KARL-FRANZENS UNIVERSITÄT GRAZ (UNIVERSITY OF GRAZ)

European Master's Degree in Human Rights and Democratisation
A.Y. 2013/2014

CHALLENGES FOR THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

A critical appraisal of Inter-American and European human rights protection systems

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To my parents Marlene e Francisco,
the best parents in this world,
with all my love.

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ACKNOWLEDGMENTS

As this thesis represents the end of a cycle, it means the completion of my Master's Degree in Human Rights and Democratisation in the European Inter-University Centre For Human Rights and Democratisation (EIUC) and in the *Karl-Franzens Universität Graz* (University of Graz), all my thanks acknowledged here will be directed to people who helped me in constructing this arduous work, as well as those who had a special participation in this phase of my life.

Firstly, I thank God for all the graces given and, because without Him, nothing would have been realised.

Likewise I thank my parents Marlene and Francisco for having been true life examples. They taught me what is crucial and essential to live with dignity and honesty. They have always believed in me by providing me endless support. They are the only people in this world that could be even happier than me for the successes I have achieved. They took every measure possible and every effort to do all that was necessary for me and for my brothers. So, I thank you for your unconditional love and for everything, exactly everything! I will never be able to express how much I am proud of you two, *mãe* and *pai*. All my current *saudades* during this time far away from you two will be reattributed in thousands of hugs and kisses when I come back home! *Muito obrigada! Amo vocês!*

I also thank my brothers Rogério and Leandro, for our companionship, for our strength, for the support and even for the online fights. *Obrigada! Amo vocês, seus feios!*

I thank all my true friends. In particular, my old Brazilian childhood friends Silmara, Thaís and Rita, for our 22 years of friendship; Karen, since the *Cursinho;* Daniele, since my last job; and Camila, Joyce and Lúcia, my eternal sisters and flatmates. During all this time abroad, all of you have demonstrated that a distance of an ocean is nothing for a real friendship! *Obrigada!* I also thank my new *Masterini* friends, in particular Karin (my new sister and advisor), Claudia, Dolores, Francis, Anita, Janica, Christoffer and Philipp who, in distinct manners, remained close and supportive from Venice until now, even with our "second semester European borders"; and Rocio and Lisa, for sharing these last months in Graz with courage, happiness and desperation with

me. I also thank my new brother Shirzad, who I found in Graz. Thus, respectively, I want to say: *kiitos, gracias, gracias/grazie, thank you/hvala, thank you, kiitos, tak, danke, gracias, dank je wel* and متنــه. All of you will be in my heart.

I thank all the EIUC staff, in particular Alan Desmond for the support since the beginning in Venice. I also thank all the University of Graz team. In particular, Prof. Benedek, for being supportive and dedicated since I found out (in the *vaporetto*) my new destination would be in Graz. *Vielen dank* for the supervision of this Master thesis and for being more than a Professor to all of us. I also thank Reinmar, for supporting and helping us since our arrival in Graz. And my special *Danke* goes to Lisa, my second supervisor and "my second eye" in this Master thesis. This thesis would not be the same without you! *Vielen vielen dank* for being really "picky" and extremely supportive and helpful at the same time. My words are not enough to show how much I really learned and how thankful I am!

In conclusion, I would like to point out that the realisation of this thesis as well as this Master's Degree in Human Rights and Democratisation as a whole represented one of the biggest tests of my life. Being away from home for so long and writing a thesis about a challenging topic in a foreign language was not an easy task. However, it has been a fulfilling experience because what is even more challenging is people who live under miserable conditions and who have to face every single day consequences of an immensurable social inequality. The poverty present in Brazil (*Brasil*), my homeland, as in so many other countries, even in Europe, is the result of a lack of effective public policies and mismanagement of state's obligations in protecting basic human rights, in particular the Economic, Social and Cultural Rights (ESCR), the focus of this study.

Undoubtedly, my own personal background, my Law studies, my both works dedicated to education juridical assistance for unprivileged people in Brazil have really influenced my decision to dedicate my academic life to Human Rights. Thus, my hope is that this Master thesis as well as other many studies in this field can contribute to the reflection and the development of the effective protection and implementation of Economic, Social and Cultural rights in order to improve the quality of life of those who need it most and to drastically reduce poverty and social inequalities.

These are my sincere acknowledgments. Thank you all! *Muito Obrigada!*

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
CPR	Civil and Political Rights
CoE	Council of Europe
ECSR	European Committee of Social Rights
ESCR	Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAS	Organisation of American *states*
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
VDPA	Vienna Declaration and Programme of Action

ABSTRACT

The main objective of this study is to analyse the challenges for the justiciability of Economic, Social and Cultural Rights (ESCR) under the European and Inter-American human rights protection systems. The legal frameworks will be analysed as well as the arguments and methods of interpretation promoted by the responsible bodies trying to overcome obstacles to the effective protection of ESCR. The matter of justiciability of ESCR has gained and still is gaining increasing attention since the effective protection of the latter can improve the quality of life of those who need it most and drastically reduce poverty and social inequalities. Therefore, the relevance of this thesis lays in the assessment of the state of the art of the discussion on the justiciability of ESCR as reflected in academia and in the most recent case law of the bodies of the CoE and the OAS. Additionally, the thesis outlines a new way forward for developing a coherent approach to the autonomous justiciability of all ESCR.

GENERAL INTRODUCTION

The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the UN General Assembly (UNGA), proclaimed for the first time the protection of both categories of human rights, *i.e.* civil and political rights (CPR) and economic, social and cultural rights (ESCR) at the universal level. Later on, in 1993, the Vienna Declaration and Programme of Action established in its Art. 5, that all human rights are "universal, indivisible, interdependent and interrelated."[1]

Despite this international recognition of ESCR, the ideal of having all these rights effectively protected has not been achieved so far. Beyond doubt, gross violations of human rights, with regard to both categories of human rights, occur at a daily basis. Whereas CPR relate to the non-interference of the state in the rights of individuals, ESCR concern the ability of people to have an adequate standard of living fulfilled.[2] Therefore ECSR, *i.e.* in particular the right to education, the right to health, the right to housing and the right to food can be directly connected to poverty and social inequality. For an individual who suffers hunger every night, has no access to safe drinking water and who has to face and struggle with poverty every day, the international commitment to protect and fully realise ESCR means more than mere lip service[3]; it is fundamental for an individual to live, inspire of hardships.

Poverty and social inequality are a result of complex historical, political, economic and social developments and are highly interrelated. The state as main mediator of these interrelationships and the relations among members of societies is also the main responsible for guaranteeing every member of its society a decent standard of living. When states fail to accomplish their obligations with regard to the protection and realisation of basic human rights, in particular ESCR, the victims suffer most. Therefore, where the state does not foresee concrete and adequate mechanisms at the national level granting an individual compensation for the damage suffered because of the concrete human rights violations, it is the international and regional level jumping

[1] Art. 5 Vienna Declaration and Programme of Action.
[2] *E.g.,* Art. 25 UDHR.
[3] UN, *Economic, Social and Cultural Rights, Handbook for National Human Rights Institution*, 2005, p. VII.

in and guaranteeing that the state will be hold accountable for breaching its human rights violations.

The development of the global and regional international human rights protection systems has been an important and powerful tool to protect individuals' rights regardless of their particular nationalities. At the international level, victims of human rights violations would only have the possibility to claim their rights in front of an international court if the right concerned is recognised as a right that actually can be invoked. The right to a legal remedy for violations of ESCR is therefore closely connected to the discussion on the justiciability of the latter. Indeed, decisions by various national courts in countries from all over the world suggest that ESCR can be subject to judicial enforcement. Still, their justiciability has traditionally been questioned.[4] However, if the justiciability of ESCR is not recognised as is the justiciability of CPR, all the acknowledgments of and efforts made to consider all human rights as one integrated body will be worthless.

Thus, the main purpose of this thesis is to reveal the challenges ESCR and their justiciability are facing in the European and the Inter-American human rights protection systems. In order to assess the state of the art protection of ESCR under the two regional human rights systems, the legal frameworks in place as well as the arguments and methods of interpretation developed and brought forward by the monitoring bodies will be analysed. The underlying hypothesis of the thesis is that through the comprehensive recognition of the justiciability of all ECSR, effective protection of the latter is granted which, in the end, could increase the levels of living standards and would contribute to drastically reduce poverty and social inequalities since states truly could be held accountable for the non-compliance with human rights obligations they committed themselves to.

The thesis does not aim to compare the two systems, since many issues just cannot be compared. The objective is rather to show that are lessons to be learned from both systems and through scientific research the international dialogue on the issue, collaboration between the two systems can be strengthened.

[4] UN, *Economic, Social and Cultural Rights, Handbook for National Human Rights Institution*, 2005, p. 30.

From a methodological perspective, the thesis is written in the tradition of legal analysis and the comparison of legal approaches reflected in jurisprudence of the Courts of the two different human rights systems. The main primary sources used will be relevant legal instruments at the international and regional level. The secondary sources will encompass in particular the relevant jurisprudence and case law, relevant academic works and official documents. The official documents are mainly UN documents but also documents by the CoE and OAS organs will be analysed. The case law comprises decisions carefully selected from the judicial and quasi-judicial bodies in charge to promote the protection of in particular ESCR. Concerning the analysis of the European system, emphasis will be laid only on the CoE *i.e.* the case law from the European Court of Human Rights (ECtHR) and the decisions from the European Committee of Social Rights (ECSR). Regarding the Inter-American system, the case law of the Inter-American Court of Human Rights (IACtHR) will be subject to analysis.

This thesis presents its relevance for raising the contemporary treatment regarding the justiciability of ESCR. These rights are fundamental for a dignified life and individuals who do not have basic ESCR effectively protected will also not be able to enjoy basic CPR. All human rights are intrinsically interconnected and the non-protection of one of them will certainly affect others.

The introductory Chapter as a first step deals with the most relevant aspects of the origins, the concept and the legal nature of ESCR and will emphasise the controversies on their justiciability. The focus thereby will be on the universal human rights level and how controversies on the justiciability have been discussed internationally. In order to make the analysis as comprehensive as possible the most common arguments used against the justiciability of ESCR justiciability will be categorised and dealt with in regard to the positive and negative dichotomy between ESCR and CPR, the vagueness of ESCR and their judicial enforcement and the progressive realisation and available resources to implement ESCR.

The second Chapter will break down the discussion on the justiciability of ESCR to the regional level and will include an analysis of the formal legal frameworks in place in Europe and under the Inter-American system. The content and scope of the most relevant legal instruments will be analysed according to their importance in both

regional systems. Additionally, the formal monitoring procedures and the ways they monitor the compliance of state behaviour with the relevant legal instruments will be portrayed. With regard to the European system, the Chapter will deal with the legal frameworks of the two main actors with regard to human right namely the Council of Europe (CoE) and the European Union (EU). As there is only one major regional organisation with significant impact on the protection of human rights in the Inter-American system, only the legal framework of the Organisation of American *states* (OAS) will be subject to analysis.

Subsequently, Chapter 3 will deal with the most relevant arguments strengthening the protection of ECSR developed by the judicial and quasi-judicial bodies of the CoE and the OAS. Due to space constraints and the complexity of the EU structure, such as its competences and policies, the analysis in this Chapter will only focus on the CoE, leaving the EU aside. Furthermore, it is not the aim of the Chapter to analyse whether state parties to the relevant instruments have protected and implemented ESCR. The focus will be laid on the argumentation and strategies brought forward in particular by the Courts promoting and strengthening the direct or indirect protection of ESCR. Through the analysis of the relevant case law, a framework or roadmap for the justiciability of those ESCR, which, despite being protected by the legal framework, are not considered justiciable yet shall be provided.

The last Chapter will propose one possible way for a coherent approach to the justiciability of all ESCR. The basis for the analysis will be the opinion by Mac-Gregor Poisot, a judge of the Inter-American Court. His line of argumentation will be presented from the Inter-American perspective, but still it is from wider importance for the protection of ESCR and the ideas promoted can also be applied at the European or the international level.

CHAPTER 1 - ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS JUSTICIABLE RIGHTS

1.1 Introduction

The examination and in-depth analysis of the historical evolution of human rights in general and economic, social and cultural rights (ESCR) in particular, require, undoubtedly, an extensive and elaborated work. Since the objective of this thesis is more modest, this introductory Chapter will only raise the most relevant aspects of the origins, the concept and the legal nature of ESCR and will emphasise the controversies on their justiciability.

1.2 Human Rights Arising: Origins and Historical Evolution of Economic, Social and Cultural Rights

The origins of the acknowledgment of ESCR are very diffuse.[5] Firstly, ESCR derive from and reflect principles expressed in diverse religious traditions to care for those in need and those who cannot look after themselves.[6] This religious charity based approach reflects however "the obligation of one individual to another, rather than the obligation of the state as to an individual".[7] Still, "the recognition that the poor, the sick, the very old and the very young have a moral claim against the larger community is a powerful and enduring norm."[8]

The ESCR can further be traced to the XVIII century liberal philosophers promoting that humans can create a better and fairer world through reason and science.[9] In this period of the Enlightenment, various philosophers discussed the connection between individuals and their rights. On the one side, English philosophers, such as John Locke pointed out the importance of negative rights, such as freedom of speech and of religious from state restrictions. On the other side, French philosophers like Jean-

[5] Steiner, Alston and Goodman, 2008, p. 269.
[6] *Ibidem.*
[7] Stark, 2009, p. 91.
[8] *Ibidem.*
[9] *Ibidem.*

Jacques Rousseau discussed the obligation of the state to take positive actions in order to assure a decent standard of living for its people.[10] In the 1791 French Constitution certain social concerns with regard to the protection of vulnerable people found entrance[11] and in the 1793 French Declaration of the Rights of Man and of the Citizen, the notion that the vulnerable have a claim against the state was included.[12]

During the XIX and XX centuries, out of the necessity to address social problems resulting from the Industrial Revolution inducing economic and political developments in particular in the US and Western Europe, ESCR increasingly became recognised.[13] Due to the development of economic liberalism, the wealth of the bourgeois class suddenly increased. The lack of social policies in western states left the working class in a miserable situation without corporative or state protection.[14] Due to the technical progress machines increasingly replaced manual causing high unemployment rates and working conditions were extremely poor and inhuman.[15] The growing disparities between the working and the bourgeoisie class finally let to protests by the former against the prevalent system aimed to acquire more rights.[16]

The starting social unrests led to the inclusion of ESCR in the legal frameworks, *i.e.* constitutions of several countries. In particular, the Mexican Constitution of 1917 was the first to establish labour rights as fundamental rights.[17] Another extremely important document for the recognition of ESCR was the 1919 Weimar Constitution dealing in particular with the right to property and its limitation "for the purpose of public welfare".[18] This document inspired several other Constitutions in the world, such as the 1934 Brazilian Constitution establishing for the first time an entire title[19] about the "Economic and Social Order".[20]

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[10] Stark, 2009, p. 91.
[11] French Constitution of 1791, First title.
[12] Ferreira Filho, 2010, pp. 64-65.
[13] *Ibidem*, p. 59.
[14] *Ibidem.*
[15] *Ibidem*, p.61.
[16] *Ibidem*.
[17] Art. 123 Mexican Constitution of 1917.
[18] Art. 153 Weimar Constitution of 1919.
[19] Silva, 2008, p. 285
[20] Title IV, Brazilian Constitution of 1934.

Nonetheless, it was only with the creation of the United Nations (UN) in 1945 that ESCR were internationally recognised as human rights. The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the UN General Assembly (UNGA), for the first time incorporated at the universal level both ESCR and civil and political rights (CPR).

The UDHR, as a GA resolution, does not have the same legal character as a treaty or a convention, even though it is argued that at least parts of it have the status of customary law.[21] Thus, in order to transform the Declaration's provisions into legally binding obligations, the UNGA promoted two new documents, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in 1966.[22] Both Covenants entered into force in 1976, after receiving each 35 ratifications.[23] Together with the UDHR, the two Covenants built the "International Bill of Human Rights", "the bedrock of the international normative regime for human rights."[24] It is important to mention that until 31st January 2013, out of 193 UN *member* states, 160 ratified the ICESCR whereas 167 states have ratified the ICCPR.[25]

At the international level, the adoption of the ICESCR and in particular the work of the Committee on Economic, Social and Cultural Rights (CESCR), the body in charge to monitor the implementation of the treaty obligations by states, have been most relevant for the strengthening and the recognition of ESCR as human rights.[26]

Still, even though ESCR were recognised as human rights, they continued to be considered a different category of rights compared to CPR. However, both categories are completely interrelated.[27] In 1968, at the First International Conference on Human Rights in Teheran, it was firstly recognised that "all human rights and fundamental

[21] Steiner, Alston and Goodman, 2008, p. 137.
[22] *Ibidem*.
[23] Coomans, 2009, p. 293.
[24] Steiner, Alston and Goodman, 2008, p. 263.
[25] UN, Office of the High Commissioner for Human Rights (OHCHR), Ratification Status of International Human Rights Treaties, at http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.
[26] Coomans, 2009, p. 293.
[27] Gómez Isa, 2009, p. 39.

freedoms are indivisible and interdependent." [28] This approach was restated and extended in the Second World Conference on Human Rights, through the 1993 Vienna Declaration and Programme of Action (VDPA), establishing in its Art. 5 that all human rights, *i.e.* CPR and ESCR, are "universal, indivisible, interdependent and interrelated."[29]

In fact, there was no consensus between Western states ("Universalists") and those states supporting cultural relativism ("Relativists") regarding these aspects inherent to all human rights. For Universalists, human rights stem from "specifies minimum conditions for a dignified life, a life worthy of a human being." [30] For Relativists, the notion of human rights is connected to politic, economic, cultural, social and moral systems present in a determined society.[31] Moreover, the Relativists affirm that Universalists only invoke a hegemonic view of the Western culture regardless the cultural aspects of other societies[32], whereas the Universalists declare that Relativists, on behalf of culture, intend to cover serious violations of human rights.[33]

Nonetheless, the compromise formula established in the VDPA, at that time, was the best solution in order to overcome the distinction construed between the two categories of rights.[34]

1.3 The Legal Nature of Economic, Social and Cultural Rights

The brief introduction above showed that through the ICESCR and the subsequent work of its Committee, ESCR step by step became a "full member of the human rights family."[35]

According to the ICESCR, which structure was basically copied by other regional and domestic legal instruments, ESCR encompass:

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[28] UN, *Final Act of the International Conference on Human Rights, Tehran*, 13 May 1968, Vol. I, Part 2.
[29] Art. 5 VDPA.
[30] Donnelly, 2013, p. 16.
[31] Piovesan, 2013, p. 49.
[32] *Ibidem*.
[33] *Ibidem*.
[34] Gómez Isa, 2009, p. 47.
[35] Coomans, 2009, p. 293.

a) Economic rights: the right to work, the right to fair and favourable working conditions, the freedom to form and join trade unions, the right to strike;
b) Social rights: the protection of the family and maternity as well as of children and juveniles, the right to social security, the right to an adequate standard of living, including food, clothing, and housing, the right to health
c) Cultural rights: the right to education and participation in cultural life and the protection of intellectual property. Moreover, this category of rights is also constituted of right of all peoples to self-determination, prohibition of discrimination and gender equality.

