provided. Consequently, the two frameworks complement one another, with the main distinction being the claim of unequal treatment under the non-discrimination framework. Therefore, while the IACmHR integrated

[1244] *Fábián v. Hungary*, ¶ 113.
[1245] *Fábián v. Hungary*, ¶ 122.
[1246] *Fábián v. Hungary*, ¶ 115.
[1247] *Fábián v. Hungary*, ¶ 127.
[1248] *Fábián v. Hungary*, ¶¶ 130–132.

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other obligations within the limitation assessment, the ECtHR relied on the limitation assessment finding to discuss the non-discrimination framework, demonstrating their similarity and linkage.

In the social security cases, the IACmHR and the ECSR also linked legitimate aims to states' obligations. Beginning with the IACmHR, it indirectly discussed the legitimate aim under Article 26, as it did not apply the limitation assessment. Instead, it applied the non-retrogression framework. It explained that the progressive realization obligation is a general principle under the provision, and, in pension cases, retrogressive measures constitute invalid limitations.[1249] Consequently, states need to present strong reasons for retrogressive measures to ensure compatibility with the ACHR.[1250] These strong reasons, though not explicitly stated as such, would fall under the legitimacy criterion. Notably, the IACmHR also mentioned the importance of available resources when complying with non-retrogression.[1251] Based on such consideration, the IACmHR found that the reduction of pensions occurred due to the "economic situation of the country and the cost of living.[1252] Since the reform aimed to improve the pension system for most pensioners (the justification provided by Peru), the IACmHR considered that the measures were not retrogressive.[1253]

In the European system, the ECSR recognized the direct link between economic aims and social rights, explaining that consolidating public finances is a solution to maintain social security systems.[1254] The ECSR's language choice is particularly worth noting: whereas the ECtHR uses a positive formulation—economic choices *are* compatible with the ECHR—the ECSR employs a negative formulation—"pursuing economic goals is *not incompatible* with the requirements under Article 12§3."[1255] This difference suggests that the ECtHR assumes that

[1249] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 140.
[1250] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 141.
[1251] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 139.
[1252] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 143.
[1253] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 143.
[1254] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 115.
[1255] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 115. The citation of this case is mere illustration of the double negation. The ESCR uses it in all the cases assessed in this section.

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economic aims are legitimate, while the ECSR acknowledges that the economic choice may not always be compatible with the ESC. Although the ECSR has accepted the aims presented in its case law, the language points to a less deferential approach. This is reflected in its focus on the maintenance and sustainability of the pension system, consistently emphasizing that members of the society should not be burdened with "social and economic risks,"[1256] to avoid transforming social security into a social assistance system.[1257]

In some cases, the ECSR explained that high expenditure and aging populations justify pension reform, especially in contexts of sovereign debt.[1258] To be considered adequate, economic measures must not impose excessive burdens on economically 'vulnerable' groups. The ECSR regards a pension low when it falls below the poverty threshold, defined as "50 per cent of median equivalized income as calculated on the basis of the Eurostat at-risk-of poverty threshold value."[1259] This standard is not applied in most cases, yet scholars argue that the ECSR's emphasis on minimum thresholds and living standards is conceptually aligned with the minimum core essential levels developed by the CESCR and followed by other international bodies.[1260]

To sum up, property and social security cases widely engage with the legitimacy criterion, except for the IACtHR, accepting distinct justifications. The assessments conducted

[1256] *IKA-ETAM v. Greece*, ¶ 71; *POPS v. Greece*, ¶ 66; *I.S.A.P. v. Greece*, ¶ 66; *POS-DEI v. Greece*, ¶ 66; *ATE v. Greece*, ¶ 66; *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 54; *PAP-OTE v. Greece*, ¶ 64; Finnish Society of Social Rights v. Finland, Complaint No. 172/2018 (European Committee of Social Rights 14 September 2022), ¶ 68; *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 36.

[1257] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 59; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 113.

[1258] *IKA-ETAM v. Greece*, ¶ 74; *POPS v. Greece*, ¶ 68; *I.S.A.P. v. Greece*, ¶ 68; *POPS v. Greece*, ¶ 68; *ATE v. Greece*, ¶ 68.

[1259] *IKA-ETAM v. Greece*, ¶ 74; *GENOP-DEI and ADEDY v. Greece*, ¶ 69; *POS-DEI v. Greece*, ¶ 69; *POPS v. Greece*, ¶ 69; *ATE v. Greece*, ¶ 69. If the amount is below 40%, the ECSR considers it a violation of the Charter. It disregards other benefits that could supplement the pension because the pension cannot go below the threshold. However, if the pension is between 40% and 50%, the Committee considers other benefits that supplement the elderly income.

[1260] Costamagna, 'Riduzione Delle Risorse Disponibili e Abbassamento Dei Livelli Di Tutela Dei Diritti Sociali: Il Rispetto Del Nucleo Minimo Quale Limite All'Adozione Di Misure Regressive', 376; Lougarre, 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights', 345; Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis an Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures', 191.

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by the regional bodies illustrate crucial aspects. First, the analysis developed by IACmHR and the ECSR focuses on collectivity and the broader improvement of social security systems. In other words, benefit reductions is not an individual issue. Second, the IACmHR, and the ECSR incorporated other obligations into the limitation assessment. The IACmHR incorporated progressive realization and substantive equality into the legitimacy criterion, accepting them as legitimate aims Moreover, it equated invalid limitations to retrogressive measures. The ECSR focused on the minimum core essential levels to evaluate whether the reform violated the poverty threshold. Additionally, the ECtHR assessed the non-discrimination obligation after the limitation assessment, demonstrating their similarities and linkages. Together, these cases reflect heightened scrutiny of states' justifications and a convergence between the limitation assessment and states' obligations frameworks.

1.3. Proportionality

The proportionality analysis of the interfering measure constitutes the central focus of the case law. The IACmHR, ECSR and the ECtHR engage extensively with this criterion, while the IACtHR addresses it in only one case. In most instances, the term 'proportionality' is not explicitly mentioned; however, the consistent emphasis on the impact of the measure effectively corresponds to this analytical method. The proportionality analysis encompasses both the non-negotiable obligations and balancing exercise, also incorporating states' obligations into its analysis.

Under the right to property, the IACmHR explained that Article 21 ACHR requires interferences to be suitable and proportionate to the chosen aim, which in this case was financial stability and the increase of lower pensions. The IACmHR held that the two legal changes, the creation of caps for pensions and the elimination of equalization between pensioners and active

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workers, were suitable in this regard.[1261] Additionally, the interference must not destroy the essence of the right. The IACmHR concluded that the impact of the pension reform was not uniform on all pensioners, as some pensions increased and others decreased, and the adjustment mechanisms changed due to the new cap. Additionally, the reduction of pension benefits must not serve as the sole measurement of the impact on the right. In this case, the IACmHR considered that no one lost their benefit, which excused the state from compensations,[1262] and that the reform did not erase "the essence of the right to receive a pension [nor] was in open contradiction to the contributions made by the victims while they were in service."[1263] Hence, the pension reform constituted a suitable and proportionate limitation.[1264] Under these, the proportionality analysis focused on erasure of the essence of the right and on mechanisms that promote equality among pensioners, incorporating the minimum core and substantive equality into its assessment, thereby intensifying the analysis conducted.

In the European system, the ECtHR explained that social security schemes are the "expression of a society's solidarity with its vulnerable members."[1265] For this reason, the erasure of social benefits is most likely to violate Article 1 of Protocol 1, although reasonable reductions may be justified. Similar to the IACmHR, the ECtHR clarified that neither the amount nor percentage of the decrease alone determines the proportionality of the measure, also considering whether the reform impaired the essence of pension rights.[1266] In one case, to analyze the reduction of benefits, the ECtHR assesses whether the measure was discriminatory, whether the state introduced transitional measures, whether the condition was arbitrary, and the applicant's good faith.[1267] Here, non-discrimination was incorporated into the proportionality

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[1261] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 120.
[1262] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 126.
[1263] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 124.
[1264] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 125–126.
[1265] *Béláné Nagy v. Hungary*, ¶ 116.
[1266] *Béláné Nagy v. Hungary*, ¶ 118.
[1267] *Béláné Nagy v. Hungary*, ¶ 117.

analysis. As this case involved the complete loss of a disability pension,[1268] the ECtHR focused on the applicant's lack of alternative means of subsistence and the special nature of the benefit, finding the interference disproportionate due to the retroactive effect of the law and the absence of transitional measures. The deprivation of the pension violated the applicant's legitimate expectation to receive a pension, particularly as she had acted in good faith.[1269]

In a case concerning the suspension of pension, the ECtHR applied the limitation assessment and the non-discrimination frameworks separately, only analyzing proportionality under the limitation assessment framework. It considered the extent of the loss, the choice of the individual, and the loss of means of substance. It explained that a suspension does not constitute a total loss of social benefit because it is to be resumed and therefore does not impair the essence of the right to pension.[1270] In this case, the applicant was unaware that the law would change when he opted to work for the state, making it impossible to foresee or avoid the consequences. However, once the reform was enacted, he chose to remain in the public service, which led to the suspension of his pension for the duration of his employment.[1271] Moreover, the ECtHR clarified that the existence of alternative income sources is relevant in determining the level of interference.[1272] Although the applicant did not disclose his salary, the government confirmed it was above the national average, indicating that the pension suspension did not affect his means of subsistence.[1273] The suspension of the benefit thus was not disproportionate.

In the cases above concerning the right to property, the IACmHR and the ECtHR differ in the degree of detail provided when assessing the proportionality of interferences. However, they converge in their central focus. Both regional bodies considered that the loss of pension denied the essence of the right to social security, finding that reductions and suspensions are

[1268] The applicant lost her disability pension due to a legislative change that increased the minimum required period of employment, which she no longer met under the revised criteria.
[1269] *Béláné Nagy v. Hungary*, ¶¶ 124–127.
[1270] *Fábián v. Hungary*, ¶ 74.
[1271] *Fábián v. Hungary*, ¶¶ 76–77.
[1272] *Fábián v. Hungary*, ¶ 78.
[1273] *Fábián v. Hungary*, ¶¶ 79–82.

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acceptable provided they do not impair the individuals' means of subsistence. This consideration overlaps with the minimum core essential levels. Additionally, the development of mechanisms to mitigate the impact was deemed crucial, linking it to substantive equality. Beyond these considerations, the ECtHR also considered the applicant's good faith and awareness of the legal reforms, incorporating non-discrimination as a requirement within proportionality.

The cases involving interferences with social security broaden the discussion on the link between the limitation assessment and states' obligations. As mentioned in the preceding subsection, the IACmHR discussed the reduction in pensions under non-retrogression and equated it with limitations in this case. The language of proportionality is not explicitly used, but the focus on the impact, the essence of the right, and adjustment mechanisms demonstrates comparable legal reasoning to the limitation assessment under the right to property.

Regarding the impact, since not all pensioners in the public sector had access to the equalization of pensions with active workers, the IACmHR found that the individuals affected by the reform were not representative of all pensioners.[1274] In other words, the IACmHR balanced the right to pension of a small group of pensioners against the majority of pensioners, favoring the majority. As for the essence of the right, the IACmHR explained that interferences that touch upon the essence are considered retrogressive measures. However, in this case, the creation of a capped pension did not deny the essence of the right, particularly because the interference was based on the country's economic situation and cost of living.[1275] Lastly, regarding the adjustment mechanism, the reform altered the rules concerning the possibility of adjusting pensions. Previously, the state had the obligation to adjust pensions periodically on a mandatory basis. Notably, the reform changed this obligation to a provision for eventual adjustment, which could potentially be a retrogressive measure. However, the national

[1274] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 142.
[1275] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 143.

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constitutional court reversed this change, explaining that the adjustment is mandatory depending on resource availability. Based on the national judicial review, the IACmHR found that the adjustment mechanism established by the economic reform was not a retrogressive measure, since the national court ensured that the pension did not stay without adjustments for unreasonable periods.[1276]

The IACmHR's assessments under the right to property and under the right to social security significantly overlap, focusing on the impact of the reform on the collectivity, the essence of the right, and the national courts' judicial review, despite applying different frameworks. Analyzing the right to property through the limitation assessment framework and the right to social security through the non-retrogression framework, the IACmHR established a connection between the two frameworks by explaining that retrogressive measures tantamount to invalid limitations. This conceptual overlap between limitations and non-retrogression leads to the conclusion that when states adopt retrogressive measures, both frameworks are suitable to assess interferences with rights.

Notably, the main difference between the two frameworks, and consequently between the analyses, is the focus on available resources under the non-retrogression framework. This aligns with the literature which asserts that the distinction between limitations and non-retrogression lies in the reasoning based on resource allocation.[1277] Apart from the discussion on state resources under the non-retrogression framework, the legal reasoning employed by the IACmHR under the limitation and the non-retrogression frameworks substantially overlaps.

In contrast with the IACmHR, the IACtHR analyzed the right to social security under Article 26 ACHR through an implicit limitation assessment in considerable detail. It explained

[1276] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 145–146.
[1277] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 205–6. While other scholars do not directly address limitations, they clearly affirm that non-retrogression serves as the analytical lens in cases involving resource-related considerations. See: Nolan, 'Human Rights and the Cost-of-Living Crisis', 6–7; Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery', 27.

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how the system should function and outlined rules for the accessibility and affordability of benefits,[1278] linking them to General Comment No. 19 of the CESCR concerning the minimum core essential levels.[1279] It also clarified the minimum core obligations regarding the right to social security, including adequate benefit amounts.[1280] Consequently, the IACtHR incorporated the minimum core into the assessment of interferences. Despite the mention of progressive realization in Article 26, the IACtHR rejected the application of this obligation since the failure to pay owed benefits constitutes an immediate obligation.[1281]

Drawing from General Comment No. 19 from the CESCR,[1282] the IACtHR stated that when states interfere with social security rights, they must ensure, beyond legality, genuine consultation, timely and complete information on the measures adopted, reasonable notice, access to legal remedies, and legal aid.[1283] Without explicitly stating as such, these elements define the scope of a lawful and proportionate interference with the right to social security, as it encompasses the analysis of the impact of interferences. In this case, the IACtHR found that the lack of information and participation in the privatization of a state company negatively impacted the right to social security. Specifically, it held that the absence of "timely and comprehensive information"[1284] undermined the effectiveness of the right to pension. Further, the lack of clarity regarding who bore the responsibility to pay the owed amount also constituted a violation.[1285]

Notably, in other cases, the IACtHR generally focuses on the intensity of the interference to conduct a proportionality analysis.[1286] However, in this case, it opted to assess

[1278] *Muelle Flores v. Peru*, ¶¶ 192–192.
[1279] *Muelle Flores v. Peru*, ¶ 186.
[1280] *Muelle Flores v. Peru*, ¶ 192.
[1281] *Muelle Flores v. Peru*, ¶ 191.
[1282] *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008).
[1283] *Muelle Flores v. Peru*, ¶ 189.
[1284] *Muelle Flores v. Peru*, ¶ 200.
[1285] *Muelle Flores v. Peru*, ¶¶ 199–200.
[1286] Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 113.

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whether the state fulfilled its obligations to adopt safeguards, provide information, establish responsible entity to pay and comply with and execute decisions.[1287] The impact of the privatization, and consequently the non-payment of benefits, was so severe that, based on the *iuria novit curia* principle, the IACtHR found violations of the rights to personal integrity and privacy.[1288] These violations stemmed from the negative impact on the applicant's standard of living. Therefore, the legal reasoning behind these findings is linked to the disproportionate effect of the measures on the applicant. Hence, although not explicitly referenced, the IACtHR conducted the proportionality analysis.

In the European system, the ECSR has also analyzed proportionality in relation to the right to social security, considering the entire social security system, similarly to the IACmHR. The ECSR applies the analysis inconsistently, referencing the criterion in some cases and omitting it in others. In cases explicitly mentioning proportionality, the ECSR assessed measures under Article G RESC, the limitation clause. Notably, before addressing proportionality, it specified that additional criteria must be considered when "the restrictions [resulted from] economic and financial factors."[1289] These criteria belong to progressive realization and are: the nature of the change; the framework of the policies implemented along with the justifications provided for the reform, considering the scope of these reforms; the necessity and adequacy of the reform; the creation of protective measures for individuals in need of social assistance due to the modifications; and the results of the change.[1290]

The ECSR's Digest clarifies that these criteria apply to instances of "partially restrictive development,"[1291] meaning situations where a state fails to progressively realize the right to social security due to economic factors. Accordingly, the ECSR has incorporated progressive

[1287] *Muelle Flores v. Peru*, ¶ 202.
[1288] *Muelle Flores v. Peru*, ¶¶ 202–207.
[1289] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 61; *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 37; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 118.
[1290] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 61; *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 37; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 118.
[1291] *Digest of the Case Law of the European Committee of Social Rights*, 122.

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realization into its assessment of interferences, applying criteria that differ from those used to evaluate the compliance with the progressive realization obligation itself—namely, reasonable time, measurable progress, and use of maximum available resources.[1292] Regarding proportionality analysis, states must demonstrate the necessity and the proportionality of the measure, which includes pressing social need and the use of the least restrictive measure.[1293] Thus, the ECSR interpreted the lack of progress as a limitation, adding these criteria into the assessment of the interference.

