

Justiciability of economic, social and cultural rights under the legal system of South Sudan: A preliminary assessment

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Summary: *This article provides an overall assessment on the justiciability of economic, social and cultural rights (ESCRs) within the legal system of South Sudan. It establishes that, in theory, ESCRs are justiciable under the legal system of South Sudan in a complementary and collaborative manner at two levels, namely, the national and supranational. The article argues that ESCRs may in theory be legally and judicially enforceable by virtue of the Constitution and domestic legislation. Furthermore, ESCRs are justiciable by virtue of the automatic incorporation of numerous treaties into the Bill of Rights in the Constitution, with these treaties also effecting justiciability as part of the international treaty obligations of South Sudan. It further asserts that there are two parallel layers, national and supranational, which give effect to the legal realisation of ESCRs in South Sudan. This is presented through numerous domestic*

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constitutional and legal provisions, and also international and regional treaty obligations of South Sudan. For that purpose, the article appraises relevant provisions in the Constitution, domestic laws, and United Nations and regional treaties to which South Sudan is a state party. In addition, the article examines a number of bodies and entities that are established by these frameworks to operationalise the enforcement of ESCRs. The article concludes that this composite situation forms a basis for all the instruments and structures to supplement and complement one another in a non-hierarchical perspective. The view expressed in the article is that the current status remains theoretical and is empirically and practically challenged by the factual realities that hinder and hamper the operationalisation of justiciability in South Sudan. It recommends that a practical test is required in order for a comprehensive legal jurisprudence about the justiciability of ESCRs in and for South Sudan to materialise.

Key words: *justiciability; legal and judicial enforcement; complaint; communication, reference, inquiry; South Sudan; economic, social and cultural rights; education; workers' and labour rights; adequate standard of living*

1 Introduction

Since the inception of the modern human rights system, debates about a number of normative human rights principles have recurred.¹ Among these topical matters is the classification of human rights standards into categories.² Of important and significant ramification is the classification into civil and political rights, on the one hand, and economic, social and cultural rights (ESCRs), on the other.³ This categorisation has resulted in an arguable determination that ESCRs are described as welfare rights, aspirations and standards of achievement.⁴ However, as human rights evolved to its contemporary status, such descriptions currently are deemed outdated and possibly in contradiction with the core notion that human rights are 'universal, indivisible, interdependent and interrelated'.⁵

1 S Besson 'Justifications' in D Moeckli and others (eds) *International human rights law* (2022) 23.

2 SP Marks 'The past and future of the separation of human rights into categories' (2009) 24 *Maryland Journal of International Law* 209.

3 As above.

4 P Alston & R Goodman *International human rights* (2012) 297.

5 Vienna Declaration and Programme of Action 1994 art 5; World Summit Outcome 2005 art 13; Resolution 60/251 of 3 April 2006 by the General Assembly of the United Nations para 3.

Then again, these terms – with which ESCRs are coined – have further attracted the attributes that these rights are deemed second-generation rights, implying that they are subsidiary and secondary to civil and political rights.⁶ Furthermore and, in essence, the nature of state obligations in regard thereto is largely viewed as positive rather than negative; in addition to the role pertaining to the actual realisation of the rights as progressive and not immediate.⁷

As a result, and in view of all these aforementioned factors, a further essential question about the ability for the legal enforcement of ESCRs has been constantly raised and scrutinised,⁸ with the discussion being centred around the possibility of judicially challenging the realisation, the failure to realise, and the violation of these rights.⁹ In this respect, there appears to be a two-sided position on the matter. The first side asserts that ESCRs, by virtue of their nature, cannot be enforced as legal rights of individuals and legal duties of states before a judicial, semi-judicial or administrative body.¹⁰ On the contrary, the second side advances that irrespective of the distinct nature and attributes of ESCRs, these rights could be legally enforced and/or their violations challenged before courts of law, judicial or administrative tribunals.¹¹ In other words, ESCRs are justiciable, meaning ‘proper to be examined in courts of justice’.¹²

This article assesses the justiciability of ESCRs in the context of the legal system of South Sudan. For the purposes of the article, ‘justiciability’ is not understood to be confined to judicial enforcement and litigation before courts of law, but includes legal enforcement before quasi-judicial or administrative tribunals. Further, the legal system of South Sudan is considered broadly to be comprised of the domestic legal framework,¹³ as well as supranational ESCR instruments to which South Sudan is a state party.¹⁴ However, the article narrows its research focus to the following ESCRs: education; workers’ and labour rights; and adequate standard of living consisting

6 J Donnelly & DJ Whelan *International human rights* (2020) 65.

7 KG Young ‘Rights and obligations’ in Moeckli and others (n 1) 129.

8 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (2013) 46.

9 As above.

10 DM Chirwa & L Chenwi ‘The protection of economic, social and cultural rights in Africa’ in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 22.

11 As above.

12 *Black’s law dictionary* (2019).

13 This consists of the Constitution, domestic legislations and customary laws, in addition to constitutional, legal and administrative entities, and customary authorities established in their purview.

14 This includes international, regional, and sub-regional treaties and conventions, and treaty bodies created by these conventions.

of food and water, housing and shelter, health and medical care, and social security and assistance.

The desire to research and explore the status of ESCRs in South Sudan arises from the fact that these rights are important entitlements for the realisation and dispensation of all the fundamental human rights in South Sudan, and also for being critical to the survival, prosperity and advancement of the populace. Optimistically viewed, the status of the realisation of ESCRs in South Sudan is severely hindered and curtailed.¹⁵ More pessimistically viewed, ESCRs in the country hardly exist and are by some accounts in tatters.¹⁶ Therefore, the article aims to investigate and interrogate the means and methods by which the realisation and rendering of these rights could be legally and judicially enforced at the domestic level within South Sudan or at the supranational level outside the country. It has also taken into account that empirically and, as per the evidence that has been unearthed, there have been minimal to no attempts in exploring the justiciability of ESCRs.

The article argues that the domestic legal framework – Constitution and laws – provides for a modality to enable a broad ground for the justiciability of ESCRs before domestic courts and quasi-judicial tribunals. Conversely, the remaining aspects of these stipulated ESCRs, in addition to those ESCRs that are not explicitly mentioned, derive the ground for legal or judicial enforcement before a domestic court or quasi-judicial tribunal in South Sudan by virtue of the automatic incorporation of the respective treaties as part of the Bill of Rights in the Constitution. Furthermore, the article asserts that the supranational instruments – ESCR treaties and conventions – that South Sudan has ratified or acceded to provide for a complementing and parallel mechanism – under the legal system of South Sudan – for the justiciability of these ESCRs before international, regional and sub-regional bodies or entities established by these supranational instruments. Notwithstanding the ideal theoretical status, the article also contends that practical realities and challenges might impact on the operationalisation of justiciability at the domestic arena of South Sudan.

The article presents its abstract analysis and critical perspective in two main parts. The first part advances the concept of justiciability in accordance with the provisions of the Constitution and all other pertinent laws of South Sudan. The second part digests the provisions

15 South Sudan Country Report 2024, BTI Transformation Index, <https://bti-project.org/en/reports/country-report/SSD#pos9> (accessed 3 May 2024).

16 As above.

of relevant ESCR treaties and conventions in which realm, and due to the nature of their obligations, these rights are rendered justiciable. The article concludes by summarising its findings and alluding to appropriate recommendations.

