19

Public Budget Analysis for the Realization of Economic, Social and Cultural Rights

Conceptual Framework and Practical Implementation

OLIVIER DE SCHUTTER

I. Introduction

The International Covenant on Economic, Social and Cultural Rights commits the States parties to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.[1] This 'progressive realization' clause is typically seen as a weakness – as an indication that economic, social and cultural rights are still undervalued in the international human rights regime in comparison to the more 'classical' civil and political rights. This chapter suggests that it can instead be a strength. With this provision, how States mobilize resources and how they define their spending priorities become human rights issues. Such decisions cannot be left to the arbitrary and capricious choices of States: they can and must be subject to a searching inquiry by courts and other bodies in charge of enforcing the Covenant on Economic, Social and Cultural Rights.

[1] This contribution traces its origins back to a seminar organized in Geneva in February 2016 with Members of the Committee on Economic, Social and Cultural Rights, with the support of the Friedrich-Ebert Foundation. The author is grateful to the participants in the workshops held at Yale Law School on 29 November 2016 and at the London School of Economics and Political Science (Law and Development Research Group) on 13 January 2017 for the very constructive comments received on those occasions.

G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (Art. 2 (1)).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Thus, what looks like an infirmity may become a powerful tool, allowing human rights bodies to scrutinize public budgets. For the potential of the 'progressive realization' clause to be fulfilled, however, the ambiguities obstructing its use should be dissipated. The Covenant imposes on States that they seek to mobilize resources, both domestically and internationally, and that they dedicate sufficient budgets to the realization of economic, social and cultural rights.[2] But what, exactly, does this mean? Unless we define more precisely the implications of this vague wording, allowing domestic actors and the Committee on Economic, Social and Cultural Rights to address issues of taxation and spending in the light of the Covenant's requirements, we run the risk of this essential contribution of the Covenant remaining a dead letter: the duty of progressive realization, as a duty to design public budgets and to implement macro-economic policies with a view to fulfilling economic, social and cultural rights, will either be ignored entirely, or considered in a purely ad hoc fashion, raising the suspicion that any such assessment will be biased and the debate politicized. In the absence of a clearer understanding as to the content of this duty, the Committee on Economic, Social and Cultural Rights may be tempted to retreat to safer waters (focusing, say, on the need to combat discrimination or to protect control of indigenous peoples over their lands and territories, rather than on levels of corporate taxes or of investments in the educational system of the State concerned); and any suggestion that independent monitoring bodies, including courts, might have some role to play in assessing budgetary choices, will be dismissed as fantasy.[3]

This chapter seeks to fill this gap. It proceeds in five steps. Part II considers how the Committee on Economic, Social and Cultural Rights has sought to clarify the content of the duty to devote the 'maximum available resources' to the progressive realization of the Covenant rights. It refers to the four 'constitutional background norms' that the

[2] While the emphasis here is on financial resources, it is acknowledged that other resources, including human and technological, should be mobilized to that effect. See Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly*, 4, 693–714.

[3] See e.g., Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 *American Journal of International Law*, 3, 462–515.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Committee has relied on in assessing the budgetary choices of States. It argues that these norms – the duty of non-retrogression, the priority to be given to the fulfilment of core obligations, and the requirements of non-discrimination and of participation – remain insufficient to provide monitoring bodies with the tools allowing them to examine whether the States parties comply with the duty of progressive realization of Covenant rights. Next, Part III considers the argument according to which the quest to define the duties of States as regards resource mobilization and allocation choices may be misguided, and may in fact undermine the credibility of economic, social and cultural rights as rights. Two versions of this argument are considered, referred to respectively as the 'violations approach' and the 'outcomes-based approach'. Both versions have in common that they seek to dispense with the need to measure whether the efforts of States parties to the Covenant to fulfil economic, social and cultural rights are sufficient to comply with the 'progressive realization' clause. These approaches, however, tend to undermine the specificity of the rights protected by the Covenant, and they miss the subversive dimension of the duty to devote the 'maximum available resources' to the 'progressive realization' of these rights: instead of providing human rights bodies with a sound framework allowing them to inquire into budgetary choices of States, they may result in shielding such choices from any meaningful scrutiny, except in the most extreme cases of misallocation of resources.

If defining this duty is a burden we must accept, how can we hope to do so? Part IV proposes a simple conceptual framework to that effect, emphasizing the need to consider *resource mobilization* jointly with *spending*, and to relate both dimensions to *outcomes*, i.e. to the effective levels of enjoyment of economic, social and cultural rights from the point of view of the beneficiary. Parts V and VI then develop the implications of the resources-spending-outcomes (R-S-O) framework, examining in turn resource mobilization and the definition of spending priorities. Part V focuses on three sources of State revenue in particular: the royalties from the exploitation of natural resources, taxation and request for international support through development assistance or financial loans. Part VI then examines spending choices, reviewing the various attempts that have been made in the academic literature to define how such choices should be assessed. The ultimate quest of this literature is to identify a methodology through which the budgetary choices of the State and their macroeconomic policies (as reflected, for instance, in the levels of social transfers or in the attention paid in public budgets to the health

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

and education sectors) can be assessed in the light of the norms of the Covenant.[4] The chapter concludes, however, with a plea for combining strong procedural requirements linked to budgetary decision-making, with the substantive norms that should guide budgetary choices: only by strengthening democratic decision-making in budgetary choices can we overcome the tension between the external supervision of such choices, whether by domestic or by international monitoring bodies, and democratic self-determination.

