The Right to a Living Wage

The Obligations of States Parties to the International Covenant on Economic, Social and Cultural Rights to Realise the Right to a Living Wage

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# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CESC</td>
<td>the Committee on Economic, Social and Cultural Rights</td>
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<td>CSO</td>
<td>Civil Society Organisation</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>the Committee</td>
<td>the Committee on Economic, Social and Cultural Rights</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>ITUC</td>
<td>International Trade Union Confederation</td>
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<td>MNC</td>
<td>Multinational Corporation</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OHCHR</td>
<td>United Nations High Commissioner for Human Rights</td>
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<td>OP-CESCR</td>
<td>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</td>
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<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>UN</td>
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1. Introduction

1.1 Background

It is a pressing issue that workers globally, are paid salaries considered below poverty lines and therefore are caught in a poverty trap.¹ Many States have set their statutory minimum wages at levels insufficient to provide workers with a decent standard of living. This issue has called for action to be taken by both governments and employers to take responsibility and undertake measures to increase wages for workers.

The debate around the living wage has caught increased attention the past few years. In 2013 and 2014 demonstrations broke out in Cambodia and Bangladesh, where garment workers demanded a higher minimum wage. In Bangladesh workers fought for a monthly minimum wage of a meager 100 USD.² In Cambodia the garment workers demanded an increase to 160 USD a month. In return they were met with gunfire by the police – killing of three workers and injuring many more.³

According to reports, at the time of the protests, the Cambodian and Bangladeshi monthly minimum wages were 75 USD and 38 USD respectively.⁴ This left the garment workers with a daily salary of 2,5 USD and 1,3 USD each.⁵ This is to be compared with figures set by the World Bank stating that the average poverty line in 2011 was set at 2 USD a day in developing countries.⁶

Although the International Labour Organisation (hereinafter: ILO) has stated in the Philadelphia Declaration that labour is not a commodity,⁷ in the globalised world of today it clearly is. Governments in developing countries use their low wages as their comparative advantage, creating manufacturing-driven economies to the cost of

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¹ 'Tailored Wages are the big brands paying the people who make our clothes enough to live on?', report by Clean Clothes Campaign, 2014, p. 6.
² Al Jazeera, Protest by Bangladeshi garment workers shutters 100 factories, 11 November 2013 (15 July 2015).
³ BBC, Cambodia garment workers killed in clashes with police, 3 January 2014 (15 July 2015).
⁴ Al Jazeera, Protest by Bangladeshi garment workers shutters 100 factories, 11 November 2013 (15 July 2015), and Al Jazeera, Cambodia garment worker strike unravels, 8 January 2014 (15 July 2015).
⁵ As calculated by author on given minimum wage figures divided by 30 days.
⁷ ILO Philadelphia Declaration Concerning the Aims and Purposes of the International Labour Organisation, 1944, article I, see also e.g. ILO Declaration on Social Justice for a Fair Globalization, preamble.
workers’ living standards. When workers’ salaries are not enough to cover basic needs for them and their families, a large part of the work force and their families face poverty related implications, such as malnutrition, lack of access to health services and education, lack of social security, inadequate housing and restrictions in participation of a cultural and political life – all rights secured under the International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter: the ICESCR). This proves the great importance and need of a living wage in order to achieve the full realisation of human rights.

Trade unions worldwide have gathered to shed light on this issue, and NGO:s have launched several campaigns for a living wage, mainly calling for corporations to voluntarily start paying living wages to their workers. What is more, the United Nations (hereinafter: UN) is evidently concerned that the importance of the protection of just and favourable conditions of work is long from realised and recognised by States and the private sector. In January 2015 the Committee on Economic, Social and Cultural Rights (hereinafter: the Committee) published a draft general comment concerning the right to just and favourable conditions of work. This draft general comment addresses the States parties’ obligations to realise workers’ right to a remuneration sufficient for a decent standard of living for themselves and their families.

1.2 Objectives and Framing of Questions

The main objective of this thesis is to examine and clarify the obligations of the States parties to the ICESCR to realise the right to a living wage, i.e. a remuneration sufficient for a decent standard of living for workers and their families. In order to do so, it is

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9 See e.g. International Trade Union Confederation, Frontlines Report, ‘Workers are on the frontlines of a war on their living and working conditions. Income inequality: Time to deliver an adequate living wage’, February 2014 (10 August 2015).
11 Draft general comment on article 7, para. 3.
12 Draft general comment on article 7, 20 January 2015. This was the first draft discussed by the Committee on 16 June 2015. The Committee has announced a second draft to be published in September 2015. See CESCR, Committee on Economic, Social and Cultural Rights discusses draft general comment on the Right to just and favourable conditions of work, 16 June 2015 (25 July 2015).
necessary to assess what a living wage is. Therefore, efforts will be made to determine the concept of a living wage in international human rights law, as well as why a living wage is needed. As the right to a living wage is a human right, there is an obligation to safeguard this right through remedial action. Therefore, this thesis will also address the justiciability\(^\text{13}\) of the right to a living wage.

1.3 Demarcations

My writing will be focused on the provision 7 (a) (ii) ICESCR establishing the States parties’ obligation to realise workers’ right to a remuneration which ensures a decent standard of living for themselves and their families in accordance with the provisions in the Covenant. I have delimited my thesis to the subject of States parties’ obligations under the ICESCR to implement this right domestically.

Due to limitations in both space and time for this thesis, I will only consider employer and worker relations in the private sector. Hence, I have left both the public and informal sector aside. In regards of the private sector, there is an ongoing and much relevant debate on living wages in corporate social responsibility (CSR). However, I will not discuss such CSR policies, but will leave my readers to find this information in other scholars’ work.

Neither will I go into depth with the mechanisms of the ILO, but rather use relevant ILO documents as data for interpretation, in the manner as the Committee has done in its general comments and other publications. Although, there is a reporting mechanism also in regards of ILO obligations, this will also be left aside as I limit the scope of this writing to the States’ responsibilities towards the ICESCR. The monitoring mechanisms of the Committee and the States parties’ obligation to report to the Committee will not be explained in detail, but only briefly described to give the reader a sense of their surveillance of the ICESCR.

\(^{13}\) Meaning a matter that is appropriately tried and resolved by courts.
1.4 Method and Materials

As this thesis is a legal analysis of the obligations of the States parties of the ICESCR to realise the right under article 7 (a) (ii) of the Covenant, a legal method will be used. Primary and secondary sources in international law have been used, such as treaties, resolutions, case law and legal doctrine.

I have primarily relied on documents published by the UN and the ILO. I have particularly referred to statements, reports and general comments by the Economic and Social Council (hereinafter: ECOSOC) concerning the legal protection and realisation of economic, social and cultural rights. As my purpose of this thesis is to clarify States parties’ obligations to realise the right to a living wage, much of the thesis is based on the first draft general comment of article 7 ICESCR concerning just and favourable conditions at work. The second draft is expected to be published in September 2015. Statements cited in this writing might have changed in the finalised general comment. It is planned to be adopted in 2016.14

ILO Declarations, Conventions, Recommendations and reports have been my primary source when examining the concept of a living wage. The majority of legal doctrine referenced are comprehensive studies authored by renowned legal scholars on economic, social and cultural rights. Some literature on labour law has also been useful for this thesis. I have also sought guidance in relevant case law, primarily from South Africa and India, where economic, social and cultural rights have been progressively incorporated in their respective constitutions.

Finally, I have only considered material available until July 25 2015.

1.5 Disposition

First, in chapter 2, I will briefly present the background on labour rights as international human rights, and the need for a living wage to be ensured globally. I will also present the relevant UN treaties, resolutions and other adopted documents, as well as basic principles of human rights law and the effects of international law in domestic law. The Committee’s role and duties will also be explained.

14 CESCER, Committee on Economic, Social and Cultural Rights discusses draft general comment on the Right to just and favourable conditions of work, 16 June 2015 (25 July 2015).
Secondly, chapter 3 will outline the concept of a living wage. The right to a living wage in the ICESCR will be compared to the corresponding provisions in relevant ILO instruments. The difference between a living wage and a minimum wage will be explained, and the indicators that may be used when estimating a living wage are described.

The States parties’ obligations to realise article 7 (a) (ii) will be examined in chapter 4 of this thesis. Here the general obligations to respect, protect and fulfil human rights will be assessed in the light of the right to a living wage. Thereafter, the specific obligations stemming from the ICESCR will be presented.

Chapter 4 is closely interlinked with the following chapter 5, in which the justiciability of the right to a living wage will be discussed. In these two chapters of the thesis, the States’ responsibilities will be scrutinised in aspects of the progressive realisation of rights in the ICESCR and the specificity of the Covenant’s provisions. Also, topics such as resource allocation and the adoption of legislation to secure the right to effective remedies in cases of violations of the right to a living wage will be studied. Lastly, chapter 6 provides the reader with my concluding remarks.
2 Background: Labour Rights as Human Rights

2.1 Introduction

In this chapter I will present the background of labour rights as human rights, the relevant UN human rights instruments and the binding nature of such to the ratifying States parties. I will also in brief explain the basic human rights principles which are important to know and understand when discussing States parties’ obligation to realising the right to a living wage – the nature of obligations, the dual freedoms of human rights and monism and dualism. The right to a living wage will be further analysed in the light of these principles throughout my writing. Finally, I will present the Committee on Economic, Social and Cultural rights and its duties.

