

SHOULD TANZANIA RATIFY?

An Analysis of Individual Communication Procedure under
the Optional Protocol to the International Covenant on
Economic Social and Cultural Rights



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Dedications

With honour, this work is dedicated to my father Y.M.Gossi (1931-2010).

Acronyms

ARV	Anti-Retro-Virals
CA	Court of Appeal
CC	Constitutional Court
CESCR	Committee of Economic Social and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CHRGG	Commission for Human Rights and Good Governance
CJ	Chief of Justice
CRC	Convention on the Rights of the Child
ESCR	Economic Social and Cultural Rights
GA	United Nations General Assembly
GC	General Comments
HC	High Court
HIV	human immunodeficiency virus
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic Social and Cultural Rights

ICRPD	International Convention on the Rights of Persons with Disabilities (ICRPD)
LHRC	Legal and Human Rights Centre
NGO's	non-governmental organisations
OAU	Organisation of African Union
OP	Optional Protocol
OP-ICESCR	Optional Protocol to the International Covenant on Economic Social and Cultural Rights
SA	South Africa
TAC	Treatment Action Campaign
Tshs.	Tanzania Shillings
UDHR	Universal Declaration of Human Rights
UN	United Nations
URT	United Republic of Tanzania
WLAC	Women Legal Aid Centre

CHAPTER ONE

1.1 Introduction

*“Closing a historic gap in human rights protection under the international system, the Optional Protocol represents a veritable milestone in the history of universal human rights, making a strong and unequivocal statement about the equal value and importance of all human rights and the need for strengthened legal protection of economic, social and cultural rights. It will move us closer to the unified vision of human rights of the Universal Declaration. Importantly, it will enable victims to seek justice for violations of their economic, social and cultural rights at the international level for the first time.”*¹

On December 10 2008, the 60th Anniversary of the Universal Declaration of Human Rights, the United Nations General Assembly unanimously adopted the Optional Protocol² to the International Covenant of Economic Social and

1 This refers to the statement given by Navi Pillay, the UN High Commissioner for Human Rights when addressing the UN General Assembly, December 10, 2008.

2 Optional Protocol to ICESCR, A Res.832, UN GAOR, 63rd session, UN Doc A/RES/63/117(2008)

Cultural Rights (OP-ICESCR). The OP was open for signature and ratification or accession on September 24th, 2009 during the UN Treat Events day. To date,³ the Optional Protocol has 35 signatories⁴ and 3 parties.⁵ OP will enter into force when ratified by ten parties.⁶ Until now, in the OP-ICESCR, the General Assembly (GA) has approved of an enforceability mechanism for economic, social and cultural rights (ESC rights).

The OP-ICESCR provides victims of ESC rights violations who are not able to get an effective remedy in their domestic legal systems with an avenue to get redress. As such, OP corrects the longstanding imbalance in the protection of different human rights, which marginalised ESC rights. It is a legal text, which establishes stronger mechanism for accountability, generally including both individual complaints communication and an inquiry procedure, thus enabling the committee to investigate of its own volition. For the purpose of this study, only individual complaint procedure will be discussed.

In the UN Human Rights treats system, an OP grants the human rights committee judicial powers to review individual complaints in a similar way to that of traditional human rights court. However, the communication procedure attached to the ICESCR can only be used by countries, which

3 Refers, as of December 2010

4 <http://treaties.un.org/> accessed of September 15, 2010

5 Signatory countries of the OP are; Ecuador, Mongolia, and Spain.

6 Optional Protocol to the ICESCR, Article 18.

have ratified both the parent treat and communication process.⁷ Filing a case to the committee of economic social and cultural rights (CESCR) individual(s) should have been suffered due to infringement of the rights contained in the ICESCR.⁸ In addition, individual need to have tried to unsuccessful or there were no avenues for redress. In this regards, they can lodge a communication to the committee. On receiving the communication, the committee considers whether it is admissible, that is whether or not really fits the rights in the treaty.⁹ If the case is admissible, consideration of the merit of the case to determine whether there is any breach of rights will follow. In case the breach has occurred, the committee may make a series of recommendation and views to the concerned government on appropriate remedies.¹⁰ Generally, committee's views focuses on providing relief for the individual and cause of the violations. The views may be used in domestic advocacy campaigns to change such laws, policies or programs, take appropriate action, and report to the committee within a specified period. During the initial stages, the committee also has the power to inquire state part to take interim measures to avoid possible irreparable damages to the victim of the alleged violation.¹¹ However, what is all about in ESC rights?

According to Mapulanga,¹² ESC rights imply a commitment to social integration, solidarity and equality and... are indispensable for an individual dignity and the free development of their personality, they include *inter alia*

7 Optional Protocol to the ICESCR, Article 1.

8 Ibid, Article 2.

9 Ibid, Article 3.

10 Article 9, OP- ICESCR.

11 Ibid, Article 5.

12 "Social and Cultural Rights" (2002) *The International Journal of Human Rights*, pp 29, 34.

the right to work, to fair condition of employment, to join and form trade unions, to social security, housing, hearth, food and culture. The main, specific international human rights instrument that comprehensively catalogues these rights is the ICESCR of 1966.

The ESC rights are also contained in other international human rights instruments. These are UN Convention on the Rights of the Child of 1989 (CRC), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights of 1981 and the African Charter on the Rights and Welfare of the State of 1990. For many years, ESC rights were referred as second Generation Human Rights that is unjusticiable human rights and the victims of the infringement of ESC rights could not to be remedied domestically as well as internationally. The adoption of the OP, prove that, ESC rights are Universal, indivisible, interdependent and interrelated.

Against this contextual backdrop, this study will focuses on identifying the deficiencies on protecting and enforcing ESC rights in the Tanzanian legal system, that may be remedied by international mechanisms particularly OP-ICESCR. This will leads to an analysis of the effectiveness of the key provisions of the OP-ICESCR dealing with individual communication procedure and their impact to Tanzania legal system.

2.1 Research Questions

This thesis contained the following questioned:

1.2.1 Are economic, social and cultural rights sufficiently provided for and protected in Tanzania?

1.2.2 What are the key provisions of the OP to the ICESCR and in what ways do they enhance the realization of ICESCR?

1.2.3 Will individual complaints procedure under ICESCR enhance the protection and realization of economic social and cultural rights in Tanzania?

1.2 Objectives of the study

The main objective of this study is to carry out a concerted analysis of the individual complaints procedure under the OP-ICESCR, with a view of discerning its effectiveness, competence and impact on the Tanzanian domestic law. In this regards, the study focuses on examination of status of ESC rights in Tanzania legal system on its, implementation, protection and enforcement in the court of law and in human rights institution. The main core in the analysis of the above will be to interrogate every legal instrument, called to protect the provision of ICESCR. For instance, the provisions of the United Republic of Tanzania Constitution, 1977 (URT) particularly ‘Bills of Rights’, Legislations, courts of law and ombudsman (The Commission for Human Rights and Good Governance - CHRGG). The interrogations allows the study to assess to what extend the URT

Constitution has succeeded in adjudicating ESC rights, in that regards, any weaknesses that may be identified will receive necessary attention to enable necessary amendments and retooling of the same be carried out. Comparative to jurisprudence as to South Africa legal system, is very essential in this paper as it delineate the real picture of a successful legal system on the protection and enforcement of ESC rights.

1.3 Methodology and Sources

This is a desk study, where as secondary sources of evidence are used. This includes evaluation of the OP- ICESCR; reviews of covenants, constitutions, general comments and judicial decision, textbooks articles as well as journals. In addition, appropriate websites have been used to compliment the materials as well.

1.4 Delimitation of the Study

This study circumscribes to the discussion of OP-ICESCR. The discussion father curtains to the analysis of the provisions describing Individual communication procedure on its effectiveness and sufficiency in protecting ESC rights. Reference is made to some international mechanism procedures such as HRC, CEDAW, and CERD by way of comparative analysis. Given the limited scope of this study, such reference will be at a superficial level as it is not the intention of the author to carry out a comprehensive comparative analysis between the OP-ICESCR and other International Human Rights Mechanisms.

1.5 Structure of this thesis

This thesis consists six chapters. *The first chapter* introduces the study topic, this involves looking at the meaning of the OP- ICESCR and the status of ESC rights in international atmosphere. The core objective of the research, methodical aspects of the study, an identification of the material sources, delimitation and outline of the thesis structure, will be highlighted. *Second chapter*, reviews and discusses on Tanzanian Human Rights status in protecting ESC rights, others are such as legislations, courts of law and ombudsman. However, the constitution analysis is the core point in this chapter. *Third chapter* focuses on the comparative jurisprudence as to this case South Africa legal system, that is to say constitution of South Africa and the courts of law. *Fourth chapter* undertakes analysis of individual complaints procedure under the OP-ICESCR on its effectives, competence and impact on Tanzania's domestic law. Finally, *chapter five* provides recommendations that form part of the conclusion of this study.

CHAPTER TWO

2.1 Tanzania Human Rights status: Protecting and Enforcing ESC rights

*The international order is still a community of states. Human rights and freedoms are primarily realized through the state. Individual can effectively enjoy human rights only when the state provides its citizen with appropriate remedies.*¹³

Generally in domestic law and municipal institutions such as courts, tribunals and human rights commissions, enforcement of international law is much easier, this is due to their approachability. For realizing this, the CESCR in its general comments provides that, state obligations under the covenant must be “reflected in the contents of domestic law”¹⁴ for ESC rights to be effectively protected. Also as a general rule of requirement of

13 Roman Wieruszewski, ‘National Implimentation of Human Rights’ (1990) Human rights in a changing East/West perspective. 264 at 264.

14 CESCR, General Comments 9: The Domestic Application of the Covenant, UN Doc E/C.12 1998 124 (1998); See also, Mnisuli Ssenyonjo, Economic, Social and Cultural Rights in International Law (2009) Hart Publisher, p.149.

the exhaustion domestic remedies, reinforce the primacy of national in this respect.¹⁵

In relation to incorporation of International laws in domestic legal system, Tanzania based on “dualist” or pluralist approach. This means, ‘International law and domestic/municipal law are two separate legal systems which exist independently of each other ...’¹⁶ This approach stresses that the rule of the system of International and municipal law exist separately and cannot purports to have effect on, or overrule the other,¹⁷ ‘requiring the performance of a formal legislative process to give effect to a treat’.¹⁸ ICESCR is not self-executing in Tanzania legal system. The Act of parliament can apply the covenant in the courts only after ratification and domesticated in form of enacting or reforming national laws to accommodate principles of the treaty. Although the Tanzanian government has not explicitly incorporated any of the ratified international instruments into domestic legislation, it accepts these instruments as legally binding.¹⁹

15 Ibid, General Comments 9; Article 3, OP- ICESCR(Criterial for admissibility of the communicationto the CESCRC)

16 Malanczuk P., Akehust’s Modern Introduction to International law (London, Routledge, 7th edn, 1997), p.149

17 M. Shaw, International law (Cambridge Univesity Press, 6th edn, 2008), p.131

18 D. Olowu, An intergrative rights-based aproach to human development in Africa (Pretoria University Law Press, (2009), p.74

19 The Government of Tanzania, ‘Fourth periodic report of the United Republic of Tanzania to the United Nations Human Rights Committee’ (17 December 2007) CCPR/C/TZA/4 (Fourth

Tanzanian Government ratified the ICESCR on September 11, 1976. Following the ratification of this International instrument that is 'enforce', it is 'binding' upon Tanzania and must be performed in 'good faith' and given full effect in the domestic legal order.²⁰ Therefore, Tanzania is obliged to fulfill and acts under the obligations stipulated in ICESCR and particularly Article 2 of the Covenant.²¹ Failure to comply within stipulated the obligations; the Tanzania Government will bear responsibility for breaching the same, whether committed by the legislative or judicial organs and other public or governmental authorities, at whatever level.²² This follows from the well-established principle of international law that state cannot invoke their internal law and procedures as justification for not compiling with international treaty obligations.²³

report to the UNHRC). at pp. 7 – 8; LHRC 2008 Human rights report; see also, *Bernado Ephrahim v. Holaria Pastory* [1990] LRC (Const.)757

20 The Vienna Convention on the law of Treaties, 1969 (Vienna Convention/ VCLT) 1155 UNTS 311 Art 26.

21 See also, CESCR General Comment no. 3 (Nature of States Parties Obligations). The document is also available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>; In addition, Article 3 of ICESCR emphasizes on equality between men and women to the enjoyment of all ESC rights; General Comment no.16 (The equal rights between men and women to the enjoyment of all ESC rights.) available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> This means that all ESC rights must be applied to every individual without distinction.