This chapter thus offers to explore the potential of the 'progressive realization' clause for introducing public budget analysis in the practice of the Committee on Economic, Social and Cultural Rights, by proposing a conceptual framework to guide the discussion. The reader should be cautioned, however, against the temptation to treat the 'progressive realization' clause as one that excludes any possibility for courts to step in, without having to rely on such public budget analysis, to enforce the rights of the Covenant. This conservatism is the reverse side of the first: just like it would be a missed opportunity not to exercise scrutiny of budgetary choices on the basis of the International Covenant on Economic, Social and Cultural Rights, it would be wrong to dismiss the possibility that the requirement of 'progressive realization' can only be imposed once all the methodological issues and normative contests associated with analysing public budgets in the light of the Covenant are settled. While public budget analysis contains considerable potential, it should not be a precondition for treating the rights of the Covenant as human rights – recognized and fully institutionalized as such, and enforced by accountability mechanisms, including courts.[5] Although

[4] For book-length treatments of the topic, see in particular (in chronological order) Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (New York, NY: UNIFEM, 2006); Mary Robinson et al. (eds.), *Budgeting for the Poor* (New York, NY: Palgrave MacMillan, 2008); Queens University Belfast Budget Analysis Project, *Budgeting for Economic and Social Rights: A Human Rights Framework* (Belfast, IR: QUB, 2010); Radikha Balakrishnan, Diane Elson, James Heintz, and Nicholas Lusiani, *Maximum Available Resources and Human Rights: Analytical Report* (New Brunswick, NJ: Center for Women's Global Leadership, Rutgers University, 2011); Aiofe Nolan, Rory O'Connell and Colin Harvey, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart Publishing, 2013); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke and Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (London: Routledge, 2014).

[5] See the Report of the Special Rapporteur on extreme poverty and human rights, Mr. Philip Alston, to the 32nd session of the Human Rights Council, 28 April 2016, A/HRC/32/31 (highlighting how, in practice, economic, social and cultural rights have been marginalized

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

the exact scope of the courts' powers to enforce the rights of the Covenant depends ultimately on the domestic legal system of each State party and how it separates powers between the Legislature, the Executive and the Judiciary, courts at the very least should be allowed to intervene to prohibit any discrimination in the enjoyment of Covenant rights; to demand from States that abstain from imposing measures that impose limitations to Covenant rights, unless the conditions set out in Article 4 of the Covenant are complied with – which requires in particular that such limitations are justified by the need to promote public welfare in a democratic society and that they do not affect the nature of the rights of the Covenant[6] – and that any retrogressive step be justified as necessary and proportionate to the fulfilment of the full range of rights protected by the Covenant.

This is especially important to recall once we take into account that the formulation of Article 2, paragraph 1 of the Covenant presupposes a certain understanding of the relationship between the realization of rights and wealth creation within a certain polity. There must be wealth available, it is suggested, before it can be invested in certain social goods and services or redistributed: resources are a precondition for progressive social policies. Keynesian economic thinking, however – which as we know did not start with the publication of J. Maynard Keynes's *General Theory* in 1936[7], suggests that the reverse logic is at least as equally valid:

in comparison to civil and political rights, and proposing a recognition, institutionalization and accountability (RIA) framework – focusing primary attention on ensuring recognition of the rights, institutional support for their promotion and accountability mechanisms for their implementation – as a means to overcome the neglect of economic, social and cultural rights as human rights).

[6] Article 4 of the Covenant reads: 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

[7] J. M. Keynes, *The General Theory of Employment, Interest and Money* (New York, NY: Harcourt, Brace and World, 1936). The key policy recommendations that followed from Keynesian macroeconomics were foreshadowed in the United States by authors such as Stuart Chase or John Maurice Clark, who were among the main intellectual influences behind the Second New Deal launched by President F. D. Roosevelt in 1935. Like Keynes, these authors saw inequalities and the lack of purchasing power of the poor as the key obstacle to the ability of the economy to overcome depression, which, again like Keynes, they explained by underinvestment. Thus, Stuart Chase expressed the view in 1932 that 'It is not so much *overproduction* as *underconsumption* which is the appalling fact. ... Millions of tons of additional material could readily be marketed if purchasing power were available. Alas, purchasing power is not available' (Stuart Chase, *A New Deal* [New

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

social expenditures are a condition for sustainable economic growth, and they should be seen therefore, rather than as a burden on the economy, as an investment. Moreover, we now understand much better that it would be a mistake to pursue growth strategies if this is at the expense of social investment or redistributive strategies: James Heckman, for instance, has illustrated this in his work on investment in early childhood education,[8] and Angus Deaton has noted that countries shifting their focus from social investments to economic growth (i.e., seeing growth as a precondition for social investment rather than as the outcome of investing in populations) were performing less well, not better, on indicators of progress on human development.[9] In other terms, the 'progressive realization' clause of the Covenant, insofar as it suggests that the realization of economic, social and cultural rights should follow wealth creation rather than be seen as a condition for prosperity, embodies an economic philosophy that it is high time we challenge. Courts upholding economic, social and cultural rights would not only be acting in line with the idea that, by doing so, they are taking these rights seriously as human rights that they have a duty to enforce but they are also practicing sound economics.

York, NY: Macmillan, 1932], p. 3). Clark argued that spending on public works could be 'antidote to oversaving' and could 'increase general purchasing power to offset the decrease due to industrial contraction' (see John M. Clark, *Economics of Planning Public Works* [Washington, DC: The National Planning Board, 1935], pp. 155–159). For an excellent intellectual history of the New Deal policies, see Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York, NY: Vintage Books, 1995).

