

# Civil and Political, and Economic and Social Rights - Indivisible or Separable?

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## CIVIL AND POLITICAL, AND ECONOMIC AND SOCIAL RIGHTS – INDIVISIBLE OR SEPARABLE?

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*Nowadays it is widely accepted among scholars that civil and political rights are in their nature generally no different from economic and social rights, and that both categories of rights can impose three different types of duties: to respect, to protect and to fulfil. This indivisibility of rights has also been proclaimed in conclusions of various human rights conferences. Although the interconnection and indivisibility of all human rights have been stressed from the very beginning of the human rights discussion in theory, in practice they have never been equally protected. The reasons for that kind of discrepancy will be analysed in this paper. Also, the current position of civil and political rights, on the one hand, and economic and social rights on the other within regional and global human rights instruments will be looked at, and this presentation will be followed by a discussion of the theoretical approaches to differences between these two categories of rights, if any. The aim of this paper is to show that despite the theoretical indivisibility of rights, in practice they are far from indivisible.*

*Keywords: civil and political rights, economic and social rights, indivisibility of rights, global and regional human rights systems*

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## 1. INTRODUCTION

Traditionally, human rights have been divided into three categories or generations of rights. Civil and political rights were considered to be ‘first generation’ rights, economic and social ‘second generation’ rights, whereas the ‘third generation’ rights were rights of solidarity.<sup>1</sup> This was due to the fact that at the beginning of the human rights era there existed in legal theory a well-established view that civil and political rights were duties of restraint, preventing the state from interfering with individual freedom rather than casting positive duties to act on the state. As such, they were thought to be more appropriate for judicial resolution than economic and social rights. Protection by the state against want or need was to be assigned to the realm of policy, and economic and social rights to the realm of aspiration. However, nowadays, in theory, there is a recognition of the unity between civil and political rights and economic and social rights. Nevertheless, this recognition of their unity is more theoretical than practical. Although numerous authors keep stressing their interconnection, indivisibility and interdependence<sup>2</sup>, in reality the situation is different and the conclusion that these two groups of rights are no longer separable is rather premature.<sup>3</sup>

Nevertheless, the classic distinction between civil and political rights as negative and determinate rights that have no budgetary implications and are appropriate for immediate implementation, and economic and social rights as positive and vague rights that are financially demanding and can be only achieved progressively, is no longer acceptable.<sup>4</sup> In this paper the current de-

<sup>1</sup> The proposal for three generations of rights can be found in Vasek, K. ‘A 30-Year Struggle: The Sustained Efforts to give Force of Law to the UDHR’ 30(11) UNESCO Courier (1977), at p. 29 and in Matulović, M. ‘Prava čovjeka’ in *Hrvatska enciklopedija*, Vol. 8, Leksikografski zavod Miroslav Krleža, 2006, at pp. 727-729.

<sup>2</sup> Van Boven, T. ‘Categories of Rights’ in: Moeckli, D. et al. (eds.), *International Human Rights Law*, Oxford University Press, 2010, at p. 173; An-Na’im, A. A. ‘To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights’ in: Ghai, Y. and Cottrell, J. (eds.), *Economic, Social and Cultural Rights in Practice, The Role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, 2004; Scott, C. ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’ 21 Hum. Rts. Q. (1999) 633; and Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008, at pp. 66-91.

<sup>3</sup> Khaliq, U. and Churchill, R., ‘The Protection of Economic and Social Rights: A Particular Challenge?’ in Keller, H. and Ulfstein, G. (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012.

<sup>4</sup> See Eide, A. ‘Economic, Social and Cultural Rights as Human Rights’ in Eide, A. et al.

bate over the distinction between civil and political rights, and economic and social rights will be presented. Firstly, the way in which the two categories of rights are given effect to in regional and global instruments will be analysed. This will be followed by an exploration of the more theoretical debates over the nature of the two sets of rights. It will be shown that although they might be indivisible in theory, they are still rather separate in practice.

## 2. CIVIL AND POLITICAL RIGHTS AND ECONOMIC AND SOCIAL RIGHTS IN GLOBAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

One of the most explicit proclamations of indivisibility of civil and political rights and economic and social rights is contained in the Vienna Declaration and Programme of Action from 1993 which states as follows: "Human Rights are (...) indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis (...)." <sup>5</sup> This viewpoint dates back to the 1948 United Nations (UN) resolution at the time of the adoption of the UN Declaration of Human Rights. What is interesting is that this line of thought was stated even when the UN General Assembly in the 1966 Separation Resolution decided to separate the rights and adopt two covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, both of these documents declare in their preambles that the full and equal enjoyment of all human rights is a prerequisite for all human rights. Later on, this viewpoint was restated in the Proclamation of Teheran, adopted as the final act of the first international conference on human rights: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development." <sup>6</sup>

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(eds.), *Economic, Social and Cultural Rights, A Textbook*, Kluwer Law International, 2001.

<sup>5</sup> UN General Assembly, The Vienna Declaration and Programme of Action from 1993, A/CONF.157/23, para. 5.

<sup>6</sup> Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, (1968) U.N. Doc. A/CONF. 32/41 at 3, para. 13.

The next proclamation was the above quoted proclamation from the Vienna world conference and the Final Document from the 2005 World Summit reaffirmed this statement.<sup>7</sup> Again, in 2006 the UN General Assembly Resolution, establishing the Human Rights Council, stated in the preamble “that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.”<sup>8</sup> Despite all these proclamations, civil and political rights are still most often placed under a different document than economic and social rights and their compliance mechanism is almost never the same.

### 2.1. THE UN SYSTEM

On the UN level, the ICCPR has been ratified by all the major states except China, which shows that protection of civil and political rights is widely accepted worldwide.<sup>9</sup> It has a monitoring body, the Human Rights Committee (HRC), consisting of independent experts monitoring implementation of the ICCPR by its State Parties. All States Parties are obliged to submit regular reports to the HRC on how the rights are being implemented. States must report initially one year after acceding to the ICCPR and then whenever the HRC so requests (usually every four years). The HRC examines each report and addresses its concerns and recommendations to the State Party in the form of concluding observations.

In addition to the Reporting procedure, Article 41 of the ICCPR provides for the HRC to consider inter-state complaints. The system of inter-state complaints operates on the basis of reciprocity. Furthermore, the First Optional Protocol to the ICCPR<sup>10</sup> gives the HRC competence to examine individual complaints with regard to alleged violations of the ICCPR by States Parties to the Protocol.

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<sup>7</sup> 2005 World Summit Outcome: resolution/adopted by the General Assembly, 24 October 2005, A/RES/60/1, para. 121.