22 This refers to the local, regional and national levels.

23 Article 27, VCLT.

In fulfilling the obligations stipulated under article 2 of the ICESCR, today, the URT constitution contains abroad chapter of fundamental human rights. The chapter displays arrays of rights spanning to the rights to own property, right to work, right to just remuneration and rights with regard to beliefs as well as rights to education. Moreover, in Article 9(f), (g) and (h), Article 12 as well as Article 13(2) and 6(e) of the Constitution provide emphasis on non-discrimination in enjoyment of ESC rights. Article 13(2) further provides that no law shall make any provision that is discriminatory either in it or in its effect. It is in this regard that the principle of non-discrimination is also reflected in various pieces of legislation enacted by country's Parliament including for instance the Employment and Labour Relations Act, 2004.

According to Geir Ulfstein,²⁴ one of the salient features of national constitutions 'is a human rights provision aiming at protecting individual against abuse of the government power'. From historical aspect, human rights norms, which are highly developed within International law to date basically, were enshrined within the framework of national constitutions as bill of rights.

It is believed, this was made possible with the rise of constitutionalism born out of the spirit of Age of Enlightenment seeking to ensure that the state's main tasks and structures were written in a constitution, 'which as highest

24 Jan K., Anne P., and Geir U., '*Institutions and Competence*' in **The Constitutionalization of International Law**, Oxford University Press Inc., New York, (2009) p. 77.

legal standard within the state was considered binding and everlasting'.²⁵ To date, Tanzania has its own distinct Bill of Rights as well as its own mechanism to ensure these rights. Never the less, in recent years, there has been clear trend towards aligning national constitutions with international minimum standards, which has partly been achieved by ratifying a number of international human rights treaties. The URT constitution is 'increasingly relying on particularly successful national institutions for protection of fundamental rights such as High Courts, Parliamentary Committees, ombudsman institution, and national human rights commissions'.²⁶

It should be born in mind, apart from ICESCR, Tanzania has also ratified other international human rights instruments which contain provisions on ESC rights for instance Un Convention on the Rights of the Child of 1989 (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR). At a regional level, Tanzania has ratified the African Charter on Human and Peoples' Rights of 1981²⁷ and its Protocol establishing the African Court on Human and Peoples' Rights,²⁸ the African Charter on the Rights and Welfare of the Child of 1990.²⁹ These instruments provide a framework for legislation and policy at a national level to respect, protect and fulfill ESC rights within Tanzania. However, questions remain

25 Nowak M., *Introduction to the International Human Rights Regime*, Leiden/Boston: Martinus Nijhoff Publishers, (2003), at p. 15.

26 *Ibid*

27 OAU Doc CAB/LEG/67.1

28 OAU Doc CAB/LEG/MIN/AFRCHPR/PROT.1 rev.2 (1997)

29 OAU Doc CAB/LEG/24.9/49 (1990).

on whether ESC rights are sufficiently provided for and protected in the URT Constitution. Moreover, if the ESC rights are justiciable under the court of law or in any other related human rights institutions.

Answering the above questions, the thesis evaluates the extent to which Tanzania has incorporated ESC rights in its Constitution. The mechanisms through which, such rights are realized. The challenges such realisation entails and the approaches taken by the courts and other human rights institutions such as the CHRGG towards the enforcement of ESC rights.

2.2 Protection of ESC rights in the Constitution of the United Republic of Tanzania, 1977

The Constitution is, as a rule, sacrosanct, that is, it is very often considered as the supreme and fundamental law of the state... the supremacy of the constitution is guaranteed by a system of control of the constitutionality of the law.³⁰

Traditionally, the constitution of a country is regarded as the supreme law of the country. According to Article 64, sub-article (5) of the URT Constitution, any other law is considered to be void if inconsistent with the Constitution.³¹ This means that, the modern approach of entrenching a bill of

30 P.F Gonidec 'The Relationship of international law and national law in Africa' (1998) 10 *African journal of International and Comparative Law* 244 247 as quoted in D.Olowu, (2009) p.73

31 Article 64 (5) of the Tanzania Constitution provides that; "...this constitution shall have the force of law of united Republic, and in the event any other law conflict with the provisions contained

rights in a country's Constitution is particularly significant for the protection and enforcement of human rights. However, under URT the Constitution of 1977, the bill of rights has largely entrenched civil and political rights in more lucid terms than is the case for ESC rights. Failure to incorporate a number of ESC rights as justiciable rights in a country's constitution, which would provide a great deal of scope for the court enforcing and developing effective remedies for these rights at the domestic level,³² has caused major suffering for majority of Tanzanians. The victims have nowhere to go in order to claim against the government for infringements of ESC rights or for non- fulfillment of the government obligations stipulated under ICESCR.

The South African Constitution of 1966 is a good example among the countries that have a system of constitutional supremacy combined with judicial review. In addition, the ESC Rights are full realized and protected. (NB: For more detailed discussion on protection of ESC rights in the South Africa Constitution, see in the next chapter). Unlike South Africa, The URT Constitution does not clearly realise some of the ESC rights as justiciable rights. However, it should be noted from the outset that, 'even if ESC rights are not directly entrenched in the constitution, they may nonetheless receive

in this Constitution, the Constitution shall prevail and that other law, to the extent of the inconsistency with the Constitution, shall be void." Available at <http://www.tanzania.go.tz/constitutionf.html>

32 Liebenberg, S., "Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth,"(2001) p.8 Available at <http://www.communitylawcentre.org.za> (accessed 7 October 2010).

significant indirect protection through the interpretation and application of other constitutional rights'.³³

It is, thus a cardinal international human rights principle of the Universality, indivisibility, interdependence and interrelated which emphasize that, ESC rights have equal footing for litigation in Courts of law with “other” categories of human rights. Even where the national constitution is silent on the recognition, respect, promotion and protection of ESC rights, Courts of law have a noble duty to interpret them, purposively, into the national constitution, by particularly basing on the basic and fundamental principles underlying the respective national constitution. For instance, in the case of *The Permanent Secretary Department of Welfare (Eastern Cape Province Government) and Another v. M.N. Ngxuzza and 2 Others*.³⁴ The Supreme Court of Appeal of South Africa [Cameron, J.A.], held that, where the Constitution is silent on the enforceability of a certain category of basic rights or procedure thereof, the Court’s role is to interpret that right or procedure thereof into the bill of rights enshrined in the national constitution.

Therefore, from foregoing account, it is apparent that individual victims of ESC rights are in the position to enforce their rights to the domestic court of law or other human rights institution established for that purpose. In addition, this individual or group of individuals can submit a communication to the CESCR claiming to be victims of a violation of any of ESC rights, as

33 Ibid.

34 CaseNo 493/2000.

Article 2 of OP-ICESCR provides. However, this right is only for individual(s) whose country is part to the covenant and the same has ratified the Optional Protocol to ICESCR.

2.2.1 The Protection and Justiciability of ESC Rights in Tanzania Bill of Rights

The *constitutionalisation* of human rights as enforceable part of the constitution in Tanzania was not an easy task. As to the historical perspective, Tanzania rejected outright the proposal by departing power to include a Bill of Rights in the Independence Constitution in 1961. This situation remained in all the subsequent Constitution: the Republic Constitution of 1962; the Interim Constitution of 1965; and the Permanent Constitution of the United Republic of Tanzania of 1977.³⁵

Tanzania ascended the mounting pressure from various sources both within and outside the country; the bill of rights was eventually incorporated in the Union Constitution through the fifth Constitution Amendment of 1984.³⁶ However, for the period of three years enforcement the bill of rights was suspended allegedly in order to give the government opportunity to ‘put its

35 Shivji I. G., (editor & contributor), Majamba H. I., Makaramba R. V., and Peter C. M., Constitutional and legal system of Tanzania : A Civics Sourcebook, Mkuki na Nyota Publishers (2004), pp. 91-92

36 Amendment of the state Constitution (Act 15) 1984

house in order'.³⁷ Thus, the bill of rights became enforceable on March 15, 1988. Nevertheless, this bill of rights does not incorporate all of the fundamental rights, particularly ESC rights, in the “enforceable part” of the Constitution i.e., Part III of Chapter One of the Constitution. In fact, this part of the Constitution entitled ‘Basic Rights and Duties’ contain most of civil and political rights and pays minimal attention to ESC rights. In spite of Tanzania’s obligations to the ICESCR to which it is a party, the ESC rights provided for under the Tanzanian Bill of Rights are:

Only the right to work³⁸ and get commensurate remuneration³⁹ and the right to own property⁴⁰ were included in the Bill of Rights (i.e., the justiciable or ‘enforceable part’ of the Constitution). The rest of ESC rights as provided for in the ICESCR are relegated to the unjusticiable or ‘unenforceable’ part of the Constitution⁴¹ – i.e., in Part II of Chapter One of the Constitution that contains Fundamental Objectives and Directive Principles of State Policy. This section contains a set of objectives and principles intended to guide government, all organs of the state and non-state actors ‘in applying or

37 Act No. 15 of 1984 Section 5 (2) noted; *“Notwithstanding the amendment of the constitution and, in particular, the justiciability of the provisions relating to basic rights, freedoms and duties, no existing law or any other provision in any existing law may, until after three years from the date of commencement of the Act, be construed by any court in the United Republic as being unconstitutional or otherwise inconsistent with any provision of the constitution.”*

38 Article 22 of the URT Constitution.

39 Ibid, Article 23.

40 Ibid, Article 24.

41 Ibid, Article 7(2) *“The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.”*

interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.’⁴²

The main economic and social rights that are contained in Part II of Chapter One of the Constitution include the right to education; the right to social welfare/security at times of old age, sickness and in other cases of incapacity; the right to health and the right to livelihood.⁴³ Surprisingly, rights to adequate food and housing were, not included in the Constitution.

It is crucial to remember that, ‘the provisions usually coached as Directive Principles are often the exact spirit and letters of ESC rights norm’.⁴⁴ Constitutional entrenchment of ESC rights at municipal level, offers the best protection of these rights in a given country. Such constitutional entrenchment normally guarantees judicial remedies to ESC rights, than the other “appropriate means” referred to in Article 2(1) of the ICESCR, which ‘could be rendered ineffective if they are not reinforced or complimented by judicial remedies’.⁴⁵

42 See Part II of Chapter One of The Constitution (particularly Article 7(1) which provides; “*Notwithstanding the provisions of sub article (2), it shall be the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of, observe and apply the provisions of this Part of this Chapter.*” **And 8(1)).**

43 Ibid, Article 11

44 D.Olowu, (2009), p.97

45 General Comment No. 9, Nineteen Session, 1998: “The Domestic Application of the Covenant,” UN Doc E/1999/22 117-121 Para 3.

2.2.2 The Extent to which Tanzania has Incorporated ESC rights in the Constitution

Evaluating as to what extent Tanzania has incorporated ESCR in its constitution; the comparison with ESC rights stipulated under the ICESCR is inevitable.