[8] James Heckman insisted, in countless publications, on four messages: skills and social abilities such as attentiveness, persistence and an ability to work with others are developed at an early age and are essential for productivity in adult life; early investment in childhood is far more cost-effective than remedial measures taken at a later stage; society as a whole shall face enormous economic and social burdens if disadvantaged families are not provided more support for early childhood development; and such investment provides significant returns to society through increased personal achievement and social productivity. See in particular James J. Heckman, *Giving Kids a Fair Chance* (Cambridge, MA: MIT Press, 2012).

[9] Angus Deaton, *The Great Escape: Health, Wealth, and the Origins of Inequality* (Princeton, NJ, and Oxford: Princeton University Press, 2013), at pp. 114–115 (noting that in China, 'the general pattern [as regards infant mortality rates] is of rapid decline until about 1970, followed by much slower decline after 1970'. This is precisely the opposite of what we would expect if the fall in infant deaths had been driven by economic growth, which would be the case if the death of babies were a direct consequence of poverty. What happened in China is no mystery. When the authorities decided to focus on growth, resources were switched to making money and away from everything else, including public health and health care).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Enforcing economic, social and cultural rights by classic methods of enforcement is thus essential to their full realization, and it should not wait. This chapter suggests however that, *in addition*, courts and other human rights mechanisms could do more, by scrutinizing the budgetary choices of States – including at which levels to tax and how to set spending priorities. It should be clear that this should not be interpreted as implying that they can refrain from doing what, minimally, can be expected from them: to protect the rights of the Covenant, using the same tools that are classic in the area of civil and political rights. But that they can and should go beyond those classic tools is what this chapter sets out to explain.

II. Guidance from the Committee on Economic, Social and Cultural Rights

What is meant by the duty to devote the 'maximum available resources' to the progressive realization of economic, social and cultural rights, as stipulated by Article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights? The provision has its source in the Universal Declaration of Human Rights, which anticipated that the realization of economic and social rights was to be achieved 'through national effort and international cooperation and in accordance with the organization and resources of each State': these carefully crafted terms appear in Article 22 of the Declaration, which defines the right to social security as the first of the social rights it lists.[10] The drafting history barely helps, however. When the working group of the Economic and Social Council's Commission on Human Rights prepared the document that was to be adopted as the Universal Declaration of Human Rights, its members were concerned that their proposal should be acceptable to a broad range of States, holding very diverging views about the role of the State in the economy.[11] Since well before World War II, the USSR had been leading an aggressive policy in favor of fast industrialization: top-down, large-scale and ruthless in its ambition to catch up with the advanced economies of the West. At the other end of the political spectrum that was going to define the geopolitics of the Cold War for two generations, the United States was presenting itself as the champion

[10] GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948) (Art. 22).
[11] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, NY: Random House, 2001), at p. 87.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

of free enterprise and of free markets, the role of the State being limited to the provision of the economic security required for individuals and companies to be able to cope with the temporary shocks or turns of fortune, that were the inevitable price for liberty. The Declaration said nothing, therefore, about the desirable degree of interference of the State with market mechanisms, and although it did include a strong condemnation of discrimination, it was silent about the need to challenge inequality as such, when it has its source in the blind workings of the economy rather than in overt discrimination. Economic and social rights had to be realized, of course, and all delegates were eager to recognize the importance of seeing all human rights as indivisible and interdependent. But part of the grandeur of the Declaration lay in its modesty. It was meant to unite and it was meant to last. The price to pay, however, was to run the risk of irrelevance in the world of today.

When it entered the scene in 1987, the Committee on Economic, Social and Cultural Rights was acutely aware of the need to provide guidance to States as to how they should go about discharging their obligation to 'progressively realize' the rights of the Covenant. The conventional wisdom of the time, reflected in the choice to adopt two separate covenants rather than one single binding instrument implementing the promises of the Universal Declaration of Human Rights, was that economic, social and cultural rights were too vague and ill-defined to be justiciable, and that neither independent experts nor courts were in a position to assess whether the efforts of States were sufficient to comply with that obligation. It was stated by a law and development scholar writing in 1984 that though the International Covenant on Economic, Social and Cultural Rights 'speaks in the language of rights, [it] refers to the realities of programs'.[12] Brownlie, a leading international law publicist, described the Covenant as 'programmatic and promotional' in the third edition of his *Principles of Public International Law*, published in 1979.[13] Jurists such as the Belgian Mark Bossuyt or the Dutch E. W. Vierdag voiced their scepticism as regards the ability of courts to supervise compliance with economic,

[12] David Trubek, 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs', in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), pp. 205–271, at 231.

[13] Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1979), pp. 572–573.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

social and cultural rights, which they saw as of a fundamentally distinct nature than civil and political rights.[14]

Sensing the danger, progressive academics and NGOs sought to clarify the nature of States parties' obligations under the Covenant in order to ensure that the work of the Committee would be based on solid ground. An expert meeting convened in Maastricht on 2–6 June 1986 provided the opportunity to further advance the understanding of the legal significance of economic, social and cultural rights, beyond the right to food on which most efforts had been converging until then.[15] The timing was propitious: it was held after the members of the Committee had been appointed (and four of them were present in Maastricht), but before they held their first session, and at a time when, although the significance of the Covenant on Economic, Social and Cultural Rights was clearly recognized, it listed rights that were still largely underexplored by human rights scholars and underenforced by courts. The Limburg Principles that were adopted at the Maastricht meeting marked an important advance in the understanding of economic, social and cultural rights, and their influence further increased after they were officially transmitted to the Commission on Human Rights at the request of the Netherlands.[16] More or less simultaneously, Philip Alston, a Committee member who was to become its first rapporteur, published an important paper identifying the challenges facing the new committee established by the Economic and Social Council to examine the reports submitted by States parties to the Covenant.[17] In a contribution written jointly with Gerard Quinn that provides the most extensive analysis of the understanding of States' obligations having guided the drafters of the Covenant, even he had to

[14] Mark Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels' (1978) 9 *Revue des droits de l'homme*, 69; E. W.; Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law*, 69–105. There were exceptions, of course: G. J. H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views', in Philip Alston and Katarina Tomaševski (eds.), *The Right to Food* (Netherlands Institute of Human Rights [SIM], Dordrecht, The Netherlands: Martinus Nijhoff, 1984), pp. 7–110.