2 Justiciability under the Constitution and laws of South Sudan

This part asserts that certain ESCRs could be justiciable before the Supreme Court and other competent courts of South Sudan by virtue of being incorporated in the Bill of Rights chapter in the Constitution. Further, the South Sudan Human Rights Commission is empowered to provide semi-judicial or administrative remedies. In addition, some aspects of other ESCRs could be litigated upon before other courts of law because they are enshrined in laws enacted by the legislature in addition to the Constitution.

This part also establishes that some other ESCRs could not be justiciable by the mere consideration of them under the 'guiding objectives' chapter in the Constitution because they are therein stipulated as aspirations and standards of achievement. Simultaneously, there is a lack of legislative enactments about these rights and they only exist as policies and plans of respective line ministries. Nevertheless, these ESCRs that are not expressly stipulated – in the Constitution and/or laws – as justiciable could be judicially enforced before the Supreme Court and other competent courts of South Sudan, because the Constitution automatically incorporates in the Bill of Rights human rights treaties ratified or acceded to by South Sudan.¹⁷

The part is divided into two components. Component 1 captures the two contrasting aspects under the Constitution, and component 2 illustrates the peculiar aspects of the relevant laws respectively.

17 This overall multilayered situation and context could be attributed to the overall legacy of constitutional development in South Sudan, which has been inextricably linked to constitutional developments of the Sudan. This particular provision, which has been incorporated in the Transitional Constitution of the Republic of South Sudan 2011, is reproduced from the Interim National Constitution of the Republic of the Sudan 2005, and the Interim Constitution of Southern Sudan 2005. The latter was the supreme law of the southern region prior to secession from the Sudan in 2011. Prior academic research on the context of the Sudan have advanced and determined similar positions and assertions. See R Miamingi 'Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of Sudan' (2009) 9 *African Human Rights Law Journal* 76.

2.1 Transitional Constitution of the Republic of South Sudan 2011

2.1.1 *Bill of Rights*

Justiciability of certain ESCRs is evident by virtue of article 9(2) of the Transitional Constitution of the Republic of South Sudan 2011 (TCRSS 2011) which requires the Supreme Court to 'uphold the rights and freedoms enshrined in the Bill of Rights',¹⁸ in addition to protecting and applying these rights.¹⁹ Enabling legislation has elaborated that 'to uphold the Bill of Rights' means to empower the court with the jurisdiction to 'protect the rights and freedoms conferred by the Constitution'.²⁰ As such, this article determines that the manner in which a court protects rights and freedoms is effected via judicial enforcement which renders these rights and freedoms justiciable.

In addition to the constitutional panel of the Supreme Court and other competent courts, the South Sudan Human Rights Commission is empowered by its establishing legislation to monitor and enforce the rights and freedoms enshrined in the Constitution or international human rights treaties and conventions ratified or acceded to by South Sudan.²¹ In doing such monitoring, the Commission has the competence to receive and investigate complaints of human rights violations.²²

The set of rights stipulated in the Bill of Rights are inclusive of civil, political, economic, social and cultural rights in addition to group rights.²³ However, the following ESCRs are explicitly stipulated: education,²⁴ public health care²⁵ and housing.²⁶

As far as education is concerned, as an ESCR, it is to be noted that the provision in the Bill of Rights codifies it as follows: 'Education is a right for every citizen and all levels of government shall provide access to education without discrimination as to religion, race,

18 No separate Constitutional Court exists in South Sudan and the Supreme Court, in applicable situations, sits as a constitutional panel in accordance with sec 11(1)(a) of the Judiciary Act 2008.

19 Art 10 Transitional Constitution of the Republic of South Sudan (TCRSS) 2011.

20 Sec 18(2)(g) Civil Procedures Act 2007.

21 Sec 3 Southern Sudan Human Rights Commission Act 2009.

22 Secs 6(1), 7(1)(a) & (i) Southern Sudan Human Rights Commission Act 2009.

23 Part 2 TCRSS 2011 (n 19).

24 Art 29 TCRSS 2011.

25 Art 31 TCRSS 2011.

26 Art 34 TCRSS 2011.

ethnicity, health status including HIV/AIDS, gender or disability.²⁷ 'All levels of government shall promote education at all levels and shall ensure free and compulsory education at the primary level; they shall also provide free illiteracy eradication programmes.'²⁸

A succinct reading of these provisions would lead to the determination that discrimination based on the specified characteristics is unconstitutional and can be challenged before the Supreme Court of South Sudan. Furthermore, paid or optional and noncompulsory primary education would contravene the Constitution; likewise, for literacy programmes that are offered subject to the payment of fees.

Pertaining to the right to health care, the justiciable aspects appear to be the duty to 'provide free primary health care and emergency services'.²⁹ However, this article contends that it would be a judicial marathon and intangible to attempt to judicially litigate the manifestation of the expected role of the government to 'promote public health, establish, rehabilitate and develop basic medical and diagnostic institutions'.³⁰ This is due to the vagueness of the terms 'promote' and 'develop'.³¹

Along the same line, the right to housing as enshrined in the Bill of Rights section of the Constitution has aspects that apparently are justiciable while other aspects would be difficult to be tested and legally enforced before a court.³² The justiciable element is apparent in the provision which states that 'no one shall be evicted from his or her lawfully-acquired home or have his or her home demolished save in accordance with the law'.³³

However and, to the contrary, it remains to be seen how the provisions of 'every citizen has the right to have access to decent housing',³⁴ and 'the state shall formulate policies and take reasonable legislative measures within its available resources to achieve the

27 Art 29(1) TCRSS 2011.

28 Art 29(2) TCRSS 2011.

29 Art 31 TCRSS 2011.

30 Art 31 TCRSS 2011.

31 The duty to promote obligates states to adopt measures for raising awareness and sensitisation in order to inform the population about their human rights. However, it is the view of this article that it remains uncertain how this could be determined as justiciable in the context of the right to health in South Sudan.

32 It is worth pointing out that some scholars assert that regardless of the right being considered an ESCR or not, governments have a legal duty to refrain from evicting people, which in itself is a basis of rendering the right justiciable.

33 Art 34(3) TCRSS 2011.

34 Art 34(1) TCRSS 2011.

progressive realisation of these rights' are to be executed.³⁵ To be particular, the question arises as to how to determine access to decent housing and/or the adoption of policies and legislative measures for ensuring decent housing, which might in the end revolve around the mere existence of access or no access, and the adoption or non-adoption of policies and measures.

This incorporation of a set of ESCRs within the Bill of Rights and fundamental rights part of the Constitution, which then renders these rights legally justiciable and judicially enforceable, remains an untested area as empirical research has revealed that such matters appear not to have been considered by the Supreme Court or other courts in South Sudan. However, legal inspiration and persuasion could be noticed and drawn from the constitutions of some other states worldwide. For instance, the Constitution of the Republic of South Africa, 1996, incorporates numerous ESCRs, such as housing, health care, food, water, social security, and education, in the Bill of Rights.³⁶ Such incorporation has been the basis and evidence for the judicial enforcement of these rights before the Constitutional Court in addition to other courts of law in South Africa.³⁷

2.1.2 Guiding objectives

A selection of some ESCRs is stipulated in the part of the Constitution under the 'guiding objectives and principles' of the government.³⁸ Hence, the ESCRs that fall under this chapter cannot be rendered justiciable or enforceable in a court of law by sole reliance on this chapter of the Constitution. As a matter of fact, article 44 of TCRSS expressly states:

Unless this Constitution otherwise provides or a duly enacted law guarantees, the rights and liberties described and the provisions contained in this Chapter are not by themselves enforceable in a court of law; however, the principles expressed herein are basic to governance and the state shall be guided by them, especially in making policies and laws.