2.2.2. a Right to Work

In Tanzania's Constitution, right to work⁴⁶ supplemented by remuneration, which is commensurate with the work done without discrimination of any kind.⁴⁷ There is, neither specific provision as to safe and healthy working conditions⁴⁸ nor right to form and join in trade union⁴⁹ as clearly stipulated under articles seven and eight of ICESCR. Instead- in the Constitution- the later rights are traced within person's freedom of association, as 'no one shall be compelled to join any association',⁵⁰ and under provisions of the Employment and Labour Relations Acts of 2004.⁵¹ Moreover, unlike Tanzania's Constitution, the ICESCR provides not only for the right to seek employment freely, but also imposes specific obligation on the state to work

46 Article 22 of the constitution

47 Article 23 of the constitution

48 Article 7 of ICESCR.

49 Ibid, Article 8.

50 Article 20(4) of the URT Constitution.

51 Section 3 (f) which says that this law shall give effect to the provision of the Constitution of Tanzania. Under this law One of the requirements for the registration of the trade union is that it must be established at a meeting of at least 20 employees -section 46-. This is unnecessary restriction because some of the working places have less than those required 20 employees, this limit the enjoyment of the intended rights.

towards achieving that right. This includes, having in place technical and vocational guidance and training programmes, policies and techniques.⁵²

2.2.2. b Right to Own Property

Right to own property⁵³ includes, right to protection of the property, fair and adequate compensation in case of dispossession. Here, property right relates to land. However, the right to own property is still inhibited in some ways by presence of some of the provisions of the laws of Tanzania. Despite repeated calls of civil rights' groups to the government, The Customary Laws Declaration Orders of 1963⁵⁴ that prohibits women from owning properties remained un-amended.⁵⁵

In 2006, two widows from Shinyanga region with the assistance of WLAC unsuccessfully challenged this in Court.⁵⁶ They were challenging the customary law because it discriminates against women and violates the country's Constitution.⁵⁷ In Tanzania, under Customary Law, women are restricted to inherit property from their husbands. Only sons, uncles and other male relatives are given preference over women in matters of

52 Article 6 of ICESCR.

53 Article 24 of the constitution.

54 G.N 276 OF 1963.

55 Tanzania Human rights report 2009, p.76. Available at <http://www.humanrights.or.tz/> Accessed 20 November 2010.

56 *Elizabeth Stephen and Another V. The Attorney General*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 82 of 2005.

57 Article 13(2)of the URT Constitution, bars discrimination.

inheritance. Additionally, women are restricted from disposing of clan land. In this case, women were restricted in where they may live and how they choose to live their lives. This is contrary to Tanzania's obligation to the international human rights instruments.⁵⁸

2.2.2. c Right to Health Services

The right to health is crucial because it is part of the right to life. However, the Constitution of the United Republic of Tanzania of 1977 does not recognize such right as one of the fundamental rights. This is contrary to ICESCR, which recognizes it and directs state parties to ensure availability of physical and mental health to their people, adequate health and medical care for all.⁵⁹ Lacking of this right in the constitution causes the enjoyment of the right to health to be a puzzle to the majority of Tanzania. For instance, the high maternal and child mortality deaths are associated with the lack of facilities and skilled human resource. Recently, it is only 40 percent of HIV positive women, who have access and receive nevirapine prophylaxis or start on Ant-Retroviral Treatment (ARV) in 2008/09.⁶⁰

58 For example Article 2(f) and (g) of the CEDAW

59 Article 12 of ICESCR.

60 The Millennium Development Goals report 2009 Tanzania at 47.

2.2.2. d Right to Education

According to ICESCR,⁶¹ right to Education is one of the basic rights for everyone. The right to education assists in fighting and protecting one's rights as it gives people ability to be aware of their rights. It is unfortunate that the URT Constitution does not include the same in its Bill of Rights. Instead, it is under fundamental principle of state policy,⁶² which is non-justiciable part of the constitution. Therefore, it cannot be justiciable under the Enforcement of Basic Rights and Duties Act, 1994.⁶³

2.2.2. e Right to Food, Clothing and Housing

Under the Tanzania's Bill of Rights, right to adequate standard of living including adequate food, clothing and housing are not guaranteed. This is contrary to ICESCR,⁶⁴ which recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing. Instead, it is provided under fundamental objectives and directive principles of state policy. The state policy provides that the State authority shall make appropriate provisions to ensure that every person earns his livelihood.⁶⁵ Apart from being non-justiciable, the

61 Article 13 of ICESCR.

62 Article 11 of Tanzania Constitution.

63 This 1994 legislation enforces the rights, which have only been mentioned in the Bills of Rights and Duties, which are Articles 12 to 29 of the Constitution of Tanzania.

64 Article 11 of the ICESCR

65 Article 11(1) of Tanzania constitution

provision is too general compared to that of ICESCR. The absence of housing right in the Constitution leads to difficulties in justiciability of the same before courts. Hence, majority of Tanzanians find themselves in the pond of poverty following evictions from their land and destruction of their houses in the process.

As illustrated above, failure to entrench some of the ESC rights in the enforceable part of the Tanzania Constitution, and for those incorporated rights (rights to work and right to property) which seems to be taken away by the language of limitations,⁶⁶ the Government of Tanzania has limited the chances of litigants to directly access judicial remedy in case of violation of any of these rights. If ESC rights claims are placed beyond the reach of the courts, the Committee noted, this would ‘drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged group of society.’⁶⁷

It should be borne in mind, nevertheless that, even where some of the ESC rights are not incorporated into Tanzania domestic law, the courts must assume that the domestic law is in conformity with the ICESCR and with the requirement of effective remedies. Otherwise, as the Committee point out in its General Comments (GN) number 9, the treat would have been ratified in bad faith. Whereas the treaty requires that it be given legal effect in the domestic order and the state ratified the same without modifying any law, courts must presume that the state, interprets its treaty obligations in good

66 Article 30 of the constitution

67 CESCR, GC No.9

faith, viewing its law as already conforming to the obligations. The courts must therefore actively strive to achieve interpretations of domestic law and exercise decision-making in a manner, which conforms, to the recognitions of ESC rights as fundamental rights rather than policy objectives, that is, as rights, which gives rise to effective remedies.

Domestic law must be interpreted and applied to provide, wherever possible, effective remedies to ESC rights. In addition, other constitutional and human rights provisions that guarantee of equality should be interpreted so as to provide, “to the greatest extent possible” the full protection of ESC rights. As noted in GC No. 9 ‘Neglect by courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations’.

In addition, since Tanzania Bill of Rights is not sufficient in protecting and justiciability of ESC rights ‘Fundamental Objectives and Directive Principles of State Policy’ set out in Part II of Chapter One of the Constitution of Tanzania can be used to guide and inform judicial interpretation of ESC rights into the Bill of Rights. These principles can also guide the court when giving practical effect to ESC rights. The principles are very important path guiding all the three arms of the Tanzanian State in their official functions, which is to achieve the state’s fundamental objective-that is, adherence to the principle of democracy and social justice.⁶⁸

68 Article 8 of the Constitution of Tanzania, 1977.

As far as deficit of the URT constitution is concerned, it is a time now for Tanzania to act positively towards its obligations of implementation and protection⁶⁹ of ESC rights as stipulated under ICESCR. In addition, for assurance of justiciability before the courts and enjoyment of ESC rights to Tanzanian, ratification of the OP-ICESR is crucially important.

2.3 Protection ESC Rights under Tanzania National Legislations

Protection of ESC rights have been so retarded in Tanzania, as mentioned previously, under the Bill of Rights only rights to property and rights to work are justiciable. The bulk of other ESC rights as stipulated in ICESCR are not enforceable. If this is the case, can there be ways of situating the implementation of ESC rights within conventional schemes of modern-day governance despite its traditionally weak constitutional status? The answer is simply yes, it is through Domestic statutes the efficacy of ESC rights can possibly be secured in Tanzania. As Klaus observed:

69 A positive obligation to engage in human rights protection can be found in Article 9 of the Constitution of Tanzania. This provision stipulates that the state authority and all its agencies must direct their policies and programmes towards ensuring, among other things, “*that human dignity and other human rights are respected and cherished*”. Unfortunately, this provision is found outside Tanzania’s Bill of Rights and therefore contains less force than necessary to truly achieve protection of human rights.

The *societas perfecta* cannot be achieved by merely acknowledging human rights and fundamental freedom in a fine sounding word in the constitution, yet failing to apply them in legislation and legal practice in a manner permitting man, as a rational being, freely to develop personality and exercise his rights to order his own life.⁷⁰

Tanzania being a state part to ICESCR is obliged to ‘take steps... with a view to achieving progressively the full realization of ESC rights... by all appropriate means including particularly the adoption of legislative measures’.⁷¹ More over, in African Charter, it is mandatory to adopt legislative or other measures to give effect the rights recognized under the charter.⁷²

It has been recognized by the Committee of ESCR that, legislation made by competent bodies at the national level is a cardinal mechanism critical to the protecting ESC rights at the domestic level.⁷³ It is the best guarantee for international human rights implementation particularly in societies having government that value its responsibility to its individuals.

In Tanzania, it is common to find the Act of parliament making elaborative provisions in relation to ESC rights, articulated as individual rights and supported by availability of remedies. However, there are very few

70 Klaus observation in the year ICESCR adopted, as courted in D.Olowu, (2009) P.98.

71 Article 2(1) ICESCR.

72 Article 1 of the Charter

73 CESCR, GC 3, para 3&8.

legislations of such kind as ESC rights are concerned and if they are available, can be in the weakness of relaying in class restrictions for instance workers, or lacking publicity even when intended for unrestricted benefit. For example, Workers' and Farmers' Housing Development Fund⁷⁴ and The Customary Laws Declaration Orders of 1963.⁷⁵

Generally, the elements of ESC rights can be garnered from several statutes, including; Land Act, 1999⁷⁶ and Land (Amendments) Act, 2004. The Act provides for the basic law in relation to land, the management of land, settlement of disputes and related matters. The Employment and Labour Relation Act 2004,⁷⁷ an act to make provisions for core labour rights, to establish basic employment standards, to provide a frame work for collective bargaining, prevention and settlement disputes. The Courts (Land Disputes Settlement) Act, 2002,⁷⁸ An Act to provide for the establishment of land dispute settlement machinery and for matters incidental thereto. The Occupation Health and Safety Act, 2003;⁷⁹ The Labour Institute Act, 2004;⁸⁰ and The Worker Compensations Act, 2008.⁸¹ Education Act, 1978⁸² and The Public Hearth Act, 2009.⁸³

74 Act No.20 of 1974.

75 Supra no. 52 above. This law desciminate women from right to own property.

76 Act No.4 of 1999

77 Act No.6 of 2004

78 Act No.2 of 2002

79 Act No.5 of 2003

80 Act No 7 of 2004

81 Act No.20 of 2008

82 Act No.25 of 1978

83 Act No.1 of 2009

Even though there are number of legislations dealing with protection of ESC rights, it is mainly through Constitution and judicial enforcement that the realization and enjoyment of ESC rights takes place and it is to such respect that attention is turned to.

2.4 Judicial Enforcement of Economic, Social and Cultural Rights

The judicial arm of the states exercises judicial power that is dispensing justice. An individual who feels wrong or aggravated can resort to the body. In order to have legitimacy, the judicial organ must be able to carry their functions without fear or favours, impartiality, and should be seen to be impartial. It is for these reasons, the Democratic Constitution of Tanzania provide for an independence of judiciary, under its 13th Amendment of the Union Constitution passed in 2000.⁸⁴

‘An independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the *full and non-discriminatory realization of human rights*’.⁸⁵ That is to say, ESC rights should be granted judicial or quasi-judicial

84 The URT Constitution; Article 107A.(1) *The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania.*

(2)...

107B. *In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land..*

85 See Vienna Declaration and Programmed of Action, adopted by the World Conference on Human Rights in Vienna, June 25, 1993, Para. 27. (my emphasis)

protection just as is it with civil and political rights in domestic level, as litigation is a separate and independent means to enforce and implement ESC Rights.

However, there is a question of justiciability⁸⁶ of ESC rights in Tanzania courts of law, even after establishment of proper mechanisms for implementation of bill of rights in 1994, following enactment of Basic Rights and Duties Enforcement Act,⁸⁷ which empowers High Court⁸⁸ to enforce HR. That, allows any person who alleges contravention, of the basic rights provided under Article 12 through 29 of the URT Constitution to bring his or her complaint to the High Court for redress.