In the cases with an explicit reference to proportionality analysis, the ECSR's approaches varied, though its focus on the entire system remained. All cases concerned legal reforms that implemented benefit reductions adopted by Italy. In one case, it required states to provide data on all beneficiaries and those denied benefits, to evaluate limitations.[1294] The absence of data hindered its ability to assess necessity and fair balance,[1295] highlighting the comparative nature of the limitation assessment. In another case, the ECSR accepted the benefit reduction due to financial difficulties, provided the state considered the population's overall income. However, the reform allowed benefit reductions without a guaranteed floor, which the national constitutional court addressed by prohibiting indefinite reductions.[1296]

In a third case against Italy, the ECSR conducted a detailed analysis of the interference, integrating the progressive nature of the social security system. It examined the different measures over time to assess "the current level of the system and the economic situation in the country concerned."[1297] Three reforms had interfered with social benefits: the 2011 suspension of the indexation of pensions, deemed necessary due to the country's economic situation and proportionate since pensioners with low benefit were exempted;[1298] the 2015 reform maintained

[1292] *International Association Autism Europe v. France, Collective Complaint no. 13/2002*, ¶ 53.
[1293] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 63; *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 40; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 120.
[1294] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 66.
[1295] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 67.
[1296] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶¶ 127–128.
[1297] *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 47.
[1298] *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶¶ 48–49.

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the suspension coupled with tax relief for specific private sections, which violated the RESC for failing to consider all "relevant and necessary criteria when assessing the need for the restrictions based on the economic situation;"[1299] and the 2018 reform restored the indexation of pensions, which, despite ongoing restrictions, ensured most pensioners received pensions cost-of-living indexed pensions.[1300] This case best illustrates the progressive and collective nature of the right to social security, as reforms were evaluated over time and with respect to all pensioners. Progressive realization was thus incorporated into the limitation assessment.

Notably, these cases also encompass a violation of the non-discrimination obligation, which was addressed separately from the limitation assessment. In one case, the applicants raised a discrimination claim under the non-discrimination clause, but the ECSR declined to assess it, finding the analysis under the limitation assessment sufficient.[1301] In another case, the applicants claimed discrimination under the provision on equal opportunity and treatment based on gender equality, arguing that Italy's reform of survivor spouse benefits disproportionately impacted women. The ECSR clarified that states must not act discriminatorily regarding "the scope of schemes, conditions of access to schemes, the calculation of benefits, and the length of entitlement to benefits."[1302] It concluded, however, that the 1995 reform was not discriminatory against women because it was justified by the need to maintain the system; it affected both 'sexes,' requiring new criteria to access the benefit to both; and the reductions were due to beneficiaries having other income sources, allowing suspension or reduction of benefits.[1303] The ECSR further affirmed that "women in general terms more often belong to a vulnerable group in need of increased protection,"[1304] but noted the reduction only applied to high-income beneficiaries. It found the legislation neutral and not discriminatory against

[1299] *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶ 52.
[1300] *Sindacato autonomo Pensionati Or.S.A. v. Italy*, ¶¶ 56–57.
[1301] *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶¶ 73–74.
[1302] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 136.
[1303] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶¶ 137–40.
[1304] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 141.

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women. Despite the higher life expectancy of women and their greater representation among beneficiaries, this did not affect equal access to the survivor benefits.[1305]

This case raises key concerns. First, the ECSR focused exclusively on direct discrimination, without considering the adverse impact that seemingly neutral laws may have on certain groups. In other words, the ECSR did not consider indirect discrimination. Second, while it found the access to the benefit non-discriminatory, it overlooked the scope, calculation and duration of benefits—elements it explicitly stated must not be discriminatory. Hence, these Italian cases serve as illustrations that in cases involving the reduction of social benefits, the non-discrimination framework is seldom applied and even when invoked, the ECSR does not assess it entirely.

Moving to cases without explicit proportionality analysis, the ECSR has also explicitly invoked the limitation clause in five cases against Greece. These are known rulings for assessing the austerity measures imposed under the agreement with the European Union (EU), leaving the ECSR to evaluate the compatibility of the agreement with the ESC. In these cases, the ECSR referred to Article 31 ESC, the limitation clause, but did not explicitly outline the criteria for the limitation assessment. It also applied the five criteria mentioned[1306] earlier in cases of "partially restrictive development,"[1307] due to "economic and demographic factors."[1308] Despite similarities with other cases, the focus of the analysis shifted.

The ECSR clarified that the measures to decrease the state deficit, taken separately, did not violate the ESC, but the cumulative effect of the entire economic reform placed a substantial burden on pensioners, significantly deteriorating their living standards and conditions.[1309]

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[1305] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶¶ 142–143.
[1306] The criteria are the nature of the change; the framework of the policies implemented along with the justifications provided for the reform, considering the scope of these reforms; the necessity and adequacy of the reform; the creation of protective measures for individuals in need of social assistance due to the modifications; and the results of the change.
[1307] *Digest of the Case Law of the European Committee of Social Rights*, 122.
[1308] *IKA-ETAM v. Greece*, ¶ 72; *POS-DEI v. Greece*, ¶ 67; *POPS v. Greece*, ¶ 67; *ATE v. Greece*, ¶ 67; *I.S.A.P. v. Greece*, ¶ 67.
[1309] *IKA-ETAM v. Greece*, ¶ 78; *POPS v. Greece*, ¶ 73; *I.S.A.P. v. Greece*, ¶ 73; *POS-DEI v. Greece*, ¶ 73; *ATE v. Greece*, ¶ 73.

Moreover, despite the economic crisis, Greece failed to conduct research on the measures and their potential "impact on vulnerable groups."[1310] This lack of research prevented the state from assessing alternative measures that could have mitigated the cumulative effect of the reform.[1311] In addition, the government did not consult organizations representing vulnerable groups' interests.[1312] Citing the ECtHR, the ECSR affirmed that individuals have legitimate expectation toward pensions, and Greece failed to respect pensioners by reforming the system without accounting for their 'vulnerability.' Furthermore, mechanisms such as domestic courts can help mitigate the negative impact of interfering measures.[1313]

Though proportionality was not explicitly referenced, its assessment is evident through the detailed analysis of the burden on pensioners affected by benefit reductions. The impact was negative due to its cumulative effect, the absence of research for alternative measures, the lack of consultation, the failure to consider individuals' 'vulnerability,' and the absence of judicial review. Notably, these cases highlight the importance of substantive equality, as the ECSR required consultation with affected groups and recognition of their 'vulnerable' situation. Hence, the limitation assessment framework incorporated both progressive realization and substantive equality.

In addition to these cases, the remaining decisions from the ECSR neither apply the limitation clause nor reference the five criteria for progressive realization. Most cases concerned reforms implemented by Greece, and one case focused on reforms created by Finland. Despite these differences, they overlap with the preceding ones. In a case concerning the complete exclusion of a category of worker from social benefits, the ECSR stated this is impermissible since "any changes […] must maintain in place a sufficiently extensive system

[1310] *IKA-ETAM v. Greece*, ¶ 79; *POPS v. Greece*, ¶ 74; *I.S.A.P. v. Greece*, ¶ 74; *POS-DEI v. Greece*, ¶ 74; *ATE v. Greece*, ¶ 74.
[1311] *IKA-ETAM v. Greece*, ¶ 80; *POPS v. Greece*, ¶ 75; *I.S.A.P. v. Greece*, ¶ 75; *POS-DEI v. Greece*, ¶ 75; *ATE v. Greece*, ¶ 75.
[1312] *IKA-ETAM v. Greece*, ¶ 82; *POPS v. Greece*, ¶ 77; *I.S.A.P. v. Greece*, ¶ 77; *POS-DEI v. Greece*, ¶ 77; *ATE v. Greece*, ¶ 77.
[1313] *IKA-ETAM v. Greece*, ¶ 82; *POPS v. Greece*, ¶ 77; *I.S.A.P. v. Greece*, ¶ 77; *POS-DEI v. Greece*, ¶ 77; *ATE v. Greece*, ¶ 77.

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of compulsory security system,"[1314] otherwise, they would constitute retrogressive measures. Consequently, creating "a distinct category of workers"[1315] to exclude them from benefits amounted to deterioration of the social security system, violating the ESC.[1316] This case raises two noteworthy points. First, the language of deterioration rather than restriction suggests an assessment of non-retrogression. Second, discrimination is implicitly included, as the state imposed unequal treatment by excluding one group from the system. Thus, the ECSR combined different frameworks to assess the interference.

In another case, the ECSR examined a reform in Greece following the EU-imposed austerity measures—previously discussed in the five aforementioned Greek cases. It regarded the 2016 reform as positive, noting that national courts had reviewed the legislation and requested the government to change its problematic points.[1317] In this case, judicial review played a pivotal role in mitigating the negative impact of the economic reform. Unlike the earlier Greek cases, the ECSR found that the interference resulting from this reform was consistent with the ESC, particularly because the government conducted research and analysis of the selected measures and had addressed previous inequalities.[1318]

Finally, in a third case, against Finland, the ECSR analyzed a period of benefits reduction, recognizing that the decrease in some benefits did not constitute a limitation since the overall social security system improved over time.[1319] It explained that "temporary decrease and/or the limited increase of social security benefits"[1320] are not necessarily incompatible with the ESC. Reducing specific benefits does not result in a violation if the system as a whole strengthens over time.[1321] Hence, the ECSR assessed specific cuts in light of the entire system,

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[1314] *GENOP-DEI and ADEDY v. Greece*, ¶ 47.
[1315] *GENOP-DEI and ADEDY v. Greece*, ¶ 66.
[1316] *GENOP-DEI and ADEDY v. Greece*, ¶ 66.
[1317] *PAP-OTE v. Greece*, ¶ 69.
[1318] *PAP-OTE v. Greece*, ¶¶ 71–72.
[1319] *Finnish Society of Social Rights v. Finland (II)*, ¶¶ 73–77.
[1320] *Finnish Society of Social Rights v. Finland (II)*, ¶ 71.
[1321] *Finnish Society of Social Rights v. Finland (II)*, ¶ 73.

incorporating progressive realization into the limitation assessment framework and reaffirming that reduction and complete loss are distinct forms of interference.

The ECSR has been criticized for its inconsistent assessment of interferences with social benefits.[1322] Scholars have observed that it tends to be vague regarding key standards, such as the median equivalent income used to evaluate the overall system, the scope of the obligation to conduct research and analysis, and the definition of 'significant degradation.[1323] Consequently, although these standards exist to guide the implementation of austerity measures in a manner that complies with the ESC, the ECSR has not substantially developed their content.[1324]

Regardless of these critiques on inconsistency and vagueness, the ECSR has applied the limitation assessment framework, evidenced by the frequent reliance on limitation clauses. Proportionality analysis, by contrast, is less explicit, as the ECSR does not consistently use the terminology. Nevertheless, the proportionality analysis is the analytical method because the ECSR focuses on the impact of interfering measures.

These cases highlight the connection between the limitation assessment framework and states' obligations framework. In cases where the limitation clause was explicitly applied, the ECSR incorporated criteria aligned with progressive realization to determine if the lack of progress due to the reduction of benefits violated the right to social security. Although the concept of "partially restrictive development"[1325] could suggest retrogressive measures, the ECSR considered it retrogressive only in cases involving complete exclusion of beneficiaries. Notably, it did not apply its established progressive realization criteria, which are reasonable

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[1322] Eleni De Becker, 'The Constraints of Fundamental Social Rights on Eu Economic Monitoring: Collective Complaint No. 76–80/2012, IKA-ETAM, Panhellenic Federation of Public Service Pensioners, ISAP, POS-DEI, ATE v. Greece', *European Journal of Social Security* 17, no. 1 (2015): 130–32.
[1323] De Becker, 'The Constraints of Fundamental Social Rights on Eu Economic Monitoring: Collective Complaint No. 76–80/2012, IKA-ETAM, Panhellenic Federation of Public Service Pensioners, ISAP, POS-DEI, ATE v. Greece', 130–32.
[1324] Aoife Nannery, 'The "Conscience of Europe" in the European Sovereign Debt Crisis: An Analysis of the Judgments of the European Court of Human Rights and the European Committee of Social Rights on Austerity Measures.', LLM thesis, European University Institute, 2015, 83–86.
[1325] *Digest of the Case Law of the European Committee of Social Rights*, 122.

time, measurable progress, and states' available resources.[1326] Although it focused on time and progress, it did not reference them. Moreover, non-retrogression was applied implicitly by the ECSR, however, only in one case.

Substantive equality also informs the analysis of the ECSR. However, non-discrimination is rarely addressed, despite the cases concerning pensioners and beneficiaries. In one case, the exclusion of a distinct category from benefits constituted a violation, but the ECSR did not engage in a discrimination analysis. The ECSR instead confirmed its emphasis on the essence of the right to social security. In short, while states may reduce or suspend benefits, they cannot exclude individuals entirely, a principle closely linked to the minimum core essential elements.

To summarize the proportionality analysis in social benefits cases, the decisions concern either the complete loss of benefits or their reduction. The complete loss of benefits is considered a violation of the essence of rights, which is not permitted by the international bodies. The reduction of benefits is deemed acceptable, provided that the impact of the measure is thoroughly assessed. The international bodies have applied proportionality within various frameworks, varying in focus among them. The non-negotiable obligations and the balancing exercise feature consistently throughout the case law. The balancing exercise has encompassed aspects such as the good faith of applicants for the ECtHR, progressive realization and substantive equality for the IACmHR and the ECSR, and the minimum core for the IACtHR. As for the non-negotiable obligations, international bodies share fewer commonalities, as the cases are factually distinct. Some points of convergence include the IACmHR and the ECtHR's analysis of mechanisms to mitigate impact, such as judicial review, the IACtHR's focus on information and participation, and the ECSR's concern over cumulative effect of reforms.

[1326] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 84.

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Nevertheless, these bodies converge in their focus on impact and the measures adopted to lessen such impact.

Beyond the incorporation of states' obligations into the proportionality analysis, parallel frameworks have also been employed alongside the limitation assessment. Non-discrimination and non-retrogression appear in the case law as complementary avenues for analyzing interferences. Notably, the focus of the assessment under these frameworks closely mirrors that conducted under the limitation assessment. Consequently, the states' obligations, when used as parallel frameworks to the limitation assessment, substantively overlap with the content of the limitation assessment. This demonstrates their interconnectedness in the conceptualization of interferences with ESCR and adds nuance to the overall analysis.

1.4. Synthesis

This section analyzed cases where austerity measures were adopted to remove or reduce existing social benefits adjudicated by the IACmHR, IACtHR, ECSR, and the ECtHR. The main analytical framework applied was the limitation assessment. Furthermore, various states' obligations frameworks were also employed. The IACmHR evaluated non-retrogression, while the ECSR and the ECtHR analyzed non-discrimination. These parallel frameworks complement the overall analysis of interferences, adding nuance to the legal reasoning adopted and intensifying the scrutiny of the analysis.

Regarding the limitation assessment criteria, the case law offers substantial insight. Under legality, the international bodies primarily focused on the existence of the law. The IACtHR was the exception since it provided a substantial meaning of legality, emphasizing the essence of the right, judicial review and compliance with decisions. Regarding the legitimacy of the interfering measure, most states' justifications have been accepted by international bodies. The IACmHR has taken an innovative approach by incorporating progressive realization of rights into the assessment of legitimacy. Substantive equality has also been listed

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as a legitimate aim to interfere with rights. This incorporation into the legitimacy criterion underscores that justifications for interferences must be robust and grounded in the intrinsic dimensions of ESCR, particularly the states' obligations attached to them.

Lastly, proportionality analysis was the predominant analytical method. Although most cases do not mention the term, the focus on the impact of the measure effectively reflects a proportionality analysis. In cases concerning the complete loss of benefits, the international bodies concluded that such loss is impermissible, as it violates the essence of rights. Although the language of minimum core is not used, the findings suggest the existence of an absolute minimum core, since complete loss would excessively interfere with rights. In cases involving benefit reductions, the international bodies share fewer commonalities than in the preceding chapter. However, they consistently focus on the balancing exercise and identify a set of non-negotiable obligations. The balancing exercise addressed aspects such as good faith, progressive realization and substantive equality. The non-negotiable obligations vary considerably, given the factual differences across cases. Their shared content includes the gradual increase of benefits, availability of alternative means of subsistence, consultation, and judicial review. Overall, states' obligations have been integrated into the proportionality analysis, thereby heightening the scrutiny applied to interferences. Consequently, the limitation assessment of ESCR is conceptualized by incorporating states' obligations into the limitation criteria, particularly legitimacy and proportionality.

States' obligations have also served as frameworks to assess interferences, in a complementary manner. The IACmHR, IACtHR, ECSR and the ECtHR, in some cases, began by analyzing interferences with rights through the limitation assessment, and then proceeded to an additional assessment under another provision. The IACmHR applied the non-retrogression framework, focusing on the same elements as under the limitation assessment, even equating retrogressive measures with invalid limitations. Moreover, the ECSR and the ECtHR added a

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non-discrimination assessment following the limitation assessment, emphasizing similar aspects.

Thus, this section has demonstrated that to assess interferences with ESCR, international bodies integrate states' obligations either within the limitation assessment or alongside it, enabling a more nuanced assessment of interferences. In other words, interferences with ESCR are conceptualized by international as a convergence between limitations and states' obligations.

2. Employment matters

This section analyzes cases involving the adoption of measures that interfere with employment-related matters, including the payment of salaries, collective bargaining, and wage reductions. In these cases, states reformed national laws to reduce public expenditure, impacting specific rights. The IACtHR, ECSR and the ECtHR have ruled such cases under the rights to property, collective bargaining, work and fair remuneration. In most instances, the limitation assessment served as the primary framework for examining interferences. The only exception is the fair remuneration cases from the ECSR, in which the interference is analyzed through the minimum core framework. However, even in these cases, the ECSR conducted a general limitation assessment prior to addressing the specific violations. As a result, the minimum core analysis supplements the limitation assessment. Moreover, in these cases, non-discrimination is also examined in addition to the minimum core.