[15] The expert meeting was convened at the invitation of the International Commission of Jurists, the Urban Morgan Institute on Human Rights and the Centre for Human Rights of the Faculty of Law of Maastricht University.

[16] See UN Commission on Human Rights, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 8 January 1987, UN doc. E/CN.4/1987/17.

[17] Philip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly*, 332–381.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

concede, however, that precise benchmarks to assess budgetary efforts by the States were lacking, so that a procedural approach might ultimately be more appropriate:

> It is the state of a country's economy that most vitally determines the level of its obligations as they relate to any of the enumerated rights under the Covenant. From an evaluation of these circumstances flows a picture of a state's abilities and from this may be determined the thresholds it must meet in discharging its obligations. In ascertaining the quantum of resources to be set aside to promote realization of the rights, the state is of course entitled to a wide measure of discretion. Nevertheless such discretion cannot be entirely open-ended or it would have the de facto effect of nullifying the existence of any real obligation. ... While the Covenant itself is, inevitably, devoid of specific allocational benchmarks, there is presumably a process requirement by which states might be requested to show that adequate consideration has been given to the possible resources available to satisfy each of the Covenant's requirements, even if the effort was ultimately unsuccessful. If a state is unable to do so then it fails to meet its obligation of conduct to ensure a principled policy-making process – one reflecting a sense of the importance of the relevant rights. In summary it may suffice to say that a plea of resource scarcity *simpliciter*, if substantiated, is entitled to deference especially where a state shows adherence to a regular and principled decision-making process. In the final resort, however, such a plea remains open to some sort of objective scrutiny by the body entrusted with responsibility for supervising states' compliance with their obligations under the Covenant.[18]

Though there has been no shortage of goodwill, little has been achieved since to clarify which obligations the Covenant imposes on States in the adoption and implementation of public budgets. The Committee has made it clear that the Covenant 'neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps [to be taken to implement the Covenant rights], provided only that it is democratic and that all human rights are thereby respected. [In] terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy,

[18] Philip Alston and Gerard Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly*, 156–229, at 177 and 181.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

or upon any other particular approach'.[19] Nevertheless, it added, the Covenant 'imposes an obligation to move as expeditiously and effectively as possible towards [the] goal [of the full realization of economic, social and cultural rights]'.[20] The Committee thereby asserted its willingness to assess both the mobilization of resources and the budgetary priorities the States adopt against this overall objective of the Covenant. For instance, whereas guaranteeing the right to social security may have significant financial implications for States, 'the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy'.[21]

While the principle is well established, the concrete implications are few. Four norms however do enjoy broad support, and clarify to a certain extent what the duty of progressive realization consists in. It follows from this general requirement, first, that 'any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[22] As regards the right to social security for instance, when faced with retrogressive measures adopted by States, the Committee will examine whether: '(a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the

[19] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations, 14 December 1990, E/1991/23; Annex III, UN ESCOR, Supp. (No. 3) (1991), at 83.

[20] Ibid., para. 9.

[21] CESCR, General Comment No. 19: The Right to Social Security, 4 February 2008, E/C.12/GC/19, art. 9(41).

[22] Ibid. See also the letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (noting that, to comply with the Covenant, austerity measures or adjustment programmes, as have been adopted by a number of States to face the financial and economic crisis after 2009, must be 'necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights').

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

national level'.[23] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted in 1997 on the occasion of the tenth anniversary of the Limburg Principles,[24] express this idea by listing among the acts of commission leading to the violation of Covenant rights 'the reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone'.[25]

A second requirement is that, when facing resource constraints, the State should demonstrate that it has given priority to the 'satisfaction of, at the very least, minimum essential levels of each of the rights' of the Covenant, which correspond to the core obligations of States under this instrument: the Committee expresses the view that 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant'.[26] The idea was already expressed in 1986 in the Limburg Principles, which stated that 'States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all'.[27] In various General Comments and statements, the Committee underlined that the duties to secure freedom from hunger,[28] to guarantee access to water to satisfy basic needs,[29] access to essential drugs[30] or to education complying with 'minimum educational standards',[31] or the enjoyment of a social

[23] General Comment No. 19, para. 42.

[24] The Maastricht Guidelines were adopted by a group of experts convened in Maastricht from 22–26 January 1997 at the invitation of the same organisations that had already invited 29 experts in Maastricht in June 1986, for the adoption of the Limburg Principles. See further Victor Dankwa, Cees Flinterman and Scott Leckie, 'Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 705–730.

[25] Maastricht Guidelines, para. 14(g).

[26] General Comment No. 3, para. 10.

[27] Ibid., at para. 25.

[28] CESCR, General Comment No. 12: The Right to Adequate Food, 12 May 1999, E/C.12/1999/5, paras. 6, 14, and 17.