In Tanzania, legal system it is noted that, many of decisions makers such as judges, lawyer, perhaps unreflectively, with issue of ESC rights on a routine basis. Most of them are unlikely to be knowledgeable about ESC rights. Hence, jeopardize the guarantee of justice to individuals whose ESC rights has been violated. As far as right to own property is concerned, there are number of cases where the HC of Tanzania failed to provide justice to the victims, and if there is justice, it might be impossible to enforce the decision. *Lekengere Faru and Others vs. Attorney General and Others, Tanzania*

86 The term ‘justiciability’ refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. **Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties.**

87 No.7 of 1994

88 Section 13(1) of the Act.

High Court, Moshi,⁸⁹ for instance, Maasai Pastoralists living in Mkomazi Game Reserve, North Eastern Tanzania claim against evictions from ancestral lands within the Game Reserve.

The High Court per Munuo, J. finds that the Evictions were illegal, Orders that alternative land be sought and Claimants be compensated. However, under the Court of Appeal, presided by the CJ,⁹⁰ in his hastily written Judgment (1999) the verdict was that the Maasai are not Natives of contested area (Mkomazi), but ‘recent’ immigrants who were only residing there under a license. He orders paltry damages for only those who gave evidence in the Court of law and also orders for alternative land to be sought. Unfortunately, the last Order remains unimplemented to date.

In the case of *Yoke Gwaku and 5 Others vs. Gawal Farms Ltd and NAFCO*,⁹¹ Barabaig Pastoralists in Hanang District Claim Over extensive Pasture Lands appropriated by NAFCO, a Parastatal, as GAWAL FARM, (about 10,000 acres) funded by CIDA, Canada.

The High Courts decision awarded a Nominal Victory to: (1) Yes, the Pastoralists have been illegally Dispossessed (2) But Representative Suit covers only those in Court and not the odd 780 others. (3) Claimants should be paid monetary compensations and not to be re-granted the land.

89 Civil cause No 33/1994, CV No.33/1995, Court of Appeal- CVA No. 53/1998.

90 Refers to Nyalali, the then Chief Justice of Tanzania

91 Civil case No. 52/1988, Tanzania HC, Arusha.

In another development, the *Ako Gembul and 100 Others vs. Gidagamowd and Waret Farms Ltds and NAFCO*, HC Arusha,⁹² The Barabaig Pastoralists in Hanang District, Claim Over extensive Pasture Lands appropriated by NAFCO, a Parastatal, as WARET and GIDAGAMOWD FARMS, (about 20,000 acres) funded by CIDA, Canada

The High Court⁹³ dismisses the case: (1) That the Government has priority in food security and the acquisition of the Barabaig Land is proper, as national interest overrides all other interests... (2) That the suit is bad in law as it should have been consolidated with the *Yoke Gwaku Case*. The litigants were at fault and maybe guilty of abuse of the process of Court.

Apart from existing dilemma of justiciability of ESC rights in Tanzania's judicial system, however, the HC, in some occasions, manage to protect ESC rights through civil and political rights. Judicial authorities have been hard pressed to hold that the right to clean environment is related to the right to life. In *Festo Balegele and 784 Others v. Dar es Salaam City Council*,⁹⁴ the high court ruled that any act of a public authority or an individual, which pollutes the environment, thereby endangering people's health, is contrary to Article 14 of the URT Constitution. The constitutional provision establishes the right to life and protection of human life. In 2004, the Union Parliament enacted the Environmental Management Act⁹⁵, which now provides directly

92 Civil case No. 12/1989.

93 This refers to the case presided by Nchalla, J.

94 High Court of Dar es Salaam, Misc. Civil Cause Number 90 of 1991(unreported).

95 Act No. 20 of 2004.

for the right of every person living in Tanzania to a clean and healthy environment.

In terms of judicial precedent, the above decisions are not sufficient in the interpretation and enforcement of ESC rights in the URT Constitution. This evidenced the dearth of ESC rights litigation and the weakness of judicial powers in enforcing such rights in Tanzania, as opposed to South African as illustrated below, where, the Constitutional Court has been more innovative and assertive in that regard.

2.5 Enforcement of ESC Rights under the Commissioner of Human Rights and Good Governance (CHRGG)

Apart from judicial enforcement exercised by the courts, there are other institutional mechanisms for the enforcement of human rights under the Tanzanian Constitution. The Commission for Human Rights and Good Governance (CHRGG) is an independent government department. It is established as the national focal point institution responsible for the promoting and protecting human rights and duties as well as good governance in Tanzania. The CHRGG was established under the Article 129(1) of the Constitution of the United Republic of Tanzania of 1977 as amended by Act No. 3 of 2000.

The Commission became operational on 1 July 2001 after the coming into force of the Commission for Human Rights and Good Governance Act.⁹⁶ The President of the URT officially inaugurated the Commission in March 2002 following the appointment of Commissioners. The functions of the Commission are spelt out under Article 6(1) (a-o)⁹⁷ to include, *inter alia*: Promoting within the country, protection and the preservation of human rights and of duties to the society in accordance to the Constitution and the laws of the land. To receive allegations, and complaints related to the violation of human rights generally; to conduct research into human rights, when necessary, to institute proceedings in Court designed to terminate activities involving the violation of human rights or redress the right or rights so violated...et al.

It is significant to note that over and above these functions, the Commission has the powers to investigate any human rights abuses.⁹⁸ The Commission can act based on its own initiative or upon receipt of a complaint or allegation to this effect. The aggrieved person or any other person acting on behalf of such person can lodge complaints, or it can be a person acting in the interest of a group or class of persons.⁹⁹

Unlike courts of law, access to the Commission has been made very easy. An individual can complain in various ways- by word of mouth, a simple letter, a petition etc. There are no pleadings, written statement of defense,

96 Act No7 of 2001 as amended by Act No 16 of 2001 and Government Notice No. 311 of 8th June 2001

97 Act No. 7 of 2001

98 Section 15(1), CHRGG Act, 2001 (Act No. 7 of 2001).

99 Ibid, Section 15(1)(a) and (b)

affidavits and counter affidavits. However, the decisions of the Commission have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out.¹⁰⁰ Therefore, unlike a decision of a courts of law which is binding on the person on whom it is directed, this is not the case with the decisions of the Commission.

In the particular context of ESC rights, the CHRGG's investigations to date, has only conducted one major inquiry. The burning of houses in the Nyamuma village in Serengeti district is the case in point.¹⁰¹ The Commission conducted a long and protracted inquiry in Musoma, in which all parties – including the Office of the Attorney-General were fully involved. The Commission investigated the complaints and after an interview with more than 120 witnesses for the complainants and the appellants, and 20 for the respondents. On the 13th December 2004, The Commission released its decision, where as the government was reviled to have violated the rights to property of the complaints. In addition, the commissions recommended that the complainants should be resettled in their native land. At the same time, the Government of Tanzania was ordered to pay compensation amounting to more than Tshs. 800 millions.¹⁰²

100 Ibid, Section 17(1)

101 See the case of *Ibrahimu Korosso & 134 Others together with the Legal and Human Rights Centre v District Commissioner and the Police Officer in Command of Serengeti District together with the Attorney General (HBUB/S/1032/2002/2003/MARA)*.

102 This refers to the exchange rate of 1U\$ to 1,027 Tshs, thus being equivalent to U\$ 778,968.

Interestingly, however, on receipt of the CHRGG's decision, the Government through the then Attorney-General of Tanzania,¹⁰³ wrote to the then Chairman of the Commission, Hon. Justice Robert Kisanga, informing him that the government was not going to respect or implement the decision. The objection frustrated affected villagers, the Commission and other pioneers of Human Rights promoters in the Country. The Commission felt helpless and asked the parties to proceed to the judiciary and seek remedy there.¹⁰⁴

Pursuant to section 28 (3) of the Act, the CHRGG recommended LHRC on behalf of 135 villagers to bring an action to the High Court of Tanzania for resettlement and Compensation, suit for enforcement at the High Court (HC), Main Registry for claim of Compensation and Land Division for Resettlement of villagers to their native land. However, at the HC, both cases were dismissed on the ground that the HC did not have the jurisdiction to enforce the recommendations by the Commission. The LHRC filed an appeal to the Court of Appeal, which is the Supreme Court in Tanzania.

The Court of Appeal of Tanzania in Dar es Salaam (CA)¹⁰⁵ ruled that the HC erred in not considering the matter on merit. The CA decided that it was

103 Refers to Hon. Andrew Chenge who was in office

104 Legal and Human Rights Centre. 2006a. *The human calamity of the evictions at Nyamuma – Serengeti: Legal and human rights implications*. Dar es Salaam: LHRC.

105 Refers to seating preceded by Ramadhani C.J., Lubuva, J.A and Nsekela, J.A on 24th April, 2008 and January 2, 2009

proper for LHRC to have filed an application to the HC for enforcement of the Commissions decision after being refused to be enforced by the Government. Moreover, ordered that the matter be referred to the HC in order to be considered on merit. The CA further suggested that the Commission should advise the Minister to make regulations, thus providing procedure for the enforcement of recommendations.

The *Nyamuma Village* complaint is one extreme case to have laid bacon of hope for individual Tanzanians especially the victims of ESC rights violations. The whole ordeal has demonstrated the limitations as to what the Commission can and cannot do.¹⁰⁶ How noble the Commission is, however it cannot investigate high-ranking officials such as the President of the URT.¹⁰⁷ According to the above, after investigating and hearing complaints, the Commission has no legal power to give binding orders. This means that the commission has no teeth to “bite” violator of the fundamental rights and freedom of the country.

2.6 Concluding Observations

Tanzania has a long way to go as far as protection of ESC right is concerned. By integrating ESC rights, Tanzania constitution provide a minimal guarantee of ESC rights protection, as only right to own property and right

106 The limitations and restrictions on investigations by the Commission are provided at length in Section 16, CHRGG Act, 2001.

107 Ibid, Section 16(1),

to work are under the Bill of Rights, leaving the bulk of those rights unprotected and therefore not justiciable before national courts.

Moreover, the constitution does not provide clearly as to what extent ESC rights can be justiciable. For instance, right to work - as discussed above - its contents has not been widely stipulated under the constitution as compared to the ICESCR. In addition, as seen in the discussion above the jurisprudence of national courts have not met in a full realization of the contents of ESC rights, hence, the remedies granted have not always provided justice to the parties.

As observed earlier in this chapter, the CHRGG also has a role to play in the protection and justiciability of ESC rights. However, the obstacles are at large extent, beyond the management of the CHRGG itself. Inadequacy of legal procedures to enforce its decisions and Independence of the Commission are among of them. As for inadequacy of powers, in terms of enforcing its recommendations, the Paris Principles do not require the national commissions to have binding decisions, but needs them to have broad legal mandate, as indicated above. It can just issue recommendations, which the violator of human rights is required to abide by within a given period of time.¹⁰⁸ Further, the constitutional powers given to the President to give directions or orders to the CHRGG regarding any matter, if he/she is

108 Section 28 (3) of the Commission for Human Rights and Good Governance Act

satisfied that it is in the public interest to do so,¹⁰⁹ undermines the freedom of CHRGG in protecting and justiciability of ESC rights.

It has revealed that, the provisions of the URT constitution are not sufficient to fully respect, protect and fulfill ESC rights in Tanzania, thereby justifying a study of the likely added benefits for Tanzania to ratify the OP-ICESCR.