<sup>8</sup> UN General Assembly, Human Rights Council: resolution/adopted by the General Assembly, 3 April 2006, A/RES/60/251, preamble, para. 3.

<sup>9</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, at p. 171.

<sup>10</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force on March 23, 1976.

On the other hand, the ICESCR protects economic, social and cultural rights.<sup>11</sup> It is important to point out that the ICESCR has not been ratified by the USA. There is great reluctance of the USA towards giving economic and social rights legal status since it considers civil and political rights as the only 'real' rights.<sup>12</sup> This approach is sometimes visible even with the states that have ratified the ICESCR, like the United Kingdom, with regard to which the Committee on Economic, Social and Cultural Rights (CESCR) in its Observations in 1997, 2002 and 2009 stated that the Covenant had still not been incorporated into the domestic legal order and could not be directly invoked before the courts. The CESCR also pointed out its regrets regarding the statement made by the UK's delegation that economic, social and cultural rights are mere principles and values and that most of the rights contained in the ICESCR are not justiciable.<sup>13</sup> Unlike the USA, the UK has accepted economic and social rights as actual rights and not only goals, however, it is argued by the UK government that they differ in nature from civil and political rights.<sup>14</sup>

The ICESCR, unlike the ICCPR, does not require states to take immediate steps regarding the full realisation of the rights contained in it, but it urges contracting parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appro-

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<sup>11</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, at p. 3. See more on the webpage of the ICESCR: <<http://www2.ohchr.org/english/law/cescr.htm>> accessed 3 February 2013.

<sup>12</sup> "Economic, Social and Cultural Rights are at best goals and not guarantees or entitlements, and the working of the free market is the best and fastest way to achieve these development goals." The US spokesperson in the Open-Ended Working Group on the Right to Development, *Report of the Open-Ended Working Group on the Right to Development*, 20 March 2001, UN Doc E/CN4/2001/26, at p. 46.

<sup>13</sup> CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, May 2009, E/C.12/GBR/CO/5 [12] and [13]; CESCR, Report on the twenty-eight and twenty-ninth session, CESCR E/2003/22 [214]; CESCR, Report on the sixteen and seventeen sessions, CESCR E/1998/22, para. 293.

<sup>14</sup> The same approach is expressed by the Polish government. See CESCR, Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc E/C.12/GBR/5, paras. 71-75; CESCR, Fifth Periodic Report of Poland, UN Doc E/C.12/POL/5; and CESCR, Concluding Observations: Poland, E/C.12/POL/CO/5, 2 December 2009, para. 8.

appropriate means, including particularly the adoption of legislative measures.”<sup>15</sup> Therefore, unlike in the ICCPR, the realization of the rights enshrined in it is not immediate, but progressive. Despite this provision the CESCR has in its General Comments declared certain rights to be of immediate effect and in relation to other rights certain steps, towards realisation of the rights must be taken within a reasonable time of a state becoming a party to the ICESCR (see *infra* section 1. C). The implementation of the ICESCR by the State Parties is monitored by the CESCR, a body of independent experts. All States Parties are obliged to submit regular reports to the CESCR on how the rights are being implemented. States must report initially within two years of accepting the ICESCR and thereafter every five years. The CESCR examines each report and addresses its concerns and recommendations to the State Party in the form of ‘concluding observations’.

In June 2008 the UN Human Rights Council adopted the Optional Protocol to the ICESCR<sup>16</sup> which provides for the CESCR to receive communications from individuals or groups claiming to be victims concerning any rights in the ICESCR. The Optional Protocol is not in force yet as it requires ten ratifications and has only obtained eight so far.<sup>17</sup>

Therefore, the UN system has, in its main human rights instruments - the ICESCR and the ICCPR, strictly separated economic and social rights from civil and political rights, by protecting them within two different instruments and with two different monitoring bodies. The form of monitoring is the same, or at least it will be when the Optional Protocol to the ICESCR enters into force. Thus the crucial difference remains that rights in the ICCPR are of immediate application, whereas those in the ICESCR are progressive. It also needs to be pointed out that the Convention on the Rights of the Child, International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women contain both civil and political, and economic, social and cultural rights. However, these examples do not undermine the dominant pattern of separation present in the main UN human rights instruments, the ICCPR and the ICESCR.

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<sup>15</sup> ICESCR, Article 2(1).

<sup>16</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted by the Resolution A/RES/63/117, on 10 December 2008.

<sup>17</sup> Spain, Slovakia, Mongolia, El-Salvador, Ecuador, Bosnia and Herzegovina, Bolivia and Argentina (on February 2013).



## 2.2. THE COUNCIL OF EUROPE SYSTEM

Within the Council of Europe (CoE) system, civil and political rights are also separated from economic and social rights. The European Convention on Human Rights (ECHR), a document on civil and political rights, was adopted in 1950 within the CoE. It entered into force in 1953 and has been ratified by all forty-seven Member States of the CoE. Today, it is an obligation of all states wishing to become a member of the CoE to ratify the ECHR.

The European Court on Human Rights (ECtHR) was set up in 1959. The original structure of the ECtHR and mechanism for handling cases provided for a two-tier system of rights protection, which included the European Commission of Human Rights as well as the ECtHR itself. When the caseload started to grow the idea of merging the Commission and the ECtHR was born. On 1 November 1998, Protocol 11 came into force, eliminating the Commission and establishing a new full-time ECtHR that replaced the former system. All the states that have ratified the ECHR are now under the jurisdiction of the ECtHR that can deliver binding judgments concerning those states.

A finding by the ECtHR that a violation of the ECHR or its Protocols has been made places an obligation on the respondent state to abide by the judgment. The ECtHR can receive both individual and inter-state complaints, although inter-state complaints tend to be quite rare. As to individual applicants, there are today 800 million potential applicants, since all the people living under jurisdiction of State Parties have direct access to the ECtHR in order to complain against violations of their fundamental rights and freedoms. Approximately 151,600 applications were pending before a judicial formation as of 1 January 2012.

The situation is somewhat different as concerns economic and social rights. Forty-three Member States of the CoE have ratified either the Original or the Revised European Social Charter (ESC). The ESC makes a distinction between 'core' and 'non-core' rights and it is unique among human rights treaties since it permits its parties not to accept all the rights it contains.<sup>18</sup> In the

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<sup>18</sup> "Each of the Parties undertake: a. to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part; b. to consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20; c. to consider itself bound by an additional number of articles or 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." Part III, Article A (1) of the Revised ESC.