As such, it would not be possible to judicially enforce the following rights by the exclusive reliance and sole referencing of their stipulations within this chapter: the rights to work, to health and

35 Art 34(2) TCRSS 2011.

36 D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 1.

37 Brand (n 36) 6.

38 Part 3 ch I TCRSS 2011.

medical assistance, and to food and water.³⁹ Similarly, the right to an adequate standard of living or, as the Constitution has coined it, 'achieving a decent standard of life',⁴⁰ academic freedom in higher education and protection of the freedom of scientific research,⁴¹ and affordable education at 'secondary and higher levels, including technical and vocational training' should be deemed similarly unenforceable.⁴²

While it could be argued that the specification in article 44 of TCRSS 2011 appears to exclude the justiciability of these rights, it is also wise to assert that the provision of the same article provides for an avenue for the same ESCRs to be judicially enforced should they be codified under other parts of the Constitution, such as the Bill of Rights, by explicit stipulation, automatic incorporation of their respective international or regional treaties, or if they are enshrined in legislation. Furthermore, such arguable determination in article 44 cannot be used as a basis to violate these fundamental rights. As an essential factor, there is an expectation on the government to aspire and excel in rendering appropriate policies, plans and allocate resources for the realisation of these rights.⁴³ Similarly, upon the implementation of such plans, there would be no justification for the government to retreat or retrieve an already rolled-out policy for implementing ESCRs.⁴⁴

While the afore-mentioned assertion remains an abstract assumption, a similar reflective context of such contrast could be observed from the Constitution of India 1950, which incorporates some ESCRs in the fundamental rights part,⁴⁵ and includes others in the 'directive principles of state policy'.⁴⁶ As a result, the ESCRs that are in the fundamental rights part of the Constitution were deemed justiciable and, hence, enforced by courts,⁴⁷ while those rights falling

39 Art 35(2) of TCRSS 2011 pronounces that '[t]his Constitution shall be interpreted and applied to advance the individual dignity and address the particular needs of the people by dedicating public resources and focusing attention on the provision of gainful employment for the people, and improving their lives by building roads, schools, airports, community institutions, hospitals, providing clean water, food security, electric power and telecommunication services to every part of the country'.

40 Art 37(1)(e) TCRSS 2011.

41 Art 38(2)(a) TCRSS 2011.

42 Art 38(2)(b) TCRSS 2011.

43 Part 3 ch I arts 35 & 44 TCRSS 2011.

44 This role here could be considered under the negative obligations of the state and the duty to respect human rights, in general, and ESCRs, in particular.

45 Part III Constitution of India 1950.

46 Part IV Constitution of India 1950.

47 S Shankar & PB Mehta 'Courts and socio-economic rights in India' in V Gauri & D Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 147.

within the state policy part were considered not adjudicative, albeit justiciable via other means and measures.⁴⁸

2.1.3 *Treaty provisions that are automatically incorporated in the Bill of Rights of TCRSS 2011*

ESCRs are justiciable and judicially enforceable under the legal system of South Sudan by virtue of the automatic incorporation of international and regional human rights – ESCR – treaties and conventions.⁴⁹ In this respect, article 9(3) of TCRSS 2011 states that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill'.

Therefore, it is prudent to argue that ESCR treaties, and their justiciable provisions, which are ratified or acceded to by South Sudan, are considered part of the Bill of Rights in the Constitution.⁵⁰ Hence, they would have the same effect of being upheld and protected by the Supreme Court, in addition to other competent courts, just as the other provisions on other human rights that are expressly enshrined in the Bill of Rights.

This automatic incorporation status includes the following international and regional treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,⁵¹ and its Optional Protocol (ICESCR Protocol) of 2008;⁵² the provisions on ESCRs in the following treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979,⁵³ and its Optional Protocol (CEDAW Protocol) 1999;⁵⁴ the Convention on the Rights of the Child (CRC) 1989;⁵⁵ the Convention on the Rights of Persons with Disabilities (CRPD) 2006,⁵⁶ and its Optional Protocol

48 As above.

49 RSP Valfredo 'Domesticating treaties in the legal system of South Sudan – A monist or dualist approach?' (2020) 28 *African Journal of International and Comparative Law* 378.

50 Miamingi (n 17) 92.

51 The Covenant was adopted on 16 December 1966 and entered into force on 3 January 1976. South Sudan acceded to the Covenant on 7 June 2019 and deposited its instrument of accession on 5 February 2024.

52 The Protocol was adopted on 10 December 2008 and entered into force on 5 May 2023. South Sudan acceded to the Protocol on 5 February 2024.

53 The Convention was adopted on 17 July 1980 and entered into force on 3 September 1981. South Sudan acceded to the Convention on 30 April 2015.

54 The Protocol was adopted on 6 October 1999 and entered into force on 22 December 2000. South Sudan acceded to the Protocol on 30 April 2015.

55 The Convention was adopted on 20 November 1989 and entered into force on 2 September 1990. South Sudan acceded to the Convention on 23 January 2015.

56 The Convention was adopted on 12 December 2006 and entered into force on 3 May 2008. South Sudan acceded to the Convention on 5 February 2024.

(CRPD Protocol) 2007⁵⁷ of the United Nations (UN); the African Charter on Human and Peoples' Rights (African Charter) 1981,⁵⁸ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) 2003,⁵⁹ at the African Union (AU) level.

To back up this article's line of argument, this same determination could also be argued to have been asserted in the context of the evolution of the justiciability of ESCRs under the German Constitution,⁶⁰ which dictates for the automatic incorporation of treaties pertaining to these rights as part of the constitutional rights in the basic law, and also renders them justiciable,⁶¹ and judicially enforceable before the Constitutional Court.⁶²

2.2 Domestic legislation

Further to the provisions of the Constitution that render ESCRs justiciable, there are also a number of ESCRs-related stipulations that are enacted in domestic legislations. These legislative provisions could be litigated upon by any concerned citizen before a competent court in South Sudan, and appropriate remedies shall be awarded and enforced accordingly. However, it should be stated that while the theory might paint an ideal situation, the operationalisation and achievement of such legal remedies before judicial and/or quasi-judicial bodies in South Sudan might be marred by practical challenges and logistical hindrances.

2.2.1 *Legalisation on the right to education*

Upon scrutiny of the Child Act 2008 as a specific law on the rights of children,⁶³ it could be established that certain aspects of the right to education are stipulated as provisions of law that are legally

57 The Protocol was adopted on 30 March 2007 and entered into force on 3 May 2008. South Sudan acceded to the Protocol on 5 February 2024.

58 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. South Sudan acceded to the Charter on 23 October 2013 and deposited its instrument of accession on 19 May 2016.

59 The Protocol was adopted on 11 July 2003 and entered into force on 25 November 2005. South Sudan acceded to the Protocol on 24 February 2023 and deposited its instrument of accession on 7 June 2023.