109 Art 130(3) of the URT Constitution. The said provision states that, *[t]he provisions of sub article(2)[which gives the CHRGG autonomy] shall not be construed as restricting the President from giving directive or orders to the Commission, nor are they conferring a right to the Commission of not complying with directions or orders, if the President is satisfied that in respect of any matter or any state of affair, public interest so requires.*

CHAPTER THREE

3.1 Comparative Jurisprudence: The 1966 South Africa Constitution and Justiciability of Economic, Social and Cultural rights

On 3 October 1994, The Republic of South Africa signed the ICESCR; however, the covenant is not yet ratified. According to S. Liebenberg,¹¹⁰ ‘South Africa Constitution¹¹¹ is a renowned internationally for its holistic, inclusive Bill of Rights. In addition to traditional civil and political rights, the Bill of rights includes a comprehensive set of social economic and cultural rights. All these rights are enforceable by the courts and the courts have a wide discretion to grant “just and equitable” remedy. The 1966 Constitution is described as ‘the most admirable constitution in the history of the world’¹¹² that it is recognizing the indivisibility of human rights.

This chapter intends to evaluate, as to what extent ESC rights can be full protected and enforced under domestic legal system. The author is using South Africa Constitution particularly Bills of Rights. The reason behind is

110 See S. Liebenberg, ‘*Adjudicating Social Rights Under a Transformative Constitution*’, in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) P. 75.

111 Act 108 of 1966

112 C.R. Sunstein, *Designing Democracy: What Constitution Do* (New York, Oxford University Press, 2001), at p.261

that in this Bill of Rights, there is clear imposition of obligations to respect, protect, promote and fulfill ESC rights toward the state.¹¹³ The courts are constitutionally bound to ensure that these rights are protected and fulfilled. Significantly, the Constitution uses the same language used by the UN CESCR in analyzing the duties imposed by various rights in the ICESCR specifically under its GC 12,¹¹⁴ on Rights to adequate food, GC 14,¹¹⁵ the rights to the attainable standard of hearth, and GC 15¹¹⁶, the rights to water. South Africa constitution seems to clarify that it is not crucial for a state to be bound by ICESCR for its individuals to enjoy their ESC rights. In other words, the international law can be recognized by interpreting and applying the same in domestic law.¹¹⁷

As we have seen in the previous chapter, Tanzania has ratified ICESCR; however, ESC rights are neither full justiciable under URT Constitution, nor properly enforced by the judicial system. It is still a puzzle whether ratification of the OP to ICESCR will motivate the implementation and justiciability of ESC rights in Tanzania and hence enjoyment of these rights to its individuals. This is no longer a question in South Africa legal system. As South African judge, Justice Yacoob, stated, ‘The question is therefore

113 See section 7(2) of the 1966 South Africa Constitution

114 (20th session, 1999), U.N. Doc. E/C.12/ 1999/5 (1999) at Para. 15

115 (22nd session, 2000),U.N. Doc. E/C.12/2000/4 (2000) at para.33-37

116 (29th session, 2003), U.N.Doc.E/C.12/2002/11 (2003) at paras. 20-26

117 See Article 231(4) of the constitution. It noted; any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an act of parliament.(My emphasis)

not whether ESC rights are justiciable under our constitution, but how to enforce them in a given case'.¹¹⁸ This statement leads us to the analysis of ESC rights contained in South Africa constitution.

3.2 Economic Social and Cultural Rights in the contexts of Bill of Rights

Unlike Tanzania whereas rights to own property and rights to work are in the justiciable part of the country's Constitution, South Africa (SA) Constitution guarantee protection to its individual(s) in respect to core ESC rights. Most of ESC rights stipulated under the ICESCR have been entrenched in SA Bill of Rights. These include, the rights of every one to have access to adequate housing,¹¹⁹ and to have access to healthcare services, including productive health care, food, water, and social security, including appropriate social assistance if they are not able to support themselves and their dependants.¹²⁰ The particular significance of these rights is grounded in the fact that they guarantee everyone the right of access not only to important components of an adequate standard of living but also to things that are ordinarily regarded as necessities of life.¹²¹ This is sported in the context of the preamble to the Constitution, which envisions the adoption of the Constitution as the supreme law of the Republic in order to, *inter alia*, 'improve the quality of life of all citizens and [to] free the

118 *South Africa v Grootboom*, 2001 (1)SA 46 (CC) at Para.20

119 See section 26(1) of the 1966 SA Constitution.

120 *Ibid*, Section 27(1)(a,b,c).

121 **J. C. Mubangizi.**, *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation.* **2 African Journal of Legal Studies.** **1** (2006) 1-19 at 5.

potential of each person.’¹²² We have to note that, these most important sections (section 26 and 27) followed by sub - provision 2 which obliged the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.¹²³ Moreover section 26(3) guarantee protection against arbitrary eviction and demolitions of people’s homes, and section 27(3) guarantee right to health as it noted as follow; ‘No one may be refused emergence medical treatment’.

In addition, there is an entrenchment of other ESC rights including, rights to basic education particularly adult basic education,¹²⁴ Labour rights,¹²⁵ dealing with labour relations include the right to fair labour practices; the right to form, join and to participate in trade unions; and the right to strike. Primarily, these rights are at the center of direct relationship between employers and employees. Unlike most other ESC rights, the rights in section 23 are not directed at material state performance such as the provision of facilities and delivery of services, but at a relationship between private parties.¹²⁶ Therefore, section 23 has a direct ‘*horizontal effect*’,¹²⁷ as its nature reflects the applicability of section 8(2) of the SA Constitution.

122 Ibid

123 The sub Para. Two of section 26 and 27 of the Constitution, has almost the same language with the article 2(1) of ICESCR. Both impose obligation for state(s) to take reasonable measure in realization of ESC rights. This shows that, even though South Africa is not yet to ratify ICESCR, it has been influenced by the Covenant.

124 Ibid, section 29(1) (a) and (b).

125 Ibid, section 23.

126 S. Liebenberg (2008) p.75.

127 Horizontal application refers to the applicability of the Bill of Rights in relation between private parties.

Environmental rights¹²⁸ comprise two essential components. The first one, is under section 24(a) everyone has the right to an environment that is not harmful to his/her health or well-being. This part has the character of both a civil and political rights on one side and ESC right on another's. This is because section 24(a) creates an individual right like most first-generation rights. The second part is section 24(b) which obliged the state to prevent pollution and other damage to the environment, and to promote conservation and sustainable development. It could be argued that since section 24(b) creates a purely ESC right, it belongs to the category of collective rights, which usually impose constitutional imperatives on the state to secure and provide services and other social or economic amenities.¹²⁹

Under Property rights,¹³⁰ emphasize is upon 'the nation's commitment to land reform, and bring about equitable access to all South African's natural resources.'¹³¹ In addition, there are inclusion of a set of provisions placing an obligation on the state to foster equitable access to land, tenure reform, and land restitution.¹³²

Moreover, there are entrenchment of children rights to basic nutrition, shelter, basic hearth care services and social services,¹³³ rights to take part in

128 SA Constitution, section 24.

129 J. C. Mubangizi., (2006) p.5

130 SA Constitution, section 25.

131 SA Constitution, section 25(4)(a) and 25(8).

132 Ibid, section 25(5), 25(6), 25(7)

133 Ibid, section 28.

cultural life,¹³⁴ rights of prisoner conferring the rights to condition that are consistent to human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.¹³⁵ It is important to note that these ESC rights tend to create entitlements to material conditions of human welfare.¹³⁶ Furthermore, as most of them reflect specific areas of basic needs or delivery of particular goods and services, they usually have salient social and economic ramifications.¹³⁷

Like other human rights, ESC rights stipulated under South Africa's Constitution are subject to the general 'limitations clause' as provided under section 36. In determining whether a limitation is reasonable and justiciable a number of factors must be taken in account as provided under section (36) (1) (a) - (e) including: the nature of the right, importance of the purpose of limitation, extent of limitation relation between limitation and its purpose, and less restrictive means to achieve the purpose. Essentially a court will inquire into whether there is sufficiently important purpose for limiting a right, and whether the limitation is proportional. This is what we call a reasonable language of a restrictive limitation clause. The clause ensures that

134 Ibid, section 30-31.

135 Ibid, section 35(2)(e).

136 D Brand, 'Introduction to socio-economic rights in the South African constitution' in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005) p. 3.

137 J. C. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta & Co, Cape Town 2004) p. 118.

the rights are meaningful and not undermined. Article 30 of the URT Constitution (as noted in chapter two), should be reviewed in order to minimize a widely worded derogation having the potential of limiting the enjoyment of ESC rights.

3.3 Justiciability of ESC Rights under South Africa Courts

The most important provision as regarding to practical enforcement of ESC rights is section 38, which contains the general provisions on right to heard '*locus standi*.'¹³⁸ A number of persons who allege or assert that rights in the Bill of Rights have been infringed or threatening are eligible to approach a court for appropriate relief. These individual(s) include, anyone acting in their own interest,¹³⁹ anyone acting on behalf of another person who cannot act in their own name,¹⁴⁰ anyone acting as a member of, or in the interest of, a group or class of persons,¹⁴¹ anyone acting in the public interest,¹⁴² and association acting in the interest of its members.¹⁴³ Under this section, the court has given a wider room for interpretation of the right to stand, requiring only allegation that, objectively speaking, rights in the Bill of Rights have been infringed or threatened, and those individuals who seeking relief, have a sufficient interest in obtaining the remedy they seek.

138 S. Liebenberg, (2008) p. 79

139 Section 38(a) of the SA Constitution.

140 Ibid, section 38(b)

141 Ibid, section 38(c)

142 Ibid, section 38(d)

143 Ibid, section 38(e)

Moreover, an individual or organization can participate in human rights litigation as friend of the court '*amicus curies*'¹⁴⁴

As far as Individual Complaint Procedure under the OP-ICESCR is the core theme of this thesis, section 38 of the Republic relates to article two of the Optional Protocol. Under OP, the communication may be submitted *by* or *on behalf* of individual or *group of individual*. In general, these two sections make sure that, every individual at a national and international level is protected against violations and is given an avenue to claim for his/her ESC rights in case of infringement of these rights. Referring to Tanzania constitution, article 30(3) provides that:

‘*Any person* claiming that any provision in this Part of this Chapter ... is being or is likely to be violated *by any person* anywhere in the United Republic, may institute proceedings for redress in the High Court.’

Critically, this article does not specify clearly what kind of this person; however, “any person” is too wide term. It can be interpreted as in section 38 of South Africa constitution or article 2 of the OP in case of dealing with ESC rights violations.

As far as enforcement of ESC rights is concerned, section 7(2) of the Constitution is among of the important provisions, as it enjoins the State to protect and fulfill the rights in the Bill of Rights. The state must not only refrain from interfering with the enjoyment of rights but also must act to

144 See, S. Liebenberg,(2008) pp. 80-81 for more discussion on *amicus curies*.

protect, enhance and realise their enjoyment.¹⁴⁵ Thus, it is mainly through *judicial enforcement* that the realisation and enjoyment of ESC rights takes place. As S. Liebenberg wrote,¹⁴⁶ the South African jurisprudence illustrates how the courts can meaningfully enforce the positive duties imposed by ESC right while still maintaining the separation of powers principle and allowing the government control over budgetary considerations.

3.3.1 Example of Cases on Enforcement of ESC Rights under South African Constitutional Court

The consideration enforceability of ESC rights first appeared in substantive Constitutional case of *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal [Soobramoney]*.¹⁴⁷ The case involved an application for an order from the court directing a provincial hospital (respondent) to provide Mr. Soobramoney (applicant) with ongoing dialysis treatment and interdicting the provincial Minister of Health from refusing admitting him to the renal unit. The applicant relied under section 11- right to life and section 27(3) - the right to emergency treatment. The Constitutional Court held that, the right to emergency medical treatment could not extend to life-prolonging

145 D Brand,(2005) p. 3.

146 S. Liebenberg., *Enforcing Positive Social-Economic rights Claims*, in M Langford, at el (eds), *The Road to Remedy: Current Issue in the Litigation of Economic, Social and Cultural Rights*, UNSW press(2005) p.76.

147 (1998) (1) SA 765 (CC).

treatment for terminally ill patients,¹⁴⁸ and found that the denial of the required treatment did not breach the section 27(1) right of everyone to have access to health care services, and the section 27(3) rights to emergency medical treatment.