Regarding the limitation assessment criteria, the legality of the measure is discussed by the IACtHR and the ECSR. While the IACtHR focuses on the retroactive application of laws (the substantive element), the ECSR centers its analysis on the existence (the formal element) and format of the law. Under the legitimacy criterion, similar to the preceding section, almost all justifications provided are accepted by the international bodies, with the exception of one wage reduction case in which the ECSR considers that economic difficulties do not justify

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excessive restrictions. As for the proportionality analysis, the two elements are non-negotiable obligations and the balancing exercise. The non-negotiable obligations are the conduct of judicial review, the compliance with judicial rulings, and the conduct of consultation with affected groups. The balancing exercise focuses on financial burden, lengthy delays, and the lack of balancing efforts by national authorities.

Similarly to the preceding section, international bodies have incorporated states' obligations, such as non-discrimination and substantive equality, into the limitation assessment. The most significant difference from the preceding section—even the preceding chapter—lies in the application of the minimum core framework instead of the limitation assessment in relation to specific violations, diverging considerably in content. The ECSR first assessed the limitation assessment in general terms in preliminary considerations, using the minimum core framework to emphasize specific thresholds deemed acceptable. In other words, reductions below the acceptable threshold constitute a violation. Moreover, the non-discrimination framework is also used to complement the limitation assessment, and its content focuses on prohibited grounds of discrimination. One explanation for the lack of discussion on justifications or proportionality is that these are addressed in preliminary considerations. Hence, the minimum core and non-discrimination framework serve as qualifiers of the already illegitimate and disproportionate interference.

This section is organized based on the limitation assessment criteria—legality, legitimacy, and proportionality analysis. Similar to the previous section, I begin the analysis with the right to property and then proceed to the rights to collective bargaining, work, and fair remuneration to avoid repetition and enhance clarity.

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2.1. Legality

The assessment of the legality of interfering measures in employment-related cases is scarce. While the ECtHR does not address the criterion at all, the IACtHR and the ECSR

consider it in one case each, under the right to property and the right to collective bargaining, respectively. The two regional bodies focus on different aspects of legality: the IACtHR analyzes the retroactive application of the law, while the ECSR examines its content, specifically the existence of the law, and format.

Under the right to property, the IACtHR reaffirmed its previous rulings on property, emphasizing that it is not an absolute right and that states must comply with the limitations clause. In Abrill Alosilla et al. v. Peru, the IACtHR pointed out that the parties agreed that the law ending the "salary scale system was proper,"[1327] meaning it respected the rules of the country. However, the laws were applied retroactively, decreasing the amount of remuneration received,[1328] which is impermissible.[1329] Despite the lack of reference to legality or rule of law, the non-retroactivity of laws is part of the rule of law, and consequently, part of the legality criterion.[1330] Hence, even without directly mentioning this criterion, the state illegally interfered with the right to property.

Under the right to collective bargaining, the ECSR examined the interferences deriving from legislation that completely banned collective bargaining for public servants. The ECSR explained that interferences "must have a clear basis in law, i.e. they must have been agreed upon by the democratic legislature,"[1331] a criterion that was met by the state. This case is relevant for the discussion on legality due to the phrase 'clear basis.' Scholars point out that the ECSR usually focuses on the existence, quality and application of the law.[1332] Consequently, the clear basis is an unsurprising element. However, the ECSR tends to accept any legal

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[1327] *Abrill Alosilla et al. v. Peru*, ¶ 80.
[1328] *Abrill Alosilla et al. v. Peru*, ¶ 81.
[1329] *Abrill Alosilla et al. v. Peru*, ¶ 82.
[1330] See the discussion regarding this topic: Yarik Kryvoi and Shaun Matos, 'Non-Retroactivity as a General Principle of Law', *Utrecht Law Review* 17, no. 1 (2021): 46–58.
[1331] *Matica Hrvatskih Sindikata v. Croatia*, ¶ 89.
[1332] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 86; Karin Lukas, 'The European Social Charter', in *Research Handbook on International Law and Social Rights*, ed. Christina Binder et al., Research Handbooks in International Law (Edward Elgar Publishing Limited, 2020), 348.

instrument as a law to reflect diverse legal systems.[1333] Instead, in this case, it accepted only laws enacted by the legislature. A possible explanation for such change is the fact that interferences with collective bargaining are considered severe, leading to higher scrutiny from the ECSR.[1334] In this case, only an enacted law would permit interferences.

These cases differ from the previous analysis on legality because the IACtHR mentioned the principle of non-retroactivity of the law, which has not been raised in other cases, and the ECSR focused on the existence of the law and its format. The format of the law has been addressed in only a few cases preceding chapter—it is rarely the focus of international bodies analyzing legality of interferences. Hence, these cases bring forward crucial aspects of legality.

2.2. Legitimacy

The legitimacy criterion in employment-related cases covers, similar to the preceding section, encompasses various justifications. The IACtHR, ECSR, and the ECtHR accept most of the justifications presented by states, which range from economic hardship to nuclear disasters.

In the property cases, the IACtHR acknowledged that the measures adopted had an anti-inflationary character, as the freezing of salaries aimed at tackling hyperinflation, reducing real remunerations, and addressing a high budget deficit.[1335] However, the issue in the case was the retroactive application of the law, which was the focus of the IACtHR's analysis. Regarding the ECtHR, it did not challenge the legitimate aim presented by the state, concluding that "the prohibition on removing the debtor company's contaminated property from the Chernobyl zone of compulsory evacuation"[1336] fell within the scope of the general interest. Hence, both the

[1333] Lukas, 'The European Social Charter', 348.
[1334] *Matica Hrvatskih Sindikata v. Croatia*, 88.
[1335] *Abrill Alosilla et al. v. Peru*, ¶ 80.
[1336] *Mykhaylenky and Others v. Ukraine*, ¶ 62.

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IACtHR and the ECtHR referred to states' aims to affirm their significance rather than to challenge them.

In the case concerning collective bargaining, the ECSR clarified that the interference with the right to collective bargaining for public servants must fall within one of the aims listed in the general limitation clause of the ESC. The government justified its actions based on the "fiscal stability of the public service system,"[1337] which falls within the scope of public interest. Notably, in cases concerning fair remuneration—where the ECSR applied the minimum core framework—it assessed the overall situation of the state in preliminary considerations before addressing the specific provisions.[1338] In GENOP-DEI and ADEDY v. Greece, the ECSR stated that economic crises may justify legislative reforms and restrictions aimed at "public expenditure or relieve constraints on business activities."[1339] However, they cannot "excessively destabilise the situation of those who enjoy the [Charter's] rights."[1340] Although the limitation assessment was not the primary framework in fair remuneration assessment, it nonetheless informed the analysis.

In GSEE v. Greece, the ECSR examined the legitimacy in detail during its preliminary considerations. It affirmed that the public interest would be the only acceptable aim,[1341] citing the "dramatic shrinking of the Greek economy and the very high rate of unemployment."[1342] However, the ECSR found that, although the situation could constitute a legitimate aim, Greece failed to justify the measures.[1343] Moreover, Greece did not achieve any of its economic objectives after the imposition of the measure.[1344] In this case, all violations were assessed based on the finding that the restrictions did not meet the legitimacy criterion. This case stands out for two reasons. First, the analysis of the limitations was conducted in preliminary considerations

[1337] *Matica Hrvatskih Sindikata v. Croatia*, ¶ 89.
[1338] *GENOP-DEI and ADEDY v. Greece*, ¶¶ 13–14; *GSEE v. Greece*, ¶¶ 83–93.
[1339] *GENOP-DEI and ADEDY v. Greece*, ¶ 13.
[1340] *GENOP-DEI and ADEDY v. Greece*, ¶ 13.
[1341] *GSEE v. Greece*, ¶ 84.
[1342] *GSEE v. Greece*, ¶ 89.
[1343] *GSEE v. Greece*, ¶ 91.
[1344] *GSEE v. Greece*, ¶ 92.

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rather than being tied to specific rights. As a result, the Greek measures as a whole did not satisfy the limitation clause. Second, the lack of legitimacy of the interfering measures was acknowledged and used as a contextual element in assessing specific rights violations. Consequently, the analysis of the right to fair remuneration was predicated on the assumption that the measures lacked legitimacy.

To summarize, the legitimate aims invoked by states under the rights to property and collective bargaining were accepted by the IACtHR, ECSR and the ECtHR. The cases concerning fair remuneration present a notable reasoning. Although the ECSR applied the minimum core framework to assess interferences, it analyzed the legitimacy criterion during preliminary considerations to inform the rights-specific assessment, ultimately concluding that the Greek state's justification of economic hardship did not satisfy the legitimacy criterion.

2.3. Proportionality

The proportionality analysis of interferences with employment matters—such as salaries and collective bargaining—has focused on the impact of the measures through various lenses. As previously noted, the regional bodies analyzed various rights through distinct frameworks. Under the right to property, both the IACtHR and the ECtHR conducted an explicit limitation assessment, while the IACtHR employed an implicit limitation assessment under the right to work, focusing solely on the impact of the interfering measure. The ECSR, meanwhile, assessed interferences with the right to collective bargaining using the limitation assessment framework. Cases concerning fair remuneration were examined through the lens of minimum social protection, consistent with the concept of the minimum core, and were evaluated in conjunction with the non-discrimination obligation. In the decisions from both the IACtHR and the ECSR, substantive equality has been integrated into the proportionality analysis.

The cases concerning the right to property cover two distinct national contexts. The IACtHR addressed the Peruvian economic crisis during the 1990s, while the ECtHR examined

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the aftermath of the Chernobyl disaster which impacted the Ukrainian economy. Despite these contextual differences, both regional bodies identified the failure to comply with judicial decisions as a key factor in the proportionality analysis.

The IACtHR explained that the retroactive application of a law had negatively impacted the remuneration of workers, especially considering that this remuneration had already entered their personal wealth.[1345] The governmental decree contradicted national laws, failing to grant judicial protection to the applicants, as it failed to execute the national judgments issued in their favor. Due to the interference, the right to property could not be fully enjoyed.[1346] In another case, the judicial authorities granted an increase in pay, which was not implemented within a reasonable time. Due to the lack of judgment execution, the full enjoyment of the right to property was adversely affected.[1347] Therefore, the IACtHR considered that the non-compliance with judicial orders adversely impacted the right to property. As for the ECtHR, it concluded that the lack of execution of salary payments was disproportionate, as the applicants bore the entire financial burden due to not receiving the full amount awarded by the courts within a reasonable time.[1348]

While both the IACtHR and the ECtHR emphasized the lack of execution of judicial decisions in their proportionality analyses, they differ in the language employed. The IACtHR focused on the lack of full enjoyment of the right, whereas the ECtHR emphasized the disproportionate financial burden. This linguistic distinction supports the conclusion that, for the IACtHR, the failure to execute judicial decisions constitutes an unacceptable interference, while the ECtHR allows for a certain level of interference, provided the delay is not excessive or the financial burden is not significant. Regardless of the approach, the importance of judicial review is firmly established, as it is crucial for assessing the proportionality of the measure.

[1345] *Abrill Alosilla et al. v. Peru*, ¶¶ 81–83.
[1346] *Abrill Alosilla et al. v. Peru*, ¶ 84.
[1347] *FEMAPOR v. Peru*, ¶¶ 113–114.
[1348] *Mykhaylenky and Others v. Ukraine*, ¶¶ 62–63.

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Under the right to collective bargaining, only the ECSR issued a decision, in which it explicitly applied the limitation clause, explaining that interferences with this right constitutes a "serious measure."[1349] In its proportionality analysis, the ECSR stated that such interferences must be "in response to a pressing social need,"[1350] and be necessary in a democratic society, which corresponds to proportionality. However, the government failed to provide information on its economic situation during the adoption of the law, thereby violating the right to collective bargaining.[1351] The language used by the ECSR is rather curious, as it claimed that the state satisfied the legitimate aim criterion and proceeded to the proportionality analysis, only to conclude that the state had not demonstrated its economic distress.

In addition to these cases, the IACtHR and the ECSR have addressed states interferences with wages. The IACtHR analyzed the reduction of wages under the right to work in Article 26 ACHR, without referencing limitations or applicable criteria. Due to the focus on the impact, the proportionality analysis was implicitly adopted, which means the limitation assessment was also implicitly applied. The IACtHR explained that the lack of execution of judicial orders negatively impacted the right to work due to the absence of the "full payment of [the applicants] remuneration."[1352] This generated "a differentiated impact"[1353] due to the applicants' age, which necessitates special measures and protection. Confirming its precedent, the IACtHR reaffirmed that states must have a "standard of expeditiousness in all judicial and administrative proceedings."[1354] Based on General Comment No. 6 from the CESCR,[1355] the IACtHR clarified that the payment of wages is intrinsically linked to nutrition and survival of individuals, thereby impacting other rights.[1356] This decision reaffirms previous rulings from the IACtHR, which

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[1349] *Matica Hrvatskih Sindikata v. Croatia*, ¶ 88.
[1350] *Matica Hrvatskih Sindikata v. Croatia*, ¶ 89.
[1351] *Matica Hrvatskih Sindikata v. Croatia*, ¶ 89.
[1352] *FEMAPOR v. Peru*, ¶ 109.
[1353] *FEMAPOR v. Peru*, ¶ 110.
[1354] *FEMAPOR v. Peru*, ¶ 110.
[1355] *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, General Comment E/1996/22 (Committee on Economic, Social and Cultural Rights, 1995).
[1356] *FEMAPOR v. Peru*, ¶ 111.

consistently focus on the impact of measures on individuals and emphasize the incorporation of substantive equality into the assessment of such impact. Such incorporation intensifies the scrutiny of the impact, ensuring that the assessment of interferences considers relevant facts when determining its proportionality.

As for the ECSR, it issued two decisions focusing on the reduction of workers' salaries in Greece. Its approach in these cases differed significantly from other decisions issued by the ECSR and other international bodies. The first main difference stems from the discussion on limitations in the preliminary considerations before addressing the specific violations. Before addressing the violation of fair remuneration, it explained that, despite legitimate aims for interferences, states cannot evade their obligations due to external institutions, such as the EU, imposing other obligations. Proportionality must be observed in cases of interferences, requiring measures to be appropriate, necessary, only used for the purpose elected, and to preserve an adequate protection level.[1357] This last element is crucial for the violation of the right to fair remuneration.

Although the Greek economic crisis necessitated restrictive measures and presented a pressing social need due to economic contraction and rising unemployment, the measures would need to be the least restrictive possible.[1358] However, the government did not conduct a balancing test to examine the impact on the most vulnerable, nor did it consult the affected individuals. Consequently, it failed to consider whether less restrictive alternatives existed,[1359] thereby imposing disproportionate measures.[1360] At the conclusion of its preliminary consideration, the ECSR determined that Greece had not reached any of stated aims, as both the labor market and the economy had deteriorated rather than improved.[1361]

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[1357] *GSEE v. Greece*, ¶ 87.
[1358] *GSEE v. Greece*, ¶ 89.
[1359] *GSEE v. Greece*, ¶ 90.
[1360] *GSEE v. Greece*, ¶ 91.
[1361] *GSEE v. Greece*, ¶ 92.

The uniqueness of this case lies in the ECSR's overall finding of violation. It concluded that the measures adopted were, in general, disproportionate. While specific rights violations were analyzed separately using language distinct from the preliminary consideration, the Greek agreement with the EU constituted a disproportionate interference with social rights. This case stands as the ECSR's most comprehensive decision on social rights and austerity measures, offering guidance to states on how to interfere appropriately with rights.[1362] The decision's structure to first analyze the limitation assessment in general terms and then moving to the rights-specific provisions is a novel one.[1363] Although the analysis of fair remuneration followed the framework of minimum social protection, the overarching finding of a general violation of the ESC influenced this assessment.

The second difference is the framework used when analyzing the interference with the right to fair remuneration. The ECSR opted for analyzing the minimum social protection afforded to individuals based on wages in Greece. In the earlier case, the ECSR analyzed the violation through this standard. It affirmed that wages must be above the poverty line and above "60% of the national average wage."[1364] The state may only decrease wages if it has proven that workers can still maintain a decent standard of living, which must be demonstrated through the submission of relevant information.[1365] In this case, young persons received reduced wages, which is permissible based on personal circumstances. However, the reduction "should not fall below the poverty level of the country."[1366] Based on information provided by the parties, the ECSR found a violation of fair remuneration since the minimum wage was "substantially below the national minimum wage."[1367]

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[1362] Nikolaos A. Papadopoulos, 'Austerity Measures in Greece and Social Rights Protection under the European Social Charter', *European Labour Law Journal* 10, no. 1 (2019): 95–96.
[1363] Adèle Marchal, 'The European Committee of Social Rights' Stance on the Greek Austerity Measures: A Pan-European Wake-up Call for a European Social Charter Reform', *Zeitschrift Für Europarechtliche Studien – ZEuS* 4 (2019): 540.
[1364] *GENOP-DEI and ADEDY v. Greece*, ¶ 57.
[1365] *GENOP-DEI and ADEDY v. Greece*, ¶ 57.
[1366] *GENOP-DEI and ADEDY v. Greece*, ¶ 60.
[1367] *GENOP-DEI and ADEDY v. Greece*, ¶ 64.

In the case GSEE v. Greece, the ECSR reiterated the standards set out in the earlier case and found a violation as well.[1368] Notably, the ECSR considered "that the reduced seniority increase of the minimum wage"[1369] for young workers had a discriminatory element, aggravating their situation.[1370] In other words, discrimination was incorporated into the assessment of the interference. This incorporation illustrates the conceptual linkage between limitations and non-discrimination, recognizing that discriminatory effects may result in disproportionate interference. Accordingly, non-discrimination functions not only as a framework for evaluating interferences but also as an element of the limitation assessment, intensifying its scrutiny.