Original ESC there are seven ‘core’ rights<sup>19</sup> while the Revised ESC adds two further ‘core’ rights – the right of children to protection and the right to equal opportunities and treatment in employment. The second category of rights comprises ‘non-core’ rights.<sup>20</sup> The probable reason for the distinction between ‘core’ and ‘non-core’ rights and for allowing states not to accept all the rights from the ESC are the considerable differences in the level of economic and social progress among members of the CoE.<sup>21</sup> The consequence is that it is unlikely that many members to the CoE are subject to the same set of obligations under the ESC.<sup>22</sup>

As to the compliance mechanism under the ESC, there are two forms of machinery seeking to ensure that parties comply with obligations under the ESC. The first is the system of Reporting which has been in existence since 1961 and is obligatory for all the State Parties to the ESC. As to the second mechanism, the system of Collective Complaints, it was introduced in 1995 and has been in force since 1998. It has been ratified by only 15 Member States to date.<sup>23</sup> The ratification of the ESC does not oblige states to accept the jurisdiction of the European Committee on Social Rights (ECSR) in Collective Complaints procedure, as the ratification of the ECHR does for the jurisdiction of the ECtHR. Ratification of the ESC only obliges states to make reports to the ECSR on their implementation of the accepted provisions of the ESC. It is left for the states to decide whether they accept the Collective Complaint

<sup>19</sup> The rights to work; to form trade unions and employers’ associations; to bargain collectively; to social security; to social and medical assistance; to social, legal and economic protection for the family; and to protection for migrant workers.

<sup>20</sup> In the Original ESC these rights are: the rights to just conditions of work; safe and healthy working conditions; fair remuneration; vocational guidance and training; special protection for children, women, the handicapped and migrants; health; social welfare services; and special protection for mothers and children, families, the handicapped and the elderly, while the Additional Protocol to the ESC from 1998 adds four more rights and the Revised ESC adds eight more non-core rights.

<sup>21</sup> Gomien, D., Harris, D. J. and Zwaak, L., *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1996, at p. 379.

<sup>22</sup> European Social Charter, Table of Accepted Provisions (situation on July 2012): <[http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevJuly2012\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevJuly2012_en.pdf)> accessed 14 February 2013.

<sup>23</sup> Those are: Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, and Sweden. It is interesting that the United Kingdom has not accepted the Collective Complaints Procedure which also shows its attitude towards the legal status of economic and social rights.

procedure that authorises the ECSR to adopt decisions, which although not judicial, do have a quasi-judicial character.

What seems obvious is that in Europe the acceptance of regional supervision of civil and political rights is widely accepted, while the same cannot be said for economic and social rights.

The Inter-American and the African regional systems will now be briefly presented.

### 2.3. THE INTER-AMERICAN SYSTEM

The Inter-American system for the protection of human rights is governed by three legal instruments: the Charter of the Organization of American States (OAS Charter), the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (AmCHR) (with its additional Protocols).<sup>24</sup> In the human rights area the most important legal document, the one that constitutes a directly binding treaty, is the AmCHR.<sup>25</sup>

The AmCHR was adopted in 1969 and it entered into force almost ten years later, in 1978. The same year when the AmCHR was adopted it was decided to establish the Inter-American Court of Human Rights (I-ACtHR), but the I-ACtHR came into effect in 1978 and began to operate only after its Statute was established in the year 1980.<sup>26</sup>

The primary organs of the Inter-American human rights system are the Inter-American Commission on Human Rights (I-AComHR) and the I-ACtHR. The I-ACtHR has both contentious and advisory functions and it is composed of seven part-time, independent judges nominated in their individual capacity by the States parties to the AmCHR. However, States parties are subject

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<sup>24</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 67 (1992), and the Protocol to the American Convention on Human Rights Relative to the Abolition of Death Penalty (1990), O.A.S. Treaty Series No. 73 (1990), not in force yet.

<sup>25</sup> American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force on 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>26</sup> See more on the web page of the Inter-American Human Rights System at <[http://www.hrea.org/index.php?doc\\_id=413](http://www.hrea.org/index.php?doc_id=413)> accessed 4 February 2013.

to the I-ACtHR's contentious jurisdiction only upon making an independent declaration recognizing the I-ACtHR's jurisdiction. Even then, the I-ACtHR can only adjudicate cases submitted to it by the I-AComHR or States parties to the AmCHR. "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."<sup>27</sup> Therefore, individuals cannot act before the I-ACtHR, but only before the I-AComHR.

The AmCHR divides the protected rights into two categories under separate chapters, where chapter II declares civil and political rights and chapter III economic, social and cultural rights. However, the AmCHR actually consists of mainly civil and political rights, since twenty three of the twenty four protected rights fall under the civil and political rights chapter. The AmCHR contains only reference to economic, social and cultural rights in Article 26. Furthermore, the structure of this Article clearly shows it is not intended for protection on the same level as civil and political rights since it urges states "to adopt measures ... with a view of achieving progressively ... the full realization of the rights".<sup>28</sup>

The Additional Protocol in the Matter of Economic, Social and Cultural Rights (Protocol of San Salvador) has been adopted and its aim is to fill the gap in the AmCHR regarding economic and social rights. The Protocol has been ratified by only 15 of the 24 parties to the AmCHR. It was designed to change the situation with economic, social and cultural rights within the AmCHR system. However, under Article 19(6) of the Protocol the only right to organize trade unions (as set out under Article 8(1)(a)) and the right to education (as set out under Article 13) are subject to the contentious jurisdiction of the I-ACtHR and the I-AComHR.

Therefore, the judicial protection of economic and social rights is still largely underdeveloped and the Inter-American judicial protection of economic and social rights has not generally involved express reliance upon, and enforcement of, economic and social rights under the AmCHR, its Protocols and the American Declaration of the Rights and Duties of Man.<sup>29</sup>

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<sup>27</sup> Article 44 of the AmCHR.

<sup>28</sup> Article 26 of the AmCHR.

<sup>29</sup> In its case law on the rights of indigenous people the I-ACtHR has interpreted various civil and political rights (such as the right to life) to give protection to a range of socio-economic rights and interests (such as the right to food, the right to

#### 2.4. THE AFRICAN SYSTEM

The African human rights system is the newest regional system and it is considerably less developed than the American and the European systems. It is based on the African Charter on Human and Peoples' Rights (the AfCHPR, the Banjul Charter)<sup>30</sup>, which entered into force in October 1986. Today, the AfCHPR has been ratified by all fifty-three members of the Organisation of African Union (OAU).<sup>31</sup> In June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.<sup>32</sup> The OAU was transformed in 2002 into the African Union (AU).<sup>33</sup>

The African Charter on Human and Peoples' Rights (AfCHPR) has specific characteristics that distinguish it from the AmCHR and the ECHR in order to satisfy the specific needs of Africa. First of all, the AfCHPR reflects the wish of Member States of the OAU to maintain their distance from both the East and the West in their conception of the ideological function of human rights. Furthermore, the AfCHPR adopts a dialectic approach by correlating rights with corresponding duties. Also, according to the AfCHPR, the realization of individual rights can find its fullest expression and fulfilment only within the context of the community. And finally, the AfCHPR adopted an integrated approach to human rights, placing the recognition of economic, social and cultural rights on the same footing as civil and political rights.<sup>34</sup>

The institutional framework concerning human rights of the AU consists of the assembly of Heads of State and Government which is the supreme organ

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education and the right to health care). See *Xákmok Kásek Indigenous Community v Paraguay*, Judgment of 24 August 2010, Series C No. 214.