2.2 The Politics of Labour Rights in Brief

The freedom of contract is the legal basis of all employer-employee relationships, and a core for the principle of labour law. It is up to the parties of an employment contract to decide what the employee is to perform and what the employer is to pay as renumeration for the labour that has been done.\(^\text{15}\)

However, this principle of ultimate freedom for the employer and employee has led to misuse of the system. Employers have used their strong position to press wages and create poor working environments for their employees. Unreasonably low wages, long hours and no holidays are among ways corporations may exploit workers. Therefore, global actors have long seen it necessary to limit and prohibit such actions. Essentially, it is a matter of acknowledging the lack of comparable bargaining strength between the employer and the worker, and securing certain conditions of work which are seen as a decent level in a given society at a given time.\(^\text{16}\)


The main objective with a global system to ensure human rights and protecting the weaker party, is to set the protection of workers to a minimum level common for all States. In regards of living wages, an international and common commitment to enforce remuneration sufficient for a decent standard of living for workers and their families would secure that all workers would at least have a decent living in common. Naturally, the cost of living and what would be considered a living wage would vary in between States parties and even between regions within such States. But at least no State party would be able to use its low wages, insufficient to meet basic human needs and human rights, as their comparative advantage. This would level the playing field in the global economy and is a vital step in securing that labour is not used as a commodity.\(^{17}\)

However, governments seem to fret that an increase in wages will decrease investments and thus have a negative effect on the economic development of the country.\(^{18}\) It shall be noted that this is not a problem exclusive of the living wage, but of all labour rights, as it is repeatedly shown that retrogressive measures in regards of labour standards are used in order to "boost" economies in times of recession. Just arguments as they in a sense are – it is basic macroeconomic thought that an increase in labour protection will have corporations refrain from employing and investing – this really sheds light on the core issues with the living wage debate. Countries with the lowest wages, and the most poverty and poverty related implications, refrain from increasing minimum wages in order to attract investments. For this reason, an international standard should be promoted in order to ensure the right for workers globally to earn a living wage and in this way level the playing field among States. International regulation is a crucial part of international labour law when there is a lack of incentive on the domestic level.\(^{19}\)

### 2.3 Labour Rights in International Human Rights Instruments

In the ILO Constitution (1919) it is stated that universal and lasting peace only can be established by social justice, and that protecting labour rights is vital to this effect.\(^{20}\)

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\(^{17}\) ILO, The Benefits of International Labour Standards (10 August 2015).
\(^{19}\) 'The Protection of Minimum Wages', *International Journal of Comparative Labour and Industrial Relations*, p. 270. NB: no author named in article.
\(^{20}\) ILO Constitution, preamble.
Labour rights was subsequently recognised as human rights in UN instruments. The Universal Declaration of Human Rights (1948) (hereinafter: UDHR) and the ICESCR are essential in relation to labour rights, as they provide provisions securing the right to work, the right to form trade unions, the right to strike, as well as the right to fair and equal remuneration. But most important for this writing is article 23(3) of UDHR which provides that:

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity.

And the corresponding provision included in article 7 (a) (ii) ICESCR which holds:

The States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions at work which ensure, in particular:

(a) Remuneration which provide all workers, as minimum, with: […]

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant.

As established in the demarcation of this thesis, the right to a living wage under article 7 of the ICESCR is the focus of my writing. To provide the reader with a greater understanding of general human rights law and its principles, obligations which rises from ratifying human rights treaties, and the monitoring of States’ obligations, a brief assessment is found in the subsequent sections.

2.4 International Human Rights Law

The fundamental human rights instruments of the UN are the UDHR, the International Covenant of Civil and Political Rights (1966) (hereinafter: ICCPR) and the ICESCR. The two Covenants and the UDHR are all gathered in the so called 'Bill of Human

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21 UDHR article 23 (1) and ICESCR article 6 (1).
22 UDHR article 23 (4) and ICESCR article 8 (1) (a).
23 ICESCR article 8 (1) (d).
24 UDHR article 23 (2) and ICESCR article 7 (a) (i).
Rights’ and are the primary basis for the UN’s activities to promote, protect and monitor human rights and fundamental freedoms.  

2.4.1 The Binding Nature of the UDHR, ICCPR and ICESCR

The UDHR holds the basic human rights, and although it is not a binding instrument in international law, due to its status as a recommendation by the general assembly, it is one of the more authoritative instruments on human rights and its provisions have been incorporated in other treaties.  

UDHR is argued to be considered customary international law.  

The ICESCR and the ICCPR are legally binding on the State parties after ratification, thus making the human rights therein legally enforceable. Ratification by its definition means that a State party has established its consent to be bound by a treaty, and through this consent they have committed to realise the rights set in the Covenants. When a Covenant has been ratified, the State party has accepted to apply the obligations and ensure that domestic legislation and practice is compatible with their international commitment.

2.4.2 The Relation Between the Two Covenants

The two Covenants are considered complements to the UDHR; the ICCPR establishes and expands the civil and political rights held in the UDHR, and the ICESCR the economic, social and cultural rights ditto. Civil, political, economic, social and cultural rights are “universal, indivisible and interdependent and interrelated”, and their realisations equally important. However, the status and legality of economic, social and cultural rights has been heavily argued. This is much due to the different wordings in the obligating provisions of the ICESCR and ICCPR respectively.

25 OHCHR, Fact Sheet No. 16 (Rev. 1).
30 OHCHR, Fact Sheet No. 16 (Rev. 1).
31 Vienna Declaration (1993), para. 5.
ICCPR article 2(1) reads as follows (emphasis added):

“Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.”

The corresponding article in the ICESCR is differently formulated. Article 2(1) ICESCR (emphasis added):

“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.”

The distinction between the two Covenants is found in the direct obligation to respect and ensure civil and political rights, while the economic, social and cultural rights shall be realised by taking steps with an aim at progressively achieving the full realisation of the rights. The clause ‘maximum of available resources’ sets a flexible standard, where the implementation is adjusted to a State party’s individual capacity to implement the rights. Through this, wrongful conclusions have been drawn that economic, social and cultural rights shall be realised only once a State party reaches a certain level of economic development. This is not correct, as there are obligations on States parties to immediately take action to realise economic, social and cultural rights once the Covenant has been ratified. What this means in regards of living wages will be further developed in chapter 4.

34 OHCHR, Fact Sheet No. 16 (Rev. 1).
2.5 Central Principles of International Human Rights Law

2.5.1 The Nature of Obligations to Realise Human Rights

Two methods of analysing States parties’ obligations to realise human rights have been established. Those are i) the obligations of conduct and result, and ii) the obligations to respect, protect and fulfil rights. These obligations will also be examined in chapter 4, but will be dealt with briefly here for reference.

2.5.1.1 Obligation of Conduct and Result

The obligations of conduct and result are usually referred to as two separate means of obliging States to realise human rights. The obligation of result implies an obligation to realise a human right, without specifying the means of achievement. The decision of the forms and designs of the means is left to the States party’s discretion. The obligation of conduct, on the other hand, establishes how a State party shall achieve the realisation of a human right.35

2.5.1.2 Obligation to Respect, Protect and Fulfil

The typology of States’ obligations to respect, protect and fulfil has become common to all human rights, civil and political and economic, social and cultural alike. The obligation to respect requires a State to refrain from interfering with the freedom of individuals. The obligation to protect provides that States shall prevent third parties from interfering with the rights of an individual, and finally the obligation to fulfil requires States to undertake measures to ensure individuals enjoyment of the rights when they cannot be secured by personal efforts of the individual.36

2.5.2 Dual Freedoms of Human Rights

An important principle of human rights is the dual freedoms of human rights. The dual freedoms contained in human rights are the freedom from the State (the negative right) and the freedom through the State (the positive right).37 Freedom from the State means

36 Ibid., p. 109.
37 OHCHR, Fact Sheet No. 33, p. 2.
being free from State interference, and freedom through the State requires the State to undertake positive measures to uphold a right.

2.5.3 Monism v. Dualism

When discussing the effect of international law in a domestic legal system it is important to establish if a State party is monist or dualist. In a monistic legal order international law prevails if there would be a conflict between ratified treaties and domestic law due to a hierarchy between the laws. Therefore, in a monistic legal system, individuals can invoke international law directly in a judicial process. Dualism, on the other hand, requires international law to be implemented in national law in order to be enforceable.\(^3\) This distinction between a dualist and monist legal system is particularly important when discussing the justiciability of a living wage and if this right can be invoked before courts.\(^4\)

2.6 The International Covenant of Economic, Social and Cultural Rights

As I have limited the scope of my thesis to the right to a living wage under the ICESCR, in this section I will briefly present the surveilling UN body i.e. the Committee, the reporting mechanisms, concluding observations and the commentary flowing from the Committee.

2.6.1 The Committee on Economic, Social and Cultural Rights

States parties’ compliance with the obligations and implementation of economic, social and cultural rights in the ICESCR is monitored by the Committee, which is a working group established to assist the ECOSOC. The working group consists of 18 expert members elected by ECOSOC based on nominations by the States parties to the Covenant.\(^5\) The Committee works on a basis of information from different stakeholders in economic, social and cultural rights, such as reports submitted by States parties and

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\(^4\) See chapter 5.

\(^5\) ECOSOC, Resolution 1985/17.
the special agencies within the UN; the ILO, the WHO, UNHCR etc. Also, information from NGOs and CSOs are considered in their work.\textsuperscript{41}

2.6.2 Reporting Mechanism

The ICESCR has been ratified by 164 States parties\textsuperscript{42} which all are obliged to submit 'State reports' to the Committee. In article 16 of ICESCR all States parties to the Covenant undertake to submit reports on their achievements of realising economic, social and cultural rights.

2.6.2.1 State Reports

The State reports shall include the States’ measures adopted and the progress made in achieving the rights in the Covenant. The reports are a vital step for the Committee to be able to perform its responsibility to monitor States parties’ compliance with the ICESCR.\textsuperscript{43} In accordance with article 17 ICESCR the reports are to be submitted on a regular basis, decided by the ECOSOC. Presently the reporting interval is set at every five years.\textsuperscript{44}

The reporting system takes the form of a dialogue between the Committee and the State party, where the State bases its report on questions put forward by the Committee.\textsuperscript{45} In regards of article 7 of the ICESCR on just and favourable conditions of work the States parties shall indicate if they have legally established a minimum wage, specify to which workers such apply and the number of workers covered. If any workers are not covered, it should be explained why. Furthermore, the State report shall indicate if the minimum wage is systematically indexed and periodically reviewed and determined at a level that provide all workers and their families with an adequate standard of living.\textsuperscript{46}

\textsuperscript{41} OHCHR, Fact Sheet No. 16 (Rev. 1).
\textsuperscript{42} UN Treaty Collection, Human Chapter IV, Human Rights, ICESCR (21 July 2015).
\textsuperscript{43} General comment No. 1, para. 1.
\textsuperscript{44} ECOSOC, Resolution 1988/4.
\textsuperscript{46} Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the ICESCR (E/C.12/2008/2), Annex, para. 19.
2.6.2.2 Concluding Observations

After the State report has been submitted, the Committee issues a ‘concluding observation’. This constitutes the Committee’s decision on the status of a State party’s implementation and realisation of the rights in the ICESCR. In the concluding observation the Committee may conclude State violations of economic, social and cultural rights, where upon it can urge the State to undertake measures in order to end its violations.\(^{47}\) However, States cannot suffer any sanctions or penalties for failing the realisation of such rights. The process has rather become known as one of “Naming and Shaming”. The concluding observations constitutes the main jurisprudence of the Committee.