These two Greek cases on fair remuneration are the only cases throughout this chapter that raise the minimum social protection as standard for assessing interferences. Scholars have argued that this is similar to the minimum core, due to its focus on standard of living.[1371] This understanding of minimum core is less open-ended than the general concepts of minimum core essential levels or obligations, as the ECSR explicitly defines the content and percentage of acceptable wages. Accordingly, the ECSR has developed its own tangible interpretation of the minimum core.

The last important aspect of these cases on fair remuneration concerns the non-discrimination obligation. In both cases, the ECSR examined it after discussing the wage reductions affecting young workers. In each instance, the right to fair remuneration was read in conjunction with the preamble of the ESC.[1372] The ECSR determined in its first case that the situation constituted a differential treatment "based on age."[1373] The justification for such

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[1368] *GSEE v. Greece*, ¶¶ 187–193.
[1369] *GSEE v. Greece*, ¶ 192.
[1370] *GSEE v. Greece*, ¶ 192.
[1371] Costamagna, 'Riduzione Delle Risorse Disponibili e Abbassamento Dei Livelli Di Tutela Dei Diritti Sociali: Il Rispetto Del Nucleo Minimo Quale Limite All'Adozione Di Misure Regressive', 376; Lougarre, 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights', 345.
[1372] *GENOP-DEI and ADEDY v. Greece*, ¶ 66; *GSEE v. Greece*, ¶ 194.
[1373] *GENOP-DEI and ADEDY v. Greece*, ¶ 68.

treatment relies on legitimacy and proportionality. However, the ECSR found that, despite legitimate aims—employment and integration to the labor market in times of crisis—Greece had taken disproportionate measures, as the wage reduction was too drastic and applied to all workers below 25.[1374] The more recent case against Greece upheld this finding, clarifying that the measures were "excessive and constitute[d] discrimination on grounds of age."[1375] Although the term was not explicitly used, the ECSR found the Greek reforms to amount to direct discrimination against young workers.

Despite the differences in rights and frameworks, the regional bodies consistently focused on the impact of interfering measures. In property cases, the IACtHR and the ECtHR found that the interferences were disproportionate due to the lengthy delays in the implementation of judicial decisions. Execution of judgments is essential, highlighting the importance of judicial review. The IACtHR emphasized the negative impact of the non-execution of judgments in relation to the right to work as well, reaffirming its mandatory nature. This group of cases underscores that the conduct of judicial review, and compliance with it, constitute a non-negotiable obligation within the proportionality analysis. In the ECtHR's decision, the duration of delays and the financial burden formed part of the balancing exercise, thereby qualifying the obligation to execute judgments. In the collective bargaining case, the ECSR focused on the lack of information regarding the economic situation, which was essential for its evaluation. Thus, proportionality was clearly the analytical method applied under the limitation assessment, even if only implicitly.

In cases concerning fair wages, the ECSR opted for the minimum core framework rather than the limitation assessment, although it had analyzed the latter during its preliminary considerations. Under the minimum core framework, the ECSR focused on the poverty line and the threshold used to determine the significant impact of wage reductions on young workers.

[1374] *GENOP-DEI and ADEDY v. Greece*, ¶ 68.
[1375] *GSEE v. Greece*, ¶ 197.

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This parallel framework diverges substantially from the limitation assessment framework, offering concrete numbers as to how low reductions can go. Since the ECSR found violations under the limitation assessment in its preliminary considerations, the conclusion is that the minimum core complemented and furthered the analysis of the already established invalid limitation.

Additionally, both the IACtHR and the ECSR incorporated substantive equality into their analyses. The IACtHR called for special measures, while the ECSR examined discriminatory elements in its assessment. These obligations formed part of the balancing exercise conducted by the regional bodies, thereby enhancing the analysis conducted. Regarding the non-discrimination obligation, only the ECSR addressed it in the wage reductions cases, identifying a violation due to the excessive nature of the reductions.

Overall, the proportionality analysis was primarily shaped by judicial review and the impact of interferences. States' obligations played a vital role, either by being incorporated into the limitation assessment or by being applied complementarily, such is the case of the minimum core framework. Such states' obligations ensure that crucial considerations become part of the limitation assessment, such as the need for special measures.

2.4. Synthesis

This section examined cases concerning austerity measures that interfered with employment-related matters, specifically payment of owed salaries, wage reductions and collective bargaining, as ruled by the IACtHR, ECSR and the ECtHR. The limitation assessment served as the primary framework for evaluating interferences, with the exception of a few cases in which the ECSR applied the minimum core framework.

In the case law, the legality criterion addressed distinct aspects: the IACtHR focused on the substantive element of the law—namely, its retroactive application—while the ECSR analyzed the formal element—existence of the law—and its format. In most cases, the various

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economic justifications were accepted by the regional bodies. The exception was a wage reduction case in which the ECSR found that the economic hardship did not justify severe restrictions. Finally, the proportionality analysis consisted of non-negotiable obligations and the balancing exercise. The non-negotiable obligations included the conduct of judicial review, compliance with judicial decisions, and consultation with affected groups. The balancing exercise involved weighing the interference in terms of financial burden, lengthy delays, and the absence of balancing at the national level. Additionally, substantive equality and non-discrimination were incorporated into the balancing exercise. The incorporation of these obligations ensured that international bodies intensified the scrutiny of the limitation assessment, ensuring that the benefits of these obligations become part of the analysis.

Beyond the incorporation of states' obligations into the limitation assessment, the ECSR also applied them as parallel frameworks. In a few cases, it used minimum social protection—its own interpretation of the minimum core—as the framework, complemented by the assessment of the non-discrimination obligation. The minimum core framework was used after the ECSR had already recognized that the interferences were illegitimate and disproportionate, concluding that the reduction of wages was below the acceptable threshold. Although the content of the minimum core framework differs from the limitation assessment, the ECSR added this framework to the limitation assessment analysis. In other words, there was a further violation arising from not meeting the minimum core. In addition, the non-discrimination obligation also added to both the limitation assessment and minimum core frameworks, heightening the focus on age-based discrimination as a consequence of the interference.

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3. Conclusion

This chapter examined the adoption of austerity measures due to economic factors. The cases selected for this case study focused on interferences with the enjoyment of rights in instances of legal reforms that reduce or eliminate such rights, i.e. cases interferences relate to

states' positive obligations to fully realize ESCR. The chapter was structured around cases regarding social benefits and employment-related matters. Through this, I demonstrate that the primary analytical framework used by international bodies was the limitation assessment. In most cases, they explicitly referred to either the limitation clause or the limitation assessment criteria, which constitutes an explicit limitation assessment. In a few cases, neither of these was referenced, but the assessment overlapped with the criteria, which I considered an implicit limitation assessment. Notably, states' obligations—non-retrogression, non-discrimination, and minimum core—have been applied as parallel frameworks to assess interferences after the application of the limitation clause, opening the possibility for comparing their legal reasoning.

Overall, this chapter has confirmed that the limitation assessment serves as the primary framework but is deeply connected to states' obligations in cases of interferences with ESCR. I demonstrated that the legality, legitimacy and proportionality criteria have incorporated states' obligations, which intensifies the scrutiny discharged under these criteria. Proportionality analysis consists of non-negotiable obligations and the balancing stage, with the balancing stage also incorporating states' obligations. The incorporation of such obligations deviates from the traditional application of limitations, as it embraces their benefits. As ESCR have been conceptualized through their obligations, such incorporation ensures that the crucial aspects of ESCR do not fall through the cracks of adjudication.

Furthermore, in a few cases, states' obligations were applied as analytical frameworks. In such cases, the assessment of non-retrogression and non-discrimination closely resemble the limitation assessment, demonstrating their linkages and the benefits of assessing interferences beyond the traditional limitation assessment. Under such frameworks, the analyses focus on the specific aspects of such frameworks, such as available resources and unequal treatment. The minimum core was an exception, as it did not overlap with the limitation assessment. However, the minimum core, as an absolute core, was used to further the analysis of interferences and provide a concrete threshold for reductions.

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Therefore, the limitation assessment, through the incorporation of and linkages with states' obligations, has been applied with grater intensity, thereby assessing interferences with more robustly. The conceptualization of interferences with ESCR is only possible through the interplay between limitations and states' obligations. As such, international bodies should expand these incorporations and linkages in a systematic manner, thereby cohesively combining limitations and states' obligations to fully realize ESCR.

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Conceptualizing Interferences with Economic, Social, and Cultural Rights

My dissertation investigates interferences with ESCR in the global and regional human rights systems, focusing on the jurisprudence of the CESCR, ACmHPR, ACtHPR, IACmHR, IACtHR, ECSR, and the ECtHR. Traditionally, the analysis of interferences has been conducted through the lens of limitations and has focused on CPR. By contrast, the realization of ESCR has been conceptualized through the states' obligations framework. Against this backdrop, my project sought to shift the focus of limitations from CPR to ESCR, while exploring the importance of states' obligations and their relationship with limitations. The dissertation did so by answering the twin questions of what the analytical framework for assessing interferences is and the analytical method employed while making this assessment.

Given the many cases of ESCR violations across the jurisdictions, for methodological reasons, I narrowed down my research to two case studies: Cases of forced removal of individuals from their homes or lands; and cases arising from the implementation of austerity measures. The first set of cases stem from a violation of the state obligation to refrain from interfering with rights—negative obligations. The second set of cases, by contrast, stems from the failure of states to realize ESCR—positive obligations. Since these case studies cover different sets of obligations, they allow for a broader comparison of interferences and ESCR, thereby ensuring that the study is comprehensive. Furthermore, since the case studies invoke different facets of states' obligations—negative and positive—they complement each other, thereby enhancing the wide applicability of the claims presented.

My dissertation is structured as follows: Chapter 1 reviewed existing literature on ESCR and the jurisprudence of the chosen bodies. I demonstrated that while the scholarship on ESCR has predominantly focused on the justiciability of these rights and the obligations attached them, questions regarding the analytical frameworks and methods applicable for assessing interferences remain underexplored. Chapter 2 then examined the analytical frameworks developed to assess interferences by scholars and the international bodies. Through this

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discussion, I highlighted the meaning and significance of the limitation assessment and the function of states' obligations. I demonstrated that not only do states' obligations—such as progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality—serve as analytical frameworks in and of themselves, but also that they can be connected to the limitation assessment. Due to these two possibilities, the scholarship treats these obligations as either identical, similar, or distinct from limitations. Beyond the question of analytical framework, this chapter also addressed two key analytical methods used in ESCR cases, namely reasonableness, which is closely tied to ESCR, and the proportionality analysis, which is more broadly applied in rights adjudication. On a more abstract level, this chapter demonstrated how the conceptualization of ESCR adjudication has developed separately from the concept of limitations, a gap that I try to close while analyzing my case studies.

Finally, chapters 3 and 4 analyzed the two case studies of forced removal and austerity measures using the frameworks of the limitation assessment and states' obligations. Together, these chapters demonstrate that the limitation assessment serves as the primary framework for assessing interferences with ESCR, and that proportionality, which includes non-negotiable obligations and the balancing exercise, is the prevailing analytical method for conducting this assessment. Beyond this general claim, I illustrate that states' obligations featured in the case law in two ways. Primarily, they have been incorporated into the limitation assessment, thereby intensifying the scrutiny conducted by international bodies. This incorporation results in the emphasizing of elements such as available resources, which a traditional limitation assessment would have looked past. Alternatively, states' obligations are applied as a parallel framework to the limitation assessment. In this formulation, the states' obligations frameworks resemble the limitation assessment, overlapping in their focus and content.

In what follows, I elaborate on the analytical framework applied by the international bodies while highlighting their innovativeness in incorporating states' obligations into the

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limitation assessment. Thereafter, in the second subsection, I explore the interplay between the limitation assessment and states' obligations when they function as parallel frameworks.

1. Framework to assess interferences: the limitation assessment

In my two substantive chapters, I demonstrated that the international bodies have predominantly employed the limitation assessment as the analytical framework to evaluate interferences with ESCR. This finding stemmed from two interconnected conceptualizations: I recognized an explicit limitation assessment when international bodies either analyzed the interference with ESCR based on the (general or specific) limitation clause or explicitly referenced the criteria—legality, legitimacy and proportionality; and an implicit limitation assessment when the international bodies did not refer to either the clause or the criteria but assessed the same elements. In my substantive chapters, I considered that when international bodies apply the unspecific states' obligations framework, they are effectively conducting an implicit limitation assessment. The is due to the striking similarity in legal reasoning between the two. However, there are cases in which the limitation assessment was not applied. Instead, other frameworks were employed, such as non-discrimination,[1376] as explained in the subsequent section. Despite the adoption of these parallel frameworks, the overarching claim that the limitation assessment is the primary framework for assessing interferences still hold merits.

The "Forced Removals" and the "Austerity Measures" chapters are distinct due to the nature of the interference. In the forced removal cases, I analyzed cases involving the removal of individuals from places where they resided either as owners or (legal or illegal) occupiers. The focus was on non-interference with rights—specifically, states' obligation to refrain from interfering. In situations where states chose to interfere, international bodies examined

[1376] For example: *J.D. and A v. the United Kingdom*.

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acceptable standards. In these cases, the rights adjudicated included the rights to property, housing, family to social, legal, and economic protection, and respect for private and family life. As for cases involving austerity measures, I analyzed the curtailment of rights in circumstances that involved the reduction or loss of social benefits, as well as cuts to remuneration and collective representation. The focus was on budgetary measures that led states to interfere with rights, rather than either maintain or enhance them. In these cases, the rights to property and social security were most frequently analyzed, with a limited number of cases addressing other ESCR.

The analysis of the case law was conducted using the criteria set forth the limitation clause. Accordingly, this section is organized following the three criteria of the limitation assessment, namely legality, legitimacy and proportionality analysis, with specific findings addressed under each of them.

1.1. Legality

The legality of interfering measures is the first criterion mentioned in the limitation clauses, expressed through phrases such as "prescribed by law."[1377] Despite its inclusion, legality is not uniformly discussed by international bodies. The ECtHR explicitly addresses it in most cases—even if only to affirm the lawfulness of the measure—while other bodies rarely engage with it in depth. However, in the few cases where it does appear, it offers significant insights to the overall analysis. As explained in the "Analytical Framework" chapter, the legality criterion encompasses both the content and the format of the law. The content of legality comprises a formal element of legality—existence of the law[1378]—and a substantive element—

[1377] Articles 9, 10 and 11 ECHR, and Article 30 ESC and Article G RESC.
[1378] Garibaldi, 'General Limitations on Human Rights: The Principle of Legality', 506.

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the quality of the law.[1379] The format focuses on what constitutes a law, such as statutory or judge-made law.[1380]

In the "Forced Removals" and "Austerity Measures" chapters, the primary focus of the analysis of legality lies in the content of the law, specifically its existence or quality. While the quality of the law is explicitly examined, the assessment of the existence of laws that interfere with ESCR is not always clearly stated. For instance, the cases decided by the CESCR and the ECSR simply referred to laws in place without affirming their compliance with the legality criterion,[1381] thus implicitly accepting the interference's legality. In a few cases, the international bodies focused on the format of the law.[1382]

Beyond the analysis of the content and format of the law, the analysis of legality raises additional aspects worth discussing. The first significant aspect is the importance of elements that are typically addressed within the proportionality analysis. The most notable inclusion concerns judicial review. While the existence and conduct of judicial review feature throughout the case law to determine the impact of the measure, some international bodies include judicial review within the analysis of the legality of the measure. This manifestation appears in two ways.

First, some international bodies, such as the IACmHR and the ECtHR,[1383] emphasize the application and interpretation of laws by various authorities, particularly judicial ones. Second, the IACtHR adopted a robust understanding of arbitrariness, in which it assessed whether interferences were based on legal proceedings, or on administrative or judicial authorization.[1384] In essence, legality encompasses judicial review and compliance with it. The

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[1379] Valutytė et al., 'Legality of Human Rights Restrictions During the COVID-19 Pandemic under the European Convention on Human Rights', 4.
[1380] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 200.
[1381] *Rosario Gómez-Limón Pardo v. Spain*, ¶ 9.4; *Médecins du Monde - International v. France*, ¶ 75.
[1382] See, for example: *Zvolský and Zvolská v. the Czech Republic*, ¶ 66; *Matica Hrvatskih Sindikata v. Croatia*, ¶ 89.
[1383] See: *Wittek v. Germany*, ¶¶ 47–49; *Corumbiara v. Brazil*, ¶ 169.
[1384] See: *Case of the "Five Pensioners" v. Peru*, ¶ 109.

mere existence of a law that is clear, foreseeable and precise is therefore insufficient; national authorities must apply and interpret the law, authorizing the interference. Another example is the introduction of the conduct of consultation and the provision of compensation into the legality analysis under the ACmHPR case law. The rationale for this inclusion was that, since both national and international laws require them for interferences, the ACmHPR deemed them components of legality.[1385]

The significance of the inclusion of judicial review, compensation, and consultation under the legality criterion lies in the fact that they are traditionally assessed within the proportionality analysis. This demonstrates that, although the limitation assessment criteria have distinct concepts and focus on specific elements, international bodies address similar content regardless of the criteria's name. Consequently, the boundaries between these criteria are not strict.

The second significant aspect is the incorporation of states' obligations into the legality analysis. The IACtHR is the only international body that has incorporated states' obligations under the legality criterion, whereas the other bodies have addressed them under different criteria. In cases concerning Indigenous and Tribal communities, it explained that states must implement measures to protect rights of people who experience disadvantage relative to the rest of the population. In this context, non-discrimination and substantive equality played central roles in determining the legality of interferences. Additionally, security of tenure, a component of the minimum core, must be guaranteed. Accordingly, the absence of security of tenure—through the delimitation, demarcation, and titling of lands—constituted a breach of legality.[1386] In cases regarding the reduction of social benefits, the IACtHR analyzed whether the interference with rights has led to denying the essence of the right. If the interference reached the essence—which is the core of the right—it was considered arbitrary.[1387] Consequently, it

[1385] See: *Endorois v. Kenya*, ¶¶ 225–236.
[1386] *Xucuru v. Brazil*, ¶¶ 121–124.
[1387] *Acevedo Buendía et al. v. Peru*, ¶¶ 84–91; *Muelle Flores v. Peru*, ¶¶ 212–219.