Art. 2 (1) ICESCR establishes that states parties in order to fulfil their obligations have to take steps, individually and through international co-operation, to the "maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[36]

According to Coomans, in order to understand the differences between both categories of rights, the central provisions of the ICCPR and ICESCR and the scope of state obligations they enshrine have to be analysed. Whereas CPR can be generically considered as immediate and enforceable since obligations of states mainly concern the non-interference in the rights of the individual[37], ESCR have been basically perceived as non-immediate and non-enforceable [38] due to the requirement of progressive realisation as enshrined in the ICESCR.[39] However, over the years and in particular because of the interpretative work by the CESCR in its General Comments, the legal nature of ESCR has been defined and specified.[40]

For instance, in General Comment No. 3, the CESCR pointed out that the emphasis placed on the different wordings of both Arts. 2 of the two Covenants fails to recognise that "there are also significant similarities" between both categories of

[36] Art. 2 ICESCR.
[37] Art. 2 ICCPR.
[38] Coomans, 2009, p.295.
[39] Art. 2 ICESCR.
[40] Eide, 2001, p. 9.

rights.[41] While Art. 2 ICESCR states that "[e]ach state *party* […] undertakes to take steps […],to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights"[42], Art. 2 ICCPR establishes that "[e]ach state *party* […] undertakes to respect and to ensure to all individuals […]the rights recognised."[43]

The argument that ESCR are neither enforceable nor immediate in their application has to be analysed case by case as same as CPR. Due to the conceptual misunderstandings about the precise nature of ESCR, the justiciability of the latter[44] has also been questioned as will be discussed in the subsequent section.

1.4 The matter of Justiciability of Economic, Social and Cultural Rights

Even though ESCR have over the years been recognised as human rights, another question and subject of heavy debates has been their justiciability, *i.e.* whether they are "able to be invoked before the courts"[45] in case of their violation.

The discussion on the justiciability of ESCR is not a new one, since the main reasons of objection have been basically based on the same arguments used for denying ESCR the status as human rights, *i.e.* their legal nature connected to the nature of state's obligations.

The aim of the next section is to develop on the traditional arguments used to contest the justiciability of ESCR. In fact, most common arguments against their justiciability relate to the comparison between ESCR and CPR opposing and classifying them as "vague/precise, positive/negative, progressive/immediate and expensive/cost-free" [46], respectively. The subsequent discussion will dismantle the commonly used arguments related to the justiciability of ESCR and analyse them in three categories, *i.e.* the positive and negative dichotomy between ESCR and CPR; the vagueness of ESCR

[41] UN, CESCR, General Comment No. 3, para. 1.
[42] Art. 2 ICESCR.
[43] Art. 2 ICCPR.
[44] Melish, 2002, p. 33.
[45] UN, CESCR, General Comment No. 3, p. 6.
[46] Yeshanew, 2013, p. 49.

and their judicial enforcement; and the progressive realisation and available resources to implement ESCR.

1.4.1 The positive and negative dichotomy between Economic, Social and Cultural Rights and Civil and Political Rights

One of the main arguments against the justiciability of ESCR concerns the nature of states' obligations with regard to their implementation. It has been argued that while CPR relate to states' abstentions, protecting the individual against interference into its personal autonomy, the main objective of ESCR is a positive state conduct in order to protect and implement them. Thus, while the primary function of CPR is to limit states' power (negative obligation), ESCR require positive actions from the states (positive obligation).[47]

According to this argumentation, CPR are justiciable since they only require states to refrain from abusive actions, such as "don't kill, don't torture".[48] On the other hand, ESCR are not justiciable because they impose general positive obligations on the state, requiring, for instance, more expenditures on social facilities and infrastructure. Courts, are neither equipped nor in the right position to take such complex decisions belonging to the policy rather than the judicial sphere.[49]

Still, the focusing exclusively on this negative and positive dichotomy of CPR and ESCR is not suitable as argument against their justiciability[50], since both categories of rights "include negative and positive elements and impose on states a spectrum of obligations that range from refraining from direct violations of rights to providing goods and services."[51]

The state has just "as strong a *negative duty* to refrain from destroying a family's food supply as it does from torturing detainees in custody. At the same time, the state's *positive duty* to create an electoral system in which fair voting by secret ballot can be

[47] Sarlet, 2009, p. 66.
[48] Melish, 2009, p. 36.
[49] *Ibidem*.
[50] *Ibidem.*
[51] Cavallaro and Schaffer, 2007, p. 345.

achieved for all citizens is just as binding as its obligations to create health care system."[52]

Therefore the attempt to divide both categories of rights based on the character of their inherent obligations is not practical, since the realisation of CPR require positive actions as the fulfilment of ESCR requires the realisation of CPR. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[53], both ESCR and CPR impose three different types of obligations on states: the obligations to respect, protect and fulfil. The failure to comply with one of the three obligations already constitutes a rights' violation.[54] The obligation to respect requires states to refrain from interfering with the enjoyment of ESCR; the obligation to protect demands states to prevent violations of ESCR by third parties; and the obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial and other measures in order to fully realise ESCR.[55]

1.4.2 The vagueness of Economic, Social and Cultural Rights and their judicial enforcement

The general argument regarding the justiciability of rights, which is automatically applicable to ESCR, is related and dependent on the "positivisation", *i.e.* the adoption of laws or other legal normative acts at the national level.[56] However, it has been argued that ESCR are just too imprecise with respect to the nature and scope of their obligations, binding states under international law, resulting in a lack of legal implications: "[W]hen a right is established in the law without explicit or clearly implicit elaboration as to its scope, content, and counterpart obligations, such a right is legally inoperative and cannot be claimed in the courtroom. [57]

Further traditional points of critique concern that the judicial enforcement of ESCR would constitute a violation of the democratic principle of the separation of

[52] Melish, 2009, pp. 36-37.
[53] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 6.
[54] *Ibidem*.
[55] *Ibidem*.
[56] Eide and Rosas, 2001, p. 30.
[57] Melish, 2002, p. 34.

powers since their realisation depends on budgetary decisions. Judges would be in charge of decisions actually belonging to the competences of the legislative or the executive powers.[58]

Nonetheless, according to Melish, ESCR are not vaguer than CPR requiring for instance "due process" or "equal protection" without specifying.[59] However, CPR have benefited significantly from more authoritative interpretation over the past decades, while the normative content of ESCR has still been discussed by experts, international human rights bodies and some domestic trying to provide some authoritative guidance.[60]

Invoking the theory of separation of powers is the result of a conservative approach to traditional constitutional doctrine. However, the modern welfare state and its various conceptions require overcoming these old dogmas. [61] According to Schutter, "judges and other branches of government should be seen less as opposing one another – the power attributed to the ones meaning less power left to the others – than as complementing each other. Courts therefore should not have to choose between substituting themselves for the other authorities, or abdicating their responsibility to monitor compliance with economic and social rights." [62]

The CESCR, in General Comment No. 9, explains that "the right to an effective remedy need not be interpreted as always requiring a judicial remedy"[63], however, there are some obligations to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the ICESCR. "In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary".[64]

Another important issue discussed in this General Comment is related to the argument that the principle of separation of powers "prohibits courts from encroaching upon the legislative function of deciding how to allocate scarce public resources."[65] In

[58] Michelman, 2003, p.13.
[59] *Ibidem*.
[60] Melish, 2002, p. 34.
[61] Krell, 2002, p. 70.
[62] Schutter, 2010, p. 743.
[63] UN, CESCR, General Comment No. 9, Part C, para. 9.
[64] *Ibidem*.
[65] Melish, 2002, p. 37.

response, the CESCR stated that "courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."[66]

Confirming the idea that ESCR are justiciable, the UNGA adopted an Optional Protocol to the ICESCR that enables victims of violations of rights covered by the Covenant to address individual complaints to the CESCR. Although the Committee, a quasi-judicial body, only can make non-binding recommendations to states, they still hesitate to ratify this new Protocol, which was adopted in 2008 and entered into force in 2013. Until 31 January 2014, out of 160 states parties to the ICESCR, only 12 have ratified it, including Argentina, Bolivia, Bosnia & Herzegovina, Ecuador, El Salvador, Finland, Mongolia, Montenegro, Portugal, Slovakia, Spain and Uruguay.[67]

The adoption of the Protocol however proves that the debate on the justiciability of ESCR is becoming more and more obsolete. It can be said that "perhaps social rights are vague because they are not adjudicated." [68] Undoubtedly, there is a growing awareness by the judiciary for the justiciability of ESCR which, in the last instance, can ensure the enforcement of ESCR. By including ESCR in their judicial practice either granting a subjective right or declaring a restrictive or retrocessive measure unconstitutional, judicial bodies have to be aware of their responsibility to act in accordance with the principle of separation of powers.[69]

[66] UN, CESCR, General Comment No. 9, Part C, para. 10.
[67] UN, Treaty Collection, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en#EndDec.
[68] Kratochvíl, 2009, p. 34.
[69] Sarlet, 2009, p. 355.

1.4.3 The progressive realisation and available resources to implement Economic, Social and Cultural Rights

Another argument used against the justiciability of ESCR concerns their progressive realisation and their dependence of their realisation on the spending of states' financial resources. In other words, it has been argued that the nature of ESCR requires positive actions often involving public spending by states in order to be realised, while the obligations of states to ensure the enjoyment of CPR do not require so.[70] According to Eide, this is a gross oversimplification. As has been explained above there are three different obligations with regard to the realisation of human rights (respect, protect fulfil). In the argumentation on the justiciability, the progressive realisation and the need for financial resources the obligation to fulfil ESCR is always compared to the obligation to respect CPR.[71].

The Limburg Principles on the Implementation of the ICESCR states that "[t]he obligation 'to achieve progressively the full realisation of the rights' requires states parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for states the right to deter indefinitely efforts to ensure full realisation. On the contrary all states parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant."[72]

In General Comment No. 3, the CESCR also states that "any deliberately retrogressive measures" [73] with regard to the obligation to achieve progressively the full realisation of the rights, established in Art. 2 (1) ICESCR, "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[74]

The discussion on the progressive realisation is closely connected to the aforementioned fact that the realisation of ESCR may depend on the availability of

[70] Eide, 2001, p. 32.
[71] *Ibidem*.
[72] UN, "Limburg Principles", para. 21.
[73] UN, CESCR, General Comment No. 3, para. 9.
[74] *Ibidem.*

adequate financial and material resources of states. However, this argumentation could also be related to the implementation of CPR, since their fulfilment as well will require the spending of public funds. Even though the non-fulfilment of certain rights is to be refused might be a natural consequence of the scarcity of resource.[75] Still, this argument does not absolve states "of certain minimum obligations in respect of the implementation" [76] of ESCR. states are "obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all"[77] and "must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." [78]

In addition, the CESCR, in General Comment No. 9, explained that judicial remedies for violations of ESCR are essential and many provisions in the ICESCR are capable of immediate implementation. [79] It also clarified the difference between "justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration)."[80]

Finally, the Committee, despite admitting that each legal system needs to be taken into consideration and that the allocation of resources should be left to the political authorities rather than to the courts, it confirms that the adoption of a rigid classification of ESCR, in defining them beyond the reach of the courts, would be "arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent.[81]

[75] Holmes and Sustein, 1999, pp. 95-97.
[76] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 10.
[77] UN, "Limburg Principles", para. 25.
[78] UN, CESCR, General Comment No. 3, para. 10.
[79] UN, CESCR, General Comment No. 9, para. 10.
[80] *Ibidem*.
[81] *Ibidem*.

1.5 Conclusions

As discussed in this Chapter, ESCR have been often considered as being fundamentally different from CPR. Nonetheless, this distinction is artificially constructed and even counterproductive, since it has widely been recognised that all human rights are universal, indivisible, interdependent and interrelated.

However, the historical approach to interpreting the character and legal nature of human rights and the constant comparison of ESCR with CPR has hindered the latters' justiciability. Still, most of the arguments against their justiciability, *i.e.* that they require only positive obligations from states, or are too vague to be enforced, or depend on financial resources to be progressive realised etc., have become than obsolete as has been discussed above.

Undoubtedly, the discussion about the justiciability of ESCR is crucial since the judicial enforcement of human rights is fundamental. As reported by the UN Office of the High Commissioner for Human Rights (OHCHR) "a right without remedy raises questions of whether it is in fact a right at all. This is not to say that judicial enforcement is the only, or indeed the best, way of protecting economic, social and cultural rights. However, judicial enforcement has a clear role in developing our understanding of these rights, in affording remedies in cases of clear violations and in providing decisions on test cases which can lead to systematic institutional change to prevent violations of rights in the future."[82]

After this general introduction into the discussions on the justiciability of ESCR at the international level, the following Chapters will break down the debate to the regional level namely the European and the Inter-American regional human rights protection systems. The most relevant legal instruments regarding ESCR will be analysed as it will the role of the judicial bodies monitoring their compliance. Following the description of the legal and institutional frameworks in place, the thesis will turn to the analysis of the existing jurisprudence and which strategies and approaches the relevant bodies have developed in order to strengthen the justiciability of ESCR.

[82] UN, OHCHR, *Frequently Asked Questions on Economic, Social and Cultural Rights*, 2008, p. 31.

CHAPTER 2 - ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE EUROPEAN AND THE INTER-AMERICAN SYSTEM: STATE OF THE ART OF THE LEGAL AND INSTITUTIONAL FRAMEWORK

2.1 Introduction

In the last decades the efforts to protect all human rights have been intense and an international protection system with organs and proper mechanisms to supervise the implementation of these rights has been developed aimed at complementing and improving the primary protection operated by states. As has been described in the previous Chapter, the universal protection of human rights is guaranteed by the UN with the UDHR as starting point.

With respect to the regional movement to protect human rights, it has been encouraged by the UNGA from 1966 on, hence after the proclamation of the ICCPR and ICESCR.[83] However, already before their recognition as valuable complementary mechanism by the UN, regional human rights systems started to be developed.

Currently, Europe, the Americas and Africa do have specific human rights instruments and mechanism in place. Regarding Asia and the Islamic region, the former has only recently started do develop human rights instruments within its regional organisations[84], whereas in the latter, there are several initiatives to launch specific instruments to ensure human rights protection in the area.[85]

Albeit Asia is considered to be a "late-bloomer" [86] with regard to the institutionalisation of a human rights protection mechanism, the Association of Southeast Asian Nations (ASEAN) and South Asian Association of Regional Cooperation (SAARC) have had positive initiatives and already adopted various human rights instruments.[87] However, the main barriers for the implementation of a regional system in the area result from the heterogeneity, the vast numbers of countries and the so-called "Asian Values". This debate argues that traditional Asian values, such as the

[83] UN, OHCHR, *Frequently Asked Questions on Economic, Social and Cultural Rights*, 2008, p. 926.
[84] Killander and Nkrumah, 2013, p. 21.
[85] *Ibidem*, p. 53.
[86] Salmón and Chavez, 2013, p. 32.
[87] Mayrhofer and Dai, 2013, p.33.

preference of the community over the individual or the importance of social and economic development were inconsistent with the "Western" human rights approach, which was said to put more emphasis on individual political and civil rights.

Moreover, the Islamic Human Rights Regimes' initiatives reflect different perceptions and developments, since the concept of human rights was rejected by several Islamic states as a "Western" product and a "new form of colonialism".[88] Nevertheless, human rights instruments can be highlighted in this regime, such as the Universal Islamic Declaration of Human Rights, inspired by the UDRH; the Cairo Declaration of Human Rights in Islam, not acknowledging freedom of religion and equality between women and men; and the Arab Charter on Human Rights, which was developed by the League of Arab states, came into force in 2008, influenced by the UDRH and is the only legally binding document in the area.[89]

In this sense, the main asset of regional systems is their capability to address complaints more efficiently when compared to the universal system. This is because, in the case of courts, binding decisions with compensation can be given and the recommendations are normally taken more seriously by the states. Moreover, they tend to be more sensitive regarding cultural and religious issues, when valid for them.[90]

The African regional system was established under the Organisation of African Unity (AOU), which was later replaced by the African Union[91] (AU).[92] The African Charter on Human and People's Rights is the main instrument in the system, being adopted in 1981and entered into force in 1986. The responsible bodies in the African system are the African Commission on Human and People's Rights and the African Court on Human and People's Rights.[93]

The Commission, among other functions, conducts fact-finding missions, issues resolutions and declarations, considers state reports and provide recommendations on what measures state parties need to take to live up to the commitments they have made through ratification of the African Charter and other regional human rights

[88] Mayrhofer and Dai, 2013, p. 54.
[89] *Ibidem.*
[90] Benedek, 2012, p. 48.
[91] The AU's member states, at http://www.au.int/en/member_states/countryprofiles.
[92] Killander and Nkrumah, 2013, p. 21.
[93] *Ibidem*.

instruments.[94] The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter and any other relevant human rights instrument ratified by the states concerned.[95] Moreover, the Court may receive complaints and/or applications submitted to it either by the Commission or state parties to the Protocol or African Intergovernmental Organisations. NGOs with observer status before the Commission and individuals from states[96] which have made a Declaration accepting the jurisdiction of the Court can also institute cases directly before the Court. [97]

The two other regional systems in the world, the European and Inter-American systems, were pioneers with regard to the protection of human rights even before the official encouragement by the UN, *i.e.* before 1966.[98] These two regional systems are subject to the analysis of the present work and their respective legal instruments will be described into details according to their importance to the protection of the ESCR.