<sup>30</sup> The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

<sup>31</sup> The African Charter was adopted in 1981 by the 18th Assembly of Heads of State and Government of the OAU, the official body of the African states. The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments.

<sup>32</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2.

<sup>33</sup> Constitutive Act of the African Union, CAB/LEB/23.15 (26 May 2001).

<sup>34</sup> Okere, O. 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American System' 6 Hum. Rts. Q. (1984) 141, at p. 145.

of the AU. Furthermore, there are the African Commission on Human and Peoples' Rights (AfComHR) and the African Court on Human and Peoples' Rights (AfCtHPR).

The AfCtHPR has the competence to render final and binding decisions on human rights violations. Currently there are twenty six AU Member States that have ratified the Protocol establishing the Court.<sup>35</sup> Despite the AfCtHPR, the AfComHR still remains important in the individual complaints process since it has the role of taking the case to the AfCtHPR (only the AfComHR and the states have automatic *locus standi* before the AfCtHPR). The AfComHR has, through its work, even read certain economic and social rights into the AfCHPR, like the right to adequate housing and the right to health.<sup>36</sup> On the other hand, very few judgments were rendered by the Court before February 2013, and in most of them it found it had no jurisdiction to hear the case.<sup>37</sup>

Therefore, although the interconnection and indivisibility of all human rights has been stressed from the very beginning of the human rights discussion, in practice they have, at least so far, not been equally protected. As expressed by A. Cassese, "this convenient catch-phrase serves to dampen the debate while leaving everything the way it was."<sup>38</sup> Despite the proclamations of their indivisibility, they are far from being indivisible on both the regional and the global level.

### 3. DIFFERENCES BETWEEN CIVIL AND POLITICAL AND ECONOMIC AND SOCIAL RIGHTS – ARE THERE ANY?

It is evident from the previous section that generally civil and political rights enjoy better legal protection and are more accepted within states as

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<sup>35</sup> AfCtHPR <<http://www.african-court.org/en/>> accessed 4 February 2013.

<sup>36</sup> See *SERAC & CESR v Nigeria*, Com. No. 155/96 (2001), para. 60; African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights (November 2010), para. 77 on the right to housing; and *Purohit and Moore vs the Gambia*, Com. No. 241/2001 (2003) AHRLR 96 (where the AfComHR stated that the Gambia did not satisfy Articles 16 and 18(4) of the AfCHPR and that enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind).

<sup>37</sup> Judgments and Orders of the Court are available on the AfCtHPR website (n 35).

<sup>38</sup> Cassese, A., 'Are Human Rights Truly Universal?' in Savić, O. (ed.), *The Politics of Human Rights*, Verso, 1999, at p. 159.

being justiciable. Nevertheless, although differences between economic and social rights on the one hand, and civil and political rights on the other still exist, they are not nearly as sharp and clear as they were believed to be at the beginning of the international human rights era.

The original idea of traditionalists in separating economic and social from civil and political rights arose from the perception of civil and political rights as negative in their nature while of economic and social rights as positive. The negative character of rights means that they do impose negative obligations on states, and negative obligations require refraining from action, while positive ones require action. The division into civil and political rights, as imposing only negative obligations, and economic and social rights, as imposing only positive, is nowadays completely abandoned. Most civil and political rights, in order to be effective, also require some positive state action and fifty years of jurisprudence of the ECtHR clearly confirms this. A superficial look at the rights contained in the ECHR as protected by the ECtHR shows that most civil and political rights entail some positive obligation on the states.<sup>39</sup> Even the rights that are construed negatively, such as the right not to be subjected to torture, require numerous positive actions from the states, such as protecting vulnerable persons from ill-treatment by others<sup>40</sup> or providing healthcare in detention.<sup>41</sup> While admittedly economic and social rights often require relatively greater state action<sup>42</sup> for their realisation than do civil and political rights, this

<sup>39</sup> For example see *Airey v Ireland* (1979-80) 2 E.H.R.R. 305 concerning Article 6(1) of the Convention right of access to a court where the ECtHR found a violation of this right due to the state's failure to provide Mrs Airey with legal aid; *Christine Goodwin v United Kingdom* (2002) 35 E.H.R.R. 447 regarding official recognition of transsexuals where the ECtHR found that a state has an obligation to provide effective legal recognition of the new identities of post-operative transsexuals; *Dougoz v Greece* (2002) 34 E.H.R.R. 61 regarding unsatisfactory detention conditions the ECtHR found a violation of Article 3 due to the state's failure to provide for satisfactory conditions of detention; and *Lopez Ostra v Spain* (1995) 20 E.H.R.R. 513 regarding failure of the authorities to adequately protect the applicant's home and family life from gases emitted by a waste treatment plant, the ECtHR found a violation of Article 8. Also see Mowbray, A., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, 2004.

<sup>40</sup> *Z. v United Kingdom* (2002) 34 E.H.R.R. 3.

<sup>41</sup> *Keenan v United Kingdom* (2001) 33 E.H.R.R. 38.

<sup>42</sup> Although, some economic and social rights are purely negative, such as the right to belong to a trade union and for a trade union to carry out its activities (ICESCR, Article 8).

difference separates the two sets of rights rather in terms of degree than in kind.<sup>43</sup>

With the above stated division came another often made distinction; that civil and political rights are resource free, whereas economic and social rights or their implementation is resource dependent. However, whether or not a right is cost-free will depend on the obligation in question, rather than the classification of the right imposing that obligation as either civil and political, or economic and social in nature.<sup>44</sup> It is true that economic and social rights are often more financially demanding than civil and political rights (but not always, e.g. requiring the private sector to provide equal pay for equal work), but it can hardly be said that civil and political rights are resource free.<sup>45</sup>

The third division is that economic and social rights are to be achieved progressively, while civil and political rights are subject to immediate implementation. This view is confirmed in the Article 2(1) of the IECSR.<sup>46</sup>

However, despite this provision the CESCR has in its General Comments declared certain rights to be of immediate effect. For example, in General Comments No. 3 and 9 it has stated that it considers many of the provisions in the Covenant to be capable of immediate implementation<sup>47</sup> and in General

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<sup>43</sup> Alston, P. and Quinn, G., ‘*The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*’ 9 *Human Rights Quarterly* (1987) 156, at pp. 183-4.