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has incorporated the minimum core—absolute in nature—to the analysis of legality. Thus, this incorporation intensified the scrutiny of the legality assessment by highlighting these obligations' importance for ESCR adjudication and challenging states' interferences.

These two significant aspects illustrate that legality is conceptualized more broadly than its formal and substantive content and its format. In various cases, international bodies focus on judicial review, consultation, compensation and states' obligations, which are typically addressed within proportionality analysis. This heightened emphasis intensifies the analysis of legality, which is otherwise not extensively explored by international bodies. Accordingly, the fluidity of each criterion's content underscores that, although each criterion has a defined content, the boundaries between them are often blur.

1.2. Legitimacy

The second criterion in the limitation assessment is concerned with the legitimacy of the interfering measure, focusing on its underlying rationale.[1388] As outlined in the "Analytical Framework" chapter, the international treaties contain a set of aims in their limitation clauses that serve to justify interferences. However, except in the case of the ICESCR,[1389] these objectives are broadly interpreted by the respective international bodies to encompass diverse goals. Justifications advanced by states must be "sufficiently important"[1390] to be deemed acceptable. However, international bodies generally defer to states, provided the justifications remain within the scope of relevant treaties.[1391]

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[1388] Sweet and Mathews, 'Proportionality, Balancing and Global Constitutionalism', 75.
[1389] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 202; Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 570–75.
[1390] Klatt and Meister, 'Proportionality—a Benefit to Human Rights? Remarks on the I·CON Controversy', 690.
[1391] Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 85–86; Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 57; Ali, 'Economic, Social and Cultural Rights General Obligations in the African Charter on Human and Peoples' Rights', 113; Orcan, 'Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness', 12.

My analysis of the case law demonstrates that, in most cases, the international bodies accept the justifications provided by states. In the "Forced Removals" and "Austerity Measures" chapters, the international bodies have concentrated on similar grounds for accepting interferences with ESCR. Notably, the justifications offered for interferences received less attention compared to proportionality. In most cases, states' aims are either merely mentioned or omitted entirely, proceeding with the proportionality analysis. In the few cases where international bodies engage substantially with legitimacy, they conduct in-depth assessments of the arguments advanced by states and incorporate states' obligations into the analysis.

Regarding the detailed analysis conducted by international bodies, my two case studies underscore the complexity of states' justification. In the "Forced Removals" chapter, the international bodies accepted several aims as legitimate, such as the preservation of cultural heritage,[1392] and addressing the illegal occupation of housing.[1393] Within this chapter, two aspects are particularly noteworthy. The first concerns the conduct of judicial review. The ECtHR incorporated judicial review into the legitimacy analysis by verifying whether it occurred and what its outcome was.[1394] As explained in the previous subsection, the conduct of judicial review is typically considered under proportionality. By analyzing judicial review within legitimacy, the ECtHR heightened the scrutiny of states' justification, rather than deferring to states.

The second noteworthy aspect is the divergence of opinions regarding the acceptance of environmental protection as a justification for interferences. States have invoked environmental protection to justify the removal of Indigenous and Tribal communities[1395] and Roma families.[1396] Different international bodies treat this justification differently. With respect to Indigenous and Tribal communities, the ACtHPR and the IACtHR rejected environmental

[1392] See: *Kozacioğlu v. Turkey*, ¶ 53.
[1393] See: *ERRC v. Ireland*, ¶ 140; *Hamid Saydawi and Masir Farah v. Italy*, ¶ 8.3.
[1394] *Ćosić v. Croatia*, ¶ 19.
[1395] See: *Kaliña and Lokono v. Suriname*, ¶ 192; *Ogiek v. Kenya*, ¶ 130.
[1396] See: *Beard v. the United Kingdom*, ¶ 93.

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protection as a valid justification for such removals, albeit for different reasons. While the ACtHPR accepted evidence attributing environmental degradation to parties other than the community,[1397] the IACtHR concluded that communities positively impact the environment, contributing to its protection.[1398] Although scholars debate the reasoning of bodies, they concur on the necessity of relying on substantiated evidence of both environmental degradation and community activities for an interference to be legitimate.[1399] At the opposite end of the spectrum, the ECtHR accepted the removal of Roma families from their own property on environmental grounds despite the absence of data demonstrating environmental degradation by those families.[1400] Thus, a justification presented by states can be received differently by international bodies, depending on the level of deference and scrutiny of state reasoning.

In the "Austerity Measures" chapter, given the nature of the cases, all aims advanced by states were grounded in economic considerations, such as ensuring the sustainability and maintenance of a social security system,[1401] and addressing a high budget deficit.[1402] In this chapter, the relevant aspect lies in the collective analysis employed by some international bodies. The IACmHR and the ECSR focused on the collective protection of rights and assessed whether the social security system improved as a result, or in spite of, the austerity measures.[1403] This collective aspect, similar to the incorporation of judicial review and the divergent approach to environmental protection, demonstrates that international bodies may conduct in-depth legitimacy analyses, albeit not in all cases.

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[1397] *Ogiek v. Kenya*, ¶ 130.
[1398] *Kaliña and Lokono v. Suriname*, ¶ 192.
[1399] Lixinski, 'Rights of Indigenous Peoples - Collective Rights - Recognition of Legal Personality - Right to Communal Property - Conflict between Nature Reserves and Indigenous Land - Free, Prior, and Informed Consultation - Environmental Impact - Restitution and Reparation', 154; Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts', 135–41.
[1400] See: *Beard v. the United Kingdom*, ¶ 93.
[1401] *Fábián v. Hungary*, ¶ 67; *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, ¶ 65.
[1402] *Abrill Alosilla et al. v. Peru*, ¶ 80.
[1403] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 140–143; *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 115.

With respect to the incorporation of states' obligations into the legitimacy analysis, my substantive chapters demonstrate that these obligations are essential when conducting the limitation assessment. This incorporation ensures that the adjudication of interferences with ESCR remains focused on what is necessary to safeguard those rights.

Beginning with progressive realization, in the "Austerity Measures" chapter, the IACmHR deemed justified the reduction of pensions for one group to increase those for another, as one group of people received 26 times more than another.[1404] Accordingly, the IACtHR clearly stated that progressive realization permeates states' actions in relation to ESCR, thereby deeming the aim legitimate.[1405] This case illustrates how the incorporation of states' obligations intensifies the scrutiny of the legitimacy of the measure, since the IACtHR determined that reducing benefits for one group would materialize the realization of the right for another group, thereby ensuring that progressive realization is a concrete obligation.

Furthermore, while the non-retrogression obligation remains absent in the legitimacy analysis, the minimum core is incorporated in case law discussed in the chapter on austerity measures. The ECSR discussed the poverty threshold when evaluating states' justifications for imposing pension reforms. This threshold has been regarded by scholars as conceptually aligned with the minimum essential levels.[1406] However, these concepts are not identical. As explained in the "Setting the Scene" chapter, minimum essential levels emphasize basic protection of ESCR.[1407] In the context of social security, such essential levels encompass adequacy and accessibility,[1408] which the CESCR articulates in general terms. By contrast, the poverty threshold formulated by the ECSR offers a concrete measurement of an acceptable

[1404] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 115–116.
[1405] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 116–117.
[1406] Costamagna, 'Riduzione Delle Risorse Disponibili e Abbassamento Dei Livelli Di Tutela Dei Diritti Sociali: Il Rispetto Del Nucleo Minimo Quale Limite All'Adozione Di Misure Regressive', 376; Lougarre, 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights', 345; Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis an Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures', 191.
[1407] Abramovich and Courtis, *Los Derechos Sociales Como Derechos Exigibles*, 90.
[1408] *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, para. 12.

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level. However, they converge on a shared goal: establishing a standard of living for individuals. Thus, the minimum core informed the ECSR's to assess the interference with social security.

The most significant incorporation into the legitimacy analysis concerns non-discrimination and substantive equality. Before addressing the incorporation of both obligations into the legitimacy assessment, it is crucial to discuss formal equality, since a sole focus on formal equality can and often does lead to a disregard—and therefore a violation—of substantive equality.

Formal equality demands equal treatment before the law,[1409] with an emphasis on ensuring non-arbitrariness.[1410] In adjudication, it is assessed through direct discrimination since it tackles unjustified and differential treatment of individuals in similar positions.[1411] In the "Forced Removals" chapter, such concepts appear in relation to Indigenous and Tribal communities. Somewhat counterintuitively, formal equality was invoked in these cases not by the disadvantaged communities but by the states, who used it to defend their decision to refrain from intervening on behalf of the disadvantaged communities (i.e. to adopt affirmative action policies). The ACmHPR, IACmHR, and the IACtHR rejected this refusal on the part of the states by citing the existing unequal treatment of the disadvantaged communities vis-à-vis the rest of the population which required redress.[1412]

From a conceptual perspective, in these cases, states not only understood equality exclusively in its formal sense, thereby avoiding the need for affirmative actions, but also misrepresented their national contexts to portray these communities as being in the same position as non-Indigenous and non-Tribal people. For this reason, their justifications failed to satisfy the legitimacy criterion, as the measures ultimately reinforced inequality. This finding

[1409] Fredman, *Discrimination Law*, 9.
[1410] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 2–5. The author goes in detail regarding the limits of formal equality. Also see: Fredman, *Discrimination Law*, 9–15.
[1411] Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', 123.
[1412] *Endorois v. Kenya*, ¶ 196; *Isseneru v. Guyana*, ¶ 187; *Saramaka v. Suriname*, ¶¶ 102–103.

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underscores the importance of substantive equality, highlighting that formal equality alone is insufficient to address such inequality. These cases demonstrate the significance of incorporating states' obligations into the legitimacy criterion, as this incorporation heightened the scrutiny employed by international bodies.

Beyond formal equality, non-discrimination and substantive equality feature in the legitimacy criterion. In the "Forced Removals" chapter, the ACmHPR found in one case that the reason for removing individuals from their land was discriminatory, as it was solely based on their status as non-citizens. In this case, the discriminatory justification led to an illegitimate interference.[1413] In the "Austerity Measures" chapter, the IACmHR, in the same case concerning progressive realization as a legitimate aim, accepted that the reform reducing benefits would ensure equal access to social security.[1414] Consequently, substantive equality was accepted as an aim to interfere with ESCR.

The incorporation of states' obligations into the legitimacy criterion has led bodies to analyze thoroughly the states' justifications for interferences. Such extensive analysis is remarkable. Most cases discussed in my substantive chapters examine interference with the rights of disadvantaged individuals or groups, requiring that the justification behind each interference be scrutinized closely. Deferring scrutiny to the proportionality phase, as most bodies prefer, fails to address the structural challenges individuals face, since most cases tend to focus on specific issues, such as the provision of compensation, without confronting the systematic issues individuals experience.

In general, the analysis of the legitimacy criterion yields four conclusions about the practice of international bodies. First, they typically do not analyze states' obligations closely, accepting states' interests over those of individuals. Second, in cases were aims were analyzed, the international bodies accepted a wide range of aims, even if not listed in international treaties.

[1413] *Open Society Justice Initiative v. Côte d'Ivoire*, ¶¶ 172–174.
[1414] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 116.

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This demonstrates that international bodies acknowledge emerging issues, such as the environment and economic hardship. Third, there is limited predictability in how bodies address certain aims. For example, environmental protection has prompted divergent discussions across bodies, resulting in varied outcomes and lines of reasoning. Fourth, international bodies have incorporated states' obligations into the analysis of legitimacy, thereby intensifying the scrutiny of the analysis. Overall, the in-depth analysis of legitimacy, through the focus on emerging issues and the incorporation of states' obligations, represents a positive development towards a more comprehensive analysis of states' justifications for interferences, instead of attributing a presumed validity to justifications.

1.3. Proportionality analysis

The third criterion of the limitation assessment is the proportionality analysis, which is the analytical method employed by international bodies. Although international treaties refer to 'necessary in a democratic society' rather than a specific analytical method, implying that various standards may be applicable, I have observed a consistent application of the proportionality analysis. In the scholarship, the applicable analytical methods have received considerable attention, both in the realm of what adjudicators do in practice and what scholar argue they should do. The scholarly discussion is relevant to understanding the similarities and differences between ESCR and CPR adjudication, as these insights inform my findings.

The two main analytical methods in adjudication are reasonableness and proportionality. These methods differ in their form and focus. Reasonableness is a one-step test, focusing on whether the decision taken by authorities is reasonable, focusing on coherence and comprehensiveness.[1415] By contrast, proportionality is multi-step test, centering its analysis on

[1415] Craig, 'The Nature of Reasonableness Review', 136; Young, 'Proportionality, Reasonableness, and Economic and Social Rights', 9; Liebenberg, 'Reasonableness Review', 13.

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the impact of the measure.[1416] The similarity between reasonableness and proportionality lies in their shared reliance on balancing exercise.[1417]

Scholars claim that proportionality is the main analytical method for the adjudication of human rights,[1418] as rights naturally conflict either among themselves or with interests.[1419] This scholarship has focused on the application of proportionality to CPR,[1420] leaving ESCR largely unexplored. Proportionality, as framed for CPR, encompasses three criteria:[1421] suitability, necessity, and proportionality stricto sensu. Each criterion focuses on distinct aspects. Suitability assesses whether the aim is suitable for the measure implemented;[1422] necessity concerns the least restrictive measure, considering equally suitable means;[1423] and proportionality stricto sensu focuses on the intensity of the interference—which is equivalent to balancing.[1424]

Beyond the extensive literature on proportionality and CPR, a few scholars have discussed proportionality and ESCR. However, the appropriateness of proportionality in adjudication of ESCR remains contested. As I explained in the "Introduction", scholars have defended three positions regarding ESCR and proportionality, mainly in national adjudication. Most scholars have concentrated on how analytical methods *should* be applicable to ESCR adjudication, with a few emphasizing how they *are* applied. The difference between them stems from discussions on abstract understanding of proportionality in ESCR cases and actual cases

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[1416] Möller, *The Global Model of Constitutional Rights*, 180–81; Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies', 4–5.
[1417] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 378.
[1418] Arai-Takahashi, 'Proportionality', 448–50; Möller, *The Global Model of Constitutional Rights*, 178.
[1419] Alexy, 'Constitutional Rights and Proportionality', 61–63.
[1420] See: Barak, *Proportionality: Constitutional Rights and Their Limitations*; Alexy, 'Constitutional Rights and Proportionality'; Möller, *The Global Model of Constitutional Rights*; Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies'.
[1421] Some scholars consider that legitimacy is part of the proportionality analysis. Since I followed the text of international treaties, I separated legitimacy and proportionality. Authors that consider legitimacy as part of proportionality, just to name a few: Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies', 4; Möller, 'The Proportionality of Lockdowns', 3.
[1422] Arai-Takahashi, 'Proportionality', 452.
[1423] Alexy, 'Constitutional Rights and Proportionality', 53.
[1424] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 340; Arai-Takahashi, 'Proportionality', 452; Alexy, 'Constitutional Rights and Proportionality', 54.

analyzing interferences with ESCR. This literature is relevant for the discussion on the practice of international bodies, as it informs how the literature perceives whether proportionality should be applied and how it is applied.

The scholarship can be divided into three groups. The first group of scholars argues that the interferences with ESCR are the same as CPR,[1425] even in times of crisis.[1426] For these scholars, the proportionality analysis itself remains unchanged. On the opposite side, the second group of scholars asserts that interferences with ESCR are fundamentally different from CPR, advocating for either reasonableness[1427] or a purely balancing approach as the analytical method.[1428] For them, the structured proportionality test would not be appropriate. A third group of scholars claims that the application of proportionality in ESCR adjudication shares similarities with CPR adjudication, albeit with additional considerations.

Most scholars argue that the suitability and necessity criteria should be assessed identically for ESCR and CPR, with the key distinction arising in the balancing stage.[1429] This is not a unanimous position, as some emphasize the importance of suitability and necessity for assessing the interference with ESCR, as these aspects are often overlooked.[1430] On balancing, the complexity of ESCR adjudication surfaces, as scholars believe that it either requires deeper levels of analysis[1431] or that financial capacity should be the central factor in the balancing stage.[1432] One crucial aspect mentioned in the literature is the incorporation of additional factors into proportionality analysis, such as individuals' vulnerability and their needs.[1433] Overall,

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[1425] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 429–34.
[1426] Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine', 738.
[1427] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?', 12–22.
[1428] Schlink, 'Proportionality (1)', 727; Möller, *The Global Model of Constitutional Rights*, 179.
[1429] Alexy, 'On Constitutional Rights to Protection', 12–15; Klatt and Meister, *The Constitutional Structure of Proportionality*, 95–98; Duarte, 'Gains and Losses in Balancing Social Rights', 63–65.
[1430] Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', 35–40.
[1431] Alexy, 'On Constitutional Rights to Protection', 12–15; Klatt and Meister, *The Constitutional Structure of Proportionality*, 95–98.
[1432] Duarte, 'Gains and Losses in Balancing Social Rights', 68.
[1433] Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', 520.

these scholars argue that despite the similarly structured test, the proportionality analysis in cases of interference with ESCR differs from CPR due to the unique nature of ESCR claims.

Considering the scholarly discussion, I analyzed the case law with the intention to address which analytical method is applied by human rights bodies and how. On the first part, proportionality is the answer. Even when international bodies do not use the term 'proportionality' or its criteria, they focus on the impact of the measure rather than the reasonableness of the decision. This finding supports claims regarding the central role of proportionality in adjudication, demonstrating that its influence persists even in the absence of explicit reference to it.[1434] In my two case studies, the rights adjudicated varied, involving rights such as property, housing, and social security. The selection of proportionality analysis as the analytical method is independent of the specific right or the nature of cases—whether involving negative or positive obligations. Consequently, within the scope of my dissertation, there is no significant variation between the cases in the choice of analytical method across different types of cases.