[29] CESCR, General Comment No. 15: The Right to Water, 20 January 2003, E/C.12/2002/11, para. 37.

[30] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 11 August 2000, E/C.12/2000/4, para. 43.

[31] CESCR, General Comment No. 13: The Right to Education, 8 December 1999, E/C.12/1999/10, para. 57.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

protection floor,[32] form part of such core obligations, which any State, at any level of development, should presumptively be in a position to secure.[33]

Third, the States parties to the Covenant have undertaken to 'guarantee that the rights enunciated in the ... Covenant will be exercised without discrimination'.[34] This implies not only a duty to remove discriminatory provisions from the States' constitution, legislation or policy documents, but also that substantive discrimination be addressed: in the realization of economic, social and cultural rights, priority should therefore be given to improving the situation of groups that have traditionally been marginalized or disadvantaged.[35] This implies dedicating greater resources to groups who face systemic discrimination.[36] In his Letter of 16 May 2012 to the States parties to the Covenant on austerity measures, the Chairperson of the Committee emphasized that fiscal consolidation policies 'must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected'. The non-discrimination requirement also implies that the Committee shall be particularly attentive to any budgetary measure that would lower the level of provision of certain public services, such as in the areas of education, or of water or electricity provision, or that would diminish the right to social security, including the right to old age pension because such budgetary choices may have especially severe impacts on women who – in the current division of gender roles that is still dominant in most regions of the world – have

[32] The letter addressed on 16 May 2012 by the Chairperson of the Committee to the States parties on austerity measures, similarly notes that the policy adopted 'must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times'.

[33] See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 10 ('resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights').

[34] See art. 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (requiring that the rights of the Covenant be guaranteed without discrimination, and in particular, that men and women are ensured equal rights in the enjoyment of these rights); Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, 2 July 2009, E/C.12/GC/20, art. 2(2).

[35] General Comment No. 20, para. 8.

[36] Ibid., para. 39.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

traditionally been assuming the burden of caring for infants, children and the elderly, and have been fetching firewood or water to meet the household needs.[37]

Fourth, although the Covenant on Economic, Social and Cultural Rights is silent about such a requirement, the principle of participation is relevant to assessing whether the budgetary choices made by States comply with its prescriptions. Such a right to participation follows from the right to self-determination, defined in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as the right of peoples to freely dispose of their natural wealth and resources. This implies that 'a State's population has a right to enjoy a fair share of the financial and social benefits that natural resources can bring. This requires ensuring participation, access to information and high standards of transparency and accountability in decision-making about the use of natural resources'.[38] The Committee has made it clear that the requirement of participation goes beyond the exploitation of natural resources, however. For instance, where retrogressive measures are adopted in the area of social security, it considers it relevant to ask whether such measures were taken with the 'genuine participation of affected groups in examining the proposed measures and alternatives',[39] and where a State cannot ensure a minimum level of protection against all risks and contingencies of life, it is recommended that it 'select a core group of social risks and contingencies', based on 'a wide process of consultation'.[40]

The duty of non-retrogression, the priority to be given to the fulfilment of core obligations, the requirements of non-discrimination and of participation: these are important norms, all highly relevant to assessing the budgetary choices of States. They are what might be called the 'constitutional background norms' that should guide such choices. But they still are expressed at a high level of generality, and they hardly suffice to provide monitoring bodies with a methodology allowing them, except in relatively extreme cases, to decide whether, in making these choices,

[37] See Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 68th session of the General Assembly, 9 August 2013, A/68/293.

[38] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 18.

[39] General Comment No. 19, para. 42.

[40] Ibid., para. 59.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

States have, or have not, complied with the duty of progressive realization of Covenant rights. There is a duty, for instance, to ensure protection of at least the 'minimum essential levels' of the rights of the Covenant, and this 'core obligation' is presumed to apply to all States, whatever their level of development. But even such a presumption cannot be absolute: '[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[41] Moreover, how these different constitutional background norms relate to one another remains unclear. For instance, may retrogressive measures be adopted for the sake of achieving greater equality? May such measures be adopted to ensure intergenerational equity, for instance where they are justified by the need to reduce the weight of the public debt?

Finally, but perhaps most importantly, these background norms betray a bias towards the preservation of the status quo: perhaps because the doctrine of the Committee has developed in order to provide courts with guidance as to how they could apply the Covenant rights, they favour the protection of the existing entitlements, which courts are better equipped to ensure, above the need to design and implement redistributive policies. In contrast to the preservation of existing levels of rights enjoyment, which the limitation clause of Article 4 of the Covenant or the non-retrogression doctrine are designed to ensure, redistributive policies require that trade-offs be made between the better off and the worse off within society. Here judges feel less comfortable. Indeed, much as it is difficult for courts to impose that a State discharges 'positive duties' towards its population where such obligations are based only on certain vague provisions of the constitution or found in international law, it is more easily accepted that they intervene to protect existing entitlements, or that they impose 'negative duties' to refrain from diminishing existing levels of enjoyment of rights. However, it is precisely then – when they act to preserve the *droits acquis* or the entitlements that individuals already enjoy, as it were – that the courts contribute the least to strengthening the position of the most powerless because the poorest among the poor simply have no entitlements to be protected.[42]

[41] General Comment No. 3, para. 10.