60 Part I Basic Law for the Federal Republic of Germany 1949.

61 C Enders 'Social and economic rights in the German Basic Law? An analysis with respect to jurisprudence of the Federal Constitutional Court' (2020) 2 *Constitutional Review* 191.

62 Y Schoog 'Germany' in D Landau & A Nussberger (eds) *The justiciability of economic, social and cultural rights* (2023) 174.

63 Child Act 2008, Acts supplement no 1 to the Southern Sudan gazette no 1 vol 1 dated 10 February 2009.

enforceable. To be specific, the Child Act requires that all levels of government ensure the rights enshrined in the Act,⁶⁴ and to 'provide effective remedies to redress violations of the rights ... including through access to child-friendly, independent complaints procedures and competent courts',⁶⁵ which includes in addition to competent courts, an independent child commission.⁶⁶

Of particular interest on justiciability and judicial enforcement of education is the legal requirement that primary education shall be free and compulsory to every child.⁶⁷ Likewise, is the right of children with disabilities to be in education 'regardless of the type or severity of the disability he or she may have'.⁶⁸

Hence, these duties on the government to recognise, respect;⁶⁹ and to ensure that necessary measures are available to remedy situations of noncompliance,⁷⁰ and also to protect these rights of children by penalising violators,⁷¹ are all manifestations of justiciability and judicial enforcement. In addition, as a practical justiciability procedure, the Child Act also provides for the establishment of courts with the jurisdiction to hear and determine matters conferred by this law, and to provide judicial remedies for the observance of these rights.⁷² It also provides for the establishment of an 'independent child commission' to function as a semi-judicial entity or administrative tribunal for the enforcement of children's rights;⁷³ more particularly, the power 'to investigate on its own motion or on a complaint ... of violations'.⁷⁴

In the same vein, the General Education Act 2012,⁷⁵ as a dedicated legislation for primary, secondary, fundamental and vocational education(s), strikes an argument for the justiciability and judicial enforcement in South Sudan of significant obligations of the government of South Sudan as provided for in the legislation. The legislation expressly stipulates that any legal issues arising from its implementation shall be first addressed to the respective ministry of education⁷⁶ and, thereafter, referred to a court of law or the public

64 Sec 36(1) Child Act 2008.

65 Sec 36(2)(u) Child Act 2008.

66 Sec 193(1) Child Act 2008.

67 Sec 14(1) Child Act 2008.

68 Sec 14(2) Child Act 2008.

69 Sec 36(1) Child Act 2008.

70 Sec 36(2) Child Act 2008).

71 Sec 35 Child Act 2008.

72 Sec 192(1) Child Act 2008.

73 Sec 193(1) Child Act 2008.

74 Sec 193(2)(a) Child Act 2008.

75 Act 30.

76 Sec 33(a) General Education Act (n 75).

grievances chamber,⁷⁷ which is an apparent procedure for judicial remedy by a court, or an administrative relief of complaints by a semi-judicial tribunal, as the public grievances chamber could be deemed.⁷⁸ Moreover, on legally-enforceable provisions, the General Education Act 2012 stipulates that at least 10 per cent of the annual budget shall be allocated for general education;⁷⁹ that public schools shall be free of charge,⁸⁰ which could potentially include, at equal footing, in addition to primary education schools, schools that provide secondary, vocational and fundamental education.

In the same vein, the Higher Education Act of 2012 provides for justiciable provisions on the enforcement of tertiary education. For example, it sets out that the ‘financial allocation ... shall constitute at least 5% of the Total National Annual Budget’ allocated by the government for higher education.⁸¹

It is worth highlighting that inspiration and insight into matters of judicial adjudication of discrimination in the context of education could be drawn from the landmark decisions of the United States Supreme Court in *Brown v Board of Education of Topeka*,⁸² in which case the Supreme Court ruled that the existence of a segregated system of schooling based on race was unconstitutional or unlawful.⁸³ Inspiration could also be drawn from *San Antonio Independent School District v Rodriguez*,⁸⁴ in which case the Supreme Court decided that the existence of a school funding system via local domestic taxations that results in a situation of imbalanced financial resources to schools based on area was not discriminatory and, therefore, not unlawful.⁸⁵

2.2.2 *Legalisation on the workers’ and labour rights*

South Sudanese legislation caters for the two sectors of formal employment – public and private. These are the Civil Service Act 2011 and the Labour Act 2017. These two pieces of legislation provide for numerous legal provisions that are justiciable and legally enforceable before a court of law and other semi-judicial tribunals.

77 Sec 33(b) General Education Act.

78 Sec 3 Public Grievances Act 2011.

79 Sec 15(b) General Education Act.

80 Sec 21(a)(i) General Education Act.

81 Sec 51(a) Higher Education Act 2012.

82 347 US 483 (1954).

83 As above.

84 411 US 1 (1973).

85 As above.

The Civil Service Act 2011 indicates that the relevant governmental institution in which an employee is employed should be the first administrative entity to be held liable for employment management matters.⁸⁶ To be particular, certain rights, such as the right to non-discrimination,⁸⁷ the requirement to pay salaries 'on time at the end of each calendar month',⁸⁸ among other legal provisions in the legislation, permit an employee to lodge a grievance with the South Sudan Civil Service Commission or the South Sudan Employees Justice Chamber,⁸⁹ which are the semi-judicial entities for administrative relief and remedy.⁹⁰ These avenues are without prejudice to the right of lodging a complaint before a competent court.⁹¹

Regarding similar perspectives, the Labour Act 2017 incorporates a set of workplace fundamental rights and renders them legally enforceable,⁹² namely, non-discrimination,⁹³ the prohibition of forced labour⁹⁴ and child labour.⁹⁵ In addition to this are the payment of wages or salaries;⁹⁶ work hours and leave entitlements;⁹⁷ and the termination of employment contracts.⁹⁸ The practical enforcement of these rights is enabled by the establishment of a labour commission to provide conciliation,⁹⁹ as an administrative remedy,¹⁰⁰ and also a labour court,¹⁰¹ to adjudicate such matters.¹⁰²

As an expansion to these overreaching labour provisions, it could be established that the Child Act 2008 has peculiar labour and employment provisions that are legally enforceable pertaining to children.¹⁰³ The judicially-enforceable rights are the prohibition of paid employment for those under 14 years of age,¹⁰⁴ and light work for those under the age of 12 years.¹⁰⁵ This is effected through

86 Secs 9(2), 18(1) & 98(1)(b) Civil Service Act 2011.

87 Sec 19(a) Civil Service Act 2011.

88 Sec 57(1) Civil Service Act 2011.

89 Secs 98(2) & 97 Civil Service Act 2011.

90 Secs 3 & 27 Employees Justice Chamber Act 2011; sec 3 Public Grievances Act 2011.

91 Sec 30 and sec 25 of each of the above Acts respectively.

92 Sec 3 Labour Act 2017.

93 Sec 6(1) Labour Act 2017.

94 Sec 10(1) Labour Act 2017.

95 Secs 12 & 13 Labour Act 2017.

96 Secs 49(1), (2) & (3) Labour Act 2017.

97 Secs 56-68 Labour Act 2017.

98 Secs 73-77 Labour Act 2017.

99 Secs 15(1), 71(1) & 83(1) Labour Act 2017.

100 Secs 102-104 Labour Act 2017.

101 Secs 15(2), 71(2) & 83(5) Labour Act 2017.

102 Sec 108 Labour Act 2017.

103 Child Act 2008 (n 63), sec 36(1) which stipulates that 'all levels of government ensure the rights enshrined in the act'; and sec 36(2)(u) which requires the government to 'provide effective remedies to redress violations of the rights in this Act'.