2.2 The European Human Rights System

The European Human Rights System (EHRS) has emerged as a reaction due to the destruction and horror during the Second World War, when numerous atrocities and violations against human rights occurred.[99]

Indeed, the European regional system comprises of three different institutional frameworks of human rights protection, the Council of Europe (CoE), the European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE) systems.[100] This work, however, will only focus on the two first sub-systems of human rights protection.

The CoE[101] is the principal human rights protector in Europe and it shares the same fundamental values with the EU, which are human rights, democracy and the rule

[94] Killander and Nkrumah, 2013, p. 21.
[95] AU, Court's jurisdiction, at http://www.au.int/en/organs/cj.
[96] AU, Court's access, at http://www.au.int/en/organs/cj.
[97] *Ibidem*.
[98] Steiner, Alston and Goodman, 2008, p. 926.
[99] *Ibidem*, p. 933.
[100] Benedek, 2012, p. 49
[101] CoE, 47 member states, at http://hub.coe.int/web/coe-portal/.

of law. Although these entities are separate, they still perform different, yet complementary, roles. [102]

Bringing governments from across and beyond Europe, the CoE has the aim to agree minimum legal standards in a wide range of areas. The EU regularly refers to CoE standards and monitoring work in its dealings with neighbouring countries, which many of them are CoE member states.[103]

Being the major responsible organ to protect human rights in the continent, as abovementioned, the CoE's Statute was adopted in 1949 and entered into force the same year.[104] The Art. 1 (a) enunciates that the aim of the CoE is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."[105]

Furthermore, in order to become a member, a state has "to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council".[106]

On the other hand, the EU[107] is an economic and political partnership. What began as a purely economic union has evolved into an organisation spanning policy areas, from development aid to environment.[108]

Its origin lies in the Treaty of Paris of 1952 (and expired in 2002), which established the European Coal and Steel Community (ECSC). Later, the Treaty of Rome, into force in 1958, created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The Single European Act (SEA) of 1987 amended the EEC Treaty for completing the single market.[109]

Finally, the Maastricht Treaty (The Treaty on the European Union), signed in 1992 and came into force in 1993, established the European Union. Subsequent, the

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[102] CoE, European Union, at http://hub.coe.int/web/coe-portal/european-union.
[103] *Ibidem*.
[104] Schutter, 2010, p. 21.
[105] Art. 1 (a) CoE's Statute.
[106] Art. 3 CoE's Statute.
[107] EU, 28 members, at http://europa.eu/about-eu/index_en.htm.
[108] EU, From an economic to a political union, at http://europa.eu/about-eu/index_en.htm.
[109] EU, *How the EU works*, 2013, p. 4.

Treaty of Amsterdam, in 1999, amended previous treaties; and the Treaty of Nice, in 2003, streamlined the EU institutional system so that it could continue to work effectively after the new wave of *member* states joined in 2004.

The Treaty of Lisbon, signed in 2007 and came into force in 2009, simplified working methods and voting rules, created a President of the European Council and introduced new structures with a view to making the EU a stronger actor on the global stage.[110]

The Treaty on the European Union (TEU) affirms that any European country can apply for membership as long as it respects the democratic values of the EU[111] and is committed to promoting them. Moreover, a candidate country must have 1) stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; 2) a functioning market economy and the capacity to cope with competition and market forces in the EU; and 3) the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[112]

As abovementioned, the CoE and the EU are separate entities, but share same values. Their legal instruments, in particular the CoE's European Convention on Human Rights (ECHR) and the European Social Charter (ESC), and the EU's Charter of Fundamental Rights (CRFEU), enshrine the commitments of both institutions to protect human rights as it will be described in more detail below.

2.2.1 The European Convention on Human Rights (ECHR)

The main legal instrument for the protection of human rights within the CoE framework is the Convention for the Protection of Human Rights and Fundamental Freedoms, mostly known as the European Convention on Human Rights (ECHR). It

[110] EU, *How the EU works*, 2013, p. 4.
[111] Art. 2 TEU.
[112] EU, Conditions for membership, at http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm.

was signed in 1950, entered into force in 1953 and is accompanied by 14 Additional Protocols[113] that have been adopted throughout the years.

The main responsible organ to protect the ECHR is the European Court of Human Rights (ECtHR), which was established in 1959, is based in Strasbourg and monitors respect for the human rights of the CoE member states.[114] The Committee of Ministers also performs an important role, monitoring the execution of judgments promoted by the ECtHR.[115]

Originally, the ECHR foresaw also the Human Rights European Commission in order to monitor the compliance of state acts with the Convention. First, the Commission received applications by alleged victims of human rights violations (individual complaints) or by states parties to the Convention (state complaints). Once the Commission considered an application admissible, it prepared a report with its findings and brought the case either to the Committee of Ministers or to the Court. Whereas the Committee of Ministers, as a political body, only could issue recommendations based on the Commission's reports, the ECtHR, even as a non-permanent Court, could already issue legally binding decisions.[116]

Regarding the individual complaints, this idea of empowering individuals to seize the ECtHR appeared in the ECHR draft, but was rejected in the course of the member states' discussions related to it.[117] The refusal was based on the argument that "the interests of the individual would always be defended either by the Commission, in cases where the latter decided to seek a decision of the Court, or by a state."[118]

However, with the reform promoted by Protocol 9[119], into force in 1994, individuals have been authorised to refer a case directly to the Court if the state had

[113] See, in particular, Protocols 2, 9 and 11, at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG.
[114] *Ibidem.*
[115] Art. 46 ECHR.
[116] Schutter, 2010, pp. 899-901.
[117] CoE, Explanatory Report on the Protocol 9 to the ECHR.
[118] *Ibidem*.
[119] Although Protocol 9 was repealed as from the date of entry into force of Protocol 11, in 1998, its discussion remains extremely relevant regarding the right for individuals complaints, which are present in the current version of the ECHR.

recognised its jurisdiction.[120] This logical development of the Convention's system of control enabled individual himself to decide to take his case to the Court, rather than letting him remain dependent on the Commission or a state for this purpose. "The situation whereby the individual is granted rights but not given the possibility to exploit fully the control machinery provided for enforcing them could today be regarded as inconsistent with the spirit of the Convention, not to mention compatibility with domestic-law procedures in states parties."[121]

On the other hand, the amendment made by Protocol 11 to the ECHR, in 1998, with the aim to rationalise the machinery for enforcement of rights and liberties guaranteed by the Convention, established only one single and permanent Court, taking over the responsibilities of the former Commission.[122] The main reason for this reform was the urgency of "improving efficiency and shortening the time taken for individual applications, at minimum cost."[123]

Furthermore, the Protocol 11 introduced the possibility for individuals to apply directly to the Court regardless the recognition of its jurisdiction. It means that, after Protocol 11 came into force, the Court was given compulsory jurisdiction and states can no longer ratify the Convention without accepting the Court's jurisdiction.[124] Currently, the ECtHR rules on individual or state applications alleging violations of rights enshrined in the ECHR.[125]

Therefore, the CoE's human rights system is of particular importance within the context of international human rights. The ECHR was the first legally binding human rights instrument and it introduced for the first time a highly active supranational complaint mechanism on human rights matters that, since its establishment, has developed extensive jurisprudence.[126]

Additionally, according to Art. 1 of ECHR, member states "shall secure to everyone within their jurisdiction the rights and freedoms" defined in the Convention.

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[120] Art. 46 ECHR (former). The Chart of Declarations of the states, at http://conventions.coe.int/Treaty/EN/Treaties/Html/005-1-bis.htm.
[121] *Ibidem.*
[122] CoE, Explanatory Report on the Protocol 11 to the ECHR.
[123] *Ibidem*.
[124] CoE, Explanatory Report on the Protocol 11 to the ECHR.
[125] Schutter, 2010, pp. 899-901.
[126] Steiner, Alston and Goodman, 2008, p. 933.

That means, that the ECHR in its application is not limited to citizens of CoE member states, but it protects everyone who is under the jurisdiction of a member state, no matter the nationality or status, such as stateless persons, refugees, irregular migrants.[127] Among others, that is one of the reasons that the ECtHR "has been a victim of its own success: over 50,000 new applications are lodged every year."[128]

In the spirit of the liberalist, individualist and democratic ideal of Western Europe in the post Second World War era, the catalogue of rights of the ECHR comprises in particular CPR.[129] These rights can be exemplified by the right to life, right to a fair trial, right to respect for private and family life, freedom of expression.

Nonetheless, already in 1952, the Additional Protocol 1 to the Convention added specific human rights belonging to the category of ESCR, namely, the right to property (Art. 1) and the right to education (Art. 2). It means that only these two rights are able to be directly claimed before the ECtHR.

However, other ESCR were not included in the ECHR, which, in view of what was mentioned above, was not as a surprise. An effective system of the protection explicitly concerning ESCR within the CoE has only been established in 1961 with the adoption of the European Social Charter (ESC) [130] as it will be demonstrated below.

2.2.2 The European Social Charter (ESC)

The European Social Charter (ESC) is, undoubtedly, the most important document in the CoE's system to protect ESCR. In entered into force in 1965 and can be considered as self-standing regime with its own monitoring mechanism, namely the European Committee of Social Rights (ECSR) selected by the Committee of Ministers.[131]

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[127] Salcedo, 2009, p. 668.
[128] CoE, The ECHR in 50 Questions, 2012, p.11, at http://www.echr.coe.int/Documents/50Questions_ENG.pdf.
[129] Harris, O'Boyle and Warbrick *apud* Piovesan, 2013, p. 111.
[130] CoE, The ESC, at http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/aboutcharter_EN.asp.
[131] *Ibidem*.

The ECSR is responsible to judge whether states party are in conformity in law and in practice with the provisions of the ESC. It is composed by 15 members, independent and impartial experts, elected by the Committee of Ministers, for a six-year term. Its main mission is to judge if states parties are in conformity in law and in practice with the provisions of the European Social Charter (ESC).[132]

Intended to be a counterpart to the ECHR, it never gained the same importance as the latter although growing attention has been paid to ESC at the global level since the late 1980s.[133]

The main arguments against the inclusion of ESCR into the ECHR concerned in particular the already heavy work load of the back then existing Commission and the ECtHR as well as skepticism regarding the justiciability of ESCR.[134]

Until the mid 1990s, the ESC was largely overshadowed by the Convention and ignored even within specialised circles. Besides, the conclusions issued by the Committee of Independent Experts, that aimed at supervising compliance with the ESC were not clear and rarely made public. Additionally, the character of the Committee as neither a full judicial nor a completely political body[135]made it a rather ambiguous mechanism of control.[136] The system did not allow for individual or collective complaints but relied only on reports made by states parties on the implementation of the Charter.

Due to the already mentioned increasing awareness for ESCR, the shortcomings of the ESC were recognised and the Convention became subject to considerable changes over the years. In 1996 the ESC became revised and now called the Revised European Social Charter (hereinafter revised ESC). The new Charter now embodied in one only instrument all the rights that formerly were included in the ESC of 1961, its additional

[132] CoE, The ESC.
[133] Benedek, 2012, p. 49
[134] *Ibidem.*
[135] The Committee used to be subordinated to the Governmental Committee of the ESC and, conclusively, to the Committee of Ministers.
[136] *Ibidem.*

protocol of 1988 as well as new rights and amendments adopted by states parties over time.[137]

For instance, the additional Protocol of 1988 added the right for workers to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex; the right for workers to be informed and consulted within the undertaking; the right for workers to take part in the determination and improvement of working conditions and the working environment in the undertaking and the right for elderly persons to social protection.

Additionally, the Amending Protocol of 1991 improved the control machinery of the Charter, confirming the political role of the Committee of Ministers and of the Parliamentary Assembly of the Council of Europe (PACE). It clarified the respective functions of the two principal organs of control, *i.e.* the ECSR and the Governmental Committee[138] and reinforced the participation of social partners and non-governmental organisations.[139]

In 1995, again by means of an Additional Protocol a collective complaint mechanism [140] was introduced as one of the measures designated to improve the effective enforcement of rights guaranteed by the Charter. From the beginning, states have been obliged to report[141] periodically under the ESC, but no complaints procedure was included when it was adopted in the Charter of 1961.

The new procedure provides for collective[142], not individual complaints, entitling social partners and non-governmental organisations to lodge collective complaints

[137] CoE, revised ESC, 33 ratifications, and only Finland recognised the right of national NGOs to lodge collective complaints against it, at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=163&CM=8&DF=&CL=ENG.
[138] Body composed of representatives of each state party, which prepares the Committee of Ministers' work, at http://conventions.coe.int/Treaty/en/Summaries/Html/142.htm.
[139] CoE, ESC, at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp.
[140] CoE, ESC, List of organisations entitled to submit complaints, at http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrganisationsIndex_en.asp.
[141] Art. 2 ESC.
[142] CoE, Explanatory Report on the Additional Protocol 1995 to the ESC. The system was based on the collective complaints procedure of the International Labour Organisation (ILO), at http://conventions.coe.int/Treaty/en/Reports/Html/158.htm.

against alleged violations rights enshrined in the Charter in states which have ratified the Protocol.[143] By June 2014, 109 complaints have been lodged.[144]

The complaint must comply with certain admissibility criteria.[145] If satisfied that these are met, the ECSR decides on the merits of the complaint. The ECSR's decision, which is not legally binding, is forwarded to the parties and to the Committee of Ministers in a report. Based on the reaction of the state party to the decision of the ECSR, the Committee of Ministers adopts a resolution closing the procedure. This resolution may include a recommendation, which again is not legally binding, to a state found in default calling upon it to take certain action.[146]

Furthermore, the ESC was limited in both its *ratione personae* and *ratione materiae* application. Regarding the former, it was only applicable to nationals of the states parties. With regard to the latter, states were, with certain limits, allowed to choose the provisions of the Charter they want to be bound by upon accession (*à la carte* system).[147]

The *à la carte* system is described as the "Undertakings" in its Part III, Art. A, of the ESC, which establishes that each party undertakes "to consider itself bound by at least six of the following nine articles of Part II of this Charter: Arts. 1, 5, 6, 7, 12, 13, 16, 19 and 20"[148], plus an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs".[149][150]

It is interesting noting that there is no article in the Charter that indicates the states parties should undertake the rights established using to the maximum of their available resources, such as the ICESCR (Art. 2), aforementioned, and Protocol of San Salvador

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[143] CoE, ESC, Ratification, at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp.
[144] CoE, ESC, Complaints, at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.
[145] Arts. 3, 4, 6, Additional Protocol of 1995 to the ESC.
[146] Art. 9, *Ibidem*.
[147] Schutter, 2010, p. 914.
[148] Art. A (1), (b) revised ESC.
[149] Art. A (1), (c), *Ibidem*.
[150] CoE, ESC, *states*' acceptance provisions, at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013_en.pdf.

(Art. 1).[151] "Instead, in each Charter article that guarantees a particular right, the state parties undertake to take appropriate measures or necessary measures or other action to realise that right."[152]

Currently, the revised ESC guarantees an extensive list of rights, in its Part II, such as labour rights (for example, right to just conditions of work, right to safe and healthy working conditions, right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex), right of children, young and elderly persons to protection, right to protection of health, right to social security, right of persons with disabilities to independence, the right to protection against poverty and social exclusion and the right to housing.

The protection of ESCR in Europe does however not end with the ESC. Besides the CoE, the EU also exercises an important role in protecting these rights by means of the Charter of Fundamental Rights as it will be discussed below.

2.2.3 The Charter of Fundamental Rights of the European Union (CFREU)

Over the years the EU has developed its self-understanding as mere economic community to a key actor with regard to the promotion of human rights. The main instrument at the EU level with regard to the protection of human rights is the Charter of Fundamental Rights of the European Union (CFREU) that has been adopted at Nice European Council summit in 2000.[153] The protection of the rights enshrined in the CFREU is as old as the debate itself about the protection of human rights in the EU.[154]

Its draft, made by representatives of the EU, member states and civil society was initially adopted as a legally non-binding instrument.[155] Nonetheless, with the Treaty of Lisbon[156] that entered into force in 2009, the CRFEU became legally binding.[157]

[151] See below *section 2.3.2*.
[152] Harris, 2009, p.11.
[153] Nanclares, 2009, p. 778.
[154] *Ibidem*, p. 790
[155] Salmón and Chavez, 2013, p. 48.
[156] EU, Treaty of Lisbon.
[157] Art. 6 (1) TEU.

According to a Communication from the Commission on the effective implementation of the Charter[158], the CFREU is innovative, since "it brings together in one text all the fundamental rights protected in the Union, spelling them out in detail and making them visible and predictable". Indeed, the CFREU includes both sets of human rights, the CPR and ESCR.[159]

The document is divided into six chapters: dignity, freedoms, equality, solidarity, citizen's rights, justice and general provisions. CPR can be exemplified by the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to marry and the right to found a family.

Explicit ESCR provisions encompass the freedom of the arts and sciences, the right to education, labour rights, such as the freedom to choose an occupation and the right to engage in a work, right to property, right to cultural, religious and linguistic diversity, right to social security and social assistance, right to health care and right to environmental protection.[160]

The provisions of the CFREU primarily apply to the institutions and bodies of the Union, according to the principle of subsidiarity, and to member states when they are implementing Union law.[161]

The competent institution to interpret and monitor the application of the CFREU is the European Court of Justice (ECJ), which was established in 1952 and based in Luxembourg. It is in charge of monitoring the application of EU law in all EU countries.[162]

The ECJ has one judge per EU country and is helped by nine advocates-general, who present opinions on cases brought before the Court.[163] Individuals, organisations and companies are entitled to bring cases before the ECJ if there is a violation against their rights directly by EU law, without any involvement of national authorities or based

[158] EU, European Commission, Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, Brussels, 19 October 2010, p. 3.
[159] Salmón and Chavez, 2013, p. 26.
[160] *Ibidem*.
[161] Art. 51 CFREU.
[162] EU, ECJ, at http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm.
[163] *Ibidem.*

on national law.[164] Individuals can complain to the ECJ because they think their fundaments rights are violated: "either directly – under very limited circumstances – or in case a national court asks the ECJ for a preliminary ruling on whether Community law, including the relating to fundamental rights, has been violated. But this is not available to litigants 'as a matter of right'. Both ways are quite complicated and lengthy procedures."[165]

Recent discussions about the EU and its Charter involve the EU's accession to the ECHR. This is because the Treaty of Lisbon[166] as well as the Additional Protocol 14 to the ECHR[167] established that the Union shall accede to the Convention.