[42] See, for a similar critique in the domestic constitutional context, David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal*, 1,

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

There we must go further. But can we? May we equip courts and other human rights mechanisms with the tools they need to assess macroeconomic policies, resource mobilization and spending choices, so that the economic, social and cultural rights of the poor are finally prioritized? It is tempting to answer that we need not. The next part examines two arguments according to which the quest to define the duties of States as regards resource mobilization and spending is, in effect, a distraction – unnecessary at best, and at worst undermining the credibility of economic, social and cultural rights as rights. One argument is that we need to model the supervision of compliance with economic, social and cultural rights on that of the more classic civil and political rights, adopting what has been called a 'violations approach' to the International Covenant on Economic, Social and Cultural Rights.[43] Another argument is that outcomes are all that matter: we should focus all our attention on the level of enjoyment of economic, social and cultural rights, and waste no time considering whether that level is reached thanks to the efforts deployed by the State, or through the workings of the market and other actors' initiatives. The two arguments are examined in turn.

III. Escaping the Burden of Progressive Realization

A. The 'Violations Approach' to the Covenant

In an influential article published 20 years ago, Audrey Chapman takes the view that human rights lawyers should abandon the quest for a benchmark by which to assess 'progressive realization'.[44] This search, ultimately, risks undermining the task of monitoring, distracting us from the more urgent task of addressing the most egregious violations of economic and social rights. Instead, a 'more feasible and effective alternative' would consist in focusing on 'three types of violations: (1) violations resulting from actions and policies on the part of governments;

189–247 (noting the paradox that it is precisely where the courts intervene with the greatest legitimacy, by preserving existing entitlements or prohibiting steps backwards in the realization of economic and social rights, that they are least able to bring about the kind of social change that would truly benefit the disempowered and the marginalized).

[43] Audrey R. Chapman, '"Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly*, 23–66. See also the editors' introduction to Audrey R. Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp, Oxford and New York, NY: Intersentia, 2002).

[44] Chapman, 'Violations Approach', 23.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

(2) violations related to patterns of discrimination; and (3) violations taking place due to a state's failure to fulfill the minimum core obligations contained in the Covenant'.[45] In later publications, Chapman insisted that this focus did not mean lowering the bar for States. Quite to the contrary, in her view:

> [If] states actually *did* fulfill their core obligations, it would in most cases represent significant progress. The purpose of the minimum state obligations approach is not to give states an escape hatch for avoiding their responsibilities under the Covenant. It is in fact the opposite: a way to accommodate the reality that many economic, social and cultural rights (and often civil and political rights as well) require resources that are simply not available in poor countries. The minimum state obligations approach affirms that even in highly strained circumstances, a state has irreducible obligations that it is assumed to be able to meet. If it cannot, the burden of proof shifts to the state to justify its claim of the need to cut back. By definition, minimum core obligations apply irrespective of the availability of resources or any other factors and difficulties.[46]

The intention behind the proposal is clear: it is to strengthen the credibility of the monitoring of the Covenant, by adopting a position of restraint that would allow the Committee to tackle only the most obvious cases, where the conduct of the government is clearly below the standards of acceptability.

The idea that the monitoring of the Covenant would be facilitated by the identification, within each of the rights, of an 'essential content', corresponding to a set of 'core obligations' imposed on all States, has a strong pedigree. It already took centre stage during the discussions that led to the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights adopted in 1986.[47] The experts who developed the Principles agreed that, though resources available to each State matter to assess the scope of that State's obligations to realize economic, social and cultural rights, each State should 'ensure respect for minimum subsistence rights for all', 'regardless of the level of economic development'.[48] The expression of 'minimum

[45] Ibid.

[46] Audrey R. Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights', in Shareen Hertel and Lanse Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge: Cambridge University Press, 2007), pp. 143–164, at 154.

[47] UN Commission on Human Rights, Limburg Principles.

[48] Ibid., para. 25.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

subsistence rights' found support in particular with Philip Alston, a member of the Committee who, writing in his academic capacity, also urged that the Committee should 'find a way of conveying to states the fact that priority must be accorded to the satisfaction of minimum subsistence levels of enjoyment of the relevant rights by *all* individuals'.[49] Unsurprisingly, the views expressed by the Limburg Principles soon found their way into the doctrine elaborated by the Committee on Economic, Social and Cultural Rights, after Alston convinced his colleagues about the need to clarify the content of the obligations the Covenant imposed on States.[50] It is this effort that resulted in the adoption by the Committee of General Comment No. 3, which as we have seen details the nature of States' obligations under Article 2(1) of the Covenant:[51] the Committee expresses the view in this General Comment that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.[52]

The doctrine presents two major infirmities, however, which significantly limit its usefulness as a guide in the jurisprudence of the Committee. First, as already noted,[53] the identification of the 'minimum essential content' does *not* imply that the question of resources simply becomes irrelevant: even a State that fails to guarantee that minimum level of enjoyment may argue that such failure is attributable to a lack of available resources, provided it demonstrates that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[54] Identifying certain core components does serve to shift the burden of proof: it imposes on the

[49] Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights', 359–360.

[50] Summary Record of the 3rd Meeting, Committee on Economic, Social and Cultural Rights, 3rd Sess., at p. 3, UN Doc. E/C.12/1989/SR.3.

[51] General Comment No. 3.

[52] Ibid., para. 10.

[53] See ibid.