104 Sec 25(3) Child Act 2008.

105 Sec 25(4) Child Act 2008.

access to child-friendly, independent complaints procedures and competent courts,¹⁰⁶ which includes, in addition to competent courts, an independent child commission.¹⁰⁷

This status of the existence of domestic legislations that cater for legislative rights pertaining to work and labour, and also pave the way for the establishment of numerous judicial and semi-judicial entities to judicially and administratively enforce labour rights, can be observed in the legal frameworks of the majority of African states.¹⁰⁸ This signifies that, at least, the theoretical framework for the justiciability of work and labour rights is comparatively enshrined in the domestic legal systems of most African countries.¹⁰⁹

2.2.3 *Legalisation on adequate standard of living*

As opposed to the existence of legislation on education and labour, it appears that limited or no legislation on the right to adequate standard of living exists.¹¹⁰ However, at least, it might be determined that the Child Act 2008 solely forms the basis for justiciability of the right to health for children. Relying on the same legislation, it can be determined that providing free basic health care to children is the responsibility of parents and the government,¹¹¹ just as the provision of free immunisation;¹¹² similarly, the absence of discrimination in accessing medical treatment on whatsoever basis.¹¹³

Hence, it could be asserted that this limited assertion on the justiciability of the right to an adequate standard of living, and its sub-rights – food and water, housing and shelter, health and medical care, and social security and assistance – appear to be a dominant domestic context in numerous countries worldwide,¹¹⁴ and most of these right formulations are reflected as policies and strategies.¹¹⁵ Notwithstanding this, a lesson or best practice could be drawn from the South African legal jurisprudence on how to effect justiciability and legal enforcement of the right to an adequate standard of living. There are interesting and persuasive judicial precedents on the judicial

¹⁰⁶ Secs 36(2)(u) & 192(1) Child Act 2008.

¹⁰⁷ Secs 193(1) & (2) Child Act 2008.

¹⁰⁸ Labour Laws in Africa, <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/practice-areas/downloads/Labour-Laws-in-Africa.pdf> (accessed 23 February 2024)

¹⁰⁹ As above.

¹¹⁰ Most of the issuances on this right are policy documents, strategies or plans.

¹¹¹ Sec 15(1) Child Act 2008 (n 63).

¹¹² Sec 15(2) Child Act 2008.

¹¹³ Secs 15(2) & 15(3) Child Act 2008.

¹¹⁴ A Eide & WB Eide 'Adequate standard of living' in D Moeckli and others (n 1) 187.

¹¹⁵ As above.

enforcement of the right to an adequate standard of living, which could ultimately be the foundation on justiciability for any possible future adaptation in South Sudan. In this regard, the domestic courts in South Africa have pronounced judicial decisions that rendered the following rights justiciable: the rights to housing;¹¹⁶ water;¹¹⁷ health and medical care;¹¹⁸ and social security and assistance.¹¹⁹

3 Justiciability mechanism and process under the structures of UN and regional human rights treaties ratified or acceded to by South Sudan

This part investigates the multitude of United Nations (UN), African Union (AU) and East African Community (EAC) treaties and conventions on ESCRs, to which South Sudan is a state party. It also assesses the jurisprudence of a handful of human rights bodies and entities that are established by these treaties which rationalise and effect the justiciability of ESCRs in the context of South Sudan before these entities and bodies. This part maintains that these bodies provide for and enable the justiciability of ESCRs at supra-national level(s) as a complementing and supplementing – yet parallel and simultaneous – extension of legal and judicial enforcements at the domestic level of the legal system of South Sudan.

However, it is also evident that the complementary and supplementary factor should not suggest that the structures at national level are superior and should be placed first, while the international structures are inferior and in second place. As a matter of fact, the supranational structure operates distinctively and independently without any procedural influence by the national structure.¹²⁰ Hence, these structures could provide for a basis for justiciability of ESCRs notwithstanding and irrespective of the national domestic layer. An assessment of structures established under the UN is presented first, then the status under the AU, followed by the structures of the EAC.

116 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46.

117 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).

118 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC).

119 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC).

120 W Vandenhoele *The procedures before the UN human rights treaty bodies: Divergence or convergence* (2004) 309.

3.1 United Nations structures

South Sudan became the 193rd member of the UN,¹²¹ and it has also acceded to pertinent UN human rights treaties that cater either exclusively or inclusively – along with other rights – for ESCRs.¹²² Therefore, due to its membership of the UN and also being a state party to the afore-mentioned instruments, the following bodies established in the realm of or by such structures could extend and apply their semi-judicial or adjudicating authority concerning ESCRs on South Sudan. These bodies are the Human Rights Council (HRC);¹²³ the ESCR Committee and its individual complaints procedure;¹²⁴ the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and its individual complaints procedure;¹²⁵ and the Committee on the Rights of Persons with Disabilities (CRPD Committee) and its individual complaints procedure.¹²⁶

In addition to this, South Sudan is a member of the International Labour Organisation (ILO),¹²⁷ and it has acceded to the following Labour Conventions: the Forced Labour Convention 1930;¹²⁸ the Right to Organise and Collective Bargaining Convention 1949;¹²⁹ the Equal Remuneration Convention 1951;¹³⁰ the Abolition of Forced Labour Convention 1957;¹³¹ the Discrimination (Employment and Occupation) Convention 1958;¹³² the Minimum Age Convention 1973;¹³³ and the Worst Forms of Child Labour Convention 1999.¹³⁴ This context renders the standards set under these conventions

121 The Republic of South Sudan seceded from the Republic of the Sudan on 9 July 2011, and was admitted to the UN on 14 July 2011.

122 See (n 51 to 57).

123 Created on 15 March 2006 by Resolution 60/251 of the UN General Assembly.

124 The Committee was established by ICESCR (n 51); and the individual complaints mechanism is provided by the ICESCR Protocol (n 52).

125 The Committee was established by CEDAW (n 53), and the individual complaints mechanism is provided by the CEDAW Protocol (n 54).

126 The Committee was established by CRPD (n 56), and the individual complaints mechanism is provided by the CRPD Protocol (n 57).

127 South Sudan has become the 184th member of the organisation on 29 April 2012, by virtue of its acceptance of the obligations in the Constitution of the ILO which was adopted in April 1919 and became part of the Treaty of Versailles of 28 June 1919.

128 Convention 29 which was adopted on 28 June 1930 and entered into force on 1 May 1932. South acceded to the Convention on 29 April 2012.

129 Convention 98 which was adopted on 1 July 1949 and entered into force on 18 July 1951. South acceded to the Convention on 29 April 2012.

130 Convention 100 which was adopted on 29 June 1951 and entered into force on 23 May 1953. South acceded to the Convention on 29 April 2012.

131 Convention 105 which was adopted on 25 June 1957 and entered into force on 17 January 1959. South acceded to the Convention on 29 April 2012.

132 Convention 111 which was adopted on 25 June 1958 and entered into force on 15 June 1960. South acceded to the Convention on 29 April 2012.