Although the Lisbon Treaty entered into force in 2009, this matter remains open since accession did not occur yet. The main idea and asset of the accession to the ECHR was to complement the fundamental rights protection system by making the ECtHR competent to review legal and executive acts of the European Union. As reported by the EU Commission, "this external judicial review should further encourage the Union to follow an ambitious policy for fundamental rights: the more the Union tries to ensure that its measures are fully compliant with fundamental rights, the less likely it is to be censured by the European Court of Human Rights."[168]

2.3 The Inter-American Human Rights System

The development of an efficient human rights system within the Organisation of American states (OAS)[169] seems of crucial importance, especially due their challenges faced in the Americas, such as the economic disparities between states: on the one side, the OAS[170] comprises United states of America and Canada and, on the other side, El Salvador and Haiti.[171]

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[164] Salmón and Chavez, 2013, p. 50.
[165] *Ibidem.*
[166] Arts. 6(1) and (2) TEU.
[167] Art. 17 Additional Protocol 14 to the ECHR.
[168] EU, European Commission, COM(2010) 573, 2010, p. 3,
[169] Art. 16 IACHR's Statute.
[170] OAS, 35 member states, at http://www.oas.org/en/about/member_states.asp.
[171] Binder, 2012, p. 241.

Moreover, for many years, Latin American states were under military and dictatorship rules. "Democracy, as it is understood today, was not a feature of many states in the region. As a consequence, many Governments were not receptive to the notion of universal human rights, and far less to the idea of states being held accountable for their actions in respect of individuals".[172]

Notwithstanding, even in democracies, domestic judicial systems can be incapable to rectify and put an end to human rights abuses.[173] For this reason, in order to guarantee that human rights are protected when domestic legal systems fail, it is imperative that victims of human rights abuses have the chance to appeal to superordinate regional systems, such as the Inter-American Human Rights System (IAHRS).[174]

The IAHRS has been developed within the framework of the OAS, an international organisation comprised of all independent states in the Western hemisphere.[175] It was established, by the OAS Charter, in 1948, at the Ninth Inter-American Conference in Bogotá, Colombia.[176] One of the objectives of the OAS is, indeed, to promote democracy, justice and human rights in the region.[177] Unlike Europe, the Americas host only this one as the major regional organisation with a significant impact on human rights.[178]

The OAS Charter constitutes the legal framework of the OAS and is binding on its all member states. "The purposes of the OAS include strengthening peace and security, promoting and consolidating representative democracy, and eradicating extreme poverty"[179].

At the Fifth Meeting of Consultation of Ministers of Foreign Affairs, in 1959, in Santiago, Chile, the Charter was amended and the Inter-American Commission of Human Rights (IACHR), one of the most important organs of the IAHRS, was

[172] Smith, 2010, p. 116.
[173] Pasqualucci, 2010, p. 433.
[174] *Ibidem.*
[175] Pasqualucci, 2010, p. 433.
[176] Smith, 2010, p. 116.
[177] Salmón and Chavez, 2013, p. 26.
[178] *Ibidem.*
[179] Pasqualucci, 2010, p. 435.

established by Resolution VIII.[180] *A posteriori*, the Protocol of Buenos Aires, in 1967, amended the Charter with the aim to include the IACHR as the main organ of the OAS[181].

The IACHR's headquarters is located in Washington D.C. and its seven members must be of high moral character, recognised competence in the human rights field and represent all the member states of the OAS.[182] According to its Statute, the IACHR promotes the observance and defense of human rights and serves as consultative organ of the OAS in this matter.[183] The human rights here are understood to be the rights defined in the ACHR, in relation to its states parties, and the rights specified in the ADRDM of the Rights and Duties of Man (ADRDM), regarding the other member states.[184]

The IACHR's mandate is established in the OAS Charter and the ACHR, while its procedures and organisational guidelines are set forth in its Statute and Rules of Procedures.[185] At its 147th Regular Period of Sessions, in 2013, the IACHR published its Resolution 1/2013 "Reform of the Rules of Procedure, Policies and Practices"[186] and amended certain articles of the Rules of Procedure. Thus, regarding its mandate, the main responsibilities of the Commission are:

a) Receive individual petitions, analysing and investigating the possible alleged human rights violations;[187]

b) Submit an annual report to the General Assembly of the OAS. In addition, it shall prepare the studies and reports it deems advisable for the performance of its functions and shall publish them as it sees fit.[188]

c) Lead on-site visits to member states in order to carry out detailed analyses of the general situation and/or to investigate a specific situation;[189]

[180] Art. 106 OAS Charter.
[181] *Ibidem*.
[182] Art. 2 (1) IACHR's Statute.
[183] Art. 1(1), *Ibidem*.
[184] Art. 1 (2), (a) and (b) ADRDM.
[185] IACHR's Rules of Procedures.
[186] IACHR, Resolution 1/2013.
[187] Arts. 44 to 51 ACHR; Arts. 19 and 20 IACHR's Statute; Arts. 23 to 52 IACHR's Rules of Procedure.
[188] Art. 58 IACHR's Rules of Procedure.

d) Request provisional measures, in case of extreme seriousness and urgency, in order to avoid irreparable damage to persons;[190]

At the same time as the Charter, the ADRDM was adopted with the aim to promote the protection of human rights in the Americas.[191] Even though the ADRDM has been adopted before the UDHR[192], the content of both is very similar.[193]

The ADRDM as well includes CPR, such as the right to life, liberty and personal security, the right to equality before law and the right to religious freedom and worship. It also includes a set of ESCR, *i.e.* in particular the right to education, the right to the benefits of culture, the right to work and fair remuneration, the right to leisure time and to the use thereof and the right to social security.

The Declaration however also includes a set of duties incumbent upon the Americas' individuals. As Smith[194] indicates, several duties correlate to specific rights, for example: "it is the duty of every person to acquire at least an elementary education." This duty links directly with the right to education.

Nonetheless, as an OAS Assembly Resolution, this Declaration, *a priori*, was not considered legally binding, although nowadays it is considered as regional customary law.[195]

2.3.1 The American Convention on Human Rights (ACHR) - Pact of San Jose

The OAS, as mentioned above, proclaimed documents and treaties about human rights, such as the ADRDM, and created the IACHR, a body responsible for monitoring the compliance of member states with the Declaration.[196]

The same Resolution VIII, in 1959, which amended the OAS Charter to adopt the Commission, also brought forward the idea of the adoption of a Convention in the

[189] Art. 59 (5) (c), IACHR's Rules of Procedure.
[190] Art. 76, *Ibidem*.
[191] Salmón and Chavez, 2013, p. 27.
[192] ADRDM adopted in April 1948; UDHR adopted in December 1948.
[193] Smith, 2010, p. 117.
[194] *Ibidem*.
[195] Binder, 2012, p. 241.
[196] Schutter, 2010, p. 26.

Americas. The amended Charter stated that "an inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters".[197]

Thus, in 1969, the American Convention on Human Rights (ACHR) was adopted in San Jose, Costa Rica. Therefore, the Convention is also called "Pact of San Jose".[198] The Convention is now the main source of human rights obligations in the region of the Americas and it was largely inspired by the ECHR, in its original version of 1950.[199]

The ACHR entered into force in 1978, after 11 states deposited their instruments of ratification or adherence.[200] To those states that have not become parties to the ACHR[201], the Commission still applies the ADRDM, as a default instrument.[202] It means that the IACHR shall receive and examine any petition that contains a denunciation of alleged violations of the human rights established in the Declaration of in relation to the OAS members that are not parties to the ACHR.[203]Nonetheless, once a state has ratified the Convention, it is the ACHR being the main source of law to be applied, as long as the petition alleges violations of identical rights enshrined in both documents.[204]

In fact, the IACHR has a dual role: First, it retained the status of being an OAS organ, maintaining the power to promote and protect human rights in all the OAS member states. Secondly, as an organ of the ACHR, it has the capacity to supervise human right in the territories of the states parties of the Convention.[205]

The ACHR also introduced a new organ responsible for the fulfillment of the commitments made by its states parties, *i.e.* the Inter-American Court of Human Rights (IACtHR).[206] Is an autonomous judicial institution, based in San Jose, Costa Rica[207],

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[197] Art. 106 OAS Charter.
[198] Schutter, 2010, p. 27.
[199] *Ibidem*.
[200] Art. 74 (2) ACHR.
[201] OAS, ACHR, 24 ratifications. For instance, Canada and the US did not ratify the ACHR. At http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.
[202] Schutter, 2010, p. 26.
[203] Art. 51 IACHR's Rules of Procedure.
[204] IACHR, Report No. 03/01, *Amílcar Ménendez et. al v. Argentina*, Case 11.670, 19 January 2001.
[205] Steiner, Alston and Goodman, 2008, p. 1025.
[206] Art. 33 ACHR.

whose purpose is the application and interpretation of the Convention.[208] However, the IACtHR became operative just in 1979, when the General Assembly of the OAS elected its first judges.[209]

The IACtHR is composed of seven judges[210] and only states and the IACHR have the right to submit a case to the Court. [211] The IACHR shall appear before IACtHR in all cases.[212]

According to Art. 1 of the ACHR state parties "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".[213]

Alike the ECHR, the ACHR's rights catalogue prioritises the CPR, enshrined in several articles, such as the right to juridical personality, right to life, right to humane treatment, freedom from slavery, right to personal liberty and rights of the family. Indeed, the ACHR drafting process was deeply influenced by the 1966 ICCPR of the UN system, which was taken as model for the Convention.[214]

On the other hand, ESCR are only encompassed by one article, Art. 26, named "Progressive Development", which represents the entire chapter entitled "Economic, Social and Cultural Rights. It reads: "The states parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American states as amended by the Protocol of Buenos Aires".[215]

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[207] Art. 3.1 IACtHR's Statute.
[208] Art. 1, *Ibidem.*
[209] Hennebel, 2009, p. 814.
[210] Art. 52 ACHR.
[211] Art. 61, *Ibidem.*
[212] Art. 57, *Ibidem.*
[213] Art. 1, *Ibidem.*
[214] Hennebel, 2009, p. 823.
[215] Art. 26 ACHR.

Only in 1988, a catalogue for ESCR was adopted by the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights, the Protocol of San Salvador.

2.3.2 The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (The Protocol of San Salvador)

The Additional Protocol of San Salvador[216] to the ACHR was adopted by the OAS with the aim to protect, reaffirm and develop ESCR.[217] Its preamble affirms that the "close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realised, and the violation of some rights in favor of the realisation of others can never be justified [...]."[218]

Although the preamble emphasises the indivisibility of the two set of rights, most states were hesitant to follow up their political rhetorics with ratification. For this reason, the Protocol only entered into force in 1999.[219]

The Protocol of San Salvador, as a matter of fact, was intensively influenced by the ICESCR of the UN system.[220] Its Art. 1 establishes that "the states parties […] undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognised in this Protocol".[221]

The rights enshrined in the Protocol encompass the right to work as well as just, equitable and satisfactory conditions of work, trade union rights, the right to social

[216] OAS, Protocol of San Salvador, 16 ratifications, at http://www.oas.org/juridico/english/sigs/a-52.html.
[217] Hennebel, 2009, p. 827.
[218] Preamble Protocol of San Salvador.
[219] Smith, 2010, p. 118.
[220] *Ibidem*.
[221] Art. 1 Protocol of San Salvador; Art. 2(1) ICESCR.

security, the right to health, the right to a healthy environment, the right to food, the right to education, the right to the benefits of culture, the right to the formation and the protection of families, rights of children. The document also protects the elderly and the handicapped. [222]

The means to protect the rights above mentioned are performed by periodic reports, provided by the states parties, on the progressive measures they have taken to ensure due respect for the rights established in the Protocol.[223]

Furthermore, only the rights of workers to organise and to join trade union as well as the right to education are able to be protected by the system of individual petitions. Art. 19 (6) of the Protocol expressly states that in any instance in which the rights just mentioned are violated, by action directly attributable to a state party, to this Protocol may give rise to application of the system of individual petitions. [224] It means that the IACHR and, when applicable, the IACtHR are allowed to analise and judge, respectively, cases directly involving the rights abovementioned. [225]

Thus, pursuant to Art. 44 of ACHR, the petitions may be lodged with the IACHR by any person or group of persons, any nongovernmental entity legally recognised in one or more member states of the OAS, containing denunciations or complaints of violation of the ACHR by a state party.[226] Besides, the admissibility criteria must be respected, such as the exhaustion of the remedies under domestic law, the period of six months from the date on which the party alleging violation of his rights was notified of the final judgment, and the subject of the petition is not pending in another international proceeding for settlement.[227]

Based on this information, the Commission will issue decisions on the admissibility, determining whether the petitioner has alleged facts that constitute a possible violation of the state's human rights obligations. Thus, it is published the

[222] Arts. 6-18 Protocol of San Salvador.
[223] Art. 19(1), *Ibidem*.
[224] Art. 62 (1) ACHR, "A *state party* may [...] declare that it recognises as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court."
[225] Art. 19 (6) ACHR.
[226] Art. 44, *Ibidem*.
[227] Art. 46 *Ibidem*.

decision on a report, which is sent to the state and the petitioner. If the petition is admissible, it is registered as case and the proceedings on the merits shall be initiated.[228]

Furthermore, if it is necessary, the Commission may carry out an on-site investigation, for the effective conduct of which it shall request and the state concerned shall furnish all pertinent facilities.[229]

After the decision on the admissibility, the Commission establishes for the petitioners and then the state each a period of four months to submit additional observations on the merits.[230] After the decision on the merits, the IACHR shall prepare a report in which contains the examination of the arguments, the evidences by the parties and all the information acquired during the process. If there is no violation in a case, the Commission shall state the report on the merits, which will be transmitted to the parties and published and included in the Annual Report to the OAS General Assembly. [231] However, if it was found that the state is responsible for the violation(s), the IACHR will prepare a preliminary report with recommendations it deems pertinent with a deadline by which the state in question must report on the measures adopted to comply with the recommendations. [232] If the states fails to comply with the Commission's recommendations, it may either make its merits report public and continue to monitor compliance with recommendations or refer the case to the IACtHR[233], only if the state has accepted the Court's jurisdiction.[234]

In this sense, unlike the European Social Charter, the Protocol of San Salvador is part of the ACHR, the main instrument to protect human rights in the Americas. It means that in the IAHRS, part of the ESCR, *i.e.* rights of workers to organise and to join trade union and the right to education, as abovementioned, have the chance to be directly claimed, and even judged, by the most important organs responsible for the human rights compliance in this region.

[228] Art. 36 ACHR.
[229] Art. 39, *Ibidem.*
[230] Art. 37 (1), *Ibidem.*
[231] Art. 44 (1), *Ibidem.*
[232] Art. 44 (2), *Ibidem.*
[233] Arts. 45-47, IACHR's Rules of Procedures.
[234] Art. 62 (1) ACHR.

2.4 Conclusions

As discussed above, the European and Inter-American systems were pioneers with regard to the protection of human rights even before the official encouragement by the UN in creating regional systems. However, it is undeniable that the UN system was the crucial starting point to protect and defend ESCR as human rights and served as guidance to the regional systems. In light of this stream, both European and Inter-American systems decided to provide more attention to ESCR in their legal framework. Nonetheless, the ideal to provide justiciability to ESCR as CPR in their instruments was not really successful.

In the European system, under the CoE level, the ECHR, on the one hand, presents a very limited content in protecting only CPR with no single mention in order to extend the protection of ESCR. Even with the adoption of ESC as a counterpart to the ECHR, the former never gained the same importance due to the lack of enforceability of the ECSR's decisions in comparison with the ECthR's ones. On the other hand, the CFREU, under the EU level, although protects both ESCR and CPR, it establishes a very complex individual complaints procedure, which makes the justiciability of ESCR unrealistic.

Concerning the Inter-American system, under the OAS, it presents important legal instruments regarding the protection of ESCR, *i.e.* the OAS Charter, the ADRDM of the Rights and Duties of Man and the ACHR. The latter is the most important one, since it presents a clear structure for individual claims, is clearly legally binding to all state parties and, although it protects mainly CPR, it establishes a general article (Art. 26) to protect ESCR. Moreover, the ACHR has its Additional Protocol of San Salvador with the exclusive aim to extend the protection of ESCR.

Even with this wide protection of ESCR, the Inter-American system is not exempted of failures in providing justiciability to them. The indefiniteness of Art. 26 ACHR in conjunction with the restriction established under Art. 19 (6) of the Protocol of San Salvador create a complicated interpretation in what extend all ESCR are in fact justiciable.

Due to several problems in interpreting the contents of both systems' legal framework, the role of their responsible bodies becomes more crucial when the instruments are applied. The next Chapter, therefore, presents the challenges faced by these bodies in interpreting the legal instruments, through their decisions, in order to protect ESCR when they are violated and then claimed.

CHAPTER 3 - INCLUDING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE JUDICIAL PRACTICE OF THE EUROPEAN AND INTER-AMERICAN BODIES

3.1 Introduction

The previous chapter demonstrated the growing concern for protecting ESCR in the formal legal frameworks of both the European and the Inter-American human rights systems aiming at equating ECSR with CPR. However, the analysed instruments have certain limits regarding the justiciability of ESCR. Therefore, the interpretation and application of ESCR by the bodies in charge of monitoring states compliance with aforementioned rights and adjudicating alleged breaches of them is of crucial importance.

Thus, the main goal of this chapter is to present the most relevant arguments of the quasi-judicial and judicial bodies of Europe and Inter-America Courts in their decisions with regard to the protection of ESCR.