Turning to how the proportionality analysis is conducted, the main focus of the international bodies is proportionality stricto sensu—or balancing. While some international bodies, such as the CESCR and the IACtHR, do reference suitability, necessity and proportionality stricto sensu in certain cases,[1435] the adjudicative focus tends to center more consistently on the intensity of the interference. In other words, the actual impact of the measure (proportionality stricto sensu) emerges as the core of ESCR adjudication. This overwhelming focus on the intensity of the interference is also present in the literature. Although scholars affirm that the proportionality analysis is a three-pronged test,[1436] they also focus substantively on proportionality stricto sensu rather than the other two criteria. The diminished analysis of

[1434] Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', 150–52; Möller, 'The Right to Justification and the Culture of Justification', 5–7.
[1435] *Kaliña and Lokono v. Suriname*, ¶ 165; *Vázquez Guerreiro v. Spain*, ¶ 8.3.
[1436] See: Beatty, *The Ultimate Rule of Law*; Alexy, 'On Constitutional Rights to Protection'; Klatt and Meister, *The Constitutional Structure of Proportionality*.

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suitability and necessity is acknowledged and criticized by scholars, who argue that the adjudication of interferences must address these criteria to advance a comprehensive analysis of interferences with human rights.[1437] Clérico, examining social rights adjudication, highlights the importance of suitability and necessity in ESCR adjudication, which are often deemed less relevant or necessary than proportionality stricto sensu in the practice of human rights bodies.[1438]

Considering the types of cases analyzed in this dissertation—forced removal and austerity measures—the analysis of the suitability and necessity of measures could have advanced an in-depth analysis of the interferences and provided better guidance to states regarding possible solutions for interferences. For instance, in cases regarding pension reforms, instead of solely focusing on the impact of benefit reduction for pensioners, international bodies could assess whether there is a rational connection between the aim and the measure,[1439] and whether there were other measures that could have been chosen to minimize interference with rights.[1440] Returning to the discussion in the "Setting the Scene" chapter, ESCR adjudication received criticism due to the supposed absence of democratic legitimacy and the existence of separation of powers. As such, adjudicators were perceived as attempting to become legislators and to usurp legislative authority.[1441] Consequently, the absence of analyses of suitability and necessity is understandable. However, a deeper focus on both criteria would offer a clearer guidance on the acceptable standards for interfering with ESCR without overstepping the legislature's competence.

Due to this heightened focus on proportionality stricto sensu, I have found that proportionality analysis consists of two components in international adjudication of

[1437] Please see: Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights'; Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach'; Silva, 'Standing in the Shadows of Balancing: Proportionality and the Necessity Test'.
[1438] Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', 35.
[1439] Arai-Takahashi, 'Proportionality', 452.
[1440] Arai-Takahashi, 'Proportionality', 452; Alexy, 'Constitutional Rights and Proportionality', 53.
[1441] See, for instance: Fabre, 'Constitutionalising Social Rights', 280–81; Gauri and Brinks, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World', 342–43.

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interferences with ESCR. The first component is 'non-negotiable obligations;' a term I use to describe specific obligations demanded by the international bodies for proportionate interferences. Regarding this component, the two case studies present notable differences.

In the "Forced Removals" chapter, the list of non-negotiable obligations was fairly similar among international bodies. While some of them provided shorter analyses, such as the ECtHR, others outlined detailed obligations, such as the CESCR. Despite differences in the length of assessments, the commonly analyzed non-negotiable obligations included providing compensation for the loss of homes or lands, conducting consultation with affected individuals and groups, carrying out a judicial review of the interfering measure, and grating alternative accommodation to affected people. The reasons for the similar list of obligations are twofold. First, the international bodies, with the exception of the ECtHR, rely on each other's rulings and soft law documents to assess interference. This is evident when some bodies reference the CESCR's general comments or cite each other's cases. For instance, the ACmHPR, IACtHR and the ECSR apply General Comment No. 7 in their decisions,[1442] and the ACmHPR and the IACmHR extensively reference the IACtHR.[1443] Consequently, this constant reliance contributes to the cohesiveness and similarities in the overall jurisprudence on forced removals. Second, the interferences are similar across the systems, as both the justifications offered, and the groups affected tend to align across jurisdictions. For example, the cases on Indigenous and Tribal communities in the African and Inter-American systems are similar, as the interferences stemmed from specific actions.

In contrast, the "Austerity Measures" chapter reveals a less uniform focus. Although international bodies required non-negotiable obligations during the proportionality analysis, they emphasized different ones, such as ensuring the existence of alternative means of subsistence, providing information and facilitating participation or consultation with affected

[1442] *Nubian v. Kenya*, ¶ 165; *Punta Piedra Garifuna v. Honduras* Footnote 227; *ERRC v. Ireland*, ¶ 139.
[1443] For both bodies, the Saramaka case is the leading decision regarding states' concessions and interferences with ESCR. *Endorois v. Kenya*, ¶ 267; *Isseneru v. Guyana*, ¶ 198.

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groups, conducting a judicial review of the measures, and complying with judicial decisions. I attribute this difference to two factors. First, the international bodies rely less on each other in cases of austerity measures than in forced removal cases, which is evident from the absence of reference to cases or general comments. Second, the facts of the cases vary significantly, with the exception of the Greek cases addressed by the ECSR.[1444] The differences across cases demonstrate the complexity of cases involving positive obligations. This complexity is evident in the reduced uniformity, but it does not affect the legal reasoning employed through the limitation assessment.

The second component of the proportionality analysis is the balancing exercise, which appears in the majority of cases. Comparatively, the content of this exercise is more consistent in the "Forced Removals" than in the "Austerity Measures" chapter. In forced removal cases, balancing included the good faith of applicants, national authorities' conduct (both administrative and judicial authorities), the impact on specific rights, and conducting proportionality analysis at the national level—in a relatively uniform manner. In contrast, in cases involving austerity measures, the balancing exercise addressed the impact of the measure, the increase of benefits over time (progressive realization), the financial burden on applicants, the lengthy execution of judgments, and national-level balancing—elements that were not consistently discussed by international bodies.

Within these two components of the proportionality analysis, the international bodies have incorporated states' obligations into the limitation assessment. Progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality are embedded within the limitation assessment, each illuminating distinct dimensions depending on the context. In other words, these obligations are examined as constituent elements of the limitation assessment, thereby shaping and qualifying the overall analysis. Accordingly, states' obligations

[1444] *IKA-ETAM v. Greece*; *POS-DEI v. Greece*; *POPS v. Greece*; *ATE v. Greece*; *I.S.A.P. v. Greece*.

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are essential to ensuring that the limitation assessment functions effectively in ESCR adjudication.

The significance of these obligations in the case law varies considerably based on the type of the interferences and the groups impacted by them. Beginning with progressive realization, this obligation has been incorporated into the proportionality analysis by the CESCR and the ECSR. In the "Forced Removals" chapter, these bodies emphasize these obligations differently. The CESCR referenced progressive realization in one case,[1445] but it did not engage in a substantive assessment. The ECSR has applied a different approach in forced removal cases. It assessed the progress toward the full realization of human rights through legislative changes that expand their protection over time, issuing multiple decisions against the same states over time. In doing so, it examined whether legislative reforms addressed the non-negotiable obligations prior to and during evictions. In these cases, the presence or absence of change became part of the assessment of the interfering measures' impact.[1446] Consequently, although this does not equate to the progressive realization in the strict sense described in the "Setting the Scene" chapter, the evolution of rights protection clearly forms part of the proportionality analysis.

In adjudicating austerity measures, the ECSR incorporated progressive realization into proportionality, equating the lack of progress with limitations of ESCR. It did so by affirming that in cases of "partially restrictive development,"[1447] five additional criteria must be assessed. These are the nature of the change; policies implemented and the justifications for the reform, considering its scope; the adequacy and necessity of the reform; existence of protective measures for individuals who need them; and the outcomes of the change.[1448] The ECSR undertook an in-depth analysis where progress is lacking due to restrictions deriving from

[1445] *El Mourabit Ouazizi and Boudfan v. Spain*, ¶ 9.1.
[1446] See: *COHRE v. Italy*, ¶¶ 67–78.
[1447] *Digest of the Case Law of the European Committee of Social Rights*, 122.
[1448] See, for instance: *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶ 118.

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economic factors. Such inclusion contributes to the limitation assessment in cases of positive obligations, as it ensures that the analysis of the impact of the measure goes beyond its intensity, to ensure that the interfering measures do not curtail the enjoyment of rights. Effectively, the ECSR equated the lack of progress with limitations, thereby ensuring a deeper scrutiny.

The incorporation of progressive realization is particularly significant due to its conceptual differences with limitations. Traditionally, progressive realization has been associated with available resources and regarded as an internal limitation of ESCR.[1449] By contrast, limitations have been linked to interferences and considered an external limitation.[1450] These conceptual differences assigned distinct functions to each concept in relation to rights: limitations were designed to assess interferences resulting from state and third-party actions, whereas progressive realization was envisioned as a tool to address (the absence of) progress in the fulfillment of rights over time. In light of the incorporation of progressive realization, although it is viewed as intrinsic to ESCR, the case law demonstrates that it is only invoked when states clearly fail to advance ESCR protections. In other words, international bodies do not treat progressive realization as an internal limitation of ESCR, but rather a tool to advance their full realization.

Furthermore, the absence of direct analysis of available resources reinforces this observation. Although scholars have argued that proportionality is useful for assessing fulfillment over time[1451] and reasonableness aids in evaluating available resources,[1452] international adjudication concerning insufficient progress has not incorporated resource constraints into its reasoning, despite claims that this would be a key benefit of emphasizing

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[1449] Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses', 454.
[1450] Gardbaum, 'Limiting Constitutional Rights', 801–4.
[1451] Young, 'Waiting for Rights: Progressive Realization and Lost Time', 674.
[1452] Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 178–79; Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', 282.

progressive realization.[1453] While CESCR recognizes that available resources are integral to meet the obligation to grant alternative accommodation,[1454] such considerations have been explicit assessed in only one case—where the state sold a public housing building rather than offering alternative accommodation.[1455] This limited engagement with available resources in the case law is explainable. As outlined in the "Setting the Scene" chapter, the adjudication of ESCR has faced criticism for its potential interference with budget decisions which are seen as the prerogative of the legislative branch.[1456] Despite the important caution exercised by adjudicators,[1457] discussions on resource allocation remain essential to ESCR and should be incorporated in a manner that respects the competences of national authorities.

As for the non-retrogression obligation, the CESCR engaged with it in one of its earlier cases discussed in the "Forced Removals" chapter. It confirmed the language developed in the Letter from the CESCR Chairperson issued following the 2008 crisis,[1458] focusing on the justification presented and availability of resources, along with the implementation of "temporary, necessary, proportional and non-discriminatory"[1459] measures. Despite this explanation, the CESCR did not individually examine these criteria. Instead, it focused on the state's justification for selling public housing rather than offering it to individuals who need it—resulting in a violation due to the lack of adequate alternative housing.[1460]

The absence of incorporation of the non-retrogression obligation in the "Austerity Measures" chapter is noteworthy. The literature has dedicated extensive attention to such

[1453] Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles*, 162–64.
[1454] See: *Hernández Cortés and Rodríguez Bermúdez v. Spain*, ¶ 10.3.
[1455] *Ben Djazia et al v. Spain*, ¶ 17.5.
[1456] See: Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 6; Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 11–13; Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', 379.
[1457] Gauri and Brinks, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World', 344.
[1458] Ariranga G. Pillay, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights', 16 May 2012.
[1459] *Ben Djazia et al v. Spain*, ¶ 17.6.
[1460] *Ben Djazia et al v. Spain*, ¶ 17.1-17.8.

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obligation in connection with austerity measures and economic factors.[1461] Additionally, the CESCR has issued various soft-law documents on the topic, including those addressing social security.[1462] Consequently, the lack of incorporation of non-retrogression leads to a weakened analysis of the limitation assessment—in this case, the proportionality analysis—as it does not focus on the aspects that non-retrogression would contribute to the discussion, such as analysis of available resources.

Such criticism has been expressed by Nolan. Analyzing the ECSR's case law, she criticizes its failure to adopt a non-retrogressive lens in cases involving clear deterioration of ESCR.[1463] Although her criticism was directed exclusively at the ECSR, there appears to be a broader pattern of omitting non-retrogression as either a framework or an evaluative element throughout the adjudicatory bodies' jurisprudence. This exclusion precludes international bodies from assessing interferences meaningfully. In both substantive chapters, the international bodies assessed similar cases against the same states over time, thereby providing an opportunity to determine whether ESCR protections had deteriorated. While some bodies addressed progress, none acknowledged, through the lens of non-retrogression, that states were not only failing to improve their national systems, but were actively adopting regressive measures that exacerbate human rights violations. Therefore, non-retrogression is the essential tool missing from ESCR adjudication.

As for the minimum core, it has significantly contributed to the limitation assessment. Considering the minimum core essential levels, my two substantive chapters illustrate distinct

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[1461] See, for instance: Nolan et al., 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights'; Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery'; Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression'; Nolan, 'Human Rights and the Cost-of-Living Crisis'.
[1462] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*; Ariranga G. Pillay, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights', 16 May 2012; *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008).
[1463] Nolan, '"Aggravated Violations", Roma Housing Rights and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System', 357–58.

incorporations of the minimum core due to their different focus. In the "Forced Removals" chapter, international bodies, without explicitly referring to them as such, rely on minimum essential levels. In the proportionality analysis, the elements most frequently cited were security of tenure[1464] and availability of housing.[1465] Despite the heightened emphasis on available resources in soft law documents,[1466] only the CESCR referenced these resources in relation to the availability of accommodations. However, it did not analyze whether states had utilized their available resources in nearly any case.[1467] Thus, these essential elements influence the balancing exercise, tipping the scale toward either the applicants or the state.

In the cases discussed in the "Austerity Measures" chapter, these essential levels manifest differently. While the ECSR focuses on some of the elements under the right to social security, such as adequacy,[1468] the IACmHR, IACtHR and the ECtHR focus on the essence of the right to property.[1469] Despite not directly conceptualizing the essence of rights, these bodies share a common emphasis on the complete loss of a right. If states implemented measures that resulted in the elimination of individuals' rights, these constituted a violation. In other words, the essence of rights functions as an absolute core, focusing not on essential elements but on the very existence of the right, the loss of which constitutes a violation. As for the minimum core obligations, they appeared exclusively in the "Austerity Measures" chapter within the IACtHR's jurisprudence. The IACtHR, citing General Comment No. 19 and its core obligations,[1470] examined access to services as part of proportionality analysis.[1471]

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[1464] See, for instance: *SERAC and CESR v. Nigeria*, ¶ 63; *Sawhoyamaxa v. Paraguay*, ¶ 128; *Lorne Joseph Walters v. Belgium*, ¶ 12.4-12–7.
[1465] See, for instance: *Chapman v. the United Kingdom*, ¶ 115.
[1466] See: *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 10; *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 10; *Nairobi Principles*, para. 17.
[1467] See, for instance: *Vázquez Guerreiro v. Spain*, ¶ 9.2.
[1468] *IKA-ETAM v. Greece*, ¶ 78.
[1469] *Acevedo Buendía et al. v. Peru*, ¶ 89; *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 121–124; *Fábián v. Hungary*, ¶ 74.
[1470] *General Comment No. 19: The Right to Social Security (Art. 9)* (Committee on Economic, Social and Cultural Rights, 2008), para. 59.
[1471] *Muelle Flores v. Peru*, ¶ 200.

The incorporation of the minimum core reinforces the value of incorporating states' obligations into the limitation assessment. The focus on essential elements, when discussing specific obligations, such as *available* accommodation, ensures that international bodies evaluate the quality of the obligations and ensure that they cover all necessary aspects of the rights protection. However, the international bodies' jurisprudence would benefit from further refinement. First, the focus on essence of the right, without going beyond complete loss, is insufficient when addressing reduction of rights. When complemented with non-retrogression, this concept could ensure that individuals, in spite of reductions, continue to have their rights protected and maintain a decent standard of living. Second, the overall absence of the minimum core obligations leaves space for deeper analysis of how states are discharging obligations when interfering with ESCR. Consequently, international bodies should expand their arsenal of reasoning tools to safeguard ESCR more comprehensively.

The last obligations incorporated into the limitation assessment are non-discrimination and substantive equality. Comparatively, substantive equality has been systematically incorporated into the proportionality analysis, whereas the non-discrimination obligation appears more sporadically.

The non-discrimination obligation is present in the proportionality analysis due to the discriminatory effects of interferences, emerging in the discussion of impact of the measure. This obligation features more predominantly in the proportionality analysis of forced removal cases. However, its incorporation has similar focus and outcomes in both case studies. In the "Forced Removals" chapter, the incorporation of non-discrimination is evident in the jurisprudence of the CESCR,[1472] ACmHPR,[1473] IACmHR,[1474] IACtHR,[1475] and the ECSR.[1476] These bodies considered whether the measure taken had a disproportionate impact on specific

[1472] See: *Lorne Joseph Walters v. Belgium*, ¶ 11.4-12.9.
[1473] See: *Endorois v. Kenya*, ¶ 196.
[1474] See: *Isseneru v. Guyana*, ¶ 193.
[1475] See: *Kichwa v. Ecuador*, ¶ 213.
[1476] See: *Amnesty International v. Italy*, ¶ 69.