<sup>44</sup> Nolan, A., Porter, B. and Langford, M., *The Justiciability of Social and Economic Rights: An Updated Appraisal*, Center for Human Rights and Global Justice Working Paper Series No. 14, New York University and the Committee on Administration of Justice Northern Ireland, 2007, at p. 8.

<sup>45</sup> For example, even the quintessential civil and political rights, such as the right to a fair trial, have budgetary implications: *Airey v Ireland* (n 39) para. 26 (where the ECtHR said Ireland must either provide legal aid or simplify court proceedings) or Article 6(3)(e) of the ECHR guaranteeing the right to free assistance of an interpreter if a person charged with a criminal offence cannot understand or speak the language used in court.

<sup>46</sup> “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

<sup>47</sup> CESCR, General Comment No. 3 (1990) E/1991/23: “Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant...Thus while the full realization of the relevant rights may be achieved progressively,



Comments No. 3 it has, regarding all the ICESR rights, stated that regardless of the state of development of any country, there are certain steps which must be taken immediately.<sup>48</sup>

The idea that economic and social rights may be of immediate effect was also accepted and affirmed in 1986 by the Limburg Principles on the Implementation of the International Covenant on the Economic, Social and Cultural Rights:

“The obligation ‘to achieve progressively the full realization of the rights’ requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.”<sup>49</sup>

As to the ESC, the rights contained in it are in general not progressive in nature, but are of immediate effect. The ECSR has taken the approach under which it requires states to take immediate steps in order to implement its decisions in respect of collective complaints and conclusions regarding national reports. For example, in its Conclusion 2003-1 on France on reducing homelessness the ECSR stated that it required “the introduction of measures, such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness”.<sup>50</sup> The same was restated in the Decision on the merits regarding Collective Complaint No. 39/2006.<sup>51</sup>

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steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned.” paras. 1-2; CESCR, General Comment No. 9 (1998) E/C.12/1998/24 “The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3.” para. 10.

<sup>48</sup> CESCR, General Comment No. 3 (n 47) paras. 2 and 9.

<sup>49</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Commission on Human Rights, *Note verbale dated 8/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (“Limburg Principles”)*, 8 January 1987, E/CN.4/1987/17, para. 21.

<sup>50</sup> ESC (Revised), ECSR Conclusions 2003 Volume 1 (Bulgaria, France, Italy), CoE Publishing, 2003, at p. 226.

<sup>51</sup> *European Federation of National Organisations Working with Homeless (FEANTSA) v France* (39/2006), (2008) 47 E.H.R.R. SE15, para. 103.

However, the ESCR has on certain occasions accepted the progressive nature of economic and social rights and made clear that it holds that the realisation of certain fundamental economic and social rights recognised by the ESC is guided by the principle of progressiveness.<sup>52</sup>

The I-AComHR has also emphasized the duty to take immediate steps towards the realisation of economic and social rights, stating that:

“The principle that economic, social and cultural rights are to be achieved progressively does not mean that governments do not have the immediate obligation to make efforts to attain the full realization of these rights. The rationale behind the principle of progressive rights is that governments are under the obligation to ensure conditions that, according to the state’s material resources, will advance gradually and consistently toward the fullest achievement of these rights...

It therefore follows that the obligation of member states to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights.”<sup>53</sup>

Although we might agree with the statement that on most occasions civil and political rights can be achieved within a stricter time limit than economic and social rights, the fact remains that both groups of rights can sometimes be realised immediately or at least impose obligations on states to start immediately with their realisation.

The fourth frequently used argument is that economic and social rights are too vague for judicial enforcement, while civil and political rights are determinate. Linked to this argument is the argument of justiciability of economic and social rights. An interesting view on this issue has been given by D.

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<sup>52</sup> *Centre on Housing Rights and Evictions (COHRE) v Italy* (58/2009), (2011) 52 E.H.R.R. SE6, at para. 26; *International Association Autism-Europe v France* (13/2002), (2004) 11 I.H.R.R. 843, at para. 53. See also *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v Greece* (66/2011), decision on the merits of 23 May 2012 where the ESCR recognised the economic crisis faced by Greece, but still emphasized that measures introduced to consolidate public finances should not undermine the core framework of the national social security system, at para. 47. Therefore, the economic crisis will not be sufficient argument for non-compliance with the obligations under the ECSR.

<sup>53</sup> Inter-Am.Comm.H.R., Annual Report of the Inter-American Commission on Human Rights, 1993, OAE/Ser.L/V/II.85 Doc.9 rev (11 February 1994), Chapter VII ‘The principle of progressive realisation’.

Marcus who wrote that the perception of non-justiciability and the normative underdevelopment of economic and social rights act as co-dependent parts of a negative feedback mechanism: “States oppose adjudication because the rules of decision are vague and imprecise, and these characteristics prevent the application of the ‘judicial craft’ to clarify and develop their content.”<sup>54</sup>

It is true that many of the rights contained in the ICESCR are formulated quite broadly, like the right to social security that only says: “The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance”<sup>55</sup>, or the right to work as guaranteed under Article 6(1).<sup>56</sup> However, not all rights under the ICESCR are formulated so vaguely and broadly, e.g. the right to primary education as guaranteed under Article 13(2)(a).<sup>57</sup> Also, the fact that rights are formulated vaguely does not automatically mean that they cannot be defined so that the states know what their obligations are. Regarding ICESCR the main guidance are General Comments adopted by the CESCR<sup>58</sup>, which although not legally binding are not without legal significance. Some of them can even be considered as interpretations of the ICESCR.<sup>59</sup>

As to the ESC, many of its provisions are drafted in sufficiently precise terms to be judicially enforceable.<sup>60</sup> Furthermore, the ECSR has through its decisions on collective complaints<sup>61</sup> and conclusions<sup>62</sup> on national reports very

<sup>54</sup> Marcus, D., ‘*The Normative Development of Socioeconomic Rights through Supranational Adjudication*’ 42 *StanJIntL* (2006) 53, at p. 55.

<sup>55</sup> IECSR, Article 9.

<sup>56</sup> IECSR Article 6(1): “The States parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

<sup>57</sup> “The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all.”

<sup>58</sup> See CESCR, General Comment No. 18 (2005) E/C.12/GC/18 on the Right to work.

<sup>59</sup> Khaliq, U. and Churchill, R., *op. cit.* (n 3), at p. 5.

<sup>60</sup> See Article 8(1), (2) and (5) of the Revised ESC on the right of employed women to protection of maternity.