133 Convention 138 which was adopted on 26 June 1973 and entered into force on 19 June 1976. South acceded to the Convention on 29 April 2012.

134 Convention 182 which was adopted on 17 June 1999 and entered into force on 19 November 2000. South acceded to the Convention on 29 April 2012.

justiciable and legally enforceable before the complaints procedures of the international labour office (ILO office) established by the constitution of the organisation.¹³⁵

All these entities and bodies cater procedurally and substantively for the justiciability of ESCRs, each in its own right and unique manner, as follows:

First, the HRC mandate extends to addressing all human rights situations that emanate or transpire from human rights treaty obligations within the UN.¹³⁶ As such, the HRC has established its authority to consider, review and determine any situation relating to the human rights treaties ratified or acceded to by a state,¹³⁷ including the competence to receive complaints, and examine and decide on these.¹³⁸ Henceforth, this article argues that this context suggests that all the treaty obligations of South Sudan and their ESCRs obligations, particularly, could be the subject matter of complaints through the complaint procedures established by the HRC.¹³⁹ As such, it could be advanced that they are admissible before the complaints mechanism of the HRC and, as such, appropriate recommendations to rectify the respective matter could be made for South Sudan. It would be anticipated that the latter will undertake appropriate and necessary required measures in view of the recommendations.¹⁴⁰ This concrete assertion for justiciability of ESCRs could be observed from the jurisprudence of the work of the HRC.¹⁴¹ Most significantly, one convincing argument in this respect is the adoption of a resolution¹⁴² by the HRC, for the attention of the General Assembly of the UN on an optional protocol¹⁴³ to ICESCR.

Second, the ESCR Committee,¹⁴⁴ which is the successor of the UN Economic and Social Council tasked with monitoring states'

¹³⁵ Arts 26-34 Constitution of the ILO (n 127).

¹³⁶ UN General Assembly UN Resolution 60/251 (n 123) para 3.

¹³⁷ HRC Resolution 5/1 of 18 June 2007.

¹³⁸ HRC Resolution 5/1 (n 137), an annex to the Resolution, para 85.

¹³⁹ Throughout the universal periodic cycle reviews of South Sudan, a recommendation on ensuring the realisation of ESCRs via accession to its pertinent instruments were made. See the following Report(s) of the Working Group on the Universal Periodic Review: A/HRC/18/16 of 11 July 2011, para 83.6; A/HRC/34/13 of 28 December 2016, paras 128.4-128.9, 128.12-128.14 & 129.5; and A/HRC/50/14 of 28 March 2022, paras 113.8-113.14, 113.17-113.18, 113.20, 113.23, 113.25 & 113.37.

¹⁴⁰ L Richardson 'Economic, social and cultural rights (and beyond) in the UN Human Rights Council' (2015) 15 *Human Rights Law Review* 409.

¹⁴¹ Richardson (n 140) 416.

¹⁴² HRC Resolution 8/2 of 18 June 2008.

¹⁴³ UN General Assembly Resolution A/RES/63/117 of 10 December 2008.

¹⁴⁴ Resolution 17 on 'Review of the composition, organisation and administrative arrangements of the Sessional Working Group of Governmental Experts on the

compliance with ICESCR,¹⁴⁵ has the competence to receive and consider communications and conduct inquiries enabled by the ICESCR Protocol 2008.¹⁴⁶ In view of these developments, all ESCRs are peculiarly deemed justiciable and legally enforceable before a dedicated mechanism of the UN.¹⁴⁷ An assessment of the jurisprudence of the ESCR Committee¹⁴⁸ points towards such trend whereby complaints against states could be examined by the ESCR Committee if the respective state is party to the ICESCR Protocol 2008, particularly pertaining to the rights to food,¹⁴⁹ water,¹⁵⁰ housing,¹⁵¹ land,¹⁵² work,¹⁵³ education,¹⁵⁴ health¹⁵⁵ and social security.¹⁵⁶ As such, ESCRs could be legally enforced against South Sudan before the ESCR Committee as a state party to ICESCR and the ICESCR Protocol.

The accession of South Sudan to this premier complaints' procedure for ESCRs is a recent development which has only occurred in February 2024, and has become operational from May 2024.¹⁵⁷ Notwithstanding that the formal deposit of the instrument of accession is recent, the domestic internal process could be traced back to 2019 when the national legislature ratified it,¹⁵⁸ followed by the assent of the head of state in 2023.¹⁵⁹ All these processes

Implementation of the International Covenant on Economic, Social and Cultural Rights' of 28 May 1985 by the Economic and Social Council of the UN.

145 Part IV ICESCR.

146 Arts 1, 10 & 11 ICESCR Protocol 2008.

147 M Langford and others 'Introduction' in M Langford and others (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A commentary* (2016) 1.

148 M Langford & JA King 'Committee on Economic, Social and Cultural Rights: Past, present and future' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2009) 477.

149 General Comment 12 on the right to adequate food by the ESCR Committee, E/C.12/1999/5 of 12 May 1999.

150 General Comment 15 on the right to water by the ESCR Committee, E/C.12/2002/11 of 20 January 2003.

151 General Comment 7 on the right to adequate housing by the ESCR Committee, E/1998/22 of 14 May 1997.

152 General Comment 26 on land and economic, social, and cultural rights by the ESCR Committee, E/C.12/GC/26 of 24 January 2023.

153 General Comment 23 on the right to just and favourable conditions of work by the ESCR Committee, E/C.12/GC/23 of 27 April 2016.

154 General Comment 13 on the right to education by the ESCR Committee, E/C.12/1999/10 of 8 December 1999.

155 General Comment 14 on the right to the highest attainable standard of health by the ESCR Committee, E/C.12/2000/4 of 11 August 2000; and General Comment 22 on the right to sexual and reproductive health by the ESCR Committee, E/C.12/GC/22 of 2 May 2016.

156 General Comment 19 on the right to social security by the ESCR Committee, E/C.12/GC/19 of 4 February 2008.

157 ICESCR Protocol 2008 and Rules of Procedure 2012.

158 [https://www.ohchr.org/en/press-briefing-notes/2019/06/press-briefing-note-south-sudan#:~:text=\(3\)%20South%20Sudan,-We%20welcome%20the&text=The%20TNLA%20on%20Monday%20ratified,which%20establish%20individual%20complaints%20procedures](https://www.ohchr.org/en/press-briefing-notes/2019/06/press-briefing-note-south-sudan#:~:text=(3)%20South%20Sudan,-We%20welcome%20the&text=The%20TNLA%20on%20Monday%20ratified,which%20establish%20individual%20complaints%20procedures) (accessed 30 May 2024).