2.6.3 Optional Protocol

The Optional Protocol to the ICESCR establishing an individual complaints mechanism was adopted in 2008, and entered into force in May 2013.\(^{48}\) To this date it has been ratified by 20 States parties,\(^{49}\) showing a lukewarm interest to the new complaints procedure. Due to the low number of ratifications and the immaturity of the Optional Protocol, I will only briefly present its mechanisms in this section and then leave this procedure aside. As of yet, no jurisprudence has derived from the individual complaints mechanism, but three cases are pending before the Committee.\(^{50}\)

Under the Optional Protocol individuals, or representatives for groups of individuals, whose rights under the ICESCR have been violated by a State party can submit communications to the Committee.\(^{51}\) The Committee only considers complaints if the available domestic remedies have been exhausted or have been unreasonably prolonged.\(^{52}\) States parties to the Optional Protocol have to declare that it recognises the competence of the Committee to undertake an inquiry procedure regarding a communication, and may at any time withdraw its declaration recognising the Committees competence.\(^{53}\) This, similarly to the regular reporting system, leaves the

\(^{47}\) OHCHR, Fact Sheet No. 16 (Rev. 1).
\(^{48}\) As provided in OP-CESCR article 18 three months after the tenth ratification.
\(^{49}\) UN Treaty Collection, Chapter IV, Human Rights, OP-CESCR (21 July 2015).
\(^{50}\) CESCR, Table of pending cases before the Committee on Economic, Social and Cultural Rights, considered under the OP-CESCR (29 July 2015).
\(^{51}\) OP-CESCR articles 1 (2) and 2.
\(^{52}\) OP-CESCR article 3 (1).
\(^{53}\) OP-CESCR article 11.
Committee’s measures quite toothless, and is mainly a way to take the naming and shaming one step further, i.e. through raising cases where individuals themselves have been directly affected by the States parties’ negligence to fulfil their obligations under the ICESCR.

2.6.4 General Comments

The Committee authors ‘general comments’ on the rights of the ICESCR, which have become vital for the understanding and clarity of economic, social and cultural rights. The contents of the general comments are primarily formed by the Committee’s insights from reviewing State reports. The general comments cover a range of topics, from the nature of the obligations of States parties, and the domestic application of the Covenant, to the right to adequate housing, right to food, and the right to work.

The objective of general comments is held to be to assist States parties in their implementation of the Covenant. The comments shall stimulate measures undertaken by States parties, as well as international organisations and specialised agencies concerned in progressively and effectively achieving the full realisation of the ICESCR. The general comments have been subject to some criticism though, mainly in relation to being too broadly framed, lengthy and being repetitive. Also, they have been stated to be excessively ambitious causing general comments to be overly detailed and including too many directives for the States parties.

2.7 Conclusion

As has been explained in this chapter, labour rights has been implemented into international human rights law, in order to avoid exploitation of workers and to secure

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55 General comment No. 3.
56 General comment No. 9.
57 General comment No. 4.
58 General comment No. 12.
59 General comment No. 18.
them safe and decent working conditions. International recognition of living wages is important to ensure the basic needs of workers and their families for a decent standard of living. This would level the playing field, and no State would be able to use its insufficiently low wages as its comparative advantage.

The ICESCR and the ICCPR are legally binding upon ratifying States, and States parties have through this action committed to realise the rights found in the two Covenants. In regards of labour rights, and living wages in particular, the ICESCR is the main act which upholds these rights. States parties have obligations of conduct and result, as well as to respect, protect and fulfil the rights in the ICESCR. Furthermore, in my evaluation of States parties’ obligations to realise the right to a living wage it is important to understand the concept of dual freedoms of rights, as well as the principles of monism and dualism.

The Committee is assigned with the task of monitoring the States parties’ compliance and achievements in realising the rights in the ICESCR. This is done through States reports and concluding observations. However, the monitoring mechanism is rather toothless as no sanctions are prescribed for violating States. The Committee also authors general comments which are vital for clarifying economic, social and cultural rights.
3 What is a Living Wage?

3.1 Introduction

To understand the obligation of the States parties to realise article 7 (a) (ii) the right to a remuneration sufficient for a decent standard of living for workers and their families – commonly known as a living wage – it is first and foremost important to examine what a living wage is. Besides being incorporated in UN human rights instruments and ILO documents, the right to a living wage has also been incorporated in regional human rights acts.61 In this chapter I will first survey and interpret the concept of a living wage in the context of the ICESCR and ILO Declarations, Conventions and Recommendations. I will then lay out the distinction between a minimum wage and a living wage, how a living wage shall be estimated and the main arguments to why a living wage is needed. Lastly, the Committee’s take on article 7 (a) (ii) expressed in the draft general comment will be presented.

3.2 Living Wage in UN and ILO Instruments

3.2.1 Living Wage in the ICESCR

As was noted above in section 2.2, the UDHR article 23(3) states that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity. In the same section it was also mentioned that article 7 of the ICESCR concerns just and favourable conditions of work, and it is in this article the right to a living wage is found.

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61 European Social Charter (Revised), Part I, para. 4, The American Declaration on the Rights and Duties of Man, article XIV, and Additional Protocol to American Convention on Human rights in the Area of Economic, Social and Cultural Rights holds in article 7 (a).
ICESCR Article 7 states the following:

“The States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
(a) Remuneration which provides all workers, as a minimum, with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant.”

There is an important distinction between the (i) and (ii) provisions of the article. Fair wages concerns the right to a wage that reflects a non-exhaustive list of objective criteria of the job done, seeing to output, level of education, skills, impact on health, conditions of work, safety, hardships and impact on family life.62 In other words, a fair wage rather see to the conditions of work, and how it is performed. The right to equal remuneration protects the right for workers who perform labour of equal value to be paid the same wages, regardless of sex or disabilities or other discriminatory grounds.63

The rights under article 7 (a) (i) and (ii) are fundamentally different in how they are estimated. Remuneration sufficient for a decent living for workers and their families shall take subjective criteria into account. Such are the cost of living to lead a decent life with the enjoyment of the other rights under the Covenant, including the right to education, health, housing and participation in a social and cultural life.64 Solely article 7 (a) (ii) is to be regarded in the rest of my writing, as article 7 (a) (i) does not concern living wages.

3.2.2 ILO Declarations

It is clear that the ILO considers the right to a living wage as a human right, as it is included in major ILO Declarations.65 Already in the preamble of the ILO Constitution it was stated that peace and harmony in the world requires the provision of an adequate

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62 Draft general comment on article 7, para. 11.
63 Draft general comment on article 7, para. 12
64 Ibid., para. 20.
65 Anker, 'Estimating a living wage: A methodological review', p. 4.
living wage.66 This was reaffirmed in the ILO Philadelphia Declaration where it was held that policies concerning wages should be calculated to "ensure a just share of the fruits of progress for all, and a minimum living wage to all employed."67 The same provision concerning minimum living wages was copied to the 2008 ILO Declaration on Social Justice for a Fair Globalization.68

The 2008 ILO Declaration on Social Justice for a Fair Globalization is referred to as one of the fundamental declarations of the ILO, together with the ILO Constitution and the Philadelphia Declaration.69 The declarations are resolutions of the International Labour Conference, drafted in order to make formal and authoritative statements as well as reaffirming the importance of certain labour rights principles. The declarations are not to be ratified, but are of general application for Member States of the ILO.70 This is to be compared to ILO Conventions which are binding only through ratification.71

3.2.3 Adequate Living Wage v. Minimum Living Wage

The above section shows that the ILO uses two different sets of terms in its declarations. The ILO Constitution refers to an adequate living wage, while the Philadelphia Declaration and the Declaration on Social Justice for a Fair Globalization provides the need for a minimum living wage. The distinction and the interpretation of these are discussed by Anker. In his opinion the most logical interpretation of this is that the word minimum “is an adjective that qualifies the meaning of living wage”. With this he means that a minimum living wage is required to support a basic (i.e. minimum) living standard, and argues that this is consistent with the phrasing "adequate living wage” in the ILO Constitution.

According to Anker, another less correct interpretation, could be that the minimum solely refers to a minimum living wage as a type of minimum wage.72 However, it would seem more legitimate to read the provisions in the Philadelphia Declaration and the Declaration on Social Justice for a Fair Globalization in the light of

66 Preamble, ILO Constitution 1919, and Ibid., p. 16.
67 ILO, Philadelphia Declaration, article III (d).
68 2008 ILO Declaration on Social Justice for a Fair Globalization, Section I. A. (ii).
70 JUR Office of the Legal Adviser, ILO Declarations (10 August 2015).
the ILO Constitution, and see to the objectives of a the provision, which is that a wage should be sufficient for a certain – decent – standard of living.

3.3 Defining a Living Wage

3.3.1 ILO Minimum Wage Convention and Recommendation

To understand what a living wage is, it has been deemed useful to take guidance in the ILOs Conventions and Recommendations on minimum wages, as these concern the needs of workers.73 Article 3 in The Minimum Wage Fixing Convention 1970 (No. 131) (ILO Convention No. 131), states that two elements should be taken into consideration when determining the level of minimum wages. First, the needs of workers and their families, taking into account the cost of living, social security benefits and relative living standards of other social groups. Secondly, economic factors should be considered, including requirements of economic development, levels of productivity and the maintenance of a high level of employment.74

ILO Convention No. 131 is further developed in the ILO Minimum Wage Fixing Recommendation 1970 (No. 135) (ILO Recommendation No. 135). In article 1 it is held that minimum wage fixing should constitute one element in a policy to overcome poverty and to ensure the satisfaction of workers and their families. Article 2 establishes that the fundamental purpose of a minimum wage fixing scheme is to give workers the necessary social protection as regards of minimum permissible levels of wages. Article 3 of Recommendation No. 135 also reaffirms the elements to determine the level of minimum wages as found in ILO Convention No. 131. The Convention and Recommendation applies to all groups of wage earners, with possibilities to restrict it for groups where it is found appropriate. This, however, should be kept to a minimum.75

The States’ discretion to restrict the application of ILO Convention No. 131 for certain groups of workers is fundamentally different than the obligation laid down in article 7 (a) (ii) ICESCR, which states that the right to a remuneration sufficient for a decent standard of living for workers and their families apply to all workers. Apart from this distinction, the above articles show that there is also some resemblance in how the

73 Ibid., p. 16, and draft general comment on article 7, para. 21.
74 As the right to work also is a human right in article 6 (1) ICESCR.
75 ILO Convention No. 131, article 1 (1) and ILO Recommendation No. 135, article 4.
minimum wage is to be determined according to Convention No. 131 and Recommendation No. 135, and the provisions concerning a living wage in international human rights instruments. Both the minimum wage and a living wage should be sufficient to cover the needs of workers and their families, and thus have an element of poverty reduction included in them. This is further developed to taking the cost of living into account, as well as the relative living standards of social groups, something that the subsequent sections will show shall be taken into regard when determining living wages as well.