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groups, which would constitute a discriminatory effect. For instance, the IACmHR considered that the lesser protection of Indigenous rights in case of rights conflict led to racial discrimination. Such discrimination contributed to the finding that the interference was disproportionate.[1477] In the "Austerity Measures" chapter, both the ECSR and the ECtHR considered discrimination as part of the assessment of the impact of the measure, explaining that reforms must not produce discriminatory effects when reducing benefits.[1478]

In these cases, the incorporation of non-discrimination occurred during the balancing exercise, as the impact is more severe in cases when interfering measures have discriminatory effects. Such consideration enhances the analysis of limitations by ensuring a comprehensive analysis of interferences. Rather than treating limitations and non-discrimination as separate inquiries, the limitation assessment incorporates non-discrimination to address existing issues arising in removals or austerity measures. Consequently, non-discrimination heightens the level of scrutiny and ensures that potential discrimination does not go unexamined.

Lastly, the incorporation of substantive equality is the clearest example of the benefits of incorporating states' obligations into the limitation assessment. Throughout the proportionality in both case studies, international bodies relied on substantive equality to require specific measures by states, to consider individuals' needs, and to account for the negative impact of interferences on specific groups.

Before addressing substantive equality in the case law, it is important to mention the concept of formal equality. Similar to the discussion under the legitimacy criterion, formal equality was invoked as a reason for refraining from action in forced removal cases. However, instead of states or applicants raising formal equality, the ECtHR considered it under proportionality analysis. In Roma cases, the ECtHR held that any treatment that would favor Roma families—i.e., not requiring a permission to park their caravan in their own land and not

[1477] See: *Isseneru v. Guyana*, ¶¶ 192–193.
[1478] See: *Béláné Nagy v. Hungary*, ¶ 117; *GSEE v. Greece*, ¶ 192.

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evicting them due to the absence of such permit—would violate anti-discrimination law. The ECtHR reached this conclusion by arguing that special treatment in favor of Roma individuals would lead to unequal treatment of the rest of the population.[1479] Such understanding falls under formal equality and disregards substantive equality.[1480]

The application of formal equality in such cases misrepresents the reality of Roma people as treated equality by states rather than constantly faced with systematic marginalization. These ECtHR's judgments diverge from the other international bodies. While the African and Inter-American bodies reject formal equality through the application of substantive equality, the ECtHR justified the absence of special measures towards Roma families based on formal equality. Although the ECtHR has not repeated this argument in other cases dealing with rights of Roma people, it has rejected discrimination claims, asserting that the discussion on procedural safeguards is sufficient to resolve such interferences.[1481] For this reason, the criticism presented in the literature on the ECtHR is well-founded, as the ECtHR fails to address the systemic discrimination and inequality experienced by Roma communities[1482] in the manner in which other international bodies do with disadvantaged groups located in their respective jurisdictions.

The active use of formal equality instead of substantive equality is an exception of the ECtHR's proportionality analysis when compared to other bodies. Overall, almost all bodies incorporate substantive equality through different avenues. In the "Forced Removals" chapter, I identified two avenues for incorporation. The first avenue is the focus on the 'vulnerability' of individuals: international bodies demanded that states take such 'vulnerability into consideration, especially when considering whether to evict and during the eviction. The second

[1479] See: *Chapman v. the United Kingdom*, ¶¶ 96–97. The same reasoning was present in the other cases related to eviction of caravans discussed in the first section of my "Forced Removal" chapter.
[1480] Fredman, *Discrimination Law*, 9-15.
[1481] *Connors v. The United Kingdom*, ¶ 97.
[1482] Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities', para. 108; Möschel, 'European Convention of Human Rights/Council of Europe', 541.

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avenue is the requirement of adopting special measures to address specific needs, such as those of Indigenous and Tribal communities, Travelers,[1483] and Roma.[1484] Comparatively, the Inter-American bodies demand more specific obligations, such as consultation procedures based on communities' customs and traditions[1485] and adoption of measures that do not deny their survival,[1486] than the ECtHR, which requires states to facilitate the lifestyle of Roma people.[1487]

In the "Austerity Measures" chapter, the incorporation of substantive equality in the proportionality analysis is less systematic but still present. The two avenues described above are also present in this case study. Under the first avenue, the ECSR embraced substantive equality by requiring consideration of the 'vulnerability' of individuals receiving social benefits.[1488] As for the second, the IACtHR demanded special measures for affected individuals, such as applying a "standard of expeditiousness in all judicial and administrative proceedings"[1489] in light of the applicants' age.

Based on the case law, it is evident that substantive equality has been incorporated into the proportionality analysis. Returning to the scholarly discussion regarding the proportionality analysis in ESCR adjudication, Pulido, in his analysis of national adjudication, observes that ESCR adjudication has introduced a range of elements into the balancing exercise. Among these, he highlights 'vulnerability' and "satisfaction of basic needs for survival."[1490] As I demonstrated in my chapters, international adjudication has similarly evolved when evaluating interferences with rights of groups that face disadvantages. Such considerations heighten the scrutiny of the interference in adjudication and address the systemic issues certain groups experience.

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[1483] *ERRC v. Ireland*, ¶ 140.
[1484] *Winterstein and Others v. France*, ¶ 76.
[1485] See for instance: *Kichwa v. Ecuador*, ¶¶ 166–171.
[1486] See for instance: *Lhaka Honhat v. Argentina*, ¶¶ 180–183; *Isseneru v. Guyana*, ¶ 202.
[1487] *Winterstein and Others v. France*, ¶ 76.
[1488] See for instance: *IKA-ETAM v. Greece*, ¶ 82.
[1489] *FEMAPOR v. Peru*, ¶ 110.
[1490] Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', 520.

Furthermore, considering the literature on equality, two other findings emerge from my substantive chapters. First, despite arguments against the terminology of 'vulnerability,'[1491] this term is indeed part of international adjudication, as recognized by Timmer et al.[1492] However, it remains an underdeveloped concept. International bodies employ this term primarily to justify heightening the protection afforded to some groups, without examining its origins or broader implications, instead focusing on the necessary measures to eliminate it. Consequently, 'vulnerability' is not acknowledged as a condition shared by all individuals, as Fineman advocates,[1493] but rather as a circumstance created or exacerbated by state and third-party actions that necessitates state intervention to achieve substantive equality.

Second, the substantive equality framework as developed by Fredman, composed of four dimensions, is partially reflected in the jurisprudence on ESCR. As mentioned in the "Setting the Scene" chapter, she affirms that substantive equality must aim at redistribution, recognition, participation and transformation.[1494] Considering the substance of each dimension, some of them are present in the jurisprudence. The most consistently included dimension is participation, as the conduct of consultation is a non-negotiable obligation within proportionality analyses. Going further, some bodies mandate that participation must occur according to the terms set by the affected groups. Transformation also features within the limitation assessment, as the international bodies require states to accommodate difference rather than eliminate it. However, based on the cases at hand, international bodies fall short in addressing redistribution and recognition, as they do not systematically confront stigma and stereotypes, nor do they emphasize structural change within the transformation dimension.[1495] Therefore, while the incorporation of substantive equality into the limitation assessment

[1491] Clark and Preto, 'Exploring the Concept of Vulnerability in Health Care', E308b; Munari et al., 'Rethinking the Use of "Vulnerable"', 197b–197c.
[1492] Timmer et al., 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights', 194–97.
[1493] See for instance: Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition'; Fineman, 'Vulnerability and Inevitable Inequality'.
[1494] Fredman, *Discrimination Law*, 29–44.
[1495] Fredman, *Discrimination Law*, 31–44.

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represents a meaningful step toward protecting disadvantaged groups, these international bodies have yet to adopt a comprehensive framework of substantive equality. Such framework would ensure that the interferences with ESCR address recurring issues individuals and groups face and refrain from deepening the systemic disadvantage they experience.

Overall, the proportionality analysis conducted by the international bodies analyzed in my dissertation consists of non-negotiable obligations and the balancing exercise. Predominantly in the balancing exercise, the bodies have incorporated states' obligations—progressive realization, minimum core, non-discrimination, and substantive equality—into their assessment. This incorporation increases the scrutiny of states' interferences, thereby ensuring a holistic and effective protection of ESCR and enabling the proportionality analysis to work in ESCR adjudication. This aligns with the third group of scholars, introduced at the beginning of this subsection, who argue that the proportionality analysis conducted on cases of interferences with ESCR incorporates additional considerations—an approach predominantly adopted by human rights bodies. Such incorporation, which has also occurred within the analysis of legality and legitimacy, demonstrates that limitations and states' obligations are conceptually linked, as states' obligations contribute to the scrutiny of the interfering measure by introducing elements that would not be assessed through a traditional limitation assessment.

Although the case law is remarkable and reflects an innovative approach to proportionality analysis, it remains incomplete. With respect to the traditional criteria of the proportionality analysis—suitability, necessity, and proportionality stricto sensu—the international bodies have largely overlooked suitability and necessity. Such choice fails to account for different outcomes in cases of interferences, which is a crucial point when considering the importance of these interferences for individuals. Moreover, the creation of non-negotiable obligations lacks consistency, even within the jurisprudence of the same bodies, resulting in less predictability as to what is expected from states. As for the balancing exercise, the incorporation of states' obligations into the analysis of the intensity of interferences has

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heightened its focus. However, this incorporation has not been consistent either, or not all aspects of the obligations are incorporated. For instance, the evaluation of available resources is absent from the case law, even in cases where progressive realization is present. Furthermore, the omission of non-retrogression from the analysis contributes to the lack of discussion on available resources, as this is the only accepted justification for the deterioration of rights protection. As a result, international bodies do not engage with the concrete circumstances of the country. Hence, despite significant developments present in the jurisprudence on forced removal and austerity measures, international bodies have a long road to effectively assess, address and remediate ESCR interferences.

1.4. Conclusion on the limitation assessment as the analytical framework for assessing interferences

After analyzing the limitation assessment conducted by the CESCR, ACmHPR, ACtHPR, IACmHR, IACtHR, ECSR and the ECtHR, I have determined that limitations are the primary analytical framework, either explicitly or implicitly. Interferences must occur through existing laws that are clear, foreseeable, and precise, and that are applied and interpreted by national authorities. Moreover, states must present justifications for such interferences. These justifications do not need to be explicitly written in an international treaty, but they must advance one of the goals prescribed within it. Proportionality is assessed through reliance on non-negotiable obligations and a balancing exercise. Despite this overarching content, the boundaries of the criteria's contents are contested by some international bodies, demonstrating that the limitation assessment is a mode of analysis that does not confine itself to rigid categories.

Furthermore, in all the criteria of the limitation assessment, states' obligations were incorporated to intensify the scrutiny of the analysis of interferences. Under legality, legitimacy, and proportionality, international bodies used different obligations, such as substantive equality,

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to complement the assessment of limitations. This incorporation is significant because it ensures that the limitation assessment framework encompasses the specific demands of ESCR adjudication. The importance of such improvement of the limitation assessment framework for ESCR's interferences is evident through the incorporation of obligations in both case studies, not only in cases involving positive obligations.

2. States' obligations as parallel frameworks

The preceding section established that the limitation assessment, whether explicitly or implicitly, is the most widely used framework for assessing interferences with ESCR, and that it incorporates states' obligations into the assessment. Beyond this integration, I demonstrate that specific states' obligations are applied as parallel frameworks to assess interferences in some cases. I consider these frameworks parallel to the limitation assessment because they are used as standalone assessments. In other words, they are assessed based on separate clauses or standards within international treaties, with international bodies focusing on the elements most relevant to such obligations. Such parallel frameworks are similar to the limitation assessment, insofar as the analysis conducted under different frameworks focuses on the same aspects—the existence of the law, states' justification, and impact. The difference, however, is the explicit focus on the obligations' characteristics. For instance, when non-discrimination is assessed, the non-discrimination clause is discussed, with the analysis centered on prohibited grounds of discrimination. The rationale for discussing these frameworks separately is to highlight their conceptual similarities with the limitation assessment, thereby demonstrating that by incorporating states' obligations into the limitation assessment, international bodies have bridged these concepts through overlapping analyses.

In my "Analytical Framework" chapter, I showcased the scholarly debate on states' obligations. I addressed whether they were considered standalone assessments, and consequently, parallel frameworks, and their relationships with the limitation assessment—

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which positions them as either identical to, similar to, or distinct from limitations. The literature is not uniform regarding such topics. For instance, non-retrogression has been understood as either identical to[1496] or distinct from[1497] the limitation assessment. For this reason, the analysis of the application of parallel frameworks to assess interferences is crucial: first, to demonstrate that such obligations can indeed function as standalone assessments in some cases, and second, to clarify their connection to the limitation assessment framework.

When debating whether specific states' obligations are standalone assessments, I chose not to focus on unspecific obligations, such as the tripartite obligations (respect, protect, and fulfill). Instead, as I explained in the "Setting the Scene" chapter, I employed positive and negative obligations to categorize specific obligations—such as progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality—deliberately avoiding the tripartite obligations due to the lack of consensus on the language by international treaties and bodies. As such, in instances where the international bodies employed unspecific obligations as the lens to assess interferences, I considered this choice as an implicit limitation assessment. The reason for this is the language used: although focusing on obligations, international bodies emphasize the impact of the interfering measure.

Although this choice remains methodologically sound, in my "Forced Removals" chapter, I identified that the ECtHR applied the positive obligations framework to assess interferences with rights instead of the limitation assessment, serving as a parallel framework in specific cases. The ECtHR's cases explicitly confirmed that the limitation assessment and positive obligations overlap with regard to legitimacy and proportionality despite being different frameworks.[1498] Although the legality criterion is absent from this overlap, since the legality of measures is typically presumed by the ECtHR, its absence does not materially affect

[1496] See: Scott, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', 99.
[1497] See: Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 205–6.
[1498] See: *Novoseletskiy v. Ukraine*, ¶ 69.

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the depth of the analysis undertaken using the positive obligations framework. Consequently, the ECtHR explicitly linked the two frameworks as similar.

Concerning this connection, Klatt argues that positive obligations are subject to the limitation assessment. However, in his view, the proportionality analysis for positive obligations produces multiple outcomes since the intensity of the measure depends on more factors—known as the "disjunctive structure"[1499]—which leads to a more complex assessment of the impact.[1500] I respectfully disagree with this position. Comparing the cases decided under the limitation assessment and positive obligations frameworks, I demonstrate that the ECtHR's assessment is functionally equivalent, as it focuses on the same elements within proportionality analysis—namely, the list of non-negotiable obligations and the balancing exercise.[1501] Therefore, the choice of framework does not alter the outcome of cases, as the legal reasoning employed in cases remains conceptually consistent. Although the ECtHR categorically separates the limitation assessment from the positive obligations framework, a comparison between the two reveals their similarities, particularly with the inclusion of crucial elements for ESCR within the limitation assessment, such as the requirement for states to actively avoid negatively impacting these rights.

As for the other obligations that I highlighted as possible frameworks, I found that non-retrogression, minimum core and non-discrimination have been applied as parallel to the limitation assessment. Here too, I demonstrate that, while the minimum core does not share similarities with the limitation assessment due to its focus on minimum thresholds, the other two have conceptual overlap with the limitation assessment. Considering these obligations, the international bodies apply them differently in the two case studies. In forced removal cases, non-discrimination is applied instead of the limitation assessment, while in the austerity

[1499] Matthias Klatt, "Positive Obligations under the European Convention on Human Rights," *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 71 (2011): para. 716.
[1500] Klatt, 'Positive Obligations under the European Convention on Human Rights', 704–17.
[1501] *Novoseletskiy v. Ukraine*, ¶¶ 73–88.

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measures cases, non-retrogression, minimum core and non-discrimination were employed complementarily to the limitation assessment. This difference is significant because in the first chapter, the international bodies chose one over the other, which gives the impression that the analytical frameworks are applied under different circumstances. As for the second chapter, these frameworks are combined, with the specific states' obligations contributing to the analysis of interferences.

The obligation of non-retrogression has attracted considerable attention from scholars, who consider it either a limitation of ESCR[1502] or an additional framework used in cases involving available resources.[1503] Despite this scholarly debate, among the cases discussed in the "Austerity Measures" chapter, only one case from the IACmHR applied non-retrogression as a standalone assessment. The IACmHR evaluated the interference with social security through the non-retrogression obligation and equated retrogressive measures with invalid limitations and non-retrogressive measures with standard limitations.[1504] The only distinction between the two frameworks lies in the explicit focus on available resources under non-retrogression.[1505]

The clear overlap established between limitations and non-retrogression confirms the scholarly claim that there is no substantive distinction between the non-retrogression and the limitation assessment frameworks, aside from the emphasis on resource availability. Although there was a prior concern that judicial bodies might adjudicate on budgetary matters and intervene in political decisions,[1506] this case demonstrates that the inclusion of available resources in the assessment of interferences enhances the scrutiny on the reasoning provided

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[1502] See: Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 23.
[1503] See: Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 205–6.
[1504] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 140.
[1505] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶¶ 141–147.
[1506] See their explanation on the matter: Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 6; Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 11–13; Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', 379.

for the interference—in this case, it was the "economic situation of the country and the cost of living."[1507] In other words, the lack of available of resources was used as a justification to reduce the pension of some individuals while increasing it for others.

Additionally, the ECSR adjudicated a case concerning the reduction of social security, in which it focused on the deterioration of the social security system. It affirmed that the absence of a functioning system would result in retrogressive measures. Consequently, the exclusion of certain workers from social security constituted a violation of the ESC.[1508] Although this case does not directly address resource availability, it was based on the exclusion of a category of workers from social benefits, interpreting it as a retrogression stemming from system deterioration.