159 <https://www.eyeradio.org/kiir-signs-four-international-conventions-into-law/> (accessed 30 May 2024).

have culminated due to the apparent recommendations made by various states to South Sudan in the course of its Universal Periodic Review process before the HRC.¹⁶⁰ This reality makes South Sudan the fifth African, and twenty-ninth worldwide state to accord the ESCR Committee the competence to receive complaints against them for violations relating to ESCRs.¹⁶¹ Therefore, it is expected that the absence of domestic legal enforcement might open the way for justiciability of these rights before the ESCRs Committee under the caveat that domestic remedies for ESCRs within South Sudan are not available, nor accessible or effective in providing remedy, hence no need to exhaust them.¹⁶²

Third, the CEDAW Committee, as the expert body established to monitor state parties' compliance with CEDAW,¹⁶³ has the competence to receive communications against any state party for violations of CEDAW, by virtue of the CEDAW Protocol,¹⁶⁴ which renders these rights justiciable and legally enforceable.¹⁶⁵ Therefore, and since South Sudan is a state party to both CEDAW and the CEDAW Protocol, the stipulated ESCRs¹⁶⁶ could be considered and examined by the CEDAW Committee as its jurisprudence provides.¹⁶⁷

Fourth, the CRPD Committee, which monitors state parties' compliance with CRPD,¹⁶⁸ and through the CRPD Protocol, it could receive communications against, or conduct inquiries into, a state party to the Protocol.¹⁶⁹ This relates to all rights, including the ESCRs incorporated in CRPD,¹⁷⁰ which as such renders them justiciable,¹⁷¹

160 Recommendations, UPR of South Sudan (Second Cycle 7 November 2016) and (third cycle 31 January 2022).

161 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR-OP (accessed 30 May 2024). The other African state parties are Cabo Verde, Central African Republic, Gabon and Niger.

162 TS Bulto 'Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system' (2012) 16 *International Journal of Human Rights* 555.

163 Art 17 CEDAW.

164 Art 1 CEDAW Protocol.

165 L Hodson 'Women's rights and the periphery: CEDAW's Optional Protocol' (2014) 2 *European Journal of International Law* 561.

166 Arts 3, 10, 11-13 CEDAW.

167 General recommendation 36 on the right of girls and women to education, CEDAW/C/GC/36 of 27 November 2017, part II; General recommendation 24: Article 12 of the Convention (women and health), A/54/38/Rev.1 of 1999, ch I; General recommendation 13: Equal remuneration for work of equal value, A/44/38 of 1989, part IV; General recommendation 8: Implementation of article 8 of the Convention, A/43/38 of 7 March 1988, part IV.

168 Art 34 CRPD.

169 Arts 1 & 6 CRPD Protocol.

170 Arts 24, 25, 27 & 28 CRPD.

171 O Ferrajolo 'Optional Protocol to the Convention on the Rights of Persons with Disabilities' in VD Fina and others (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017) 703.

and legally enforceable for persons with disabilities.¹⁷² This status indeed is applicable and extended to South Sudan as a state party to both CRPD and the CRPD Protocol.

Fifth, a last peculiar justiciability layer for ESCRs in the context of South Sudan pertains to the right to work solely and, most particularly, labour rights in the context of the ILO. The constitution of the ILO establishes a complaints procedure against its member states for non-compliance with the ILO conventions to which a state is party.¹⁷³ A complaint as such would be examined by a commission of inquiry, which in turn makes recommendations for the concerned state to comply with.¹⁷⁴

Based on these factors, this article asserts that the existing and established mechanism caters for the justiciability of the labour standards relating to the right to work.¹⁷⁵ Hence, the relevant ILO conventions acceded to by South Sudan provide for such context of legal enforcement against South Sudan.¹⁷⁶

3.2 African Union and East African Community structures

3.2.1 African Commission on Human and Peoples' Rights

As a member of the AU,¹⁷⁷ and within the realm of the AU, and its predecessor, the Organisation of African unity (OAU) structures, South Sudan has acceded to the following treaties that cater inclusively for ESCRs: the African Charter¹⁷⁸ and the African Women's Protocol.¹⁷⁹ Therefore, the obligations emanating from these two treaties put South Sudan under the radar and within the work of the African Commission on Human and Peoples' rights (African Commission).¹⁸⁰ The African Commission is the continental human rights body that

172 General Comment 4 on the right to inclusive education by the CRPD Committee, CRPD/C/GC/4 of 25 November 2016; and General Comment 8 on the right of persons with disabilities to work and employment by the CRPD Committee, CRPD/C/GC/8 of 7 October 2022.

173 Arts 26-34 ILO Constitution (n 127).

174 As above.

175 L Swepston 'Human rights complaint procedures of the International Labour Organisation' in H Hannum (ed) *Guide to international human rights practice* (1992) 99.

176 South Sudan has acceded to seven ILO conventions (nn 128-134).

177 South Sudan became the 54th member of the AU on 15 August 2011 upon deposit of its instrument of accession to the Constitutive Act of the AU (adopted on 11 July 2000 and entered into force on 26 May 2001).

178 African Charter (n 58).

179 African Women's Protocol (n 59).

180 Part II ch I African Charter (n 58).

has been tasked with monitoring state parties' compliance with their human rights treaties obligations under the African Charter.¹⁸¹

In dealing with such role, the African Commission has been empowered with the competence to receive communications (that is, complaints),¹⁸² and conduct inquiries.¹⁸³ Such measures indicate the justiciability of human rights and their legal enforcement before the African Commission.¹⁸⁴ Furthermore, the justiciability and legal enforcement could be determined to extend to all categories of rights, including ESCRs.¹⁸⁵

Hence, the stipulated ESCRs in the African Charter, namely, property,¹⁸⁶ work,¹⁸⁷ health¹⁸⁸ and education,¹⁸⁹, according to the jurisprudence of the African Commission, are legally enforceable.¹⁹⁰ This could further be deduced from the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.¹⁹¹ The Principles and Guidelines clearly recognise that 'economic, social and cultural rights are justiciable and enforceable rights and that state parties to the African Charter have obligations to ensure that individuals and peoples have access to enforceable administrative and/or judicial remedies for any violation of these rights'.¹⁹² Furthermore, numerous decisions of the African Commission point towards the same finding and conclusion.¹⁹³

181 Art 45 African Charter.

182 Arts 48, 49 (inter-state complaints) & 55 (individual complaints) African Charter.

183 Art 58 African Charter.

184 S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

185 MA Baderin 'The African Commission on Human and Peoples' Rights and the implementation of economic, social, and cultural rights in Africa' in MA Baderin & R McCorquodale (eds) *Economic, social, and cultural rights in action* (2007) 139.

186 Art 14 African Charter.

187 Art 15 African Charter.

188 Art 16 African Charter.

189 Art 17 African Charter.

190 SA Yeshanew 'Approaches to the justiciability of economic, social, and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317.

191 Adopted by the African Commission on 24 October 2011.

192 Principles and Guidelines (n 191) preambular paras & para 22.

193 See eg decisions such as in *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Sudan Human Rights Organisation & Others v Sudan* (2009) AHRLR 153 (ACHPR 2009); *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995); and *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009). See also See JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 2 *African Journal of Legal Studies* 129.