3.3.2 The Distinction of a Minimum Wage and Living Wage

None of ILO’s instruments actually defines what a minimum wage is, even though Convention No. 131 provides the criteria to be used in determining a minimum wage. Instead, the ILO General Survey of 1992 on Minimum Wages attempted a definition, which has since been affirmed by the ILO General Survey of 201476 and referred to in the draft general comment of article 7.77 The meaning of the term minimum wage is held to be:

“The minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his or her family, in the light of national and economic conditions.”78

First of all, the above statement shows that the minimum wage must be legislated and guarantee a floor level of remuneration. Secondly, as seen in the above statement and Convention No. 131, the concept of a minimum wage does in fact already in itself imply a minimum living wage, as the purpose of a minimum wage to begin with seemingly is to ensure workers and their families with a basic minimum to cover their needs.79 Thus, the idea of a remuneration sufficient to cover the needs of workers and their families is

76 ILO, General Survey 2014, para. 35.
77 Draft general comment on article 7, para. 21.
79 Ibid., paras. 32-33.
not something new. What is more, both the minimum wage and the living wage constitute elements of a policy to overcome poverty. However, there is a couple of distinctions to be made between a living wage and a minimum wage.

The first is that the minimum wage permits States to take into account national and economic conditions when setting the wage floor, acknowledging that minimum wages are an instrument in public financial policy. The second is that the elements to determine a minimum wage do not include precise indicators on which needs of workers to be taken into account when setting wage levels. A living wage, on the other hand, does provide such indicators. Therefore, a living wage can be argued to be more subjective than the minimum wage, as the workers’ needs are prevalent in the former.

3.3.3 National and Economic Conditions

One of the main distinctions between a minimum wage and a living wage is that the former may take into consideration wages’ implications on employment and economic development when they are set.80 As an example, the second element in the above mentioned article 3 of Convention No. 131, states that the requirements for economic development and aspirations of a high level of employment shall determine the level of minimum wages. This has also found resonance in the definition in the ILO General Survey 1992, where it is held that the minimum wage shall be set in the light of national and economic conditions.

In the preparatory work of Convention No. 131, it was stated that although the basic needs of workers and their families is the purpose of a minimum wage, it must be recalled that such a legislation cannot alone overcome poverty and that it should instead be part in a more comprehensive poverty reduction policy with the objectives of promoting a better life for the masses of the people.81 Furthermore, it was concluded in the process of adopting Convention No. 131 that the perspective of a minimum wage fixing policy should be both “an effective instrument of social protection and an element of a strategy of economic development.”82 This motivates the clause of taking into account the economic development when establishing minimum wages, and shows the deep-rooted conflict of interests in the debate regarding wages in general.

82 Ibid., para. 68, with reference to ILO: Meeting of Experts of 1967, para. 98.
As held in article 3 of Convention No. 131, minimum wages may be adjusted to economic development, productivity and the achievement of a high level of employment. Investments are needed to satisfy these three important parts in the development of a State. Foreign direct investments by for example a MNC in a certain country may include establishing manufacturing hubs which in turn create employment opportunities. State parties fret that an increase of wages within their borders could discourage corporations to put their investments in their State, and the ambition of maintaining a high level of employment may suffer. After all, productivity and jobs are needed to reach economic development and in turn achieve welfare for the citizens in a State.

However, seeing to the enforcement of a living wage as a tool to level the playing field among States parties, there would not have to be a contradiction between attracting investments and securing a remuneration sufficient for a decent standard of living for workers and their families. Therefore, in terms of a living wage, the national and economic conditions have been stripped away. It has been held that Convention No. 131 should be interpreted in the light of the ILO Constitution and the Philadelphia Declaration and their requirement of a living wage. Furthermore, the provision in Recommendation No. 135 establishing that the minimum wage should be sufficient to overcome poverty clearly shows that the ILO sees wage policies in general as an element in poverty reduction. Such arguments speak in favour of a wage level that rather see to the workers’ right to an adequate standard of living, than to national and economic development when being set. The aim should be that no worker is stuck in a poverty trap.

Furthermore, according to the authors of the ILO General Survey 1992, the concept of a minimum living wage should be interpreted in the light of the ICESCR, and implies that there is an aim at improving the material situation of workers and guaranteeing them, and their families, a basic standard of living which is compatible with human dignity or cover the basic needs of workers and their families. However, the circumstance that the provision in Convention No. 131 does not specifically state the criteria to be taken into account shows the discretionary power, margin of appreciation.

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83 See to this effect, Statement by ITUC at the general discussion of draft general comment of article 7 ICESCR, 16 June 2015.
of States parties, which enables them to set their own minimum wage rates appropriate to their national circumstances and economic development.\footnote{ILO, General Survey 2014, para. 51.}

### 3.3.4 Criteria to Determine a Living Wage

One of the objectives of the Convention No. 131 is to give workers a necessary social protection in terms of a minimum permissible level of wages.\footnote{ILO, General Survey 1992, para. 65.} However, the elements in Convention No. 131 do not give any precise indications on what types of needs to be taken into account. This is one of the reasons why the living wage is needed – it establishes the indicators constituting a decent standard of living. While a minimum wage is mainly concerned with legally fixing a wage floor, a living wage concludes the needs which actually bring workers and their families a decent standard of living.

I have regarded Anker’s ILO report on how to estimate a living wage to be the closest to an official and recognised summary of what a living wage is, as it is referred to by the Committee in the draft general comment and further endorsed in other ILO documents.\footnote{See e.g. ILO, General Survey 2014, para. 52.}

In the report Anker first makes an assessment of different stake holders view on what a living wage is, and then provides his readers with his interpretation of how a living wage could be defined.

> “The idea of a living wage is that workers and their families should be able to afford a basic, but decent, life style that is considered acceptable by society as its current level of economic development. Workers and their families should be able to live above the poverty level, and be able to participate in social and cultural life.”

Anker continues by stating that several indicators are needed to estimate a living wage. First, an indicator should be the per capita cost of a basic, but decent, living standard that is acceptable for the society at that time, enabling workers and their families to live above an acknowledged poverty line. This is usually done by adding up the cost of basic necessities such as a nutritious low-cost diet appropriate for the society, basic housing of an acceptable standard seeing to rooms and amenities such as electricity and toilet, and finally adequate clothing and footwear.
Secondly, other needs also must be taken into account, which include the cost of transportation, health care, children’s education, cultural activities, etc. A worker should also have room for some savings, in case of unforeseen costs.

Finally, the household size has to be determined. Here, the most common seems to be to take two adults and two children into account. Anker points out that determining the number of working adults in a household might be subjective considering cultural differences and whether a presumed wife in the household should work. Even though there is a whole other question of gender issues linked to this assessment, raising this question is appropriate. 87 Also, cultures where inter-generational households are common, such as India, adds to the subjectivity that has to be taken into account when determining what a household constitutes.

The subjectivity of a living wage is often the main criticism of the concept, due to the subjectivity it entails to figure the cost of living in a certain place, the size of a household, adequate housing and cost of education and health care. As Anker points out, data and statistics to measure these criteria is already available. For example the market basket approach to estimate basic family budgets is an acknowledged and widely used way in calculating poverty lines and cost of living in countries. 88 It should also be noted, that subjectivity is included when determining a minimum wage as well, particularly if one is to follow the ILO’s elements to determine a minimum wage in Convention No. 131. Therefore, it must be held fairly unjust to claim that a living wage would be more subjective, as this challenge is already present when defining a minimum wage.

3.4 Wages in the Committees Draft General Comment

The Committee holds in its draft general comment on just and favourable conditions of work that a ‘decent living’ shall be determined by the cost of living and other economic and social conditions. The remuneration should enable workers and their families to enjoy the rights under the ICESCR, such as social security, education, health care and an adequate standard of living including adequate food, water and sanitation, housing

88 Ibid., p. 11.
and clothing. The Committee also firmly states that minimum wages shall be above the poverty line.  

Seemingly, the Committee show a willingness to include living wage elements in their commentary to the right provided in the ICESCR article 7 (a) (ii). However, in the draft general comment the Committee consistently uses the term minimum wage, causing some criticism of the draft during the general discussion. The International Trade Union Confederation (ITUC) and the Clean Clothes Campaign criticized the lack of clarification concerning minimum wages, and that the Committee has not underscored that minimum wages should be equivalent to a living wage. Additionally, the statement that minimum wages should be ‘realistic’ was questioned. Again, ITUC and the Clean Clothes Campaign held similar arguments, stating that the term ‘realistic’ allows for minimum wages to be kept unduly low out of global competition considerations.

According to the Committee, the elements to be taken into account when fixing a minimum wage should be flexible but technically sound, by reference of the general level of wages in the country, the cost of living, social security and relative living standards. However, the draft general comment seems to add little news to how a living wage should be determined, but rather only hold on to the standards set by the ILO in Convention No. 131.

The Committee does affirm that although requirements of economic and social development and the achievement of a high level of employment should be considered when determining minimum wages, such factors should not justify a minimum wage which does not sufficiently ensure workers and their families a decent living.

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89 Draft general comment on article 7, paras. 20 and 24.
90 The Clean Clothes Campaign is an alliance of NGOs and trade unions representing 16 European countries promoting just and favourable working conditions for garment workers. On the global scene, the Clean Clothes Campaign is one of the main promoters of a living wage.
91 Statement by ITUC at the general discussion of draft general comment of article 7 ICESCR, 16 June 2015, and statement by Clean Clothes Campaign at the discussion of the draft general comment of article 7 ICESCR, 16 June 2015.
92 Draft general comment on article 7, para. 23.
93 Ibid., para. 25.
3.5 Conclusion

The right to a living wage is a human right recognised in the ICESCR and ILO Declarations, Conventions and Recommendations. The realization of a remuneration sufficient for a decent standard of living is also a prerequisite for the enjoyment of the other the rights in the ICESCR. However, the relevant provisions in the ICESCR and ILO instruments do not define what the concept of a living wage is. This leaves much to the States parties’ discretion in deciding how a living wage shall be determined. Guidance can be sought in the way minimum wages are defined in Convention No. 131. Minimum wages shall be determined by the needs of workers and their families and as a policy in overcoming poverty, but also by taking a State’s development and economic factors into account.