The aim, however, is not to identify whether state parties to the relevant instruments have protected and implemented ESCR. As has been pointed out, the focus is on the argumentation and strategies brought forward, in particular by the Courts, strengthening the direct or indirect protection of ESCR as has been reflected also in recent case law. This analysis therefore should provide for a framework or a roadmap for the justiciability of those ESCR that are protected by the legal framework but that are not considered justiciable yet. Still, specific ESCR and their implementation will be mentioned at some points, since these are correlated and sometimes essential to comprehend and reach the purpose of this work.

3.2 Protecting Economic, Social and Cultural Rights under the European System

Concerning the analysis of the European system, emphasis will be laid on the CoE level due to its importance for the protection of human rights in the region. Firstly, the analysis will be concentrated on the ECtHR's jurisprudence regarding the indirect

protection of ESCR. As a next step, the specific body in charge of protecting ESCR in the CoE system will be subject to analysis, namely the ECSR, analysing its collective complaints procedure and to which extent it uses the opportunity to provide direct protection of ESCR.

3.2.1 Economic, Social and Cultural Rights in the Jurisprudence of the European Court of Human Rights

As stated in the previous Chapter, the ECHR is a treaty established to protect explicitly CPR, although the rights to property and to education, which formally belong to the category of ESCR, are also reflected in this document. Therefore, only the latter rights are autonomously justiciable and, in case of alleged violations, the ECtHR has the competence to admit the claim and to adjudicate on the individual complaint.

Nonetheless, in some of its decisions, the ECtHR has demonstrated the urge to protect other ESCR as the ones not explicitly included in the ECHR. The ECHR has always been said to be a living instrument and through the interpretation of its articles the ECtHR in various cases on violations of CPR has included an indirect protection of certain ESCR.

One of the first leading cases on the indirect protection of ESCR under the CoE system was *Airey v. Ireland*[235] in 1979. In the application, first lodged to the Commission and then transferred to the Court, Mrs. Airey claimed that the Irish state failed to *inter alia* respect her right to a fair trial (Art 6 ECHR) in conjunction with the prohibition of discrimination (Art 14 ECHR) by not ensuring an accessible legal procedure in family-law matters that would allow her to petition for a decree of judicial separation from her husband who threatened her and their children.[236] Even though a corresponding procedure with the Irish High Court at its end was foreseen by the Irish law, due to her particular scarce financial situation, the claimant was "in the absence of

[235] ECtHR, *Airey v. Ireland*, App. No. 6289/73, Judgment of 9 October 1979.
[236] *Ibidem*, para. 15.

legal aid and not being in a financial position to meet herself the costs involved, to find a solicitor willing to act for her."[237]

The ECHR, in its Article 6 (3) (c)[238], protects the right to a fair trial and also the right to have free legal assistance, but only in cases of criminal offence. The Court however stated that "the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals"[239] in order to provide free legal assistance to the complaint for the dispute relating to her civil rights.[240] Indeed, already in *Tyrer v. the United Kingdom*[241] the Court stated that "the Convention is a living instrument which […] must be interpreted in the light of present-day conditions."[242]

Finally, in *Airey v. Ireland*, the Court affirmed that "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers […] that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention".[243]

Thus the ECtHR implicitly touched upon the indivisibility and interdependence of all human rights as first declared by the 1968 Proclamation of Teheran and later on confirmed by the 1993 Vienna World Conference on Human Rights.[244] According to Scheinin, the ECtHR thereby developed the so-called "integrated approach" allowing it to consider and thereby protect ESCR when dealing with breaches of CPR.[245] Therefore the fair trial clause in *Airey v. Ireland* was "the starting-point for the most important interpretations that give protection to some economic and social rights."[246]

Another strategy developed by the ECtHR was to derive positive state obligations with regard to ESCR from CPR as enshrined in the ECHR. Primarily, the ECtHR based

[237] ECtHR, *Airey v. Ireland*, para. 9.
[238] Art. 6 (3) (c) ECHR.
[239] ECtHR, *Airey v. Ireland*, para. 26.
[240] *Ibidem.*
[241] ECtHR, *Tyrer v. The United Kingdom,* App. 5856/72, Judgment of 25 April 1978.
[242] *Ibidem*, para. 31.
[243] ECtHR, *Airey v. Ireland*, para. 26.
[244] *See* Chapter 2, *subtitle 2.2.*
[245] Scheinin, 2001, p.32.
[246] *Ibidem*, p.34.

this indirect protection on the right to respect for private and family life, Art. 8 ECHR, establishing that "[e]veryone has the right to respect for his private and family life, his home and his correspondence" and that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society […]."[247] In *Lopez Ostra v. Spain*[248], the applicant Mrs. Lopez Ostra alleged that Spain has violated Art. 8 ECHR and Art. 3 ECHR[249] since it failed to take appropriate measures against the smell, noise and contaminating smokes originating from a solid and liquid waste treatment plant located a few meters away from the claimant's home.[250]

The ECtHR concluded that Spain failed to find a "fair balance […] between the competing interests of the individual and of the community as a whole, and in any case the *state* enjoys a certain margin of appreciation [resulting in] health problems to many locals" [251] besides environmental ones.[252] The Court found Spain in violation of Art. 8 ECHR since serious pollution can impact an individual's well-being and prevent him or her from enjoying his or her home in such a way that his or her private and family life is damaged. The Court however held that the conditions suffered did not amount to degrading treatment as stated in Art. 3 ECHR.

López Ostra v. Spain is a casebook example for the integrated approach adopted by the ECtHR and the interdependence and indivisibility of all human rights as the protection of Art. 8 ECHR, a clear cut civil right enshrined in the ECHR was relatedto two ESCR namely the right to a healthy environment and the right to health. And regardless of the fact that the ECHR "contains neither a right to health nor a right to environment, cases have been brought for injury due to pollution, invoking the right to life (Art. 2) and […] the right to privacy and family life (Art. 8)." [253]

Ten years later, the ECtHR uphold its line of reasoning in *Taşkin v. Turkey*[254]. The applicants of whom one died during the process alleged that the operating permits

[247] Art. 8 ECHR.
[248] ECtHR, *López Ostra v. Spain*, App. 16798/90, Judgment of 09 December 1994.
[249] Art. 3 ECHR.
[250] ECtHR, *López Ostra v. Spain*, paras. 7-14.
[251] *Ibidem*, paras. 51-53.
[252] *Ibidem*, paras. 44-60.
[253] Shelton, 2008, p. 203.
[254] ECtHR, *Taşkin v. Turkey,* App. 46117/99, Judgment of 30 March 2005.

issued for a gold mine and the related decision-making process had violated Art. 8 in conjunction with Art. 2 ECHR, the right to life.[255] They argued that as a result of the "gold mine's development and operation, they had suffered and continued to suffer the effects of environmental damage; specifically, these include the movement of people and noise pollution caused by the use of machinery and explosives.[256]

In its decision the Court affirmed its reasoning of *López Ostra v. Spain* and repeated that "Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.[257]

In *Powell v. the United Kingdom*[258] the Court dealt specifically with the right to health. The applicants alleged that their son had died of a disease, "which is potentially fatal if untreated, but which is susceptible to treatment if diagnosed in time."[259] Although the Court considered the application inadmissible[260], it hold that the first sentence of Art. 2 ECHR, "everyone's right to life shall be protected by law"[261], orders states "not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".[262] Thereby the ECtHR highlighted that acts and omissions of the authorities in the field of health care policy cannot be ruled out and may enact "their responsibility under the positive limb of Article 2. However, where a Contracting *state* has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting *state* to

[255] ECtHR, *Taşkin v. Turkey*, paras. 2-4.
[256] *Ibidem*, para. 13.
[257] *Ibidem*.
[258] ECtHR, *Powell v. the United Kingdom*, App. 45305/99, Admissibility of 4 May 2000.
[259] *Ibidem*, Part A.
[260] *Ibidem*, Para. 5
[261] Art. 2 ECHR.
[262] ECtHR, *Powell v. the United Kingdom*, para. 1.

account from the standpoint of its positive obligations under Article 2 of the Convention to protect life".[263]

The Court's strategy thus clearly reinforces the positive aspects of CPR in order to protect ESCR. In this particular case, it requires a positive action stemming from the right to life with the aim to encompass and thereby also protect the right to health.

Even though the Court in few occasion used the opportunity to connect claims with regard to health and health care measures with rights enshrined in the ECHR, due to the poor prospects of success of being recognized under the ECHR, such claims remain rather an exception as has been also observed by Koch.[264]

Next to the right to health also the right to housing has been invoked in front of the ECtHR. In the admissibility decision *Marzari v. Italy*[265] the ECtHR endeavored to connect the right to housing with Art. 8 ECHR, the right to respect for family and private life.

The applicant suffered serious diseases and alleged that "the local administrative authorities have evicted him and failed to provide him with accommodation adequate to his illness."[266]

The Court considered that although the right to housing was not an integral part of Art. 8 ECHR "a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual."[267]

The broader interpretation of Art. 8 ECHR by the ECtHR includes that – even though there is the negative undertaking related to the *state*'s abstention – "there may be positive obligations inherent in effective respect for private life. A *state* has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life."[268]

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[263] ECtHR, *Powell v. the United Kingdom*, para. 1.
[264] Koch, 2009, p. 61.
[265] ECtHR, *Marzari v. Italy*, App. 36448/97, Admissibility of 4 May 1999.
[266] *Ibidem*, para. 1.
[267] *Ibidem*, para. 2.
[268] ECtHR, *Powell v. the United Kingdom*, para. 2.

Again the Court has derived positive obligations from a provision primarily enshrining negative ones. Therefore, negative obligations inherent to in particular CPR, *i.e.* the non-interference of the state in the individual's rights, do not exclude positive obligations that might arise out of the same objective namely the protection of the individual. In the aforementioned case, in order to ensure the right to housing positive obligations have to be fulfilled by the state in order to protect the individual.

Another point of contact for deriving positive from a negative state obligation could be found in the right to property as enshrined in Art. 1 Protocol 1 ECHR.[269]The right to property *per se* does however not provide for a link to the right to housing under all circumstances. Generally, the right to property deals only with already purchased property and is not directed at obtaining property. [270] Therefore, to derive a positive obligation from it might only be possible under very specific circumstances.

Regarding specifically cultural rights, the ECtHR also dealt with some cases, such as the access to culture and linguistic rights. The Court stated that "although the European Convention does not explicitly protect cultural rights as such […], the Court, through a dynamic interpretation of the different Articles of the Convention, has gradually recognised substantive rights which may fall under the notion of '*cultural rights*' in a broad sense."[271]

In *Khurshid Mustafa and Tarzibachi v. Sweden*[272] which concerned the evictions of tenants on account of their refusal to remove a satellite dish that enabled them to receive television programmes in Arabic and Farsi from their country of origin (Iraq)[273], the Court adopted a broad approach to Art. 10 ECHR (freedom of expression)[274] reflecting this gradual recognition of cultural rights inherent in certain substantial rights.

Relying on Art. 10 ECHR, the applicants alleged that their freedom to receive information had been violated because "the restrictions imposed on them either had not been prescribed by law or had been more far-reaching than necessary in a democratic

[269] Art. 1 Protocol 1 ECHR.
[270] Koch, 2009, p. 114.
[271] ECtHR, Research Division, Cultural right in the case-law of the European Court of Human Rights, 2011, p. 4.
[272] ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, App. 23883/06, Judgment of 16 March 2009.
[273] *Ibidem*, para. 44.
[274] Art. 10 ECHR.

society."[275] Furthermore, it was claimed that the consequences, *i.e.* the eviction from their flat and the move to another town, had been disproportionate to the aims pursued.[276]

According to the Court, the protection of the freedom to receive information as part of Art. 10 ECHR was crucial since the wish to maintain contact with the culture and the language of the country of origin in particular for an immigrant family with three children was not to be underestimated.[277] The ECtHR further stated that, "even if a certain margin of appreciation is afforded to the national authorities, the interference with the applicants' right to freedom of information was not 'necessary in a democratic society' and that the respondent *state* failed in its positive obligation to protect that right. There has accordingly been a violation of Art. 10 of the Convention."[278]

In a more recent case, *X et al. v. Austria*[279], the protection of the interest of the child was discussed in relation to Art. 14 (prohibition of discrimination)[280] in conjunction with Art. 8 ECHR. The case concerned the prohibition of second-parent adoptions for same-sex couples whereas this was legally allowed for married or unmarried heterosexual couples. The applicants argued that there was an unjustified distinction drawn between different-sex and same-sex couples amounting to discrimination on account of their sexual orientation as prohibited under Art. 14 ECHR having severe implications on their private life as protected under Art. 8 ECHR.[281] Based on the aforementioned articles the ECtHR made an effort to indirectly protect the child who was about to be adopted. International treaties that specifically enshrine ESCR do have specific provisions related to the protection of children's rights, such as the UN ICESCR[282], the Additional Protocol of San Salvador to the ACHR[283] and the ESC.[284] Even though the ECHR does not concretely mention the rights of children, the Court included in its reasoning the UN Convention on the Rights of the Child and the

[275] ECtHR*, Khurshid Mustafa and Tarzibachi v. Sweden*, para. 25.
[276] *Ibidem*.
[277] *Ibidem,* para. 44.
[278] *Ibidem*, para. 50.
[279] ECtHR, *X et al. v. Austria*, App. 19010/07, Judgment of 19 February 2013.
[280] Art. 14 ECHR.
[281] ECtHR, *X et al. v. Austria*, para. 58.
[282] *E.g.*, Art. 10 (3) ICESCR.
[283] *E.g.*, Art. 16 Protocol of San Salvador.
[284] *E.g.*, Art. 7 ESC.

European Convention on the Adoption of the Children.[285] The Court argued again that the ECHR is a "living instrument, to be interpreted in present-day conditions".[286] Accordingly, the Court decided that there was a violation of Article 14 in conjunction with Article 8 of the ECHR in comparison to the situation of unmarried different-sex couples in which one partner wishes to adopt the other partner's child.[287] The Court indeed showed its awareness that "the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things."[288] Still, according to the Court, Austria failed to demonstrate reasonable arguments to exclude the possibility of a child's adoption by a "second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, to be necessary for the protection of the family in the traditional sense or for the protection of the interests of the child." [289]

Besides the concern about the indirect protection of the child's interest under the ECHR, another relevant aspect in this case was the brief consideration regarding the interpretation of the ECHR as a living instrument, as aforementioned. In a dissenting opinion seven of the judges questioned exactly this point and raised the question on the limits of the evolutive interpretation in light of "present-day-conditions".[290] They state that "[…] since its judgment in *Tyrer v. the United Kingdom* the Court has frequently reiterated that the Convention is a living instrument which must be interpreted 'in the light of present-day conditions' […]. In other words, the point of the evolutive interpretation, as conceived by the Court, is to accompany and even channel change […]; it is not to anticipate change, still less to try to impose it. Without in any way ruling out the possibility that the situation in Europe in the future will evolve in the direction apparently wished for by the majority, this does not seem to be the case, as we have seen, at present. We therefore believe that the majority went beyond the usual limits of the evolutive method of interpretation."[291]

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[285] ECtHR, *X et al. v. Austria*, para. 49-53.
[286] *Ibidem*, para. 139.
[287] *Ibidem*, para. 153.
[288] *Ibidem*, para. 151.
[289] *Ibidem*.
[290] ECtHR, *X et al. v. Austria*, Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano And Sicilianos, para. 23.
[291] ECtHR, Joint Partly Dissenting Opinion of Judges Casadevall […], para. 23.

Albeit the judges did not explicitly refer to the implicit inclusion of ESCR in the jurisprudence of the Court, they still made a reasonable point with regard to the limits of the ECHR's evolutive interpretation which in the future might also have impacts on ESCR. In fact, there is a lack of discussion among the judges regarding this issue. What has been established more than two decades ago – namely that the Court, via an evolutive interpretation of the ECHR, shapes the general understanding of the latter – has been reiterated and reflected in the current case law without new discussions to be started on the extent of this concept. The question on the methods of interpretation is pertinent. Still, in their dissenting opinion the judges missed an opportunity to take on the issue in order to improve the coherence of the methods of interpretation of the ECHR, which might influence as well the indirect protection of ESCR in the jurisprudence of the ECtHR.

Undeniably, efforts have been made to find a way to protect some ESCR even in an indirect way under the ECHR. However it is striking that, when comparing the case law over the years, no remarkable evolution in the arguments promoted by the ECtHR in order to protect ESCR can be noticed. Due to the limited content of the ECHR, the ECtHR cannot promote direct justiciability of ESCR, besides all its efforts made to interpret the Convention in this way.

Therefore, as a next step the specific body in charge of protecting ESCR in the CoE system will be subject to analysis, namely the ECSR its collective complaints procedure and to which extent it uses the opportunity to provide direct protection of ESCR. As has been discussed in the previous chapter the collective complaint procedure has been introduced to improve the enforcement of ESCR in the European system. Even though the decisions of the Committee are not legally binding and the procedure is limited to a collective complaint procedure, *i.e.* individual victims of a violation cannot lodge a claim directly with the Committee, the interpretation of ECSR by the Committee deserves specific attention.

3.2.2 Economic, Social and Cultural Rights in the Decisions of the European Committee of Social Rights

Albeit the collective complaint mechanism has several limitations as has been already analysed above, "it has already proved its worth, to judge from the number of complaints that have been submitted from a limited number of possible complainants, the variety of the subject matter of the complaints, the contribution of some of the Committee's decisions to the substance of international human rights law and the precedent that they set an example of a workable international system for the consideration of complaints concerning economic, social and cultural rights."[292]

The most important aspect to be analysed though is the interpretation and of the ESC by the ECSR and the progressive developments it has made thereby establishing essential rules for the understanding and protection of ESCR. The same way the ESC was meant to complement the ECHR with regard to ESCR, the Committee's interpretations mean to complete the relevant rules established by the Court's jurisprudence as analysed above.