In this case, the court explicitly recognises that ESC rights are a state's responsibility and are judicially enforceable.¹⁴⁹ In addition, a 'standard of qualified deference to the legislature' is acknowledged. In Soobramoney's situation, the legislature had adopted public guidelines that were in line with legitimate medical opinions and these guidelines were applied in a fair and reasonable manner.¹⁵⁰

The decision of Soobramoney case also dealt with the other criticisms frequently associated with ESC rights. Prior to issuing the decision, the court reviewed evidence regarding the budgetary limitations of the hospitals and the government to provide such medical services.¹⁵¹ The court clearly demonstrated that economic limitations are taken into account when rendering such a decision.¹⁵² Again, this shows that despite the criticisms regarding ESC rights, they can be adjudicated and given proper consideration if heard by a competent judiciary. Finally, the Court conducted

148 E. C. Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2006-7) 38 *Columbia Human Rights Law Review* p. 360.

149 *Ibid*, 361.

150 *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal [Soobramoney]* (1998) (1) SA 765 (CC), Para 25.

151 Christiansen, (2006-7), p. 362.

152 *Soobramoney*, Para, 31.

the Soobramoney analysis with regard to the larger social context. It recognised that Soobramoney represents only a single person from the larger class and was careful to evaluate the case as such; therefore not overburdening the legislature with unrealistic remedies.¹⁵³ That means healthcare needs must be seen in the light of the population at large and the demands of other services. As long as the relevant guidelines are reasonable, non-discriminatory, made in good faith, and applied fairly and rationally, the Constitutional Court (CC) will uphold them.¹⁵⁴ The decision in Soobramoney did not find a violation of ESC rights; however, it laid important foundations that can be applied in subsequent decisions.

Another CC decision, illustrates the possibility of the judicial enforcement of ESC rights. The case between, *The Government of the Republic of South Africa and Others v Grootboom and Others*.¹⁵⁵ In Grootboom's, a group of adults and children were rendered homeless because of eviction from their informal dwellings situated on private land earmarked for low cost housing. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services. The CC found that the state had failed to meet the obligations placed on it by section 26 and declared that the government's housing programme was inconsistent with section 26(1) of the Constitution. In that it failed 'to provide relief to people having no access to land, no roof over their

153 Ibid, para, 26.

154 M, Ssenyonjo, (2009) p.172

155 2001 (1) SA 46 (CC).

heard and who are living in an intolerable condition or crisis situation',¹⁵⁶ Hence the court remedied *Grootboom* by ordering the states housing programme to include 'reasonable measure' to provide relief for this group of housing beneficiaries.¹⁵⁷

The remedy awarded in *Grootboom* remain to be the subject of much criticism; most of which stemmed from the state's 'tardy implementation' of the award. The reality of the court victory did little to change the social conditions of the complainants; it was reported that more than five years after the decision, most of the complainants were still located in crowded, unsanitary conditions on the periphery of the sports field with highly inadequate services. No, wonder that Kent Roach comes to argue that:

Judicial bodies that use declarations will find themselves dependent on the legislative and executive branches of government to provide remedies for socio-economic rights ...Declarations proceed on the assumption that governments will take prompt and good faith steps to comply with the court's declaration of constitutional entitlement.¹⁵⁸

However, *Grootboom* stands as a perfect example of separation of power. While declarations are meant to create a dialogue between the court system and the government, hence keeping in line with the separation of powers

156 *Grootboom* at para 99.

157 *Ibid.* Para 2(b) of the Order.

158 K Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 53.

principle, they can ‘suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance.’¹⁵⁹ Thus, while declarations can be a powerful tool if the government has simply been inattentive, they may prove to be an ineffective remedy for ESC rights violations if the state is unwilling or unable to provide for ESC rights.¹⁶⁰

Due to length limitation of the thesis, the last case to discuss in regarding to justiciability of ESC rights is *Minister of Health and Others v Treatment Action Campaign and Others (TAC)*.¹⁶¹ The TAC, a non-governmental organization, in a bid to force government to provide anti-retroviral drugs under the public health care system, specifically demanded that nevirapine, a drug that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with the virus all over South Africa. The Court held that the government’s policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme.

What happened in the *Grootboom case* with regard to judicial remedy seems to be repeated in this case. Again, the state was slow to implement the court remedy. After months of correspondence, meetings and a complaint to the Human Rights Commission, the Treatment Action Campaign (TAC), in December 2002, launched contempt of court proceedings against the state to

159 Ibid

160 Ibid

161 2002 (5) SA 703 (CC)

seek enforcement of these orders.¹⁶² Eventually, a national program was adopted, but again this case shows there still a challenge in enforcing ESC rights and that court need to state clearly that ESC rights are fundamental human rights, in addition to that in the future courts must order effective remedies to ensure compliance with ESC rights.

Generally, South African courts demonstrated the development of an arsenal of creative remedies to ESC rights violations. This shows that courts are capable of adjudicating ESC rights guaranteed in the country's Constitution in a manner that is consistent with the separation of powers principle. They have also proved that a domestic court can remedy violations of ESC rights, thus buried unfounded skepticism that social rights adjudication would cast the courts in an inappropriate and unmanageable role. The South African Courts provide a challenge to Tanzanian courts in adjudicating ESC rights and the government in its totality.

162 Liebenberg, (2008),p. 100.

CHAPTER FOUR

4.1 The Optional Protocol to the International Covenant on Economic Social and Cultural Rights

The objective of Tanzania's Constitution is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, and that the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that human rights are respected and cherished; and *Human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights (UDHR)*.¹⁶³ The fundamental principles enshrined in UDHR are to be implemented by the member states through their commitment under the international human rights conventions, as to our case the ICESCR, together with its respective protocol.

Tanzania is a state party to ICESCR and recognizes that; its citizens are 'entitled to realization ... of the ESC rights indispensable for his dignity and the free development of his personality'.¹⁶⁴ However, Tanzania is among the nations, of which majorities of its individuals suffer due to insufficient protection of ESC rights. Forced eviction, lack of education, poor health services, discrimination on access to and ownership of the property,

¹⁶³ Article 9(1) Tanzania Constitution. (*My emphasis*)

¹⁶⁴ Article 22 of the UDHR, G.A.res.217A (III), U.N. Doc.A/10AT 71(1948)

unemployment and poor working conditions, are the daily cry among Tanzanians. That is to say, there is slightest connection of what URT constitution illustrates on respecting of human dignity through protection of ESC rights and the reality on the implementation and enforcement of those rights.

The OP-ICESCR purport to provide individual or groups of individuals with a right to submit complains of ESC rights violations against their States to the CESCR. It also allows them to seek redress for violations of ESC rights that generally go unnoticed at the national level. However, in order to exercising the “rights of standing” before the committee, these individuals must be coming from a state party to the OP-ICESCR.

This chapter encompasses the analysis of Individual Complaint Procedure focusing on its scope and admissibility criteria. Interim measures, examination of the communication and remedy phase also are discussed. Impacts of ratification of the Option Protocol are evaluated in detail.

4.2 Individual Communication Procedure under the OP- ICESCR

With regard to individual complaints, the OP-ICESCR provides the Committee competence to receive and consider communications concerning state party to the covenant that becomes a Party to the Protocol.¹⁶⁵ It is important to note that, the CESCR does not have similar power like of the courts. CESCR cannot charge but “receiving and consider

165 Article 1 of the OP-ICESCR

communication”¹⁶⁶ with a ‘view to reaching a friendly settlement,’¹⁶⁷ and “not explicitly to find guilt or punish an offender”.¹⁶⁸ The committee does not “render a verdict”¹⁶⁹ rather requires state part within six months to response to the committee’s views and recommendations, if any, including information on any ‘action taken’.¹⁷⁰

Generally, the final views of the committee are not binding. However, as experienced under HRC, the views have explicitly declared to be legally binding.¹⁷¹ The practice of Committees regarding remedies is characterized by self-restraint; “views” usually recommend States to provide adequate remedies, but do not go into detail about these remedies, leaving States a wide degree of discretion to devise appropriate responses and select the means by which to implement their respective obligations. Sometimes, however, they do specify how the Government is to rectify the situation, for example through restitution or compensation.¹⁷² Through follow-up procedure, the committee ensures the implementations of its views. Therefore, ‘it will be politically difficult to agree that the views are not technically binding.’¹⁷³

166 Article 1 of the OP-ICESCR

167 Article 7 of the OP-ICESCR.

168 B.A Simmons ‘Should states ratify? - Process and Consequences of the Optional Protocol to the ICESCR., Nordic Journal of Human Rights Vol.27 No.1 of (2009) p. 70

169 Ibid.

170 Article 9(2) of the OP-ICESCR.

171 J S Davidson., ARTICLE: Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee, 2001 NZ Law Review 125 at introduction.

172 ‘OP-ICESCR’, Available at <http://www.right-to-education.org/>

173 J S Davidson, (2001)

4.2.1 Scope of the Individual Complaints Procedure

As to what extent the communication can be considered by the CESCR, the main issue is whether the procedure applies to all of the rights recognized in the Covenant or only to some of them, and who has the right of standing. Article 2 of the OP makes this clearly as what violations may be invoked. It provides:

Communications may be submitted *by or on behalf of individuals or groups of individuals*, under the jurisdiction of a State Party, claiming to be victims of *a violation of any of the economic, social and cultural rights set forth in the Covenant* by that State Party.

This means that, all of the ESC rights contained under Article 1 to 15 of ICESCR are recognized and justiciable in the OP. Moreover, the protocol includes the possibility to submit complaints concerning the socio-economic aspect of the right to self-determination¹⁷⁴ in case of violations to the principle of non-discrimination.¹⁷⁵

Standing under a communications procedure determines who may submit a communication. If an author of a communication does not have right of standing under the instrument, the committee will reject the communication on formal grounds, without consideration of the merits. As noted above, Communication procedure allows complains from Individuals and groups of individuals.

174 Article 1 of the ICESCR

175 Article 2(2) and 3 of the ICESCR

4.2.2 Admissibility of the Communication

In order to submit an individual communication to the ECSCR, the communication has to fulfill certain formal criteria for admissibility. Including exhaustion of all domestic remedies,¹⁷⁶ communication being submitted within one year after the exhaustion of domestic remedies, the matter not to have been already examined by the Committee or another procedure of international investigation or settlement, complaint must be compatible with the provisions of the covenant and not manifestly ill-founded. It is neither an abuse of the rights to submit a communication nor anonymously or unwritten.¹⁷⁷

Article 3(1) is the most important admissibility requirement since it will contribute and encourages the use, development and strengthening of mechanisms at the national level for the enforcement of ESC rights.

4.2.3 Interim Measures

The OP-ICESCR, just as it is the case in the OP-CEDAW and ICRPD includes the provision of Interim measures, so as, if the alleged violation is of extreme gravity and urgency or would constitute a serious retrogressive measure that would be difficult to remedy, such that immediate action is required in order to avoid irreparable harm to victims and potential victims or to the enjoyment of Covenant rights. Through Interim measures the CDESCR will require a State party to take measures to avoid “irreparable

176 Article 3(1) of the OP

177 Article 3(2) of the OP

damage” to the victim of the alleged violation.¹⁷⁸ It should be noted that these measures does not imply a determination on admissibility or on the merits of the communication.¹⁷⁹

Interim Measures are crucially important in a various areas of economic, social and cultural rights, including “destruction of livelihood, forced evictions, suddenly retrogressive measures or lack of immediate reasonable action that could expose complaints to serious denial of their rights such us homelessness, destitution and exposure to disease”.¹⁸⁰

4.2.4 Assessment of Communications

The consideration of the merits of a communication takes place in the light of all the information made available by the State party and the complainant. Consideration of communications takes place in closed meetings.¹⁸¹ Moreover, the committee can also consult, as appropriate, relevant documentation emanating from other UN bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.