When determining a living wage this should be done solely from the perspective of the workers’ and their families’ needs to achieve a decent standard of living. Thus, the determinants when fixing minimum wages which enables States parties to use the minimum wage as a means of fiscal policy to stimulate the market and attract investors is to be left aside when determining a living wage. This is in line with the aim to level the playing field among States and prevent labour to be used as a commodity, as well as the objective that no worker should be stuck in a poverty trap.

A living wage should be above poverty lines and be based on the cost of living in a society at a certain time. It should be sufficient for workers and their families to afford a basic but decent life, and enable the enjoyment of the other human rights found in the ICESCR. This includes a number of subjective criteria such as household size, adequate food and housing etc., which all have to be determined based on the culture and society where the living wage is to be applied.
4 State Obligations Under the ICESCR

In this chapter I will examine the obligations that States parties have committed to through the ratification of the ICESCR, and especially concerning the right to a remuneration sufficient for a decent standard of living for workers and their families. I will begin by presenting the three layered obligations to respect, protect and fulfil which are common for all human rights. Thereafter, I will move on to the four obligations specific for the ICESCR, which are found in article 2(1); the obligation of progressive realisation of the rights, the immediate obligation to prioritise the satisfaction of minimum core obligations, obligations of immediate effect, and the obligation to adopt legislative measures to realise the rights in the Covenant.

4.1 Respect, Protect and Fulfil

4.1.1 Respect

In terms of respect, the State is obliged to refrain from interfering directly or indirectly with individuals’ enjoyment of any human right. This includes, for example, respecting property and resources owned by individuals, freedom of association, and respecting the right to strike.94 This obligation also includes that whenever States are required to undertake positive measures for the realisation of rights, it should be done in manner which sufficiently respects individuals’ freedom.95

States should respect collective agreements aimed at introducing and maintaining favourable conditions of work. Such agreements could for example include the setting of wages for those unionised. But this also means that States must respect the individual employment contract between an employer and a worker, and recognise its legal effect. In order to respect, the States parties must review legislation, e.g. corporate laws and regulations, to ensure that they do not constrain a right laid down in the

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Thus, the States parties should take measures to respect the right to a living wage by taking positive action to review minimum wage laws within its territory or undertake legislative measures if such are not in place.

Furthermore, the obligation to respect includes a strong presumption that States should refrain from taking deliberate retrogressive measures, i.e. limiting rights already implemented in the domestic legal order. Hence, the obligation to respect the right to a living wage puts limitations to the possibility to, for example, lower minimum wages in times of financial crises and recession. States who have taken retrogressive measures must show that such have been adopted after most careful considerations and scrutiny of other alternatives.

As an example, the regulation of the fixing of minimum wages in Convention No. 131 allows adjustment of minimum wages after economic development, which could enable retrogressive measures concerning wages if a State suffers a recession. However, seeing to the discussion regarding the difference of a living wage compared to a minimum wage in the previous chapter, such retrogressive measures may be hard to justify in regards of living wages.

4.1.2 Protect

In order to protect a right, States must take measures to ensure that third parties, such as employers in the private sector, do not disturb the workers’ enjoyment of economic, social and cultural rights. Measures have to be taken to prevent, investigate and punish violations of just and favourable conditions of work through legislation, judiciary, policies and remedial action. States shall secure sanctions and penalties to third parties that violate the rights. This obligation can be argued to imply a ‘horizontal effect’ of rights. In the draft general comment the Committee holds that the obligation to

96 Draft general comment on article 7, para. 57, and Guiding Principles on Business and Human Rights, principle 3(b).
97 General comment No. 13, para. 45, Draft general comment on article 7, para. 52, general comment No. 3, para. 9, and Langford, ’The Justiciability of Social Rights: From Practice to Theory’ in Langford (ed.) Social Rights Jurisprudence - Emerging Trends in International and Comparative Law, p. 16.
98 Draft general comment on article 7, para. 52, and general comment No. 3, para. 9.
99 Draft general comment on article 7, para. 58, and Guiding Principles on Business and Human Rights, Principle 1 and 2.
100 Craven, International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development, p. 111.
protect includes obligations of corporations to respect the right to just and favourable conditions of work, through laws and policies set by States parties.101

The Committee is quite firm on the measures needed to protect economic, social and cultural rights – sanctions, remedies and legislation. However, the nature of legislative and sanctionary mechanisms is fully left to the States to decide upon. This leaves the States parties with a great margin of appreciation in how the protective measures shall be designed in detail.

This obligation to protect is of particular importance in terms of labour rights, as many workers are employed in the private sector.102 The Committee holds in its draft general comment that this specifically includes an obligation to legislate minimum wages and minimum standards of working conditions in order to protect workers from exploitation by their employers.103

4.1.3 Fulfil

The States parties’ obligation to fulfil is closely related to the provision in the ICESCR to progressively realise economic, social and cultural rights.104 The steps taken to fulfil the rights are the means of realisation, and usually constitute the positive measures that have to be taken by a State party. The obligation to fulfil has been further divided, and includes measures to facilitate, promote and provide a right.105

With facilitate the Committee suggests that States shall undertake positive measures and enabling strategies to assist workers to enjoy their labour rights as set out in laws, policies and regulation.106 States must also regularly review the impact of laws, policies and regulations with a view to update their standards, including mechanisms to systematically assess the minimum wage level. Furthermore, the States parties should

101 Draft General Comment on Article 7, para. 58, and Guiding Principles on Business and Human Rights, Principle 2.
103 Draft general comment on Article 7, para. 58, and Guiding Principles on Business and Human Rights, Principle 2.
104 Craven, Ibid., p. 113.
105 Draft general comment on Article 7, para. 59.
create adequate dialogue mechanisms between workers and employers, and construct incentives regarding wages.\textsuperscript{107}

In order to \textit{promote} just and favourable conditions of work the State shall take efforts to educate and raise awareness about the rights.\textsuperscript{108} This includes providing advice on issues concerning the rights to all workers and employers. \textit{Provide} requires the States parties to provide just and favourable conditions of work, where the individual or a group is unable to enjoy the right by their own means.\textsuperscript{109} An example of this is providing incentives for private sector employers to make working spaces accessible for persons with disabilities.\textsuperscript{110} Or possibly, providing the same with incentives to introduce living wages.

4.1.4 Conclusions on Respect, Protect and Fulfil

The obligations to respect and protect usually requires less State resources than the obligation to fulfill. Fulfill could place a greater burden on a State’s resources, as allocation for social security, food schemes and housing is needed. Measures within the frame of respect and protect, on the other hand, are of a kind that can be implemented without delay as neither necessarily would require extensive State resources. Respect in its essence, calls for States to refrain from action to enable the enjoyment of the right.

Protect however, in regards of protecting individuals from third parties, might require administrative resources such as legislation, inspectorates and remedies. Such efforts are needed to secure rights for workers against their employers.\textsuperscript{111} Instead, the real burden of the obligation to protect is on the third party, whom has to comply with the State party’s adopted measures to provide the right. This particularly is the case with living wages, where a rise in wages and the implementation of a living wage policy would not burden the States resources directly, but rather the employers in the private sector. The resource allocation is not from a State party’s budget, but from the resources of the private sector.

\textsuperscript{107} Draft general comment on Article 7, para. 61.
\textsuperscript{110} Draft general comment on Article 7, para. 54.
However, such measures are rather intervening for the third party, and therefore the State party’s positive measures have to be balanced with the freedom of individual, i.e. the employers’ freedom. This brings up the principle of the dual freedoms of rights. A State party acting to secure the positive right of workers when protecting them, at the same time have to show respect, the negative right, towards the employers.

4.2 The Progressive Realisation of the ICESCR

As already noted in section 2.2.3, article 2(1) of the ICESCR provides that States shall take steps to the maximum of their available resources, with a view to progressively achieve the full realisation of the rights recognised in the Covenant by all appropriate means, particularly through the adoption of legislative measures. The key elements of the article which will be dealt with in this section are “take steps by all appropriate means” and “maximum available resources”.

4.2.1 Take steps

The obligation to take steps in the ICESCR lays down an obligation on States parties to act to progressively achieve economic, social and cultural rights within a reasonably short time after ratifying and implementing the Covenant. The steps to be taken shall be deliberate, concrete and clearly targeted, and should include legislative measures, judicial remedies, constitutional recognition, as well as administrative, financial, educational and social measures. Thus, the Committee is rather demanding and has quite a strict interpretation of what to ‘take steps’ implies.

The obligations of conduct and result are relevant when discussing the provision to take steps. The provision to take steps by all appropriate means in article 2 (1) ICESCR is held to obligate the States of result, but gives the States a choice of conduct to achieve the result, as the appropriate means are not specified. Therefore, the rights in the ICESCR are often stated only to hold the obligation of result.

113 General comment No. 3, para. 2.
However, for all economic, social and cultural rights, this is not entirely true. Certain rights, such as the ICESCR article 11 (2) (a) states, that to realise the right to adequate food, measures should be taken to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge. These should be considered obligations of conduct found in the ICESCR.  

For the justiciability of the rights in the Covenant, it has been argued that the obligations of conduct have to be clarified. For those provisions in the ICESCR where obligations of conduct are not provided for, such rights are left at a general level, challenging the justiciability of those rights.

Eide argues that it is only when such general rights are broken down to more specific components that they become justiciable. Looking at article 7 (a) (ii) specifically, the States parties’ obligation to ensure a remuneration that provides all workers with a decent living for themselves and their families in accordance with the provisions in the ICESCR, seem general and fundamentally an obligation of result. No provisions on how this right shall be achieved are given. This can be compared to article 6(2), which clearly include an obligation of conduct as it requires States parties when taking steps to achieve the full realisation of the right to work to include technical and vocational guidance and training programmes.

However, the Committee’s general comments are a way of clarifying and adding to the rights’ substance where the provisions themselves lack obligations of conduct. The general comments commonly include explicit examples of measures that should be taken by States parties. What is more, guidance in the Committee’s expectations of what steps should be taken can be found in the reporting instruction States parties are to follow when constructing their State reports. As shown in section 2.5.2.1 States parties shall indicate if they have legally established a minimum wage and if the minimum wage is systematically indexed and periodically reviewed and determined at a level that provides all workers and their families with an adequate standard of living.