In *International Commission of Jurists (ICJ) against Portugal*[293], the applicant requested the Committee to declare that Portugal violated Article 7 (1) ESC[294] due to its failure to take all necessary measures to ensure that no children under 15 were working under poor conditions that affecting their health as it was the case in particular in the northern part of Portugal.[295]

The importance of this decision *inter alia* concerns the effective protection of ESCR under the ESC and the approach adopted by the ECSR in this regard. Portugal in its submission heavily referred to all the international commitments it has made with regard to the prohibition of child labour and the comprehensive national legislative framework it has adopted and the supervision mechanism it has established.[296] The ECSR in its decision very frankly stated that the Charter as a human rights instrument

[292] Harris, 2009, p. 5.
[293] ECSR, *International Commission of Jurists (ICJ) against Portugal*, Complaint No. 1/998, Decision of 9 September 1998.
[294] Art. 7(1) ESC.
[295] ECSR, *ICJ against Portugal*, para. 6.
[296] *Ibidem,* paras. 8-18.

has the aim and purpose "to protect rights not merely theoretically, but also in fact."[297] It continued and considered "that the satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised."[298] This approach underlines that the scope of the ESC requires the effective protection of ESCR and is thereby in line with the ECtHR's interpretation of the ECHR.[299]

International Federation of Human Rights (FIDH) against France[300] raised another important issue regarding the interpretation of the Charter setting forth that the Committee has to interpret it in good faith[301] according to the 1969 Vienna Convention on the Law of Treaties.[302]

In this case, the FIDH alleged that France had violated the right to medical assistance as enshrined in Art. 13 ESC (revised)[303] , by ending the exemption that illegal immigrants, with very low incomes were relieved from charges for medical and hospital treatment. The ECSR was furthermore asked to rule that the rights of children to protection as enshrined in Art. 17 ESC (revised) [304] were violated by a legislative reform restricting access to medical services for children of illegal immigrants.[305]

In its decision, the Committee confirmed that the ESC complements the ECHR and has also to be seen as a "living instrument". It is further an instrument "dedicated to certain values, such as dignity, autonomy, equality and solidarity" and its "rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention on Human Rights". [306]

Even though only a violation of Art. 17 and not Art. 13 ESC (revised) was determined by the ECSR, it also wisely reinforced the common features inherent to all human rights, *i.e.* their character as being universal, indivisible and interdependent and

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[297] ECSR, *ICJ against Portugal*, para 32.
[298] *Ibidem*.
[299] Koch, 2009, pp. 292-293.
[300] ECSR, *International Federation of Human Rights Leagues (FIDH) against France*, Complaint 14/2003, Decision of 08 September 2004.
[301] ECSR, *FIDH against France,* para. 26.
[302] Art. 31§1 Vienna Convention on the Law of Treaties.
[303] Art. 13 revised ESC.
[304] Art. 17, *Ibidem*.
[305] ECSR, *FIDH against France*, para. 16-22.
[306] *Ibidem*, para. 27

interrelated as confirmed by the 1993 VDPA as has already been mentioned.[307] The Committee in its approach appears to be very conscious about the complex interaction between the two sets of rights. And the Charter must be interpreted accordingly in order to give life and meaning to fundamental social rights. It follows *inter alia* that restrictions on rights have to be made in a rather restrictive way, *i.e.* the essence of the right has always to be preserved in order that the overall purpose of the Charter can be fulfilled.[308]

In this decision, the Committee provided a broad and comprehensive interpretation of the Charter regarding illegal immigrants and children's protection. Besides the recognition of the Charter as a living instrument in line with the ECtHR understanding of the ECHR, the Committee in particular recognised the connection between and interrelatedness of the ESC and other international human rights treaties, in this case the Convention on the Rights of the Child.[309]

In a more recent decision, *Defence for Children International (DCI) v. Belgium*[310], the ECSR reiterated this interpretation. The case concerned the *de facto* exclusion of unaccompanied foreign minors and illegally resident accompanied foreign minors from social assistance in Belgium. Even though they would be formally eligible for the latter, it was alleged that this situation would amount to a violation of Arts. 7, 11[311], 13, 16[312], 17 and 30[313] ESC (revised).[314] Except for Arts. 30 (not applicable) and 13 ESC (revised), the Committee agreed with the complainants and found a breach of the Charter.[315]

The Committee reiterated and enlarged the interpretation of the ESC in stating it is a human rights treaty which aims to implement the rights guaranteed to all human beings by the 1948 UN UDHR; it is a living instrument and the "teleological approach should be adopted when interpreting the Charter, *i.e.* it is necessary to seek the interpretation of the treaty that is most appropriate in order to realise the aim and

[307] ECSR, *FIDH against France*, para. 28.
[308] *Ibidem*, para. 29.
[309] *Ibidem*, para. 36.
[310] *Ibidem*, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, Decision of 23 October 2012.
[311] Art. 11 revised ESC.
[312] Art. 16, *Ibidem.*
[313] Art. 30, *Ibidem*.
[314] ECSR, *DCI v. Belgium*, para. 40.
[315] *Ibidem*, para. 152.

achieve the object of this treaty, not that which would restrict the *parties*' obligations to the greatest possible degree."[316]

This broad interpretation extended the scope of the Charter and its provisions, in this case the right to health and to social assistance, beyond the requirement of a legal status. Besides, what can be seen from the Committee's argumentation, it maintained the nearly 15 years ago firstly applied integrated approach and the consideration of the ESC as a living instrument. With regard to the former, the integrated approach applied includes a contextual element by taking into account other relevant international human rights treaties.[317] Similar to the approach taken by the ECtHR, the adherence to the well-established principle of the Charter as a living instrument reflects the objective of an effective human rights protection under the Charter. Still, discussions with regard to the limitations of this approach are also lacking among members of the Committee.

The complaints procedure has given the ECSR a voice to develop its arguments and opinion regarding other aspects of ESCR further. For instance, in the already mentioned case *DCI v. Belgium*, even though the ECSR did not consider Art. 30 (protection against poverty and social exclusion) as applicable to the case, it still declared that "living in poverty and suffering social exclusion obviously undermine human dignity" and that positive measures entailing economic, social and cultural promotion are required of *states* under a series of Charter provisions.[318]

The necessity of adequate positive measures for the realisation of the Charter's provisions was confirmed with a comparable line of reasoning in *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*[319], concerning the suspension of family allowances in the event of truancy from school by their children, which is a measure applied in France under domestic acts.[320]

The complainants asked the Committee to find violation of the following articles of the ESC (revised): a) Art. 16 (right of the family to social, legal and economic protection), since the right to family allowances should not be part of a conditional

[316] ECSR, *DCI v. Belgium*, para. 30.
[317] Koch, 2009, p. 300.
[318] ECSR, *DCI v. Belgium*, para. 145.
[319] ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 82/2012, Decision of 19 March 2013.
[320] *Ibidem,* para. 2.

arrangement; b) Arts. E (non-discrimination)[321] read in conjunction with 16, since only families receiving family allowances are affected and, when the measure is applied, all the siblings in the family are penalised; c) Art. 30 (right to protection against poverty and social exclusion), since families suffering or at risk of suffering poverty are affected; d) Arts. E read in conjunction with 30, since "families are treated unequally according to their stock of intellectual knowledge and their interpersonal skills. Some families without difficulties will be entirely capable of finding and giving legitimate reasons or valid excuses for the absence of their child whereas others, encountering language or literacy problems or failing to master the means of contacting the school, will be incapable of doing so, making them much more prone to economic sanctions." [322]

Even though the Committee has not found a violation of the mentioned articles, as a result of the abrogation of the contested measures by one of the domestic acts[323], it confirmed again that the protection against poverty and social exclusion will be just effective if the parties would "take measures to promote and remove obstacles to access to fundamental social rights, in particular employment, housing, training, education, culture and social and medical assistance."[324] Furthermore, "as long as poverty and social exclusion persist, alongside the measures there should also be an increase in the resources deployed to make social rights possible."[325]

Contrarily to the ECtHR the Committee therefore took the chance to discuss in-depth the issues and problems that surround the protection and implementation of ESCR. The issue of allocating financial resources for the realisation of ESCR was taken earlier in *Autism-Europe against France.*[326]

In this case, it was claimed that France failed to provide sufficient education to adults and children with autism constituting a violation of Arts. 15(1)[327] and 17(1)[328] of

[321] Art. E, revised ESC.
[322] ECSR, *EUROCEF v. France,* para. 8.
[323] *Ibidem,* para. 46.
[324] *Ibidem,* para. 56.
[325] *Ibidem,* para. 57.
[326] ECSR, *Autism-Europe against France*, Complaint No. 13/2002 , Decision of 4 November 2003.
[327] Art. 15 revised ESC.
[328] Art. 17(1) revised ESC.

the ESC (revised). The Committee found a violation of these articles and agreed with the complainants.[329]

Moreover, and in line with previous decisions, it affirmed that the implementation of the Charter requires the state not only to take legal but also practical action in order to give full effect to the rights recognised in the Charter.[330] Additionally, it went to the heart of the discussion on the protection and justiciability of ESCR by taking on the costs and the progressive realisation requirement.[331] It stated "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a *state party* must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources."[332]

This decision is certainly a precedent for the Committee interpreting the Charter beyond its content in particular of importance for the financial scarce resources of states to for the implementation of ESCR. In recent complaints against Greece, all the complainants reiterated exactly the same content when alleging that the *state* "has failed to make maximum use of available resources."[333]

It is however important to note that the Committee raised the issue of the cost of ESCR, which, as discussed, do not involve obligations that are less expensive than those required of *states* to achieve and enforce legislation in respect of CPR. Thereby the ECSR confirms the approach adopted by the UN CESCR in General Comment No. 3. Still it broadens the ESC content, since the latter does not indicate that states should take measures to the maximum of their available resources.[334]

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[329] ECSR, *Autism-Europe against France*, para. 54.
[330] *Ibidem*, para. 53.
[331] *See* Chapter 2, *subtitle 2.4.3*
[332] ECSR, *Autism-Europe against France*, para. 53.
[333] ECSR, *Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece,* Complaint No. 76/2012, Admissibility of 23 May 2012, para. 1; *Panhellenic Federation of Public Service Pensioners v. Greece*, Complaint No. 77/2012, Admissibility of 23 May 2012, para. 1; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, Complaint No. 78/2012, Admissibility of 23 May 2012, para. 1; *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece*, Complaint No. 79/2012, Admissibility of 23 May 2012, para. 1; and *Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece,* Complaint No. 80/2012, Admissibility of 23 May 2012, para. 1.
[334] *See* Chapter 1, *section 1.4.3.*

It is notable that the Committee, in conjunction with its collective complaint procedure, has developed an approach to interpreting ECSR in light of the character of the Charter as a human rights instrument.[335] Beyond doubt, the complaint mechanism as established provides for the possibility to adjudicate ESCR before an international monitoring body.[336]

Whereas the judgments of the ECtHR are legally binding and their implementation monitored by the Committee of Minister, the lack of enforceability of the ECSR's decisions remains the main disadvantage of the system and for the justiciability of ESCR at the CoE level.

3.3 Protecting Economic, Social and Cultural Rights under the Inter-American System

As has been analysed in Chapter 3, the legal human rights framework of the Inter-American human rights system includes different mechanism in order to ensure the protection of human rights including ESCR and their enforceability and justiciability. As everywhere, in particular individual complaint mechanism allow for, first, an effective remedy against the violation of human rights of an individual or of a group and second, for a just compensation for the violation suffered. Thirdly, individual complaint mechanism plays a crucial role for the prevention of future human rights violations on the same accounts. Under the IAHRS, according to the ACHR, it is the IACHR and the IACtHR that can receive/analyse and judge complaints.

3.3.1 Economic, Social and Cultural Rights in the Jurisprudence of the Inter-American Court of Human Rights

As has been pointed out in the previous Chapter, the Additional Protocol of San Salvador to the ACHR is the main document with regard to the protection of ESCR in the Inter-American human rights protection legal framework. Still, due to the limitation

[335] Harris, 2009, p.24.
[336] *Ibidem*.

that only the right to education and the right to form and join trade unions can be subject to individual petitions, the Protocol cannot be considered sufficiently developed instrument for guaranteeing the justiciability of ESCR. It is not surprising therefore that because of these restrictions no legal practice or jurisprudence has evolved so far.[337]

Still, that does not mean that no case law has developed in the IAHRS, with regard to ESCR. Most cases, as will be described subsequently, are based either on Art. 26 ACHR, related to the adoption of progressive measures by the *state*[338], or on the indivisibility, interdependence and integrality of human rights. These points mean that the Convention must be interpreted always in the most favorable way for the protection of the rights enshrined, without excluding or limiting the effects of provision of the Convention *per se* or of other corresponding and relevant international acts in force.[339]

The IACtHR in its jurisprudence, following in this respect the ECtHR, considers human rights treaties as "living instruments whose interpretation must consider the changes over time and present-day conditions".[340]

In *Villagrán Morales v. Guatemala*[341], concerning the torture and slaughter of five street children by two national police men, the IACtHR illustrated the living instrument approach. It considered that the right to life cannot be understood narrowly, since it would not only include a negative dimension – *i.e.* the right not to be arbitrarily deprived of life - but also a positive one requiring the state to take appropriate positive measures to protect the right to a dignified life. By stating that "*states* have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it"[342] the Court opened the field for the protection of ESCR under the IARHS.

The Court's reiterated and broadened its argumentation in further decisions, as for instance in *Indigenous Community Yakye Axa v. Paraguay*.[343] The complaint concerned

[337] Saul, Kinley, Mowbray, 2014, p. 390.
[338] See Chapter 3*, subtitle 3.3.1*
[339] Art. 29 (d) ACHR.
[340] IACtHR, The right to information on consular assistance in the framework of the guarantees of the due process of law. Advisory Opinion 16/99 of 1 October 1999, para. 114.
[341] IACtHR, *Villagran Morales et al. v. Guatemala (Case of the "Street Children")*, Judgment of 19 November 1999.
[342] *Ibidem*, para. 144.
[343] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005.

the alleged failure of Paraguay to acknowledge indigenous communities' property rights over ancestral land. The IACtHR ruled that Paraguay had failed to adopt necessary positive measures to ensure that the community lived under dignified conditions during a period in which they have been without territory.[344]

Furthermore, the Court reaffirmed its wide interpretation of the right to life taking into account health (Art. 10)[345], education (Art. 13)[346] and food (Art. 12)[347] standards as set forth in the Protocol of San Salvador.[348] Additionally, in order to protect the ESCR mentioned in an indirect way the Court reaffirmed the living instrument aspect of the Convention, took into account the relevant General Comments by the UN CESCR and concluded that "in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water."[349]

Art. 26 ACHR has been subject to further interpretation in various other cases in which the Court referred to the duty of states to take positive measures in order to fulfill ESCR. In *Five Pensioners v. Peru*[350], a group of retired citizens filed a petition against Peru before the IACHR, which subsequently referred the case to the IACtHR claiming a violation of the right to private property (Art. 21 ACHR)[351] and to judicial protection (Art. 25 ACHR)[352]. The Commission furthermore claimed a violation of the obligation to ensure the progressive realisation of ESCR, since Peru had adopted regressive measures reducing the pensions of the petitioners. "The obligation established in Article 26 of the Convention implies that the *states* may not adopt regressive measures in relation to the level of development achieved; although, in exceptional circumstances and by analogous application of Article 5 of the Protocol of San Salvador, laws that impose restrictions and limitations on economic, social and cultural rights may be justified, provided that they have been 'promulgated in order to preserve the general

[344] IACtHR, *Yakye Axa Indigenous Community v. Paraguay,* para. 168.
[345] Art. 10 Protocol of San Salvador.
[346] Art. 13, *Ibidem*.
[347] Art. 12, *Ibidem*.
[348] IACtHR, *Yakye Axa Indigenous Community v. Paraguay,* para 158.
[349] *Ibidem*.
[350] IACtHR, *Five Pensioners v. Peru*, Judgment of 28 February 2003.
[351] Art. 21 ACHR.
[352] Art. 25, *Ibidem*.

welfare in a democratic society and only to the extent that they are not incompatible with the purpose and reason underlying those rights.'"[353] Since the regressive measures by Peru did not seem to be justified, the IACHR maintained its allegation before the Court.[354]

It was the first time the IACHR asked the Court to declare a violation of Art. 26 ACHR. Still, the Court did not follow the submission of the Commission arguing that the right to social security had not been violated on a general basis, but only with regard to a certain group of persons. It stated that "Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development […] should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation. It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case."[355]

The case illustrates a very limited interpretation of the obligation to progressively realise ESCR. Interesting points to the discussion on Art. 26 ACHR were added by judge Roux-Rengifo in his reasoned opinion.[356] He generally agreed with the Court on the non- violation of Art. 26 ACHR but followed a different line of reasoning. He declared that "the reference to the fact that the five victims in this case are not representative of most Peruvian pensioners is pertinent – they are not, in view of both their number and the amount of the pensions they have received."[357] Nevertheless, "the reasoning according to which only *state* actions that affect the entire population could be submitted to the test of Article 26 does not appear to have a basis in the Convention, among other reasons because, contrary to the Commission, the Inter-American Court cannot monitor the general situation of human rights, whether they be civil and political,

[353] IACtHR, *Five Pensioners v. Peru*, para. 142 (b).
[354] *Ibidem*, para. 142 (c).
[355] IACtHR, *Five Pensioners v. Peru*, paras. 147 -148.
[356] IACtHR, *Five Pensioners v. Peru*, reasoned opinion of judge de Roux-Rengifo, p.1.
[357] *Ibidem,* p. 4.

or economic, social and cultural. The Court can only act when the human rights of specific persons are violated, and the Convention does not require that there should be a specific number of such persons."[358]

Contrarily, judge Sergio García Ramírez, with his reasoned concurring opinion[359], contributed to explain the cases involving ESCR as well as their relation to CPR, their progressive realisation and their justiciability under the IAHRS. In his opinion, even though the Court has already dealt with ESCR through cases related to CPR it "has not yet had the opportunity to fully broach the […] issue itself; neither has it been able to rule on the meaning of the so-called progressive development of economic, social and cultural rights provided for in Article 26 of the Convention and embodied in the Protocol of San Salvador."[360] Moreover, by referring to the Court's explicit reference to the individual and collective dimension of ESCR, he importantly observed that "the issue is not reduced to the mere existence of a *state* duty that should orient its tasks as established by this obligation, considering individuals as mere witnesses waiting for the *state* to comply with its obligation under the Convention. The Convention is a body of rules on human rights precisely, and not just on general *state* obligations. The existence of an individual dimension to the rights supports the so-called 'justiciable nature' of the latter, which has advanced at the national level and has a broad horizon at the international level."[361]

In *Girls Yean and Bosico v. Dominican Republic*[362], a violation of the rights to nationality and education of girls of Haitian descent born in the Dominican Republic was alleged. In fact, the claim for a right to nationality was a way to recognise civil and political rights and also an obligation to respect the right to non-discrimination regarding the girls. The Court emphasised the *states*' duty to progressively realise ESCR and based its decision also on the Protocol of San Salvador in order to ensure the right to education, in particular due to the girls' vulnerability."It is worth noting that, according to the child's right to special protection […] interpreted in light of […] the Additional Protocol to the American Convention on Human Rights in the Area of

[358] IACtHR, *Five Pensioners v. Peru*, reasoned opinion of judge de Roux-Rengifo, p.1.
[359] IACtHR, *Five Pensioners v. Peru*, reasoned concurring opinion of judge Sergio García Ramírez.
[360] *Ibidem*, p.3.
[361] *Ibidem.*
[362] IACtHR, *Girls Yean and Bosico v. Dominican Republic*, Judgment of 08 November 2005.

Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the *state* must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development."[363] Thereby, the Court subsumed the right to education under Art. 26 ACHR.[364]

Besides its importance for the progressive measures approach, this case is also a precedent since it was one of the first cases related to violations of the right to education where the Court ruled that the child's background was not decisive for the latter's enjoyment. Moreover, the right to nationality was recognised as means to enjoy other rights.[365]

Pursuing this reasoning line, in *Dismissed Congressional Employees v. Peru*[366], it was claimed that Peru violated Art. 26 ACHR when it arbitrarily dismissed a group of 257 employees. The Court declared that Peru violated the right to a fair trial (Art. 8(1) ACHR)[367] and the right to judicial protection (Art. 25 ACHR). Although recognised that the violation of these provisions might affect other rights inherent in labor relations, the Court did not find a violation of Art. 26 ACHR.[368] In a separate opinion, judge Cançado Trindade pointed out his dissatisfaction regarding the Court's decision on Art. 26 ACHR, clarifying that "all human rights, even economic, social and cultural rights, are promptly and immediately demandable and justiciable, once the interrelation and indivisibility of all human rights are affirmed at both the doctrinal and the operational levels – in other words, both in legal writings and in hermeneutics and the application of human rights". [369]

Despite judge Cançado Trindade's clear affirmation that ESCR are justiciable, *Albán Cornejo v. Ecuador*[370] again proofed differently when it came to the autonomous justiciability of ESCR. The case concerned the death of a person after having been

[363] IACtHR, *Girls Yean and Bosico v. Dominican Republic*, para. 185.
[364] *Ibidem*, para 115 (b).
[365] *Ibidem*, para. 185.
[366] IACtHR, *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment of 24 November 2006.
[367] ACHR, Art. 8(1).
[368] IACtHR, *Aguado-Alfaro et al. v. Peru,* para. 136.
[369] IACtHR, *Aguado-Alfaro et al. v. Peru*, separate opinion of Judge Antonio Augusto Cançado Trindade, p. 3.
[370] IACtHR, *Albán-Cornejo et al. v. Ecuador*, Judgment of 22 November 2007.

medically neglected in a private hospital. The Commission referred that Ecuador has not ensured effective access to a fair trial and judicial protection for the applicant and, for this reason, it requested the Court to declare the *state* to be responsible for having violated the rights enshrined in Arts. 8 (right to a fair trial) and 25 (right to judicial protection), in relation to Arts. 1 (1) (obligation to respect rights)[371] and 2 (domestic legal effects)[372], all of ACHR.[373] Moreover, the representatives claimed the violation of Arts. 4 (right to life), 5 (right to humane treatment), 13 (freedom of thought and expression) and 17 (rights of the famity), all of ACHR.[374]

The Court acknowledged that Ecuador violated the articles abovementioned.[375] Judge García Ramírez, in his separate opinion, exposed that the Court, "once again reflected on the protection of life and integrity, both of which translate into health care, as a right of individuals, and the duty to provide such care through different means, as an obligation of the *state*."[376] It means that the Court did not base its decision on the right to health, which genuinely belongs to ESCR. Even though the right to health was implicitly protected through the protection of CPR, the case demonstrates the lack of justiciability of ECSR pursuant to the Court's interpretation.

Judge García Ramírez, stated that "so far, the protection of health is not a readily actionable right under the Protocol of San Salvador. However, this issue can – and should – be examined, as done by the Court in the instant case, from the perspective of the preservation of the rights to life and humane treatment." [377] The constant interpretation to protect ESCR via CPR is extremely valuable and important, but it still can constitute a loss of autonomy of the former rights, which could self-standing be invoked under Art. 26 ACHR as has been explained by judge Cançado Trindade's as aforementioned.

[371] Art. 1 (1) ACHR.
[372] Art. 2 ACHR.
[373] IACtHR, *Albán-Cornejo et al. v. Ecuador*, para. 4.
[374] *Ibidem*, para. 38.
[375] *Ibidem*, p. 48, paras. 1-3.
[376] IACtHR, *Albán-Cornejo et al. v. Ecuador,* separate opinion of judge Sergio García Ramírez, para. 1.
[377] *Ibidem*, para. 2.

In *Acevedo Buendía et al. v. Peru*[378] finally a more reasonable and wider approach regarding the justiciability of ESCR under Art. 26 ACHR was adopted. The petitioners claimed the non-compliance of Peru regarding their granting remuneration, gratuity and similar bonus, which were ordered by domestic courts before.[379]

Even though the Court did not find a violation of Art. 26 ACHR, but only violations of the right to judicial protection and of the right to property[380], it recognised its full competence to assess violations of all rights enshrined in the ACHR, including those under Art. 26.[381] "The broad content of the Convention indicates that the Court has full jurisdiction over all matters pertaining to its Articles and provisions."[382] It furthermore acknowledged that human rights should be interpreted from the perspective of their integrality and interdependence due to the absence of hierarchy between CPR and ESCR.[383]

In order to back its argumentation the IACtHR, once again, referred to the ECtHR's jurisprudence, in *Airey v. Ireland* (abovementioned) and followed its reasoning that also under the IAHRS the "Convention must be interpreted in the light of present-day conditions.[384]

The Court further emphasised that even though Art. 26 is embodied in Chapter III of the ACHR, named "Economic, Social and Cultural Rights", it is also established in Part I[385] of said instrument, named "*state* Obligations and Rights Protected". Therefore, Art. 26 ACHR is also subject to the general obligations contained in Arts. 1(1) and 2 mentioned in Chapter I, titled "General Obligations", as well as Arts. 3 to 25 mentioned in Chapter II, entitled "Civil and Political Rights".[386] Thereby, the Court really opened a way for a wider and more favorable interpretation of ESCR being as justiciable as CPR

[378] IACtHR, *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*, Judgment of 1 July 2009.
[379] *Ibidem,* para. 2
[380] *Ibidem,* para. 106.
[381] *Ibidem*, para. 16.
[382] Compare as well IACtHR*, Velásquez Rodríguez v. Honduras*, Judgment of 26 June 1987, para. 29; and *19 Tradesmen v. Colombia*, Judgment of 12 June 2002, para. 27.
[383] IACtHR, *Acevedo Buendía et al. v. Peru,* para. 101.
[384] *Ibidem*.
[385] Part I (*states* obligations and rights protected) of the ACHR comprehends Chapters I-V.
[386] IACtHR, *Acevedo Buendía et al. v. Peru*, para. 100.

since, accordingly, every time *states* do not respect all the rights established in the ACHR, they immediately violate the compliance with Art. 1(1).

Judge García Ramirez, in his concurring opinion, recognised the Court's limitation to receive cases concerning breaches of self-standing ESCR even though it "has examined issues that relate to social rights or are forthwith identified with such rights, by means of the analysis of violations of rights embodied in the American Convention."[387]

Following this reasoning, the most recent case *Suárez Peralta v. Ecuador*[388] of 2013 adds new helpful aspects regarding the evolution of interpreting the justiciability of ESCR in the Inter-American system.

The case concerns the alleged failure of Ecuador to prosecute healthcare professionals who caused severe injuries to a patient in an unsuccessful surgery in a private clinic.[389] The Court concluded that the *state* has international responsibility for not preventing the damage and for failing to guarantee the right to personal integrity, as enshrined in Art. 5 (1)[390] in conjunction with Art. 1 (1) ACHR. It affirmed that the relation between the two articles entails that *states* have the obligation to respect the rights and freedoms recognised in the Conventions (negative obligation), but also to adopt all appropriate measures to guarantee them (positive obligation).[391]

In line with its argumentation in *Acevedo Buendía v. Ecuador*, the Court once again confirmed that *state parties* are obliged to respect and guarantee all the rights enshrined in the ACHR (Article 1(1)), including those in Art. 26, as well as to ensure the effectiveness of all human rights.[392] The IACtHR also recalled the interdependence and indivisibility of CPR and ESCR, "because they must be understood integrally as human rights without any specific ranking between them, and as rights that can be required in all cases before those authorities with the relevant competence." [393] Regarding the right to health, the Court considered it relevant to refer to the American

[387] IACtHR, *Acevedo Buendía et al. v. Peru,* concurring opinion of judge Sergio García Ramírez, para. 17.
[388] IACtHR, *Suárez Peralta v. Ecuador*, Judgment of 21 May 2013.
[389] *Ibidem*, para. 1.
[390] Art. 5 (1) ACHR.
[391] IACtHR, *Suárez Peralta v. Ecuador*, para. 127.
[392] *Ibidem*.
[393] *Ibidem*, para. 131.

Declaration (Article XI)[394], the OAS Charter (Article 45)[395] and the Protocol of San Salvador (Article 10)[396] [397], although the violation of right to health was not even considered by the Court in this case.

Nonetheless, the IACtHR decided that Ecuador was responsible for the violation of the right to judicial guarantees and judicial protection as recognised in Arts. 8(1) and 25(1) in conjunction with Art. 1(1) ACHR, and violation of the obligation to guarantee the right to personal integrity, recognised in Art. 5(1), in conjunction with Art. 1(1) ACHR.[398]

In a concurring opinion, judge Eduardo Ferrer Mac-Gregor Poisot broadened the discussion stating that the Court, in principle, missed the opportunity to take into consideration the underlying cause for this case, *i.e.* the violations of the right to health of the victim.[399] The Court could have approached the violation of the obligation to guarantee the right to health as part of the ESCR protected under Art. 26 ACHR.

As has been shown, despite the discussions by the IACtHR in favor of the justiciability of ESCR, there is still a lack of coherence in the application of a common ground authorising their autonomous justiciability.

In particular, the argumentation of judge Mac-Gregor Poisot in *Suárez Peralta v. Ecuador* is extremely helpful for the wider discussion proving that the arguments in favor of the autonomous justiciability of ECSR have not been exhausted yet. Therefore, subsequently in the next Chapter on the future of ESCR and their justiciability, particular attention will be paid to the arguments of judge Mac-Gregor Poisot since they open a total new way to invoke ESCR directly without having to rely on CPR.

[394] Art. XI ADRDM.
[395] Art. 45 OAS Charter.
[396] Art. 10 Protocol of San salvador.
[397] IACtHR, *Suárez Peralta v. Ecuador*, para. 131.
[398] *Ibidem*, p. 61, para. 3-5.
[399] IACtHR, *Suárez Peralta v. Ecuador*, concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para. 2 .

3.4 Conclusions

In a nutshell, the argumentation lines routinely applied by both ECtHR and IACtHR with regard to interpreting ESCR enshrined in their instruments can be summed up on three different accounts:

a) The Conventions should be interpreted as a "living instrument", in the light of present-day conditions. This reasoning line originated in the ECtHR's jurisprudence;
b) The fair trial clause (Art. 6 ECHR) was the starting-point for the most important interpretations made by the ECtHR to give protection to some ESCR, through an "integrated approach". Although the IACtHR does not demonstrate explicitly this argumentation, it has also used several other human rights treaties in its jurisprudence, following therefore the integrated approach to protect ESCR;
c) The indirect protection of ESCR, through positive obligations stemming from CPR established under the ECHR and ACHR. The right to life, the prohibition of discrimination and the freedom of expression are some of the common examples used as key elements to require positive obligations from the *states* in order to protect ESCR. Both Courts adopt this approach by relying on the indivisibility and interdependence of all human rights.

On the one hand, the ECtHR and its jurisprudence clearly have a guiding role, also for the IACtHR in particular with regard to the indirect protection of ESCR through its methods of interpretation. However, the ECtHR, over the years, has not developed new arguments in order to directly protect ESCR as the analysis of its recent case law has shown. Besides all efforts by the ECtHR, the restricted content of the ECHR does not allow for a wide margin of interpretation by the Court with regard to ESCR. Unlike the ACHR and its Art 26, the ECHR lacks in particular a general article protecting ESCR. Therefore, the ECtHR cannot promote the direct justiciability of ESCR.

Albeit the ESC as counterpart to the ECHR ESCR complements the CoE's system, the collective complaints procedure foreseen cannot provide full justiciability to ESCR. Although the ECSR's decisions are clearly important, including and applying the most favorable interpretation of the ECtHR, but also discussing more in-depth the problems surrounding the implementation of ESCR, their lack of enforceability still represents the principal disadvantage of the system and for the justiciability of ESCR at the CoE level.

On the other hand, the IACtHR's jurisprudence, even though inspired primarily by the ECtHR's decisions, through dynamic and evolutive interpretation in particular shaped by the principles of indivisibility and interdependence of all human rights, the IACtHR's framework for the protection of ESCR has considerably developed over the years. The recent case law analysed in this Chapter has demonstrated the innovative approach by the IACtHR in interpreting the ACHR, in particular with regard to Art. 26 ACHR in conjunction with its Additional Protocol of Salvador, in order to directly protect all ESCR.

As aforementioned, the next Chapter has the aim to explore further possibilities for the autonomous justiciability of ESCR, motived by arguments of judge Mac-Gregor Poisot of the IACtHR.

CHAPTER 4 - THE WAY FORWARD: DEVELOPING A COHERENT APPROACH FOR THE JUSTICIABILITY OF ALL ECONOMIC, SOCIAL AND CULTURAL RIGHTS FROM THE INTER-AMERICAN SYSTEM'S PERSPECTIVE

4.1 Introduction

As has been shown, under the European and Inter-American regional human rights systems, the protection and justiciability of ESCR has been promoted by their bodies in charge, *i.e.* ECtHR and ECSR, in Europe, and IACtHR, in the Americas. By adopting approaches mainly relying on the indivisibility and interdependence of all human rights and on the most favorable interpretation of the legal instruments, an indirect protection of ESCR has been accomplished despite they remain not considered autonomously justiciable under the legal frameworks in place.

Still, in particular under the Inter-American framework, there seems to be hope for a coherent approach regarding the justiciability of ESCR even without a reform of the legal instruments. The same, however, does not seem to be possible under the European framework, due to the actual restrictions and limitations imposed on the system, *i.e.* the restricted content of the ECHR and the lack of enforceability of the ECSR's decisions, as it has been described in the last Chapter.

This present Chapter aims to develop the discussion on the implications of the principles of indivisibility and interdependence of human rights can have on the interpretation of the legal instruments enshrining ESCR further. It will show a possible way forward for developing a coherent approach allowing for the autonomous justiciability of all ESCR.

The starting point for the discussion will be the opinion by IACtHR judge Mac-Gregor Poisot in *Suárez Peralta v. Ecuador,* as presented in the previous Chapter, offering a total new approach to the autonomous justiciability of ESCR. Even though the opinion by judge Mac-Gregor Poisot does not represent the consensual opinion of the IACtHR as a whole, it was for the first time that a judge of the IACtHR extensively engaged in the discussion on a new approach of how ESCR could become

autonomously justiciable in concrete cases. Additionally, since this new approach was developed by a judge of the IACtHR, there is a real chance that it will be taken up in future cases.

4.2 The implications of the indivisibility and interdependence of human rights for the autonomous justiciability of Economic, Social and Cultural Rights

As has been explained above *Suárez Peralta v. Ecuador* only recently brought up again the old discussion on the justiciability of ESCR. Judge Eduardo Ferrer Mac-Gregor Poisot, in his 36 pages concurring opinion systemised the possibilities on how ESCR could be invoked directly and autonomously before the Court.