[54] General Comment No. 3, para. 3. In 1997, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights stated that the minimum core obligations referred to in General Comment No. 3 'apply *irrespective of* the availability of resources of the country concerned or any other factors and difficulties' (para. 9; emphasis added). This is not an accurate reading of the Committee's own position. Although it is true that (as correctly stated by the Maastricht Guidelines) 'resource scarcity does not *relieve* States of certain minimum obligations in respect of the implementation of economic, social and cultural rights' (para. 10; emphasis added), this does not imply that resource availability is *irrelevant* in assessing whether the duty to guarantee at least the minimum essential

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

State that it makes a convincing case that, even by calling upon international support, it is unable to finance what it would take to deliver even that 'essential content' of the right. Should the State fail to make that case, it will be presumed that it has not been complying with its obligations to prioritize the fulfilment of economic and social rights under its jurisdiction. In that sense, reliance on the 'core content' of a right introduces a baseline that is less dependent on the degree of realization of the right that is already attained in any particular State.[55] It also helps defining priorities both for domestic efforts towards the fulfilment of human rights obligations, and for international assistance and cooperation.[56]

content of rights is complied with: the position of the Committee, rather, is that the burden shall be on the State to prove that it has done everything in its capacity to ensure at least that level of guarantee. Audrey Chapman took part in the expert meeting held in Maastricht in January 1997, but she overstates her case in which she suggests that the meeting took up the approach she advocated (see Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights', 155). More recently, the Committee confirmed its view that resource availability remains relevant even as regards the satisfaction of the 'core content' of rights: see General Comment No. 12, para. 17: 'Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations'; or Committee on Economic, Social and Cultural Rights, *Statement on an Evaluation of the Obligations to Take Steps to the 'Maximum Available Resources' under an Optional Protocol to the Covenant* (Thirty-eighth session, 2007) (E/C12/2007/1), para. 6: 'As regards the core obligations of States parties in relation to each of the Covenant rights, General Comment No. 3 states that, for a State party to be able to attribute its failure to meet its core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those core obligations'.

[55] As noted by Robertson: '[T]here is an assumption, though a rebuttable one in the eyes of the Committee, that every state possesses sufficient resources for subsistence purposes if they define resources broadly enough and are sufficiently aggressive in resource acquisition' (Robertson, 'Measuring State Compliance', 702).

[56] The Committee on Economic, Social and Cultural Rights has referred to an obligation to prioritise the core obligations aimed at ensuring the minimum essential levels of rights in the context of international cooperation, stating that: '[C]ore human rights obligations create national obligations for all States, and international responsibilities for developed States, as well as others that are in a "position to assist"' (Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* [2001] [E/C.12/2001/10], para. 16): 'When grouped together', the Committee added, 'the core obligations establish an international minimum threshold that all developmental policies should be designed to respect … [The duty of international assistance and cooperation] is particularly incumbent on all [the States] who can assist, to help developing countries respect this international minimum threshold. If a national or international anti-poverty strategy does not reflect this minimum threshold, it is

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

It does not, however, allow to dispense completely with considerations related to resource availability: the presumption that is established is relative, not absolute.

Second, how this 'minimum essential content' of the Covenant rights is to be determined remains contested. Because Article 11 of the Covenant refers in paragraph 2 to 'the fundamental right of everyone to be free from hunger', in addition to its more general reference in paragraph 1 to 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions', the Committee could easily define the core obligation corresponding to the right to food as an obligation to 'take the necessary action to mitigate and alleviate hunger'.[57] Perhaps this underestimated the complexity of the task, but it had the advantage, at least, of being clearly linked to the text of the Covenant. Not all rights allow for such an easy identification of the 'core content', however. As regards the right to education guaranteed under Article 13 of the Covenant, the Committee considers that 'this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a) [which provides that primary education shall be compulsory and available free to all]; to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13 (3) and (4))'.[58] In its General Comment No. 14 on the right to the highest attainable standard of health, the Committee provides the following description of 'core obligations' corresponding to this right:

inconsistent with the legally binding obligations of the State party' (ibid, at para. 17). On international duties of assistance and cooperation, see text corresponding to notes 151–170.

[57] General Comment No. 12, para. 6. See also ibid., para. 14 ('Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger'), and para. 17 ('Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger').

[58] General Comment No. 13, para. 57.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
(d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
(e) To ensure equitable distribution of all health facilities, goods and services;
(f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.[59]

A similar list is provided in the Committee's discussions of the right to water[60] and of the right to work, where it consists in an elaborate description of the requirements of non-discrimination and equal protection of employment.[61]

The 'core content' of the rights stipulated in the Covenant, it appears from these examples, includes three components: (1) a *basic needs* requirement, ensuring that each individual is not deprived of essential goods or services that keep him/her safe, physically and emotionally, and protect him from permanent social exclusion: this would include basic shelter, adequate food, water and sanitation, and essential drugs, but also access to primary education;[62] (2) a *non-discrimination* requirement,

[59] General Comment No. 14, para. 43. In para. 44, the Committee adds a list of five obligations of 'comparable priority'.
[60] General Comment No. 15, para. 37.
[61] CESCR, General Comment No. 18: The Right to Work, 6 February 2006, E/C.12/GC/18, art. 6(31).
[62] In 1982, the International Labour Organisation (ILO) identified as 'basic needs' the following: 'First, certain minimum requirements of a family for private consumption: adequate food, shelter and clothing, as well as certain household equipment and furniture. Second, they include essential services provided by and for the community at large,

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

ensuring that any progress made in the realization of the right in question benefit all without discrimination, and that where distribution issues arise, priority be given to the most disadvantaged and marginalized groups;[63] and (3) a *procedural obligation*, requiring from the State that, having identified the key challenges associated with the realization of each right, it designs and implements a strategy that will put it on track of moving towards the full realization of the right for all.[64]

It follows from these attempts at circumscribing the 'core content' of rights that the fulfilment of the corresponding obligations is neither costless – particularly not the duties corresponding to the 'basic needs' component, which requires States, for instance, to set up primary health-care centres and to ensure that all have access to primary schools at a reasonable distance from the home – nor even finite:[65] this is why the

such as safe drinking water, sanitation, public transport and health, educational and cultural facilities' (ILO, *Target Setting for Basic Needs* [Geneva: ILO, 1982]) at p. 1. See also Trubek, 'Economic, Social and Cultural Rights in the Third World', 206 (referring to the core rights linked to subsistence as 'what is most basic and universal . . . Behind all the specific rights enshrined in international documents and supported by international activity lies a social view of individual welfare').