<sup>61</sup> See *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (30/2005), (2007) 45 E.H.R.R. SE11, on the obligation of the State to adequately prevent the impact for the environment or to develop an appropriate strategy in order to prevent and respond to the health hazards for the population; or *European Roma Rights Centre (ERRC) v Bulgaria* (31/2005), (2008) 46 E.H.R.R. SE10 on the obligation of the state to provide adequate housing for Roma people.

<sup>62</sup> See ESC, ECSR Conclusions XVII- 2, Volume 1 (Austria, Belgium, Czech Republic,

clearly stated the obligations of the states regarding certain provisions of the ESC.

The fact is that most civil and political rights in the ECHR are also in no way determinate and conclusive, but the ECtHR has given meaning to these rights through numerous interpretative methods.<sup>63</sup> On the other hand, the ECSR members are also entitled to use (and they often do) the same interpretative methods as the ECtHR and thereby determine the meaning of rights contained in the ESC. “There are strong arguments in favour of open-textured framing of all human rights, so that courts are able to respond adequately to individual circumstances and historical developments in concretising their meaning over time.”<sup>64</sup>

Finally, the issue of justiciability of economic and social rights has been debated a lot during the last 15 years, and most authors will nowadays agree that judicial protection of economic and social rights is possible.<sup>65</sup> Part of the concern was that adjudicating economic and social rights issues is beyond the institutional capacity of the courts. In the paper *The Justiciability of Social and Economic Rights: An Updated Appraisal* A. Nolan, B. Palmer and M. Langford broke this assertion into four primary claims: (I) that the courts lack the information required to deal with social and economic rights; (II) that the judiciary lacks the necessary expertise, qualification or experience to deal with social and economic rights issues; (III) that the courts are incapable of dealing successfully with ‘polycentric’ tasks, such as those entailed by adjudication involving social and economic rights; and (IV) that the courts lack the necessary tools and remedies to deal effectively with social and economic rights. Further

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Denmark, Finland, Germany, Greece, Hungary, Iceland) (CoE Publishing 2005); and ESC (Revised), ECSR Conclusions 2007- Volume 1 (Albania, Armenia, Belgium, Bulgaria, Cyprus, Estonia, Finland, France), CoE Publishing, 2007.

<sup>63</sup> Like the doctrine of autonomous concept, the margin of appreciation doctrine or the doctrine of effectiveness.

<sup>64</sup> Nolan, A., Porter, B. and Langford, M., *op. cit.* (n 44), at p. 11.

<sup>65</sup> Melish, T., *Protecting Economic, Social and Cultural Rights in the Inter-American System: A Manual on Presenting Claims*, Orville H. Schell Jr. Center for International Human Rights, Yale Law School and Centro de Derechos Economicos y Sociales, Ecuador, 2002, at pp. 33-40; Marcus, D., *op. cit.* (n 54); Wiley, A. ‘Aspirational Principles of Enforceable Rights? The Future for Socio-economic Rights in National Law’ 22 *Am. U. Int’l L. Rev.* (2006-2007) 35; Baderin, M. A. and McCorquodale, M. ‘The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development’ in Baderin, M. A. and McCorquodale, R. (eds.), *Economic, Social and Cultural Rights in Action*, Oxford University Press, 2007, at p. 12.

on in the text they elaborated arguments against this assertion, claiming that the courts do have the necessary capacity to adjudicate economic and social rights.<sup>66</sup>

Acceptance of the justiciability of economic and social rights on the international plane is shown by a number of developments. The CESCR has asserted the justiciability of rights contained in the ICESCR both in its General Comments<sup>67</sup> and in some of its Statements.<sup>68</sup> Also, as already mentioned in June 2008 UN Human Rights Council adopted the Optional Protocol to the ICESCR<sup>69</sup>, which provides for the CESCR to receive communications from individuals or groups claiming to be victims of any rights in the ICESCR.

The ECSR has established a quasi-judicial procedure under the Collective Complaints Protocol. Although under this Protocol the ECSR does not have the power to deliver binding judgments, it has through a number of decisions clearly shown that economic and social rights are capable of legal enforcement. The I-ACoMHR and the I-ACtHR have also confirmed the justiciability, albeit limited, of Article 26 of the AmCHR guaranteeing economic and social rights.<sup>70</sup> Finally, the African system, at least in theory, makes no difference in justiciability of civil and political, and economic and social rights.<sup>71</sup>

#### 4. TRIPARTITE TYPOLOGY OF OBLIGATIONS

The classical division into civil and political rights as rights that impose on the state the duty to avoid and only exceptionally to protect from deprivation (therefore as rights that generally require the non-intervention of the state (negative rights)), and economic and social rights as rights that impose duties to protect from deprivation and to aid the deprived (therefore as rights that require active intervention on the part of the state (positive rights)) is nowadays

<sup>66</sup> Nolan, A., Porter, B. and Langford, M., *op. cit.* (n 44), at pp. 15-18.

<sup>67</sup> CESCR, General Comment No. 3 (n 47) [5] and General Comment No. 9 (n 47), para. 10.

<sup>68</sup> Statement to the Convention to draft a Charter of Fundamental Rights of the European Union <[www2.ohchr.org/english/bodies/cescr/docs/statements/EU.doc](http://www2.ohchr.org/english/bodies/cescr/docs/statements/EU.doc)> accessed 4 February 2013.

<sup>69</sup> Optional Protocol to the ICESCR (n 16).

<sup>70</sup> *Ivanildo Amaro da Silva et al. v Brazil*, Case 1198-05, Report No. 38-101, Inter-Am.C.H.R., OEA/Ser.L/V/II. Doc. 5, rev. 1 (2010) [26], [41]; *Accevedo Buendia et al v Peru* (I-ACtHR), 1 July 2009, paras. 92-107.

<sup>71</sup> See Principles and Guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights (n 36).

rather abandoned. Today mostly accepted is the H. Shue's idea that for every basic right there are three types of correlative duties.<sup>72</sup> After H. Shue, A. Eide, as the Rappporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, divided all human rights as to whether they impose obligations to *respect*, *protect* or *fulfil*. A. Eide described them in the following way: the obligation to *respect* requires states to abstain from violating a right; the obligation to *protect* requires states to prevent third parties from violating that right; and the obligation to *fulfil* requires the state to take measures to ensure that the right is enjoyed by those within the state's jurisdiction.<sup>73</sup>

Therefore, both Shue and Eide made no distinction between rights, but rather between duties. This tripartite typology of obligations has also been applied by the CESCR in General Comments<sup>74</sup> and the AfComHPR in its decision in *Social and Economic Action Centre (SERAC) and Another v Nigeria*<sup>75</sup>, in the African Commission Principles and Guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights, as well as in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>76</sup>

The obligation to respect requires from the state not to interfere with the enjoyment of a guaranteed human right. This obligation applies to all human

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<sup>72</sup> Shue, H., *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy*, Princeton University Press, 1980, at p. 52. Shue does not believe there are distinctions between rights, but only distinction between duties. In his view, the complete fulfilment of each kind of right involves the performance of multiple kinds of duties, that is, for every basic right there are three types of duties. Therefore, Shue rejected the notion that rights can be divided into negative and positive ones.