Therefore, in view of this situation and ground, justifiable arguments on justiciability of ESCRs and their legal enforcement against South Sudan before the African Commission could be advanced and asserted.¹⁹⁴

3.2.2 *East African Court of Justice*

Another structure that could provide a ground for judicial enforcement of ESCRs against South Sudan is the East African Court of Justice (EACJ).¹⁹⁵ By virtue of membership of the East African Community (EAC),¹⁹⁶ the EACJ is empowered with the competence to determine references or matters of violations of the EAC treaty provisions that are brought against a partner state.¹⁹⁷ While the EAC Treaty has explicitly stipulated the jurisdiction of the EACJ on interpretation and application of the EAC Treaty,¹⁹⁸ it deferred the EACJ's jurisdiction pertaining to human rights matters to the adoption of a subsequent protocol.¹⁹⁹

This notwithstanding, the EACJ has innovatively determined that, pending the conclusion of such protocol, it has jurisdiction to examine matters of human rights relating to the interpretation and application of the provisions of the EAC Treaty.²⁰⁰ Hence, the basis for the Court exercising jurisdiction on human rights matters is the fact that human rights are reflected as one of the fundamental principles of the EAC,²⁰¹ which is evident as the basis for the EACJ in asserting jurisdiction over human rights issues.²⁰²

Therefore, it could be argued that the EACJ could examine human rights matters in South Sudan, which might also include ESCRs.²⁰³

194 Bulto (n 169) 555.

195 Established by virtue of art 23, ch 8 of the Treaty for the Establishment of the East African Community (adopted on 30 November 1999 and entered into force on 7 July 2000) (EAC Treaty).

196 South Sudan joined the EAC on 15 April 2016 upon accession to the EAC Treaty 1999 and became a member on 5 September 2016.

197 Arts 27 & 30 EAC Treaty (n 198).

198 Art 27(1) EAC Treaty.

199 Art 27(2) EAC Treaty.

200 *James Katabazi & 21 Others v the Secretary General of the EAC and Attorney General of Uganda* (reference 1/2007). The EACJ decision decreed that 'the court ... will not abdicate from exercising its jurisdiction of interpretation ... merely because the reference includes allegation of human rights violation'.

201 Art 6 EAC Treaty which stipulates as one of the fundamental principles 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

202 TR Luambano 'Litigating human rights through the East African Court of Justice: Overview and challenges' (2018) 71 *Journal of Law, Policy and Globalisation* 76.

203 Art 6(d) EAC Treaty (n 201).

The existing jurisprudence could be argued to be providing such composite human rights situations, including ESCRs situations.²⁰⁴ In this respect, it is worth pointing out that the following matters relating to adjudication of ESCRs are already being considered by the EACJ: a reference brought by a former justice of the Court of Appeal of South Sudan that addresses workers' and labour rights,²⁰⁵ and two others references brought by private citizens and relating to the right to land, in connection with the right to housing and shelter.²⁰⁶

4 Conclusion and recommendations

This article has set out an abstract and analytical perspective pertaining to the justiciability and legal enforcement of ESCRs in the context of the legal system of South Sudan. It has provided a comprehensive assessment of the multi-layered legal system relating to ESCRs applicable in the context of South Sudan. The domestic layer included the TCRSS 2011, in addition to legislation that addresses ESCRs which are enacted by the national legislature, such as the General Education Act 2011; the Higher Education Act 2012; the Child Act 2008; the Civil Service Act 2011; the Labour Act 2017; and customary laws where relevant. Furthermore, the article has also evaluated the provisions of selected international and regional human rights conventions on ESCRs, to which South Sudan is a state party, including ICESCR; CEDAW; CRC; CRPD; the African Charter; the African Women's Protocol; and the EAC Treaty.

The article establishes that, in theory and in view of the aforementioned legal instruments, ESCRs are justiciable and legally enforceable within the domestic context of South Sudan by relying on the Constitution and the laws. In addition, some ESCRs could be legally enforced, within the domestic context of South Sudan, by reliance on the ESCRs treaties that are automatically incorporated as part of the Bill of Rights. Furthermore and, alternatively, these ESCRs treaties establish distinct frameworks for justiciability and legal enforcement at a supranational layer for the legal system of South Sudan. Regardless and, in practice, the ultimate operationalisation of

204 EM Nijiru 'Adjudication of human rights disputes in the sub-regional courts in Africa: A case study of the East African Court of Justice' (2021) *De Jure* 493. Also see *African Network for Animal Welfare v Attorney General of the Republic of Tanzania* (Ref 9 of 2010) EACJ First Instance Division (20 June 2014).

205 *Hon Justice Malek Mathiang Malek v The Minister of Justice of the Republic of South Sudan (Attorney General of the Republic of South Sudan) and The Secretary General of the East African Community* reference 9 of 2017.

206 *Bishop Jambo Mulla & 4 Others v the Attorney General of the Republic of South Sudan* reference 35 of 2022; *Christopher Serafino Wani Swaka v The Attorney General of the Republic of South Sudan* reference 36 of 2022.

the process appears to be hindered by factual realities and challenges pertaining to the domestic entities that are bestowed with the mandate to effect justiciability.

The article advances the view that such a multilayered context enables judicial enforcement before courts of law and administrative remedies before semi or quasi-judicial bodies and entities. At the domestic level, these courts and entities include the Supreme Court of South Sudan; other courts of law, including the Labour Court; the Human Rights Commission of South Sudan; the Independent Child Commission; the Public Grievances Chamber; the South Sudan Civil Service Commission; the South Sudan Employee Justice Chamber; the Labour Commission; and customary courts when they are seized with relevant and related matters. At the supranational level, the following bodies and entities are empowered: the HRC; the ESCR Committee; the CEDAW Committee; the CRPD Committee; the ILO office; the African Commission; and the EACJ. However, the article contends that the numerous operational challenges faced by the domestic entities might impact on proper and full justiciability within South Sudan.

The article has determined that these various instruments and composite entities, both domestic and international, exist side by side and hand in hand, and that their work would supplement and complement the others' work respectively without any hierarchy or subordination among the two layers, in ensuring the ultimate realisation of ESCRs. Further, the article concludes that this determination is deduced from theoretical perspectives that remain untested in the particular context of South Sudan. Hence, it advises that these conceptual aspects require a practical test before any of the respective entities in order for such determinations to materialise as a practice and also to legally solidify. This is anticipated to result in an enhanced understanding of the importance of realising ESCRs, either through state policies or, in lieu of that, legal and judicial measures to enforce realisation, with the ultimate outcome of achieving the enjoyment of these fundamental rights.

Nevertheless, the article recommends that, as it stands, these legal instruments, and their pertinent frameworks and structures, provide the foundation for a progressive legal ground and steady practical steps towards the justiciability of ESCRs in South Sudan, which needs to be retained and built upon in any future constitutional and legal dispensations for South Sudan. Similarly, any arising legal gaps and challenges should be filled and clarified through practical application, which would ultimately inform the legal interpretation on the realisation of ESCRs in South Sudan. This practical application

could materialise via public interest litigation and advocacy, at the respective national and supranational fora, which would then form judicial precedents, and legal reforms to introduce additional or revised bills of legislations and other legal manuals on the matter. In addition, the foreseen future constitutional and legal developments in South Sudan, and any supranational treaty obligations, should further be cognisant of and aim to harness the justiciability of all ESCRs, including the provision of legal and judicial enforcement of all aspects and specifications of these rights that are deemed mere aspirations, welfare rights, standards of achievement or policies for realisation, and craft ESCRs as constitutional and/or clear-cut legal rights and provisions.

Finally, the article professes that further legal and empirical research could be explored in respect of each of the ESCRs on its own, as this could unearth particular matters that might be privy to each ESCR apart from others. Further, the scope and extent of justiciability before the international and regional structures might expand and widen further should South Sudan become a state party to additional human rights treaties at the supranational level and accepts the complaints procedures established therein, either via declarations or accessions to their respective additional protocols, as appropriate and relevant.