118 Craven, Ibid., p. 108.
Much criticism has been directed towards the onerous formulation of article 2(1), which is held to make it rather impossible for governments to comply with its obligations.\textsuperscript{119} Indeed, the UN is strict in putting obligations on the States parties to expeditiously take steps, and to a certain extent how it shall be done, but in terms of the time frame of the result nothing is said. There is no clear direction as to when the obligations are to be met or have been met.\textsuperscript{120}

\subsection*{4.2.2 Maximum Available Resources}

The phrasing “maximum of available resources” leaves some room for flexibility for States parties depending on their level of development. This acknowledges that due to scarce resources the full realisation of rights might only be achieved over a period of time.\textsuperscript{121} The progressive realisation is a "necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights."\textsuperscript{122} It also reflects a sense of realism, in how the provision accepts that a lack or resources, both financial and other – human, technological and information resources – can hurdle the full implementation of the rights in a State.\textsuperscript{123}

However, the Committee has established that the implied immediate obligation to take steps is irrespective of the level of available resources.\textsuperscript{124} A lack of resources cannot ever justify inaction or indefinite postponement of realising the rights.\textsuperscript{125} Compliance evaluation by the Committee is assessed in the light of resources available to the State.\textsuperscript{126} One of the hardest challenges is how to measure the compliance of the obligations,\textsuperscript{127} and especially in the light of available resources as the terms also raises

\begin{flushleft}
\textsuperscript{122} Ibid., para. 6, and general comment No.3, para. 9.
\textsuperscript{124} Ibid., para. 18, and e.g. general comment No. 3, paras. 2 and 9.
\textsuperscript{126} OHCHR, Fact Sheet No. 33, p. 13.
\end{flushleft}
some doubts to its meaning. But as has been touched upon above, and will be further developed below, the right to a living wage may not require too much of State resources to be realised, making it hard for States to argue a lack of resources to justify any non-compliance with article 7 (a) (ii) of the ICESCR.

4.3 Minimum Core Obligations

The Committee has found that States parties to the Covenant are under an immediate obligation to prioritise the satisfaction of minimum core obligations of the Covenant. These are held to be 'minimum essential levels of each right'. There is a presumption that all States, irrespective of their level of economic development, will be able to immediately implement the minimum core obligations within each right. If only few resources are needed to fulfil a right, similar realisation levels are expected from poorer and more resourceful States respectively.

The burden of proof lies on the States to justify its (in)actions by showing that every effort to use, and prioritise, the resources at its disposal has been done to satisfy the minimum essential levels of the rights. Failing to ensure such minimum core obligations constitutes a violation of the Covenant.

The Committee has suggested in its draft general comment that it is a minimum core obligation to legislate minimum wages. In relation to this statement, the Committee holds that the minimum wage legislation shall be non-discriminatory and non-derogable, and set in consultation with workers and employers, their representative organisations and other relevant partners. The minimum wage shall be fixed taking into account relevant economic factors indexed to the cost of living so as to ensure a decent

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129 OHCHR, Fact Sheet No. 33, p. 16.
130 Joseph, 'UN Covenants and Labour Rights’ in Fenwik and Novitz (eds.), Human Rights at Work - Perspectives on Law and Regulation, p. 338.
living of workers and their families.\textsuperscript{133} States parties that do not realise these minimum core obligations will be considered violators of article 7 (a) (ii) ICESCR.

\textbf{4.4 Obligations of Immediate Effect}

According to the OHCHR, besides having minimum core obligations, certain rights also imply obligations of immediate effect, excluding them from the ‘progressive realisation’ and ‘maximum of available resources’ clauses. These are non-discrimination,\textsuperscript{134} freedom of association,\textsuperscript{135} the right to strike,\textsuperscript{136} protection of children and young persons from economic and social exploitation,\textsuperscript{137} and equal remuneration for work of equal value.\textsuperscript{138}

Nota bene, the right to equal remuneration in article 7 (a) (i) ICESCR is included in the OHCHR’s statement, however not the right to a remuneration sufficient for a decent standard of living. Perhaps this is due to article 7 (a) (ii)’s characteristics to be an obligation of result, where there is no clear set obligation of conduct, leaving a great margin of appreciation for the States on how to fulfil the right to a living wage.

However, I would like to argue that not adding 7 (a) (ii) to the rights under immediate effect is quite remarkable. Seeing to the characteristics of the other rights of immediate effect, a common denominator seems to be the limited resources needed for their realisation. As a matter of fact, the statement that certain rights are of immediate effect is under the heading ‘Obligations not subject to resource availability and progressive realisation’. Under the assumption that a rise in wages would require little State resources and mostly burden the employer – as the State party is protecting the right to a living wage – article 7 (a) (ii) could also be held to be under immediate effect.

The counterargument could however be that although State resources may not be directly required to realise the right, the risk of loss of investments that increased wages may result in can affect States’ economic development. Perhaps the Committee’s

\begin{footnotes}
\item[133] Draft general comment on article 7, para. 64.
\item[134] Article 2 (2) ICESCR.
\item[135] Article 8 (1) (a) ICESCR.
\item[136] Article 8 (1) (d) ICESCR.
\item[137] Article 10 (3) ICESCR.
\end{footnotes}
decision to establish that a minimum core obligation is to legislate minimum wages that are sufficient for a decent standard of living for workers and their families clarifies the matter if 7 (a) (ii) could be qualified to be under immediate effect.

4.5 Adoption of Legislative Measures

In article 2(1) ICESCR it is stated that States parties should adopt legislative measures to realise the rights of the Covenant. It has also been shown that the Committee holds the importance of legislating minimum wages. Legislation is held to be highly desirable and may also be indispensable in some cases, as using legislation to protect economic, social and cultural rights may have several advantages. In the long run, legislation provides means of preventing violations of economic, social and cultural rights by clarifying obligations of various stakeholders and by providing means of remedies in case of breaches of these obligations.

The Committee has stated that although there is no formal provision which obligates the States parties to incorporate the ICESCR into its national law, the Committee clearly prefers a comprehensive implementation into States domestic legal order. The OHCHR has found that one way of strengthening economic, social and cultural rights is by giving them constitutional recognition and undertaking legislative measures. An advantage with incorporating economic, social and cultural rights in constitutions, is that government actions can be tested against the constitutional provisions. This is especially so in States with Constitutional Courts. The Committee has in its concluding observations explicitly encouraged States Parties to include economic, social and cultural rights in their constitutions. It has even been suggested

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141 General comment No. 9, para. 8.
143 Ibid., para. 18.
144 See e.g., Concluding observations on the third periodic report of Nepal (E/C.12/NPL/CO/3), para. 5, where the Committee has noted a lack of economic, social and cultural rights in the drafting process of the State’s Constitution. The Committee urged Nepal to adopt a constitution
that there might be an international legal obligation to give constitutional recognition to economic, social and cultural rights, based on the following principles: *principle of good faith*, according to which the failure to include a right under the ICESCR could be viewed in theory as a violation of international law; *effet utile*, international treaties should be read in a way to give effect to their provisions, and rights will only be seen as effective if individuals can invoke the right before domestic courts; and, *effective right to remedy*.  

UDHR article 8 states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." This has been incorporated in the ICCPR article 2 (3) (b) where States are obligated to "develop possibilities of judicial action". However, no corresponding provision is provided for in the ICESCR. However, the Committee clearly sees the need for effective remedies for the rights in the ICESCR in order for them to be realised. The Committee holds that in general should legally binding human rights acts, such as the Covenant, be directly incorporated into the domestic legal order to enable individuals to have their rights enforced before national courts and tribunals. Therefore the obligation to legislate comes with the obligation to provide effective remedies, and where appropriate, judicial remedies, for violations of the ICESCR. The inability to secure remedial action for victims of States parties’ non-compliance with the Covenant is a violation of the same.

Seeing to the fact that there is no effective international complaints mechanism for violated workers to claim their rights in the ICESCR, it is particularly important that the rights are incorporated in the domestic legislation. If this is not done, there is no possibility for a victim to claim a living wage against a State who has not sufficiently set minimum wages at a level corresponding to article 7 (a) (ii). Legislating the rights in the ICESCR must be deemed particularly important for States parties with a dualist legal system, where international treaties have to be implemented into domestic legislation in order to be invoked before the judiciary. The Committee has also

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146 General comment No. 9, paras. 3 and 4.
specifically pointed out the importance of a dualist State party to give full effect to the ICESCR in its domestic law, to make sure that the rights can be invoked before national courts.  

Connected with the right to an effective remedy to claim the rights held in the Covenant, is the question of the justiciability of the rights in the ICESCR and in particular the right to a living wage. The State party’s obligation to realise the right to a living wage is not fulfilled unless there is a way to claim this right. Objections to the realization of this right might be motivated with the argument that economic, social and cultural rights – and thus a living wage – are not justiciable. The justiciability of the right to a living wage in particular will be examined in the following chapter.

4.6 Conclusion

The obligation to protect the right to a remuneration sufficient for a decent standard of living for workers and their families, requires a State party to undertake positive measures to safeguard this right against a third party, i.e. the employers. This is the positive right of the provision, while a State party’s obligation to respect the freedom of the employers to be able to negotiate wages with its employees regards the negative rights. These rights have to be balanced, in order for sufficient protection of workers to meet the respect of the freedoms of employers at an adequate level, to avoid a too excessive intervention in the freedom of the market.

A lack of obligation of conduct in article 7 (a) (ii) may raise questions concerning the justiciability of the right to a living wage for workers. This however, should be clarified by the final general comment on article 7 expected in 2016. Also, the Committee’s guidelines for the States reports may be used as an interpretation of what obligations a State party is expected to realise. Both the draft general comment and the guidelines provides that the States parties should undertake legislative measures to ensure the right to a living wage. However, it does not in detail clarify which indicators to be used or if other means of securing this right might be as sufficient as legislation.

In the case of the notion of ‘maximum available resources’, I have argued that it can be questioned if the progressive realisation implied by this locution can be applied to the

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148 Concluding Observation on the combined initial and second reports of Thailand (E/C.12/THA/CO/1-2), para. 6.
case of living wages. The obligation to realise the right to a living wage would rather burden the employers who have to comply with higher levels of wages. However, in this regard a loss of investments could be argued to strain States parties’ resources, and this could be a reason for article 7 (a) (ii) not being considered to be of immediate effect. A clear statement from the Committee on the minimum core obligation to legislate minimum wages, taking into account that the remuneration shall be sufficient for a decent standard of living for workers and their families, might clarify this matter.