<sup>73</sup> Eide, A., UN Special Rappporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide*, (1987) UN Doc E/CN.4/Sub.2/1987/23, at pp. 23-24.

<sup>74</sup> CESCR, General Comment No. 21 (2009) E/C.12/GC/21, para. 48; General Comment No. 19 (2008) E/C.12/GC/19, paras. 43-51; General Comment No. 18 (n 58), paras. 22-28; General Comment No. 17 (2005) E/C.12/GC/17, paras. 28-34; General Comment No. 16 (2005) E/C.12/2005/4, paras. 17-22; General Comment No. 15 (2005) E/C.12/2002/11, paras. 20-29; General Comment No. 14 (2000) E/C.12/2000/4, paras. 33-38; General Comment No. 13 (1999) E/C.12/1999/10, paras. 46-48.

<sup>75</sup> *Social and Economic Action Centre (SERAC) and Another v Nigeria* (2000) AHRLR 23 (ACHPR 1995), para. 44.

<sup>76</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997, <[http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)> accessed 4 February 2013.

rights, civil and political, and economic and social. Fulfilment of the obligation to respect usually does not place a large financial burden on states, and judgments concerning violations of these obligations should be suitable for immediate implementation. It is considered that civil and political rights tend to place this obligation on states more often, since most civil and political rights are construed in a way that they primarily place an obligation on the state not to interfere. One example may be Article 3 of the ECHR stating “No one shall be subjected to torture or inhuman or degrading treatment.” The same goes for Article 2 that prohibits states to intentionally deprive someone of their life or Article 8 that guarantees everyone the right to respect for his private and family life, his home and his correspondence which are construed in a way that they primarily impose obligations to respect.

However, not only civil and political rights place obligations on the state to respect; economic and social rights also require non-interference by the state. For example, states are under the obligation to respect the right to health by refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy; and abstaining from imposing discriminatory practices relating to women’s health status and needs.<sup>77</sup> Therefore, the obligation to respect is attributable to both categories of rights.

The obligation to protect imposes some positive obligations on states, since the state not only has to refrain from acting, but is also required to protect individuals from having their rights interfered with by third (i.e. non-state) parties.<sup>78</sup> Although an obligation to protect has within classical theoretical divisions been more attributed to economic and social rights, the HRC, the ECtHR and the I-ACtHR have through their interpretation also imposed the obligation to protect on civil and political rights.

The HRC in its General Comment No. 20 concerning the prohibition of torture and cruel treatment or punishment stated as follows:

“It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official

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<sup>77</sup> CESCR, General Comment No. 14 (n 74), para. 34.

<sup>78</sup> See Nolan, A. ‘Addressing economic and social rights violations by non-state actors through the role of the state: a comparison of regional approaches to the “obligation to protect”’ 9(2) H.L.R.Rev. 2 (2009) 25.



capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’<sup>79</sup>

As to the ECtHR, there are numerous cases where the ECtHR interpreted the ECHR as to give rise to obligations to protect. For example, under Article 8 of the ECHR, the ECtHR has on numerous occasions gone beyond the notion to respect, requiring the states to protect individuals’ rights guaranteed under Article 8. Here the states have had to protect persons under their jurisdiction by changing legislation<sup>80</sup>, protect the applicants’ private life from environmental hazards<sup>81</sup>, or they have had an obligation to protect the right to home by preventing evictions without sufficient (procedural) safeguards, all in relation to acts by private parties.<sup>82</sup>

With the I-ACtHR this approach is visible in *Velasquez Rodriguez v Honduras* where the I-ACtHR stated that the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. It also emphasized that an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the AmCHR.<sup>83</sup>

Regarding economic and social rights, in General Comment No. 18, concerning the obligation to protect the right to work, the CESCR stated that it includes, *inter alia*, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers’ rights.<sup>84</sup>

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<sup>79</sup> HRC, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7), Forty-fourth session, 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 2.

<sup>80</sup> *X and Y v Netherlands* (1986) 8 E.H.R.R. 235.

<sup>81</sup> *Lopez Ostra v Spain* (n 39).

<sup>82</sup> *McCann v United Kingdom* (2008) 47 E.H.R.R. 40; *Yakovenko v Ukraine* App no 15825/06 (ECtHR, 25 January 2008).

<sup>83</sup> *Velasquez Rodriguez v Honduras* Inter-AmCtHR (Series C) No 4 (1988), paras. 166-176.

<sup>84</sup> CESCR General Comment No. 18 (n 58), para. 25.

On the regional level, the ECSR has also emphasized an obligation of the state to protect, both in its conclusions and in its decisions. For example, in its Conclusions XIV-2 (1998) on Malta it emphasized that it has found no information on specific measures (prohibition, protective equipment, permissible maximum exposure levels, etc.) taken to protect workers against dangers associated with hazardous biological agents, carcinogenic agents, ionising radiation or asbestos.<sup>85</sup> In its decision on the merits in *Marangopoulos Foundation for Human Rights v Greece* the ECSR pointed out that with a view of ensuring the effective exercise of the right to a healthy environment within the right to health, Article 11 of the ECSR requires States parties to protect public health against air pollution resulting from actions of private enterprises.<sup>86</sup>

Finally, the obligation to fulfil requires states to adopt measures to ensure the goal of the full realisation of rights to those who cannot secure rights themselves.<sup>87</sup> The obligation to fulfil is attributed mainly to economic and social rights, it is financially demanding, and usually the obligation itself is vague and unclear. Regarding the imposition of the obligation to fulfil, the reluctance of the judiciary to decide on these matters is most apparent. The CECSR has adopted a three-fold classification and divided the obligation to fulfil economic, social and cultural into the obligation to *facilitate*, *promote* and *provide*. The obligation to facilitate requires states, *inter alia*, to take positive measures that enable and assist individuals and communities to enjoy rights while the obligation to promote requires states to undertake actions that create, maintain and restore the realisation of all rights. Finally, the obligation to provide rights arises when individuals or groups are unable, on grounds to be reasonably beyond their control, to realise these rights themselves, with the means at their disposal.<sup>88</sup>

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<sup>85</sup> ESC, Committee of Independent Experts Conclusions XIV-2 Volume 2 (Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom) (CoE Publishing 1998), at p. 505.