178 Article 5(1) OP-ICESCR

179 Article 5(2) OP-ICESCR

180 M. Langford., Closing the Gap? An Introduction to the Optional Protocol to the International Covenant of Economic, Social and Cultural Rights. Nordic Journal of Human Rights Vol.27 No.1 of (2009) at p.24.

181 Article 8(1 and 2) OP-ICESCR

Among others, the crucial part in assessment of the merits is Article 8(4) of the OP to ICESCR provides *inter alia* that:

When examining communications under the present Protocol, the Committee shall consider the *reasonableness of the steps taken by the State Party* in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

The concept of reasonableness can be viewed on its use within adjudicative bodies or courts in “The question whether the measures that have been adopted ‘on implementation of ESC rights’ are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness.”¹⁸²

The importance of reasonable review is to ensure compliance with the Covenant and protection of human rights values. Reasonable review acknowledges the kind of substantive ESC rights claims that address systemic inequalities, poverty, and destitution.¹⁸³

182 *Grootboom*, para 41.

183 B. Porter and S. Liebenberg, ‘Consideration of Merits Under the OP-ICESCR: Reasonableness Review under 8(4) and the Maximum of Available Resources Standard.’ Available at <http://www.escr-net.org/> viewed 18 December 2010

Present different kind of challenges to adjudicative bodies.¹⁸⁴ ‘A misapplication of reasonableness review can easily be used to justify deference to the State Party not only on the question of how to design or implement particular programs or positive measures necessary to compliance - i.e., on the specific remedial measures to be employed – but on the very legal issue in dispute – i.e. what constitutes reasonable measures in compliance with article 2(1) and the substantive rights in the Covenant’. Thus, through reasonable review, Tanzania government will be forced to review its laws as well as social-economic policies to comply with ICESCR obligations.

4.2.5 Remedies

The next stage in individual communication procedure is follow-up to the views and recommendations of the committee. The existing procedure contains a provision that the treaty body shall forward its views and recommendations, if any, to the State party concerned and to the petitioner.¹⁸⁵ In the case of any violation, the treaty body requests the State party to take appropriate steps to remedy the violation. These steps might be limited to recommendations that a State party provides an “appropriate remedy”, or they might be more specific, such as recommending the review of policies or the repeal of a law, the payment of compensation or the prevention of future violations.

184 B. Porter., The Reasonableness of Article 8(4) - Adjudicating Claim from the Margins. Nordic Journal of Human Rights Vol.27 No.1 of (2009) p.40

185 Article 9 of OP

In order to make a follow-up for its decision the committee requires the state party within six to submit written respond “including information on any action taken in the light of the views and recommendations of the Committee.”¹⁸⁶

4.3 The Consequences of Ratification of the Optional Protocol to the ICESCR and its Impact on Tanzania Domestic Laws

4.3.1 Enhancing Tanzanian Government to honour its commitment under ICESCR

The ratification of the OP-ICESCR will help Tanzania to honour its commitments that have made for ratification of the Covenant. Individual complaints procedure will help the Tanzanian government through the CESCRs’ jurisprudence, in elucidating its obligations under the ICESCR, which will arguably improve both implementation and compliance.¹⁸⁷ Moreover, through Individual complainant procedure there is assurance of ESC rights improvements, since the victim of ESC rights will be able to stand before the body of experts and his case discussed in detail. Automatically individual complaints procedure would help to clarify the nature of States parties’ obligations and provide a more precise

186 Ibid

187 B. A Simmons, (2009) p. 65.

understanding and knowledge of ESC rights¹⁸⁸ therefore improve rights outcomes on average provides a strong rationale for ratification.¹⁸⁹

Further, individual complaint procedure will give an opportunity, though limited, to vulnerable Tanzanian victims of ESC rights violations to make the executive accountable.

Generally, ratification of OP-ICESCR will affirm Tanzania's deeper commitment to the realization for all people of a life of dignity, free from want.

4.3.2 Complementing existing ESC Rights Monitoring Mechanism (reporting procedure)

The ratification of the OP-ICESCR by Tanzania becomes crucially important having regard to the insufficiencies associated with the state reporting procedures. Since ratification of the ICESCR on 1976, it is only last year 2009 were the government of the United Republic of Tanzania submitted the combination of the initial and first to fourth consolidated periodic reports to the CESCR for its consideration, as in conformity with Article 16(1) and 17 of the ICESCR. Tanzania has delayed submitting its reports for past thirty-three years. Moreover, the report was not sufficiently self-critical. Although there was a possibility of submissions of shadow

188 Report of the Open-Ended Working Group to consider options regarding the elaboration of an OP-ICESCR on its first session, UN Doc E/CN.4/2004/44 (2004), Para. 70.

189 A. Simmon (2009), p.66

reports by NGOs, there is always the risk that these ‘assessments become ritualized and formulaic.’¹⁹⁰

Individual complaints procedure will complement the ICESCR reporting mechanism by providing a better understanding of the rights, leading to the Tanzanian government to act in good faith in complying with its legal obligation, henceforth submit reports in line with those obligations.¹⁹¹ This is possible since, the Committee can follow up the measures taken by States as a result of “views” through their subsequent dialogue with them –for example, in the review of their next State party report. Governments may also be questioned on their implementation of the Committee’s “views” during their examination under the new Universal Periodic Review at the Human Rights Council.¹⁹² In addition, the civil society, as well as individual will be empowered through individual complaint procedure. It will help the victims of ESC rights to have a last resort forum to address any state deficiency implementation and enforcement of the rights under the covenant. Hence, it would help interpretation of the covenant through ‘the lives and experiences of living individuals’.¹⁹³ That is, the Committee on ESCR would be exposed to concrete cases and not general statistics as in state reporting or even shadow reporting.

190 A. Simmons,(2009) p. 68.

191 Ibid.

192 <http://www.right-to-education.org>

193 A. Simmons,(2009) p. 68.

4.3.3 OP as a Policy Complementary for the Economic Need and Social inequality Programmes

Tanzania's Bill of Rights does not provide sufficient protection on ESC rights, since most of the said rights are under fundamental objectives and directive principles of state policy section, which is unenforceable part of the constitution. Ratification of OP-ICESCR does not mean that the agreement is going to over-legalize the rights which are not in the bill of rights rather the protocol will only complements the stipulated policy. This is through implementations of CESCR's views and recommendations.

Following the criticism of 'over judicialisation', and will divert resources from the true problems that states face.¹⁹⁴ It is argued that, the OP does intend neither to replace any government plans, and to push the argument further, nor compensate for any 'severe resource constraints, corrupt and inefficient government or ill-conceived developmental plans.'¹⁹⁵ For this case, the ratification of the OP would provide a better protection of ESC rights within the constitution in a wider sense as it is provided under the provisions of the ICESCR.

194 Ibid, p.70

195 Ibid, p.70.

4.3.4 Guidance to National Courts and Human Rights Institutions

The Tanzanian court system has not been that effective in enforcement, interpretation, and remedies ESC rights. As discussed in chapter two, usually the victims of unjustifiable and unfair evictions, as the result of violation of the right to own properties, lose their cases because of poor interpretation of the legislations or unwillingness of the state to remedy the victims. Moreover, some legislation particularly the *Customary Laws Declaration Orders of 1963*¹⁹⁶ discriminates women from owning properties. In these incidences, the Tanzanian courts are supposed to interpret the above law according to ‘the law of the land’ (constitution), which prohibits any kind of discrimination under its article 13 particularly in its sub- article 2. However, usually Tanzania courts do not use its authority to make new laws through case decisions that would suppress the discriminatory laws. The court’s weakness is observed in the case between *Elizabeth Stephen and Another V. The Attorney General*;¹⁹⁷ whereas the two widows unsuccessfully challenged the Customary Laws Declaration Orders of 1963 in the High Court of Tanzania.

Ratification of the OP-ICESCR would serve to strengthen the domestic protection of ESCR rights through judicial system. The OP-ICESCR requires the exhaustion of all available domestic remedies, this includes judicial and quasi-judicial, before admission of a complaint to the

196 G.N 279 of 1963.

197 Miscellaneous Civil Cause No. 82 of 2005 High Court of Tanzania at Dar es Salaam.

CESCR.¹⁹⁸ This encourages the use, development and strengthening of mechanisms at the national level for the enforcement of these rights.

Moreover, since the final views of the committee are often invoked in support of litigation in countries,¹⁹⁹ the ratification of the OP-ICESCR might correct the courts defect and guide the same through the Committee's views and recommendations. In addition, for the victims who have not been able to obtain a remedy from the national court, they can always have recourse to the CESCR. This will assist the development of the court system at the national level.

4.3.5 Emulating the Ratification to Neighboring States

In a normal life within the society, often people do things which their surroundings do. Due to this custom of imitating others, if Tanzania would take step of ratifying the OP-ICESCR, it will encourage neighboring states with poor record of protection of ESC rights to do so. This witnessed in recent year. After ratification of a new constitution in Kenya,²⁰⁰ now

198 Article 3, OP-ICESCR

199 J S Davidson, (2001)

200 Kenya president ratifies new Constitution - 27 August 2010. Available at <http://www.bbc.co.uk/news/world-africa> _ viewed 1december 2010

Tanzanians are demanding the new constitution.²⁰¹ According to B. Simmons's arguments,

Emulation effects could very well contribute to a virtuous spiral in which rights leaders ratify, other follow their example, the dialogue over individuals' complaints begins, expectations converge, local political pressure for compliance increases, and responsibility of government agencies and legislatures consider their policy alternative in the light of new interpretive information about the legitimate range of ways a state may fulfill its international legal obligations.²⁰²

4.3.6 Facilitating International Assistance

The OP-ICESCR facilitates international assistance for states with serious resource constraints.²⁰³ The ICESCR recognises that the full implementation of ESC rights depend on resources. The OP-ICESCR encourages, facilitates international assistance and cooperation, and provides for the establishment of a fund. The fund will stand in a way of assisting Tanzania when facing serious resource constraints in implementing the CDESCR's views and recommendations. In addition, as the CDESCR pointed out in General

201 Demand for new constitution for Tanzania picks up tempo- 22 December 2010 Available at <http://www.ippmedia.com>; Tanzania-Kikwete announces review of Tanzania-constitution-2 January 2011 Available at

<http://www.afriquejet.com/news/africa-news/tanzania>

202 A.Simmons (2009), p.77

203 Article 14, OP-ICESCR.

Comment 2 on international technical assistance measures²⁰⁴ states have the opportunity under article 22 of the ICESCR to identify in their reports any particular needs they might have for technical assistance or development cooperation. Hence, ratification of the protocol will motivate on the implementation of the obligations under ICESCR.²⁰⁵

4.3.7 The OP-ICESCR enhances states' compliance with the ICESCR

Tanzania's legal system does not guarantee protection for all ESC rights. Rights to education, health, social security, food are examples of unprotected rights in Tanzania. It does not mean that there are no violations of ESC rights on these unprotected rights. As Tanzania Human Rights Reports of 2009 notes, most of Tanzanian citizens are hooked in the chains of discrimination as well as experiencing different kinds of violations.²⁰⁶ Unfortunately, it is impossible for victims of the above rights to go before Tanzanian courts or other human rights institutions to ask for remedies.²⁰⁷

Through the communications procedure, the government would be encouraged to take steps towards the full incorporation of the ICESCR into domestic law and policies and the effective implementation of the rights contained in it. Therefore, ratification is crucially important as Individual

204 UN doc. E/1990/23, para 10.

205 Article 14(4), OP-ICESCR

206 Tanzania Human Rights Report (2009) at xv

207 Article 7(2) URT Constitution

complaints procedure ‘might nudge the “Tanzanian government” to take ESC rights more seriously’,²⁰⁸ hence, ‘improvements of the rights’.²⁰⁹

4.4 The Question of Effectiveness of the OP to ICESCR and its Impact to Victims of ESC Rights

The purpose of individual complaints mechanism is to protect the victim of ECS rights from ill treatment of their government by enabling the former to submit communications before CDESCR, “on the basis of complaints of realization of a state’s obligations.”²¹⁰ In order to fulfill its goal and be potentially effective the protocol “must have a strong wording so as to provide for strong procedure”²¹¹ since “it is arguable that the stronger procedure, the more likely that reasonable and balanced outcome will result.”²¹² Under this part of the thesis, the author examines the extent to which Individual Complaints Procedure can be claimed to be ineffective or weak and its impact to individuals.