Finally, to secure economic, social and cultural rights in legislation is necessary, particularly in order to secure remedial action and access to judiciary in cases of violations of the ICESCR. This is of certain significance in States parties with a dualist legal system, where the ICESCR cannot be invoked directly in court.
5 Justiciability of the Right to a Living Wage

5.1 Introduction

There is no human right if there is no remedy, and therefore States parties are obligated to ensure that the rights in the ICESCR can be enforced by judicial remedy. However, the justiciability of economic, social and cultural rights is often questioned.\textsuperscript{149} There are several reasons to the different perceptions of the justiciability of the ICESCR. Yet, I have found that these reasons can be singled down to two main arguments.

Firstly, the rights are held to be vague and lack specificity. Secondly, it is argued that economic, social and cultural rights are too closely linked with public policy and the realisation of politics. Thus the rights are primarily a matter for the legislator than the judiciary to enforce, as the rights lack in justiciability and cannot be legally enforced in courts. In this chapter I will first deal with the specificity of economic, social and cultural rights, and particularly the living wage. Thereafter I will examine the relation between public policy and the ICESCR, with a focus on article 7 (a) (ii) of the Covenant. Finally, I will briefly examine the possibility of claiming economic, social and cultural rights through civil and political rights.

5.2 Specificity

A common claim is that the lack of legal protection of economic, social and cultural rights is due to their vagueness, broad framing and insufficient legal specificity, resulting from their normative implications.\textsuperscript{150} In regards of specificity, the ICESCR is often compared to its sister Covenant, the ICCPR, which on the contrary is unanimously and undoubtedly held to be sufficiently precise and legally enforceable. Civil and

\textsuperscript{149} General comment No. 9, para. 10.
political rights have been considered easier to implement due to their 'clearer' definition and need of little resources to implement in ratifying States.\footnote{Report of United Nations Commissioner for Human Rights to the Economic and Social Council’s substantive session of 2006 (E/2006/86), para. 8.}

The question of vagueness may in part rise from the subjective elements in economic, social and cultural rights, as they have to be appropriately determined to the location, time and culture where they are to be enjoyed. But one would be fooled to say that civil and political rights do not raise any issues of vagueness. The substantive case law on civil and political rights, both nationally and internationally, proves the contrary and that there indeed are many ways of interpretation also in regards of those rights. But even though civil and political rights also can be claimed to be broadly framed, their clarity and enforceability is rarely questioned.\footnote{Ibid., para. 34.} In its report to the Vienna World Conference on Human Rights, the Committee stated that:

"States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would evoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action."

The Committee has stated that certain rights are clear enough to make their justiciability undoubted.\footnote{A/CONF.157/PC/62/Add.5, para. 5.} Those are, for example, the right to primary education, the right to form trade unions and the protection of children and young persons from economic and social exploitation. Furthermore, the right to a fair remuneration is declared to be specific enough to be legally enforceable,\footnote{Limburg principles (UN doc. E/CN.4/1987/17), article 8.} however not article 7 (a) (ii) which provides the right to a remuneration sufficient for a decent standard of living for workers and their families.

Alston has argued that the rights conferred in articles 6-9 of the Covenant, i.e. the articles concerning labour rights and social security, are “a notable exception” in regards of vagueness and doubted justiciability, as they should be considered adequately clear to be justiciable. There are two reasons for this. First, these rights are usually

\footnote{General comment No. 3, para. 5, with reference to articles 7 (a) (i), 8, 10 (3) and 13 (2) (a), (3), and (4). See also Report of United Nations Commissioner for Human Rights to the Economic and Social Council’s substantive session of 2006 (E/2006/86), para. 33.}
better known to domestic legal systems as they have been recognised for a longer time and with greater precision than other rights of the Covenant. The second reason is that the ILO has been a developer in clarifying labour rights ever since the ILO Constitution was adapted in 1919. Thus, it is possible to use the vast bulk of jurisprudence of the ILO in guidance as to how to interpret labour rights and the right to social security.\(^{156}\)

The broadness that can be found in economic, social and cultural rights should be duly specified in case law and commentaries, in order to set some clarity to the interpretation of these rights. The judiciary has an important role to add to the understanding of economic, social and cultural rights,\(^ {157}\) and thus it must be considered favourable that the rights can be tried by the judiciary. The Committee’s general comments are important in this regard, and considering the ever increasing number of general comments, the uncertainty surrounding the legality and obligations of the ICESCR should be overcome. Therefore, the general comment on article 7 is much welcomed, to clarify the right to a remuneration sufficient for a decent living for workers and their families. However, I align with the statements of ITUC and Clean Clothes Campaign\(^ {158}\) in their opinion that the draft general comment does not sufficiently clarify the provision 7 (a) (ii), and that this should be revised in the next draft.

### 5.3 Public Policy

#### 5.3.1 Resource Allocation

Economic, social and cultural rights are often held to be expensive for States to realise, while realising civil and political rights is resource-free.\(^ {159}\) The rights of the ICESCR are often labeled as distributive justice,\(^ {160}\) referring to the idea that economic, social and


\(^ {158}\) See section 2.5.4.


cultural rights require resources for their realisation, such as shelter, food, education etc. provided by the State to the needy. Due to the resource dependence of the economic, social and cultural rights, it is argued that those are more challenging for developing countries to achieve, than for industrialised States. It is often a matter of trade-off for the States when budgeting – if more money is set aside for education, the resource allocation for food and housing will suffer.\textsuperscript{161}

Ideology wise, the idea is that the positive measures that States have to undertake to realise economic, social and cultural rights would distort the functioning of free market, as such rights require State to intervene and thus motivates a downgrade of civil and political rights.\textsuperscript{162} The negative right of individuals, i.e. the freedom from State interference, is inflicted. However, the positive rights of workers, the right to a living wage, call for positive action taken by the States parties. As can be seen, and has been noted in the above chapter, there is a conflict between these rights that has to be balanced. The arguments tend to be polarised into a leftist contra rightist debate, where the more socialist thinkers favour strong economic, social and cultural rights and a greater extent of State interference, while liberals favour civil and political rights and a minimum of positive action taken by States.

5.3.2 Separation of Powers

Transforming the above debate into a case of the justiciability of economic, social and cultural rights, the arguments tend to surround the principle of separation of powers and if it is adequate for national courts to hear cases that could regard questions of public policy and State allocation of resources.

Neier acknowledges that if economic, social and cultural rights are sufficiently clear and specified, such as e.g. every child’s mandatory right to primary school, then the right under the ICESCR has an adequate level of legislative specificity appropriate for judicial enforcement. However, he is clearly hesitant as to when the judicial process intrudes into an area of democratic process.\textsuperscript{163} That is, when a right clearly requires a State to undertake positive measures to realise the right, which could require resource

\textsuperscript{162} Ibid., p. 277.
allocation or extensive legislative measures. Such tasks, should lie on the legislatures and elected politicians.

The question of the appropriateness of having the judiciary hear claims involving questions of social policy and political matters – which would usually be the case when claiming that a State has denied or not taken steps to realise the rights under the ICESCR – is rightly raised. Seeing to the separation of powers, where the legislator, the judiciary and the executive shall be clearly separated from each other, and fulfilling different tasks in the name of rule of law, the arguments seem rather valid.¹⁶⁴

In terms of living wages, many subjective elements have to be taken into account when setting the level of wages. One shall assess the poverty line and cost of living in a Society at a certain time, as well as determining what constitutes adequate food, housing and access to health care. Such determinations should be done by a democratically elected legislature after a careful assessment and estimation of what constitutes a living wage in a certain society at a particular time. It is a matter of public policy, and it is hard to argue that such tasks should lay on the judiciary to decide upon.

However, the Committee has refrained from this argument in its general comment No. 9, where it stated that although the respective responsibilities of the two branches have to be respected, this is not strong enough an argument. To put economic, social and cultural rights beyond the reach of the judiciary would be incompatible with the interdependence and indivisibility of all human rights. Indeed, the Courts are already mandated to try matters involving resource implications and the complex balancing of different rights. Denying the justiciability and judiciary enforcement of economic, social and cultural rights would suffer the most vulnerable and disadvantaged groups in society.¹⁶⁵ The adequacy in having courts try measures taken by a State in order to realise economic, social and cultural rights has been ruled on in the landmark South African case of Grootboom.¹⁶⁶

5.3.3 The *Grootboom* Case

The South African Constitutional Court ruled on “progressive realization” in the landmark *Grootboom* case. The case has been extensively referred to in doctrine and the Committee’s publications regarding the justiciability of economic, social and cultural rights. The South African Constitution (1996), which has economic, social and cultural rights incorporated in it, establishes that "[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights." In the case of *Grootboom*, the Constitutional Court tried the States obligation to progressively achieve the right to adequate housing, and made the following statement:

“The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. […] A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could be better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the State to meet its obligations.”

The Court concluded that the State had not satisfied the criteria of taking reasonable legislative and other measures, and thus had not acted as obligated under the Constitution. This method of deciding the “reasonableness of measures taken” has been adopted by the Committee, who has stated that this assessment should be done when monitoring States parties implementation of the ICESCR. It can be argued that having courts try the reasonableness in measures taken by a State may inflict on the prerogative of the democratically elected national legislatures. However, the OHCHR

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168 Constitution of the Republic of South Africa, Section 26, para. 2.

169 *Grootboom*, para. 41.

170 *Grootboom*, para. 99.

171 Evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the Covenant (E/C.12/2007/1), para. 8.
has clearly stated that the judiciary does not have the mandate to prescribe what measures a State party is to undertake in order to meet its obligations to realise the rights in the ICESCR, but rather assess the reasonableness of the measures already taken. Therefore, in regards of the right to a remuneration sufficient for a decent standard of living for workers and their families, a court should be mandated to try the reasonableness in the measures taken to realise the right. The measures could perhaps be whether the State party has sufficiently legislated the right, as well as which estimates are used and if these are appropriate to determine the level of wages.

In *Grootboom*, the Court relied heavily on the ICESCR and the Committee’s general comments, especially general comment No. 3 concerning States parties’ obligations. The Court particularly made efforts in interpreting the notion of minimum core obligations by first confirming that States have to satisfy a minimum essential level of each right – “floor beneath which the conduct of the State must not drop” – and subsequently held that a

“[m]inimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.”