<sup>86</sup> *Marangopoulos Foundation for Human Rights v Greece* (n 61), para. 93; See also *International Commission of Jurists v Portugal* (1/1998), decision on the merits of 10 September 1999, where the ECSR concluded 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, para. 32.

<sup>87</sup> Ssenyonjo, M., *Economic, Social and Cultural Rights in International Law*, Hart Publishing, 2009, at p. 25.

<sup>88</sup> CESCR, General Comment No. 14 (n 74), para. 37; General Comment No. 15 (n 74), para. 25; General Comment No. 17 (n 74), para. 34; General Comment No. 18 (n 58), paras. 26-28; General Comment No. 19 (n 74), paras. 47-50; General Comment No. 21 (n 74), paras. 51-54. See also Ssenyonjo, M., *op. cit.* (n 87), at p. 25.

The ECSR has on numerous occasions stressed the obligation of State Parties to promote, facilitate and to provide. In its Conclusion 2010 on Sweden regarding Article 26 it asked that the next report contains a short description of the active measures taken by the government alone or in co-operation with employers and workers' organisations to promote awareness, information and prevention of moral harassment in the workplace.<sup>89</sup> In Collective Complaint No. 52/2008 the ECSR recalled that in order to satisfy Article 16 of the ESC, states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and size considering the composition of the family in question, and include essential services, meaning that the state has an obligation to provide for those means.<sup>90</sup>

Instruments on civil and political rights generally do not place obligations on states to fulfil nor do their monitoring bodies interpret the provisions contained in them in such a way.<sup>91</sup> However, ECtHR judges have entered this sphere, for example by placing an obligation on states to provide for detention centres of certain standards<sup>92</sup> or to provide for medical treatment.<sup>93</sup>

It might be true that both civil and political rights, and economic and social rights entail all three obligations for the state and that all three types of obligations have budgetary implications, but the fact remains that the obligation to fulfil tends to be the “most resource demanding, and often also the one that raises most questions as regards a precise description of the obligation”<sup>94</sup> and most attributable to economic and social rights.

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<sup>89</sup> ESC (Revised), ECSR, Conclusions 2010- Volume 2 (Lithuania, Malta, Moldova, Netherlands, Norway, Portugal, Romania, Slovenia, Sweden, Turkey, Ukraine), CoE Publishing, 2011, at p. 585.

<sup>90</sup> *Centre on Housing Rights and Evictions (COHRE) v Croatia* (52/2008), (2011) 52 E.H.R.R. SE8, para. 65.

<sup>91</sup> Although it is not always easy to discern the dividing line between the obligation to protect and obligation to fulfil. See *Lopez Ostra v Spain* (n 39).

<sup>92</sup> *Kehayov v Bulgaria* App no 41035/98 (ECtHR, 18 January 2005); *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009); and *Kalashnikov v Russia* (2003) 36 E.H.R.R. 34.

<sup>93</sup> *D. v United Kingdom* (1997) 24 E.H.R.R. 423. Case *D. v United Kingdom* is not directly about providing medical treatment, but by preventing D. from being expelled from the UK, the ECtHR impliedly placed an obligation to the UK to provide him with the medical treatment. Also, there are numerous examples where the state was under an obligation to provide for the medical treatment of prisoners.

<sup>94</sup> Koch, I. E. ‘*The Justiciability of Indivisible Rights*’ 72 *Nordic Journal of International Law* (2003) 3, at p. 12.

## 5. CONCLUSION

In this article the theoretical approaches to civil and political rights and economic and social rights have been analysed together with their placement in the main regional and global human rights instruments. The conclusion that can be reached is that nowadays the classic division between civil and political rights as negative, subject to immediate implementation, justiciable and resource free, and economic, social and cultural rights as positive, progressive, non-justiciable and financially demanding, is not sustainable. With all the developments in human rights protection, particularly on the global and regional level, we can say that both civil and political, and economic and social rights can place both negative and positive obligations on states and financial burdens, as well as being justiciable. Furthermore, both civil and political rights and economic and social rights can give rise to three different types of obligations: to respect, to protect and to fulfil. However, the implementation and execution of these two groups of rights is still under most human rights instruments somewhat different and separate.

The fact is that a black-and-white distinction between economic and social on the one hand, and civil and political rights on the other is not possible. Nevertheless, there still are certain differences among those two categories of rights that cannot be ignored and it cannot be said that civil and political, and economic and social rights are nowadays indivisible.

To conclude with the words of M.J. Dennis and D.P. Stewart:

“The decision to put the two sets of rights in different treaties with different supervisory mechanisms was well considered, and the underlying reasons for those distinctions and decisions appear to remain valid today. Their different treatment in no way disqualified economic, social and cultural rights as rights or relegated them to a lower hierarchical rung. It did reflect an assessment of the practical difficulties that states would face in implementing generalized norms requiring substantial time and resources.”<sup>95</sup>

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<sup>95</sup> Dennis, M. and Stewart, J. *Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the right to food, water, housing and health?* 98 Am. J. Int'l L. (2004) 462, at p. 465.

## Sažetak

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### GRAĐANSKA I POLITIČKA PRAVA TE EKONOMSKA I SOCIJALNA PRAVA – NEDJELJIVA ILI DJELJIVA PRAVA?

*U današnje je vrijeme u pravnoj struci opće prihvaćeno stajalište kako građanska i politička prava u svojoj prirodi načelno nisu različita od ekonomskih i socijalnih te kako obje kategorije prava mogu nametnuti tri vrste obveza državama: obvezu poštovanja prava, obvezu zaštite prava te obvezu ispunjenja uvjeta za ostvarivanje prava. Nedjeljivost građanskih i političkih od ekonomskih i socijalnih prava proglašena je i u zaključcima brojnih konferencija o ljudskim pravima. No, iako se u pravnoj teoriji od samih početaka naglašava nedjeljivost i međuovisnost svih prava, u praksi su ona odijeljena. U ovom će se radu analizirati razlozi te nedosljednosti. Prikazat će se trenutačna pozicija građanskih i političkih te ekonomskih i socijalnih prava u najvažnijim međunarodnim i regionalnim dokumentima za zaštitu ljudskih prava. Prikazat će se i teorijski pristup tim dvjema kategorijama prava. Cilj je ovog rada prikazati kako su, unatoč teorijskom stajalištu o nedjeljivosti prava, u praksi građanska i politička prava odijeljena od ekonomskih i socijalnih.*

*Ključne riječi: građanska i politička prava, ekonomska i socijalna prava, nedjeljivost prava, međunarodni i regionalni sustavi za zaštitu ljudskih prava*

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