According to Mac-Gregor Poisot, based on the premise that the IACtHR has the competence to rule on alleged violations of all human rights as enshrined in the ACHR, including Art. 26 and the progressive development of ESCR, the Court already would be able to rule directly on ESCR.[400] Moreover, he bases the competence of the Court to rule directly on ESCR on the interdependence and indivisibility existent between all human rights, also granting direct justiciability to ESCR.[401]

His starting point was in *Acevedo Buendía v. Peru*, which was influenced by the ECtHR case *Airey v. Ireland,* as aforementioned*,* and dealt with Art. 26 ACHR in conjunction with the right of social security. The latter is protected in the Protocol of San Salvador, but has not been recognised as justiciable[402] under Art. 19 (6) of the Protocol, as discussed above. Without mentioning the Protocol of San Salvador, the Court acknowledged its authority "to determine the scope of its own competence (*compétence de la compétence*); and […] the optional clause on binding jurisdiction (Art. 62(1) of the Convention) supposes the acceptance of the Court's right to decide *any dispute on relating to its jurisdiction by the states*."[403] Additionally, the Court

[400] IACtHR, *Suárez Peralta v. Ecuador*, concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para. 5
[401] *Ibidem,* para. 15.
[402] *Ibidem*, para. 18.
[403] *Ibidem*, para. 19.

indicated that the broad content of the ACHR allows its "full jurisdiction over all its articles and provisions".[404]

The Court thus rejected the state's objection that the Court lacked the competence to rule on a non-justiciable right by stating that it was competent to hear and decide cases regarding alleged violations of Art. 26 ACHR.[405] Furthermore, it confirmed the interdependence and indivisibility of all human as a basis for these competences for ESCR as referred to in Art. 26 ACHR.[406]

Judge Mac-Gregor Poisot clarified that this interdependence encompasses that the enjoyment of some rights depend on the realisation of others; indivisibility on the other hand relates to the non-hierarchy among human rights for the effects of their respect, protection and guarantee.[407] In his opinion, both interdependence and indivisibility should be considered "as an inseparable duo, […] in order to assume the challenge of their interpretation and implementation as a holistic task."[408]

Judge Mac-Gregor Poisot elaborated in a very coherent and logical manner on the implications of the interdependence and indivisibility of human rights as being useful tools for achieving the direct justiciability of all ESCR and their full realisation and effectiveness[409] that according to him involved:

> a) A strong relationship between ESCR and CPR based on their equal importance;
> b) The obligation to interpret all rights together and assess the implications of the respect, protection and guarantee of some rights for the realisation of other rights;
> c) Considering ESCR as autonomous rights;
> d) The recognition that ESCR can be violated autonomously, which could lead, as happens to CPR, to declaring the obligation to guarantee rights

[404] IACtHR, *Suárez Peralta v. Ecuador* , concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot para.19.
[405] *Ibidem*, para. 20.
[406] *Ibidem*, para. 23.
[407] *Ibidem*, para. 24.
[408] *Ibidem*, para.25.
[409] *Ibidem*, para.26.

arising from Art. 26 ACHR, in particular in relation to the general obligations established in Arts 1 and 2 of the Convention;

e) The definition of states' obligations with regard to ESCR;

f) The progressive and systematic interpretation of the *corpus juris*, in particular to stress out the implications of Art. 26 ACHR with regard to its Additional Protocol of San Salvador; and

g) The support for a further justification to apply other international instruments and interpretations regarding ESCR with the scope to endow them with content. [410]

Concerning the particular case *Suárez Peralta v. Ecuador*, judge Mac-Gregor Poisot stated that the Court could have approached the right to health autonomously when the latter expressly acknowledged, in this case, the interdependence and indivisibility of all human rights, the absence of hierarchy among them and by mentioning other instruments belonging to the IAHRS framework, such as the ADRDM, the OAS Charter and the Protocol of San Salvador regarding the right to health in conjunction with Art. 26.[411]

The recognition of the indivisibility and interdependence of all human rights therefore leads to the obligation to interpret, protect, respect and guarantee them with the same parameters. If violated, ESCR should thus be autonomously claimed, with no need to rely mandatorily on CPR, since they are protected by Art. 26 in conjunction with Arts 1(1) and 2 ACHR. It is important to note that states, bound by the mentioned articles, must accomplish their obligations related to ESCR, in light of and in accordance with other relevant international instruments, especially the Protocol of San Salvador.

[410] IACtHR, *Suárez Peralta v. Ecuador*, concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para.27.
[411] *Ibidem*, para. 32.

4.3 The most favorable interpretation to bring autonomous justiciability to Economic, Social and Cultural Rights

Another challenge with regard to the justiciability of ESCR is the apparent conflict between Art. 26 ACHR and Art. 19(6) of the Protocol of San Salvador.[412] Whereas the former is a very broad article covering both CPR and ESCR, the latter limits the right to individual petitions to the Commission or the Court to the right to education and the right to organise and join trade unions as aforementioned.

According to judge Mac-Gregor Poisot, the principle of the most favorable interpretation must be always applied in order to solve this apparent conflict between these two instruments mentioned above.[413] If the Additional Protocol had the aim to limit or to indicate that Art. 26 ACHR was no longer in force, it would have explicitly referred to it. Nonetheless, no reference in the Protocol indicating either the reduction or limitation of the scope of the Convention can be found.[414]

On the contrary, the Protocol, in its Art. 4 states that "a right which is recognised or in effect in a state by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognise the right or recognises it to a lesser degree."[415] This disposition perfectly matches Art. 29(d) ACHR, prohibiting any interpretation to limit or exclude the effect of the Convention and other international acts with the same nature.[416]

It is important to repeat that the IACtHR is not allowed to declare violation of any ESCR under the Protocol of San Salvador, except of those explicitly mentioned in Art. 19(6).

Nonetheless, judge Mac-Gregor Poisot pointed out that ESCR are still protected by Art. 26 in conjunction with Arts 1(1) and 2 ACHR. He continues that the Protocol besides being a valuable tool providing guidance on the application of Art. 26 ACHR, it also clarifies on the content that the obligations of respect and guarantee should have in

[412] IACtHR, *Suárez Peralta v. Ecuador*, concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para. 35.
[413] *Ibidem*, para. 43.
[414] *Ibidem.*
[415] Art. 4 Protocol of San Salvador.
[416] Art. 29(d) ACHR.

relation to ESCR.[417] He uses *Indigenous Community Yakye Axa v. Paraguay*, demonstrated in the previous Chapter, to illustrate the connection made by the Court between Art. 26 ACHR and the ESCR enshrined under the Protocol, such as the right to education, to food and to health.[418]

Although the Court's jurisprudence has accepted the justiciability of Art. 26 ACHR, for judge Mac-Gregor Poisot, the Court still needs to resolve some questions arising with regard to it, *i.e.* for instance its scope and which rights are protected, which obligations stem from these rights and which implications the principle of progressiveness has in this regard.[419] Different positions concerning this article will arise, when "some people consider a mere programmatic norm, without any type of effectiveness in itself."[420] For him, this would constitute a clear step backward from the progressiveness perspective promoted by Art. 26 ACHR. He highlights that the IACtHR, in *Acevedo Buendía v. Peru*, made a "firm step"[421] regarding the principle of progressiveness, abandoning its position in the precedent case *Five Pensioners v. Peru*.[422]

Various reasonable arguments and interpretations concerning the direct justiciability to ESCR can be made therefore. Even though the arguments brought forward by judge Mac-Gregor Poisot in favor of the direct justiciability are related to the right to health, his line of argumentation can be broadened and applied to all cases concerning ESCR.[423]

The line of argumentation based on Art. 26 ACHR means that the Court can indeed declare a violation of the obligation to respect and guarantee all the rights protected under its article in conjunction with Art. 1(1) ACHR. According to judge Mac-Gregor Poisot, this positive line of interpretation stemming from the conjugation

[417] IACtHR, *Suárez Peralta v. Ecuador*, concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para. 47.
[418] *Ibidem*, para. 49.
[419] *Ibidem*, para. 57.
[420] *Ibidem*, para. 59.
[421] *Ibidem*, para. 61
[422] *Ibidem.*
[423] *Ibidem*, para. 91.

of Arts 1(1), 2, 26 and 29 ACHR requires also a "progressive vision" in keeping pace with other national and international jurisdictions.[424]

In addition, "the absence of the explicit citing of the violation of a right or freedom does not prevent the Inter-American Court from analysing it based on the general principle of law *iura novit curia*, […] in the sense that the judge has the power and even the obligation to apply the pertinent legal provisions in a litigation, even when the parties do not cite it expressly".[425] This principle certainly should be used by judges of the Court and there should be more judicial activism in favor of the justiciability of ESCR.

Concluding, it is worth noting that the whole line of argumentation proposed by judge Mac-Gregor Poisot points towards the best interpretation of the legal instruments of the IAHRS. Moreover, his opinion in *Suárez Peralta v. Ecuador* can be extremely valuable for the Court, maybe even more than the sentence *per se*, since it includes the most coherent explanation with regard to the autonomous justiciability of ESCR so far. It should definitely be widely used and better explored as a basis to future case law in this regional system as well as in other international and national jurisdictions.

Challenges arising with regard to ECSR can be better solved if the line of argumentation brought by judge Mac-Gregor Poisot continues to be perpetuated, bringing transparency and coherence to demonstrate that ESCR can be directly justiciable independently from CPR. Obviously, the direct justiciability of ESCR does not mean that both categories of rights can under no circumstances be related when a violation of one of them is claimed. On the contrary, the autonomy of ESCR only reinforces the integrality of human rights, granting both sets of rights the same level of importance. This confirms the preamble of the Protocol of San Salvador, which states that the relationship between CPR and ESCR "constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realised, and the violation of some rights in favor of the realisation of others can never be justified."[426]

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[424] IACtHR, *Suárez Peralta v. Ecuador*, concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot para. 8
[425] *Ibidem*, para. 92.
[426] Preamble Protocol of San Salvador.

4.4 Conclusions

The approaches mainly relying on the indivisibility and interdependence of all human rights and the most favorable interpretation of the legal instruments in place have demonstrated as important tools for the indirect protection of ESCR in both European and Inter-American regional human rights systems.

Even though the autonomous justiciability of ESCR cannot be promoted yet under the CoE system, some of the arguments indicated by IACtHR judge Mac-Gregor Poisot are also valuable for this system.

Regarding specifically the indivisibility and interdependence approach, some of the implications considered by the judge could also be incorporated in the ECtHR's jurisprudence, such as the relationship between ESCR and CPR based on their equal importance; the obligation to interpret all rights together and the assessment of the implications of the respect, protection and guarantee of some rights for the realisation of other rights; the consideration of ESCR as autonomous rights; the definition of states' obligations with regard to ESCR and; the support for a further justification to apply other international instruments and interpretations regarding ESCR with the scope to endow them with content, as abovementioned, even despite the restricted content of the ECHR, in order to improve the indirect protection of ESCR.

Although judge Mac-Gregor Poisot analysed particularly the apparent conflict between the ACHR and the Protocol of San Salvador, part of his arguments concerning the most favorable interpretation approach could also be applied at the CoE level. In particular the role of the specialized instruments that protect explicitly ESCR, *i.e.* the Protocol of Salvador and the ESC should be strengthened and the latter should be used as guidance to better protect ESCR.

Due to the obligation to respect and guarantee all the rights protected under Art. 26 in conjunction with Art. 1(1) ACHR, the IACtHR can rule on ESCR autonomously. Still, further discussions are necessary in order to overcome obvious problems with regard to the justiciability of ESCR, such as the lack of coherence in the application of Art. 26 ACHR.

Therefore, the whole line of reasoning by judge Mac-Gregor Poisot indicates the way forward to develop a coherent approach to directly protect ESCR in this regional system. If his argumentation is used and better explored as basis to future case law by other judges, the challenges surrounding the justiciability of ESCR can be better tackled. The independence from CPR would reinforce the integrality of human rights, granting both sets of rights the same level of importance as been affirmed in the international human rights framework.

GENERAL CONCLUSIONS

The in-depth analysis conducted in this study has clearly shown that the differentiations and distinctions made between ESCR are artificially constructed and counterproductive. Through the years, it has been explicitly recognised that human rights are universal, indivisible, interdependent and interrelated. The historical approach to interpreting the character and legal nature of human rights and the constant comparison of both categories of human rights have prevented the translation of formally recognising ESCR as truly justiciable rights. This study has demonstrated that most of the arguments used against the justiciability of ESCR - *e.g.* their vagueness, their programmatic character and that their implementation requires positive actions by states, which are always closely related to the spending of public resource, which, in times of economic crisis and austerity measure, appear not to be the most welcome topic - have become more than obsolete and should be overcome.

Still, the discussion about the justiciability of ESCR also demonstrated that, through an increasing attention paid to the enforcement of ESCR in the judiciary, a shift occurred towards a coherent interpretation of their justiciability. In particular, an understanding grew in the sense that the individual, whose rights have been violated, must have a right to a remedy even if the right violated was one of the ESCR. The coherent acknowledgment of the justiciability of ESCR, by judicial and quasi-judicial bodies, could bring systematic institutional changes and can, thereby, prevent future human rights violations to happen.

The reasons why the European and the Inter-American system have been subject to analysis are twofold: 1) the importance of both systems, as regional human rights protection systems, has grown constantly over the years; 2) both systems show clear deficits with regard to the protection of ESCR by not recognising the latter's justiciability.

Within the CoE legal framework, attention was first paid to the ECHR, the most important human rights protection instrument in Europe. The ECHR focuses, with the exception of the right to property and the right to education enshrined in its additional protocols, exclusively on CPR, which do not allow for a wider margin to the implicit

protection of ESCR. In order to compensate the shortcomings regarding the protection of ESCR, the ESC was adopted as a specialised instrument to be the counterpart to the ECHR. However, it never gained the same importance as the latter. In fact, the weak protection of ESCR under the ESC relies on two main factors: 1) the ESC does not provide an individual complaint mechanism; and 2) the ECSR's decisions are not enforceable to states parties.

At the OAS level, several legal instruments formally guarantee the protection of ESCR, such as the OAS Charter, the American Declaration of the Rights and Duties of Man and the ACHR. The latter, as being legally binding for all state parties, plays a crucial role in the protection of ESCR, since it foresees an individual complaint procedure and includes an umbrella provision, namely Art. 26 ACHR, materially protecting all ESCR. Moreover, its Additional Protocol of San Salvador has been adopted with the exclusive aim to extent the protection of ESCR. Even though, from a legal perspective, ESCR appear to be well protected under the Inter-American system, their justiciability has not been granted yet. The vagueness of Art. 26 ACHR in conjunction with restrictions enshrined under Art. 19 (6) of the Protocol of San Salvador, establishing that only the rights of workers to organise and to join trade union as well as the right to education can be invoked in the individual complaint procedure, have undermined the coherent interpretation and determination of the justiciability of ESCR.

Even though legal instruments formally enshrine ESCR and foresee their protection, their restricted content and procedure have undermined the justiciability of ESCR. The bodies, who are in charge of monitoring their application and implementation, have become essential actors in facing the challenges to interpret these instruments, through their decisions, in cases where violations of ESCR are claimed. The analysis has found that both ECtHR and IACtHR have made efforts in protecting ESCR using similar lines of argumentation. Both bodies relied on the *dictum* that conventions are "living instruments" and should be interpreted in the light of present-day conditions. Furthermore, both Courts followed an "integrated approach" in their jurisprudence, *i.e.* referring to other human rights treaties in order to protect ESCR. Most importantly, both Courts have tried to protect ESCR implicitly by applying and

referring to the positive obligations stemming from CPR as enshrined in the ECHR and the ACHR. The main argument for the latter reasoning line relied especially on the indivisibility and interdependence of all human rights.

The analysis of its case law showed that although the ECtHR was a pioneer in indirectly protecting ESCR, it has not developed new arguments in order to find possibilities to directly protect ESCR. Besides all efforts by the ECtHR, the restricted and specified content of the ECHR does not allow for a wide margin of interpretation by the Court with regard to ESCR. Unlike the ACHR and its Art. 26, the ECHR lacks in particular a general article protecting ESCR. Therefore, it was found that the ECtHR cannot promote the autonomous justiciability of ESCR under its current legal framework.

Despite the ESC and the decisions by the ECSR, it cannot be considered that ESC are granted full justiciability under the CoE system. The adoption of the collective complaint procedure under the ESC has been certainly an improvement, since ECSR's decisions have allowed for in-depth discussions regarding the problems surrounding the implementation of ESCR. However, the lack of an individual complaint mechanism as well as the lack of enforceability of ECSR's decisions still represent the main disadvantage for the justiciability of ESCR at the CoE level.

The IACtHR, on the other hand, has demonstrated through its jurisprudence a dynamic and evolutive interpretation of the justiciability of ESCR based on the principles of indivisibility and interdependence of all human rights. The recent case law analysed highlighted the innovative approach by the IACtHR in interpreting the ACHR, in particular with regard to its Art. 26 ACHR in conjunction with its Additional Protocol of Salvador, in order to directly protect all ESCR.

Indeed, there seems to be hope for a coherent approach regarding the justiciability of ESCR even without a reform of the legal instruments under the Inter-American system. A recent opinion by judge Mac-Gregor Poisot of the IACtHR has offered a new approach to the autonomous justiciability of ESCR. In accordance with his opinion, the IACtHR can already rule on ESCR autonomously, due to the obligation to respect and guarantee all the rights protected under the ACHR as enshrined in Art. 1(1) ACHR in conjunction with Art. 26 ACHR, the umbrella norm covering as well ESCR. This means

that every time states do not respect the rights established in the ACHR, they immediately violate the compliance with Art. 1(1) ACHR. Accordingly, the direct justiciability of ESCR in cases of alleged violations can be based on Art. 1(1) ACHR without having to rely on a CPR. Undoubtedly, the independence from CPR would reinforce the integrality of human rights, granting both sets of rights the same level of importance as it also has been affirmed in the international human rights framework.

Even though the judge's opinion does not represent the consensus of this Court as a whole, it should be highlighted that is the first time that a judge of the IACtHR extensively engaged in the discussion on a new approach of how ESCR could become autonomously justiciable. Furthermore, this opinion is crucially important in the actual Inter-American's framework, since there is a real chance for it being taken up in future cases, since it was promoted by a own member of the IACtHR.

The way forward for developing a coherent approach allowing the autonomous justiciability of all ESCR, mainly based on the indivisibility and interdependence of all human rights and the most favourable interpretation of the legal instruments in place have demonstrated as important tools for the indirect protection of ESCR in both European and Inter-American regional human rights systems. Albeit the autonomous justiciability of ESCR cannot be invoked yet under the CoE system, some of the arguments indicated by IACtHR's judge Mac-Gregor Poisot can be also applied and transformed into this system. In particular, the indivisibility and interdependence approach of all human rights, the relationship between ESCR and CPR based on their equal importance in the international framework, the obligation to interpret all rights together and the assessment of the implications of the respect, protection and guarantee of some rights for the realisation of other rights, the consideration of ESCR as autonomous rights, the definition of states' obligations with regard to ESCR and the support for a further justification to apply other international instruments and interpretations regarding ESCR with the scope to endow them with content even despite the restricted content of the ECHR, in order to improve the indirect protection of ESCR.

It is worth noting that, even in the Inter-American system, further discussions are extremely necessary in order to overcome obvious problems with regard to the justiciability of ESCR, such as the lack of coherence in the application of Art. 26 ACHR

and its apparent conflict with Art. 19 (6) of the Protocol of San Salvador as aforementioned.

Therefore, the discussion with regard to an approach allowing the direct protection of ESCR must be further pursued. If the proposed argumentation by the IACtHR judge is wider explored as basis to future case law by other judges, the challenges surrounding the justiciability of ESCR can be certainly better confronted.

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