208 A. Simmons,(2009), at p. 81.

209 Ibid, p. 66

210 A. Vandenberg and W. Vandenhoe., *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process*, *Human Rights Law Review* (2010) 10(2): 207-237 at 231.

211 Ibid

212 Scheinin and Langford, ‘Evolution or Revolution? Extrapolating from Experience of Human Rights Committee’, (2009) 27 *Nordic journal of human rights* 97 at 101.

4.4.1 Admissibility Requirement of Exhaust Domestic Remedies

As discussed in chapter two, URT constitutions guarantee the protections of some of the ESC rights²¹³ and leave others' unprotected hence non-justiciable before national courts.²¹⁴ This 'limits the degree of domestic remedial protection of ESC rights'²¹⁵ as it would be not easier for victim of unprotected right for example -of right to education- to use judicial avenue in order to be offered a '*reasonable prospect of redress.*'²¹⁶

Since Tanzanian domestic remedies are unlikely to bring effective relief for unprotected ESC rights, The requirement of exhaustion of domestic remedy for the case to be admitted before the CDESCR, automatically will be a barrier for victims Tanzanian to exercise right of standing before the Committee specifically for violation of unprotected rights. For Tanzanian the individual complaints procedure would have been useful if the OP decided, "not to have to exhausted domestic remedies that are unlikely to bring effective relief."²¹⁷ As Malcolm argues, "it might be victims in those states without *unworkable* domestic remedies who may be at most risk of faltering on this threshold."²¹⁸

213 See Article 22,23,24

214 Supra no.203

215 M. Langford., Closing the Gap? An Introduction to the ICESCR, Nordic Journal of Human Rights Vol.27 No.1 of (2009) at P. 22

216 Langford, (2009), p. 23

217 A. Vandenbogaerde and W. Vandenhole (2010) at 235.

218 Malcolm, (2009), p. 23.

4.4.2 Time Limitation

Different from other human rights instruments, Individual complaints procedure under the OP-ICESCR contains provision of time limitation. The protocol illustrates that a communication ought to be submitted within one year after the exhaustion domestic remedies except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.²¹⁹ This provision is a barrier to victims who would need to have “access to the procedure”.²²⁰ It is argued, any barrier to access to individual complaints procedure, beyond those that strictly necessary to prevent abuse, inevitably jeopardizes the effectiveness of such a procedure.²²¹

4.4.3 Omission of Collective Communication Procedure

Under collective complaints procedure non-governmental organization (NGOs) both domestic and international are permitted to submit collective communication against their respective states without consent of victims or justification of acting on behalf of the victims. This is possible because, there is no need of a “victim requirement”²²² for communication to be admissible. The inclusion of collective communication procedure would be

219 Article 3(2)(a), OP-ICESCR

220 HRC, Report of the Open- Ended working Group to consider n an OP-ICESCR on its forth session, 30 august 2007, A/HRC/6/8 at Para 61

221 A. Vandenberg and W. Vandenhole (2010)at 235.

222 Ibid, at 234.

very useful for community like “Maasai”,²²³ since NGOs would be able to complain to the committee for a “more general or systemic violations of which large group of individual of whole community fall victim to.”²²⁴ Thus, the indigenous people would find less gratification from OP-ICESCR, for its omission of collective rights.

4.4.4 Excluding of Extraterritorial Obligation of State Party

Article 2 of the OP stipulates that, ‘Communications “can only” be submitted by or on behalf of individuals or groups of individuals, *under the jurisdiction of a State Party*, claiming to be victims of a violation of any of the ESC rights set forth in the Covenant by that State Party’. The provision does not allow submission of the communication for violation of ESC rights against different actors particularly those outside the state. It means the protocol does not recognize obligations imposed by ICESCR towards the ‘actors’ and by doing so, the OP excluding extraterritorial obligations of state parties. This limitation is contrary the ICESCR, since the covenant ‘contains no explicitly territorial limitation provision in its scope of application’.²²⁵ Therefore, “the impossibility to take accounts the obligations of actors other than the domestic state”,²²⁶ is weakening the Individual complaints procedure.

223 For deeper discussion about “maasai” community, see Tanzania human rights report of 2009.

224 Ibid, no.195

225 See, Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Report 2004 1 at Para. 112.

226 A. Vandenbogaerde and W. Vandenhole(2010) at 232.

4.4.5 Burden on the Victim to Demonstrate ‘Clear Disadvantage’

It is provided, “The Committee may... decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.”²²⁷ Imposition of this admissibility requirement “may well exclude cases worthy of consideration as it only at the merit stage that the substantive issues of case can be adequately investigated”.²²⁸ Therefore, this admissibility requirement stands as obstacles for individuals who their cases need to be taken in a merit stage for a detailed investigation that might prove that the same has suffered a clear disadvantage.

4.4.6 State Actors-only Legal Person can be Accountable

Different from other ESC rights, the right to work which comprises the availability of decent work, fair remuneration, the right to organize in trade unions, security of tenure, and the like,²²⁹ has a nature of “direct horizontal effect” that is, it is binding the relationship between employers and employees. Right to work, is not “directed at material state performance such as the provision of facilities and delivery of services, but at a relationship between private parties.”²³⁰ Article 3 of the OP limits submission of complainant against an individual as it is only state which can

²²⁷ Article 4 OP-ICESCR.

²²⁸ See no. 221 above at 235; see also, Scheinin and Langford,(2009) P.110.

²²⁹ Article 22 of the URT Constitution, and Article 7, ICESCR.

²³⁰ Mubangiza (2009) at p. 5

be answerable for violation of ESC rights. Thus, it will be impossible for individuals who are victims of the infringement of right to work, to submit complaints before the committee against individual employee. For this case, individual complaints procedure under the OP-ICESCR seems not useful comparing to domestic courts.

4.5 The Concluding Remarks

The benefits laid down in this chapter aimed at promoting a better human rights protection regime in Tanzania. As discussed in chapter two it is clearly, the domestic provisions are not sufficient; therefore, there is a need for international pressure to improve the situation. For example, under the Bill of Rights, only right to own property, right to work and right to just remuneration are protected and hence justiciable, the bulky of ESC rights are left without any protection and their unjusticiable before the courts and human rights institutions. Full protection of ESC rights can only be achieved if Tanzania ratifies the OP-ICESCR.

Even though there are some points against OP, which seem to limit enjoyments of ESC rights to Tanzania citizens, the same a very minor comparing to poverty existing among Tanzanian. Therefore, it is better to have OP-ICESCR ratified with few limitations, rather than having no protection at all.

CHAPTER FIVE

5.1 Conclusion and Recommendations

Tanzania has made commendable strides towards the promotion and protection of human rights in general. As in the case of ESC rights the Tanzanian government ratified several international and regional agreements with the aim of respecting, protecting and fulfilling ESC Rights in domestic legal system. Provisions of the URT Constitution attempted to guarantee ESC rights so as the human dignity of Tanzanians would be preserved and upheld. Still, a lot need to be done by the government of Tanzania in fulfilling international obligations toward protection of ESC rights.

As seen in the previous chapters, Tanzania Bill of Rights provisions concerning ESC rights can never be compared with the advanced South African Bill of Rights provisions on ESC rights.²³¹ In URT Constitution, so much appears to be lacking in major areas such as; the right to education and the right to health services, right to housing, and right to social security. The adjudicating of ESC rights by Tanzanian courts remains to be a mystery, as most of those rights are not well protected under the national Constitution. With the breakthrough of the OP-ICESCR, a major step has been made at the international level in favour of justiciability of ESC rights. In view of the

²³¹ See chapter three of the Thesis

fact that Tanzanian courts have yet to adjudicate most of ESC rights, it is recommended for Tanzanian government to ratify the OP-ICESCR. The ratification of the OP-ICESCR will enhance the protection of ESC rights in the domestic application.

The study stresses that; the ratification of the OP-ICESCR is not going to produce an abruptly changes to the Tanzanian legal system on the protection and justiciability of ESC rights. However, individual complaints procedure has an important role to play in the Tanzania jurisdiction be it for the purpose of interpreting laws or legislating or for advancing the enforcement of rights in general. Views and recommendations of the CDESCR would be a ‘catalyst’ for Tanzanian courts in interpreting the laws, thus contributing in making ‘just’ decisions.

The second finding is concerned with an imperative need for a rationalization of URT Constitution with the view of incorporating all ESC rights as stipulated under the ICESCR under the Bill of Rights as will provide a full realization and more effective domestic implementation of ESC rights.²³² In any law there are limitations, however, the limitation clauses,²³³ within URT Constitution need to be reviewed and written in unambiguous language, which may not undermine the very basic of the right.

232 Article 2(1) of the ICESCR

233 Article 30 of URT Constitution.

Further, it is submitted that even if Tanzania has not incorporated the ICESCR in its domestic law, the Courts should be a major player in domesticating the contents of ICESCR provisions. This can be done through its judgments, thus making it the law of the land through common law. Failure of the HC (in the case of *Elizabeth Stephen and Another V. The Attorney General*) to interpret Article 2(2)²³⁴ of ICESCR can be interpreted as the courts negligence on domesticating the provisions of ICESCR, hence failure in adjudicating ESC rights.

The legislature is the only body, which can through incorporation in national laws, effectively implement the ICESCR. The parliament, within its mandate, has the duty to pressurize the government to conform to the Constitution. Therefore, it is the primary function of parliament to use the parliamentary processes to allow the domestication of the provisions of the ICESCR. This is crucial in assuring the justiciability of ESC rights in Tanzanian judicial systems. Hence, parliament can also be instrumental in encouraging the government to ratify the OP-ICESCR.

The CHRGG marks significant development in protecting and adjudicating ESC rights in Tanzania. The government should ensure that the CHRGG is independence in order to be effective in protecting ESC rights. The Tanzania constitutional provision that allocates power to the President to give directions or orders to the CHRGG regarding any matter satisfied that it is in the public interest to do so, should be removed and set free the CHRGG to operate the way it is allowed under the law. Moreover, the government must

234 The provision obliged the state to exercise ESC right without discrimination of any kind.

be willing on implementing the views and recommendation of the CHRGG. As it has been noted in Nyamuma case,²³⁵ this blatant disregard for the recommendations of the CHRGG in effect limit its ability to carry out its mandate, rendering the CHRGG of limited use in the battle to achieve equality and enjoyment of ESC rights. The CHRGG simply cannot win over public confidence when its efforts, expertise and recommendations are not respected. In addition, the CHRGG must be accessible all over the country. Government has the obligation to provide CHRGG with sufficient funding to effectively and widely carry out functions.

Education of ESC rights is of prime importance among Tanzanian. Education and training workshops should be organised more frequently as aiming at sensitising people concerning ESC rights and the alternative means available for them to seek redress in case of violation or threats of violation. Non-governmental organizations; for example the LHRC, should extend its services in assisting the vulnerable needy section of the society in this regard. Academicians are obliged to write about ESC rights. Lawyers, judges, and other decision makes must be reflectively with the issue of ESC rights.

The discussion about protection of ESC rights under URT Constitution comes in a ‘ripe’ time, as now Tanzania is under consideration of having a new constitution.²³⁶ It is recommended that, Tanzania could follow an example of South Africa holistic inclusive Bill of Rights, which includes a

235 See no. 101 above.

236 See, no.196 above.

comprehensive set of ESC rights. Not heeding to the above, the claims that Tanzania is a democratic country with free individuals who enjoying freedom, justice, fraternity and concord, and that preservation of the human dignity, will be nonsense if the majority of Tanzanians will continue to be hooked by the chain of poverty, discrimination and inequality.

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