These two cases demonstrate that non-retrogression serves as a standalone assessment, overlapping with the limitation assessment. Although these cases are not representative of the broader jurisprudence of international bodies, they are instructive examples of how the framework is applied and its conceptual alignment with the limitation assessment. The considerations under the non-retrogression framework highlight the specific issues involved in interferences with ESCR, thereby intensifying the analysis. However, as discussed above, the international bodies have discussed these elements by incorporating states' obligations into the limitation assessment. Therefore, while applying non-retrogression as a framework is valuable for further analysis on availability of resources, international bodies have done so by bridging the concepts of limitations and non-retrogression. By advocating that limitations and non-retrogression conceptually overlap, some scholars have already bridged the gap between the two concepts,[1509] thereby outlining their connection.

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[1507] *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, ¶ 143.
[1508] *GENOP-DEI and ADEDY v. Greece*, ¶¶ 47–66.
[1509] Scott, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', 99; De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation', 541; Young, *Constituting Economic and Social Rights*, 104; Courtis, 'La Prohibición de Regresividad En Matéria de Sociales: Apuntes Introductorios', 23.

Similar to non-retrogression, the minimum core emerges as a parallel framework in only two cases from the ECSR, both concerning austerity measures. In these cases, I demonstrate that the ECSR assessed the reduction in wages against the poverty line and the national average wage.[1510] In this regard, it is worth noting that the ECSR, unlike the CESCR,[1511] fleshed out the standard that could be taken as satisfying the minimum core. For instance, it specified the exact amount deemed acceptable and established clear limits on how far below that amount states were allowed to go. As such, though the ESCR's approach to the minimum core overlaps with the CESCR's approach to minimum essential levels,[1512] it goes further by specifying what constitutes as a decent standard of living,[1513] thereby reducing the scope for determination by states.

Furthermore, the application of the minimum core as a parallel framework in these decisions followed from preliminary conclusions that the governmental reforms failed to comply with the limitation clause present in the ESC, informing the analysis of specific rights.[1514] The premise of the case is that the Greek reforms as a whole violated the limitation clause, yet for the specific provisions, the ECSR adopted other frameworks to assess breaches. This structural choice is interesting, as the usage of the minimum core to assess the interference with the right to fair remuneration represents a further analysis of the already recognized disproportionate interference.[1515] In other words, the minimum core framework served to complement the findings of the limitation assessment, thereby intensifying the assessment and

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[1510] *GENOP-DEI and ADEDY v. Greece*, ¶ 57; *GSEE v. Greece*, ¶ 187.
[1511] *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para. 8; *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, para. 12; *General Comment No. 19: The Right to Social Security (Art. 9)*, General Comment E/C.12/GC/19 (Committee on Economic, Social and Cultural Rights, 2008), paras 10–28.
[1512] Lougarre, 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights', 345.
[1513] See criticisms: Müller, 'The Minimum Core Approach to the Right to Health: Progress and Remaining Challenges', 61–62.
[1514] *GENOP-DEI and ADEDY v. Greece*, ¶¶ 11–16; *GSEE v. Greece*, ¶¶ 69–93.
[1515] *GENOP-DEI and ADEDY v. Greece*, ¶¶ 11–16; *GSEE v. Greece*, ¶¶ 87–92.

ensuring that it included the benefits of the minimum core—namely, the protection of the essential aspects of ESCR.

The last obligation employed as a parallel framework is the non-discrimination obligation. As explained in the "Analytical framework," this obligation can be applied in cases of both direct and indirect discrimination,[1516] which focus on formal and substantive equality, respectively.[1517] The assessment of these two facets of non-discrimination differs: direct discrimination is analyzed based on comparators (prohibited grounds) and the adequacy of the justification,[1518] while indirect discrimination is assessed based on legal neutrality and proportionality.[1519] A few cases in my dissertation have been assessed solely under the non-discrimination framework. When this framework is applied, the focus is primarily on direct discrimination, albeit without explicit reference to this terminology.

Non-discrimination as a parallel framework is utilized in the cases discussed in both my substantive chapters. In the "Forced Removals" chapter, non-discrimination is applied by some international bodies in place of the limitation assessment. In the "Austerity Measures" chapter, this obligation serves to complement the limitation assessment conducted, either preceding or following it. For this reason, this framework features in the case law in two ways: either as the main framework employed or as a complement to the limitation assessment. When used as the main framework, it highlights the connection between non-discrimination and limitations.

The first way that non-discrimination was applied features only in the "Forced Removals" chapter, in which the ACmHPR and the ECtHR engaged with non-discrimination as the main framework. In cases of direct discrimination, these bodies differ in their focus. The ACmHPR found that a law that exclusively targeted non-Ivorian individuals was discriminatory

[1516] Fredman, *Discrimination Law*, 250–306.
[1517] Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', 123.
[1518] Moeckli, 'Equality and Non-Discrimination', 60–62.
[1519] See for instance: Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform', 1204. For a comparative perspective: Moeckli, 'Equality and Non-Discrimination', 62–63.

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based on ethnic grounds,[1520] a finding later confirmed under the limitation assessment.[1521] Similarly, the ECtHR analyzed the unequal treatment before the law, finding that the state failed to justify such treatment, withholding legal protection established in law.[1522] Consequently, the application of non-discrimination as the analytical framework did not alter the legal reasoning employed by the ACmHPR and the ECtHR. The main difference between the two is that the non-discrimination framework entails a heightened scrutiny of justifications and effects. However, this heightened scrutiny is also present in the limitation assessment when it incorporates non-discrimination and substantive equality.

As for indirect discrimination, only the ECtHR adjudicated cases concerning it.[1523] It held that the relocation of individuals who had experienced domestic violence conflicted with the objective of providing them with stability, thereby resulting in a disproportionate interference.[1524] Here, similar to the direct discrimination cases, the indirect discrimination cases show that the limitation assessment and non-discrimination frameworks intersect. When the limitation assessment incorporates states' obligations, the resulted heightened scrutiny aligns more closely with the analysis under non-discrimination.

The second way in which non-discrimination appears in the case law is a complement to the limitation assessment in both "Forced Removals" and "Austerity Measures" chapters. This approach is evident in the jurisprudence of the ACmHPR,[1525] the IACtHR,[1526] the ECSR,[1527] and the ECtHR.[1528] As I demonstrated in my substantive chapters, these bodies relied on similar criteria—legitimacy and proportionality—to determine whether there was a violation. The interesting aspect of such cases is the influence exerted: the international bodies

[1520] *MIDH v. Cote d'Ivoire*, ¶ 78.
[1521] *Open Society Justice Initiative v. Côte d'Ivoire*, ¶¶ 171–174.
[1522] *Larkos v. Cyprus*, ¶ 31.
[1523] *J.D. and A v. the United Kingdom*, ¶ 90.
[1524] *J.D. and A v. the United Kingdom*, ¶ 104.
[1525] *Ogiek v. Kenya*, ¶¶ 136–146.
[1526] *Xákmok Kásek v. Paraguay*, ¶¶ 265–275; *Kuna and the Emberá v. Panama*, ¶¶ 202–204.
[1527] *Sindacato autonomo Pensionati Or.S.A. v. Italy (II)*, ¶¶ 134–144; *GENOP-DEI and ADEDY v. Greece*, ¶¶ 66–70; *GSEE v. Greece*, ¶¶ 194–197.
[1528] *Fábián v. Hungary*, ¶¶ 122–132.

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first engaged with the limitation assessment—usually finding a violation—and then proceeded to the non-discrimination assessment, drawing on similar arguments already discussed in the limitation assessment to intensify the scrutiny conducted.[1529] Therefore, these cases demonstrate the link between the limitation assessment and the non-discrimination, with the non-discrimination enriching the discussion on the impact of measures on specific groups.

The main distinction between the limitation assessment and the non-discrimination assessment lies in the (un)equal treatment of individuals. While legality is not directly addressed in the non-discrimination assessment, the analyses of legitimacy and proportionality, the same elements considered by the international bodies in cases involving the limitation assessment, are also employed in the non-discrimination assessment. For this reason, I conclude that the choice of frameworks in interferences with ESCR is dictated solely by the emphasis on differential treatment under non-discrimination, and not by a desire to apply a different legal reasoning. This is evident in light of the fact that discriminatory effects and substantive equality have been incorporated into the limitation assessment in other cases, thereby intensifying the scrutiny of interferences.

Returning to the discussion in the "Analytical Framework" chapter, most states' obligations have been employed as standalone assessments in cases of interferences with ESCR—the only exceptions are progressive realization and substantive equality. The focus on such obligations demonstrates the benefits they add to adjudication. For instance, non-retrogression raises questions of available resources and non-discrimination highlights discriminatory justifications and effects. Despite the application of these obligations as standalone assessments, they mirror the analysis conducted under the limitation assessment—particularly, as international bodies have also incorporated such obligations into the limitation assessment. The only exception is the minimum core: although it has been incorporated into the

[1529] See, for instance: *Ogiek v. Kenya*, ¶¶ 144–145.

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limitation assessment, its analysis as a parallel framework does not focus on justification and impact of measures. Instead, the minimum core framework focused on the minimum threshold which states must not fall in cases of interferences. This framework provided a concrete standard to measure the interference.

Overall, the application of parallel frameworks does not represent a major deviation from the findings presented in the previous section: states' obligations illuminate aspects that have received less analytical attention within a traditional limitation assessment. In doing so, the obligations can be considered complementary, rather than alternative, to the limitation assessment, thereby intensifying the scrutiny of the interference. This section has shown that the incorporation of states' obligations helps close the gap present in the traditional limitation assessment by adding ESCR-specific elements. Consequently, even if states' obligations are sometimes applied as frameworks, their legal reasoning does not represent a deviation from the robust limitation assessment developed in the adjudication of ESCR interferences.

3. Conclusion

The scholarship on ESCR has developed in parallel to that of CPR. As outlined in the "Setting the Scene" chapter, ESCR adjudication faced extensive criticisms over the years, with ESCR scholars responding to arguments, including claims that ESCR are fundamentally distinct from CPR.[1530] Due to the courts' previous reluctance to adjudicate ESCR, their adjudication has been conceptualized through the lens of obligations, whereas CPR has been studied through limitations to assess interferences. For this reason, the literature on limitations has largely overlooked ESCR to date.[1531] Against the background of this standard approach, my dissertation

[1530] Please see: Gauri and Brinks, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World'; Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal'; Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration'; Langford, 'Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights'; King, *Judging Social Rights*.

[1531] See some of the scholars who have analyzed limitations with ESCR in national adjudication: Alexy, 'On Constitutional Rights to Protection'; Pulido, 'The Constitutional Adjudication of Positive Social and Economic

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demonstrates that international adjudication of interferences with ESCR has bridged the limitations and states' obligations frameworks by either incorporating the latter into the former or applying both. While this incorporation has permeated the criteria for assessing limitations, the specific states' obligations frameworks, as parallel frameworks, have, in most of the jurisprudence, been employed sequentially.

In both case studies that I analyze, namely that of forced removal and austerity measures, the limitation assessment serves as the primary framework, with proportionality analysis acting as the analytical method. While the dominant literature on limitations attributes specific content to each of the criteria of the limitation assessment—namely, legality,[1532] legitimacy,[1533] and proportionality[1534]—and prescribes a distinct role to each, I demonstrate, based on my assessment of my case studies, that in fact their content is not rigid. The boundaries between the three criteria of the limitation assessment are, from time to time, blurred by international bodies. Additionally, the limitation assessment functions essentially as a mode of analysis, which is underscored by the fact that the limitation assessment has been implicitly applied by international bodies.

Beyond the issue of the analytical framework, I demonstrate that proportionality analysis remains the sole analytical method employed by international bodies. In light of the discussions on proportionality and ESCR outlined in the "Introduction", a few clarifying remarks are due: the proportionality analysis in ESCR cases, as carried out by the international bodies under analysis, comprises two components: non-negotiable obligations and the balancing exercise.

Non-negotiable obligations refer to a set of measures that states must adopt to avoid disproportionately interfering with ESCR. For instance, in forced removal cases, the provision

Rights by Means of the Proportionality Analysis'; Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable'; Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?'

[1532] See, for example: Garibaldi, 'General Limitations on Human Rights: The Principle of Legality'.

[1533] See, for example: Sweet and Mathews, 'Proportionality, Balancing and Global Constitutionalism'.

[1534] See, for example: Alexy, 'Constitutional Rights and Proportionality'.

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of alternative accommodation is expected, while in austerity measures cases, the existence of alternative means of subsistence are required. Here, it is worth noting that the two chapters highlight different facets of non-negotiable obligations and their relation to the balancing component. While the forced removal cases tend to exhibit a uniform list of obligations, the austerity measures cases present fewer uniform obligations and a greater reliance on balancing. One plausible explanation for this difference stems from the reliance on general comments from the CESCR in the forced removal cases, which results in greater consistency and coherence in the approach adopted across the jurisdiction. Differently, when it comes to the austerity measures cases, since the cases vary significantly across regions, no predefined template to answer the legal questions raised exists. For this reason, balancing plays a more significant role in these cases. Notwithstanding this difference, the two case studies together illustrate that non-negotiable obligations provide clarity on how to minimize interferences with ESCR, thereby making them a crucial facet of the proportionality analysis.

The second component, namely the balancing exercise, involves the process of weighing the rights and interests at stake through the analysis of certain factors (e.g. good faith of the applicant) in favor of or against the interference. Similar to the non-negotiable obligations, I demonstrate that the balancing exercise in the forced removal cases display greater uniformity with regard to the factors weighed. For instance, the conduct of national authorities was a relevant factor in many of the cases under analysis in the "Forced Removals" chapter. I attribute this difference between the two case studies to the higher number of cases concerning forced removal and the factual similarities between them.

Onto the content of the proportionality analysis, I demonstrate that although the literature has focused on a structured test which proceeds in three separate criteria, namely suitability, necessity, and proportionality stricto sensu,[1535] in practice, the international bodies

[1535] See: Alexy, 'On Constitutional Rights to Protection', 6–9; Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies', 4.

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predominantly emphasize the final criterion by focusing on the intensity of the impact of the interfering measure. This, in turn, confirms the prevalent claim that adjudicators rarely engage with the first two criteria of the proportionality analysis.[1536]

In the scholarly debate concerning the justiciability of ESCR, one of the main arguments against their justiciability was the possibility of judges overstepping their judicial mandate and attempting to become legislators.[1537] The focus on suitability and necessity would not constitute a usurpation[1538] of political authority. Instead, it would establish clearly defined parameters for what is permissible based on tests that adjudicators apply in other cases.[1539] Thus, the absence of such analysis weakens the adjudication of interferences with ESCR, as the rational connection between the aim and the measure,[1540] along with consideration of alternative measures,[1541] would provide states with much needed guidance on permissible interferences.

Finally, on the question of the interplay between states' obligations and limitations, I demonstrate that international bodies have adopted one of two strategies: either they have incorporated them into the limitation assessment itself, or they have applied states' obligations as parallel frameworks to the limitation assessment. The first strategy is, by far, the more common strategy adopted. Delving into its working, I have highlighted that the international bodies have incorporated specific states' obligations into all of the criteria of the limitation assessment, however, the bulk of the incorporation has taken place in the final criterion—i.e. proportionality. This act of incorporation confirms the claims of scholars who have identified the inclusion of ESCR-specific elements, such as financial capacity[1542] or individuals' needs,[1543]

[1536] See: Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable', 35; Silva, 'Standing in the Shadows of Balancing: Proportionality and the Necessity Test', 1740–41.
[1537] Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 6; Nolan et al., 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 11–13; Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration', 379.
[1538] Fabre, 'Constitutionalising Social Rights', 280–81.
[1539] See: Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach', 41–42.
[1540] Arai-Takahashi, 'Proportionality', 452.
[1541] Arai-Takahashi, 'Proportionality', 452; Alexy, 'Constitutional Rights and Proportionality', 53.
[1542] Duarte, 'Gains and Losses in Balancing Social Rights', 68.
[1543] Pulido, 'The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis', 520.

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into the proportionality analysis. Building on their claims, I argue that the incorporation of obligations, such as progressive realization, non-retrogression, minimum core, non-discrimination, and substantive equality, into the legal reasoning of the international bodies has significantly influenced the limitation assessment. Most importantly, their incorporation has heightened the scrutiny of interferences with ESCR. For instance, the incorporation of progressive realization has led adjudicators to consider the effect of measures taken over a period of time, while non-discrimination has compelled adjudicators to closely examine the effects of interferences on specific individuals or groups.

Regarding the second strategy, which is specific states' obligations as parallel frameworks, though it is by no means wide-spread, I demonstrate that it has been used in a few pivotal cases. Interestingly, in these cases as well, the analysis employed to assess the states' obligations overlaps with that of the limitation assessment in significant ways. For instance, international bodies focus on the justifications provided (legitimacy) for not fulfilling the obligation and the impact of the interference (proportionality) with the obligation, both of which clearly echo the limitation assessment's criteria. For this reason, it is possible to argue that although the language employed under the states' obligations framework differs from the limitation assessment, the analysis conducted while using them is, to a large extent, similar.

Although international bodies have employed states' obligations as parallel frameworks, the incorporation of states' obligations into the limitation assessment has marked an evolution in its traditional application. Accordingly, interferences with ESCR are conceptualized through a combination of states' obligations and the limitation assessment, while emphasizing the essential aspects of ESCR. Notwithstanding this advancement in the adjudication of ESCR interferences, the incorporation of states' obligations into the limitation assessment remains inconsistent and fragmented. For this reason, the adjudication of interferences with ESCR has a long road ahead of itself. While the framework developed by international bodies has significantly heightened the scrutiny of states' actions and omission, there is a need to further

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incorporate states' obligations into the limitation assessment, thereby ensuring the comprehensive protection of ESCR. The tools developed by ESCR scholars and bodies are both valuable and necessary to conceptualize ESCR. As such, they are essential when assessing interferences with ESCR, to ensure that interferences are adequately scrutinized and do not exceed what is necessary in a democratic society.

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