Furthermore, it was held that it is impossible to determine the minimum threshold for the progressive realisation of a right in the ICESCR without identifying the needs and opportunities for the enjoyment of the right. As the Committee now has established the minimum core obligation of article 7 (a) (ii), some clarity in regards of the justiciability of the right has been made. The Committee has identified the essential levels of the right, which shall be immediately prioritised by a State party, to protect vulnerable groups of workers. In the light of this, a Court should be able to try the reasonableness of the measures taken by a State to realise the right to a remuneration sufficient for a decent standard of living for workers and their families. However, it should be noted that for a Court to try the right to a living wage, this right has to be

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173 *Grootboom*, para. 29.
174 *Grootboom*, para. 31.
175 *Grootboom*, para. 32.
incorporated into the domestic legal order, either through the direct application of the ICESCR in a monist State party, or in a dualist State by implementing the right in national legislation.

5.4 Enforcing Economic, Social and Cultural Rights through Civil and Political Rights

As dualist States parties may have failed to incorporate economic, social and cultural rights in their domestic legal system, alternative ways have been sought in order to find some form of redress for violations of these human rights. A lack of legal protection of economic, social and cultural rights has led violations to be framed into claims relating to these rights in terms of civil and political rights.

Violations of just and favourable conditions of work could perhaps be argued to inflict on the right of private and family life established in ICCPR article 17. This provision requires States to provide the enjoyment of a private and family life, which may be unattainable if workers do not earn a living wage on normal working hours, but instead must dedicate their lives to labour to be able to survive.\(^\text{176}\) This solution has been used by the Supreme Court of India, where the right to life in the Indian Constitution has been extensively interpreted to include economic, social and cultural rights, making them justiciable and ensuring the right to judicial remedy for these human rights.

5.4.1 Justiciability of Economic, Social and Cultural Rights in India

In the Indian Constitution (1950), civil and political rights are gathered under Part III, “Fundamental Rights”, of the Constitution, and economic, social and cultural rights are established in Part IV “Directive Principles of State Policy”. It is explicitly held that none of the rights in Part IV shall be enforced by court, but rather as principles in governance of the country and for the legislatures when making laws.\(^\text{177}\) However, the


\(^\text{177}\) Constitution of India, Part IV, article 37.
Supreme Court of India has made wide interpretations of the right of life\textsuperscript{178}, which is a “Fundamental Right”, to include certain social, economic and cultural rights.\textsuperscript{179} The right to life has been argued to protect the right to livelihood and housing,\textsuperscript{180} the right to health,\textsuperscript{181} as well as the right to education.\textsuperscript{182} The Court has argued that the “Fundamental Rights” and the “Directive Principles of State Policy” shall be seen as complimentary rather than one set of rights superior to the other. The rights under the “Directive Principles of State Policy” shall be seen as interpretative tools to the “Fundamental Rights” adding to their substance.\textsuperscript{183}

In \textit{Consumer Education \& Research Center v. Union of India}, which concerned health issues in the working space, the Supreme Court extended the right to life to include, among others, article 43 in Part IV “Directive Principles of State Policy” establishing the right to a living wage. The Court argued that “the right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery”\textsuperscript{184} and that the fundamental right to life should extend to labour rights to “make the life of the workman meaningful and purposeful with dignity of person”.\textsuperscript{185} However, to the author’s best knowledge, article 43 and the right to a living wage has not been tried in the Supreme Court.

\textbf{5.4.2 An Insufficient Procedure}

The OHCHR has emphasized, however, that the protection of economic, social and cultural rights through civil and political rights “is clearly piecemeal and merely a stop-
gap solution in the absence of effective legal recognition of all human rights". 186 Furthermore, although the Supreme Court of India has used this mechanism to achieve the justiciability of economic, social and cultural rights, India has still been criticised by the Committee for not incorporating these rights in legislation. The means of safeguarding the rights through case law has been seen insufficient. 187 The Committee is firm on the obligation to legislate economic, social and cultural rights and making them justiciable standing on their own.

States parties with a monist tradition may in theory not have to face this problem, as the ICESCR should be able to invoked before court by victims of violations of the rights therein. However, it has been out of my capabilities to find any such case where the ICESCR has been invoked to realise the right living wages in a monist State party. In dualist States parties, where the right under article 7 (a) (ii) has not been duly incorporated in national legislation, victims of insufficient wages seem to have little possibilities to invoke this right against their State, unless it can be claimed through appropriate civil and political rights.

5.5 Conclusion

Although the right to effective remedies for violations of human rights is not questioned as such, the justiciability of economic, social and cultural rights has been heavily argued. The main argument being that such rights are closely linked to public policy and resource allocation and that the rights are not sufficiently precise to make them legally enforceable in court. The right to equal remuneration in article 7 (a) (i) ICESCR has been deemed clear enough to be justiciable, while article 7 (a) (ii) regarding living wages has not. I can identify three reasons for this being. First, it might be due to the fact that the Committee and the States parties still consider the setting of wages as a part in economic and fiscal policy, where the States shall have a large margin of appreciation in how to fix their wages. The international community should not interfere with the discretion of a State party to set its own fiscal policies. Secondly, article 7 (a) (i) which provides the right to equal remuneration, is closely linked with the prohibition of

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discrimination in article 2 (2) ICESCR and article 4 (1) ICCPR. It would be rather inconsistent of the Committee to claim an absolute prohibition of discrimination, and then not affirm the justiciability of article 7 (a) (i).\textsuperscript{188}

The third reason might be the subjectivity of determining a living wage, and that this is closely linked to public policy. Thus, the determination of wage levels should solely be the task of the legislature, and the judiciary should be regarded inadequate to assess if wage levels are sufficient. However, the Committee has refrained from this strict hold on the duties of the legislature and judiciary respectively. The Committee has argued that although there should be respect for the separation of powers, economic, social and cultural rights cannot be held entirely out of the scope of the judiciary.

The case law from South Africa and India has shown that courts indeed can rule on economic, social and cultural rights. Courts must be deemed capable of trying the reasonableness in measures taken by a State party to realise a human right, without inflicting on the prerogative of the legislatures. The legislatures would be the ones to set wage levels in a State at an equivalent level of living wages, after careful examination of the estimates to decide upon this. The judiciary, on the other hand, should be able to try the reasonableness in the States usage of indicators to set the living wage.

As the right to a remuneration sufficient for a decent standard of living for workers and their families is a human right, victims of insufficient wages have to be able to claim this right in a judiciary process. States parties to the ICESCR have an obligation to secure effective remedial action to provide the right to a living wage. Victims shall not have to disguise a claim for a living wage into civil or political rights in order to be able to invoke the right to a sufficient remuneration before the judiciary.

\textsuperscript{188} See to this effect, general comment No.3, para. 5.
6 Concluding Remarks

Labour is not a commodity. This is the basis for all labour rights, and the main objective with a living wage is to prevent any further exploitation of poor workers and to level the playing field between States. States parties to the ICESCR shall not be able to use low minimum wages, insufficient to provide workers and their families with a decent standard of living, as their comparative advantage. By leveling the playing field, all workers would be able to enjoy the same basic living standards, such as adequate housing, food, health care and education for their children. As the cost of living varies from one State to another, the wages would not be exactly the same globally. However, the same minimum necessities would be provided for to all workers, if global standards for a living wage were to be set.

Ensuring the right to a living wage is a prerequisite for the realisation of workers’ enjoyment of the other rights in the ICESCR. Among others, the right to adequate housing, clothing and food, the right to health care and the right to education are included in the Covenant. All of these human rights shall be ensured to each and every individual residing in a State party to the ICESCR. If workers are kept in a poverty trap, they will continuously be deprived of the enjoyment of these rights. For example, the children of workers who are kept in poverty may be denied their right to primary education, and be forced into child labour in order for the family to be able to sustain a decent standard of living.

The obligation to realise the right to a living wage include the obligation to undertake legislative measures to ensure that workers are paid a remuneration sufficient for a decent standard of living for themselves and their family. Indeed, the Committee has included this to be a core minimum obligation of article 7. Legislation is needed to protect workers from a third party interfering with this right.

In the case of living wages this would be to protect workers from being paid unduly low wages from their employers. Here, the effects of legislating a living wage to secure workers’ positive right will inflict with the negative right of the employers, i.e. to be able to negotiate the wages freely with their employees and/or unions. A balancing of these positive and negative rights have to be done. States parties may also be hesitant to enforce living wages, as they fret that an increase in wages would discourage investments to their country. Wages are consistently considered a means of public fiscal
policy, and are often in part regulated by considerations of the economic development. This is seemingly the reason for the general vagueness of provisions concerning wages in international law. The States parties are left with a large margin of appreciation in how to set their wages, as the international community should not interfere with individual States’ economic policy.

Furthermore, it is necessary to legislate the right to a living wage in order to ensure that victims can seek remedial action when their right has been violated. States parties that do not comply with this minimum core obligation are in violation with the Covenant. If a State party has a monist legal system, a worker could rely on the ICESCR directly in court to claim his or her right to a living wage. The worker could, for example, in a constitutional court, claim that the legislated minimum wages do not correspond to a remuneration sufficient for a decent standard of living for the worker and his or her family.

In a dualist legal system, the provision in article 7 (a) (ii) has to be duly incorporated into domestic legislation for it to be enforceable. Constitutional recognition of the right is particularly desirable, as any legislative process of fixing wages have to comply with rights included in a constitution. If a State party, however, does not commit to the obligation of incorporating the right to a living wage into domestic law, there is no possibility to invoke this right in a judiciary process. A worker who finds that the remuneration he or she receives is too low to cover the minimum needs for a decent standard of living, is left without possibilities to claim this right either from the State or an employer. Thus, it is quite unsatisfactory that there is no effective international claims mechanism for workers to claim their rights in the Covenant, when a State party lacks in incentives to realise its obligation to legislate.

For the right to a living wage to be enforceable in court, it has to be justiciable. However, objections have been held against the justiciability of economic, social and cultural rights. Although the arguments against the rights’ justiciability – lack of specificity and respect for the separation of powers – are rightly held, leaving the right to a living wage completely out of the boundaries of the judiciary would be a violation of fundamental principles of human rights law. Every human right shall be safeguarded by the access to effective remedies in cases of violation. It is under no circumstances adequate for courts to estimate and fix wage levels, but the judiciary must be claimed capable to judge if a State party has undertaken appropriate measures to ensure workers’ right to a living wage. This has been shown by the Grootboom case.
The lack of clarity on what steps a State party is to take to realise the right a remuneration sufficient for a decent standard of living for workers and their families will hopefully be redressed in the final draft of the general comment to article 7 ICESCR. As has been shown, the draft must be deemed quite insufficient in that regard, as the Committee addressed the provision of 7 (a) (ii) in quite general terms, adding little news to its substance. Clarity and detailed statements on what measures States are to undertake are needed to make the justiciability of the right to a living wage undoubted.
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