[63] See text corresponding to notes 34–37.

[64] Referring to the immediate obligations that would follow from a ratification of the Covenant by the United States, which the Carter administration had transmitted to the Senate in 1978 accompanied by a statement according to which, in the understanding of the United States, the Covenant describes 'goals to be achieved progressively rather than through immediate implementation', Philip Alston, a member at the time of the Committee on Economic, Social and Cultural Rights, writes that this view is incorrect because there is an immediate requirement to take steps towards full realization of the right of the Covenant: 'The starting point for a program to implement economic and social rights is to ascertain, as precisely as possible, the nature of the existing situation with respect to each right, so as to identify more clearly the problems that need to be addressed and provide a basis for principled policy making' (Philip Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an entirely New Strategy' [1990] 84 *American Journal of International Law*, 365–393, at 379).

[65] This is true even for the requirement of non-discrimination. As illustrated by CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, 2 July 2009, E/C.12/GC/20, the prohibition of discrimination in international human rights law includes (1) a prohibition of differential treatment that is based on any ground such as race, colour, disability, sex, sexual orientation and gender identity, language, religion, political or other opinion, national or social origin, property, birth or other status, and that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms; (2) a prohibition of any action or omission that, whether intended or not, disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting de facto discrimination; (3) a duty to adopt special measures to attenuate or suppress conditions that perpetuate discrimination to eliminate

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

question of which resources are available to the State still matters, even for the satisfaction of this minimum, and why we can hardly pretend that the 'maximum available resources' vanishes once a definition of the 'core content' is agreed.

Another concern is that the definition of such 'core content' may appear arbitrary, even if we limit ourselves to the first, 'needs-based' requirement listed in the preceding text. Katharine Young notes that the 'core content' of economic and social rights listed in the Covenant is identified, alternatively, through four pathways, to which different justifications correspond.[66] While the 'core content' often is described as a 'needs-based core', in which the 'core' is derived from the basic needs of the individual, and particularly his or her survival needs, in line with the theories of development *en vogue* in the 1970s, other approaches also permeate the doctrine of the Committee. The 'core content' is sometimes defined as a 'value-based core', in which its contours are based on what is required by certain basic values such as the dignity of the individual, equality or freedom. Or, following a third approach, the 'core content' may be seen as the result of a consensus that gradually takes shape across jurisdictions, across States (as expressed in international declarations in which governments profess their attachment to certain 'core' dimensions of economic and social rights), or across experts of the concerned fields – such as public health, education or housing – that correspond to the rights of the Covenant. Finally, a fourth approach would be to define the 'core content' taking as a departure point the corresponding obligations, and asking what can reasonably be demanded from the State immediately, rather than being left to be subject to progressive realization: by paying attention to the remedial dimension associated with the 'core content', we would be able to define the 'core' based on what can practically be achieved. Young concludes that none of these approaches is convincing and that, taken together, they result in a doctrine that is neither principled nor, for that matter, legitimate. She finds that the various functions the 'core content' approach to economic and social rights is meant to fulfil would be better served by abandoning the

de facto discrimination: such measures are considered legitimate to the extent that they represent reasonable, objective and proportionate means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Thus, equality of treatment calls for an ongoing process of addressing inequalities.

[66] Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal on International Law*, 113–175.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

approach altogether. Instead, she suggests, we should rely on indicators and benchmarks (to track progress in the realization of the rights) and on classic notions of responsibility and causality (where violations are alleged to result from certain measures being adopted by States that infringe on the enjoyment of economic and social rights).[67]

The inconsistency of current definitions of the 'core content' may be simply an indication of the impasse we encounter when we try to bracket away the 'progressive realization' clause of the Covenant, ignoring both its novelty and its subversive potential. Indeed, it shall come as no surprise that many commentators considered that the proposal made by Audrey Chapman might represent a step backwards, not forward – in her own words 'weaken[ing] the calls for a full implementation of the rights of the Covenant by concentrating on the most flagrant abuses'.[68] For instance, writing the right to health, Brigit Toebes notes that clarifying the 'core content' of that right may encourage States to 'put the elements not contained by the core into an "indefinite."'[69] Young makes a similar critique in her article already cited, though with a more ideological spin. She writes that 'the minimalist focus within the core may well legitimate neoliberalism, especially if the claim for the minimum core is made in order to increase the bundles of commodities or consumption share of the disadvantaged, while failing to challenge the underlying economic institutions which have produced the disadvantage in the first place'.[70] Indeed, by focusing on the core content of economic and social rights – providing the poor and marginalized with the essential minimum that they require to live healthy lives in dignity, while neglecting the other requirements associated with the progressive realization of the promises of the Covenant, we do not question the structures that cause the poverty and marginalization of the victims in the first place: we leave them untouched, while guaranteeing a 'floor' to the individual that avoids him or her falling permanently into extreme poverty.[71]

[67] Ibid., at 165.
[68] Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights', 156.
[69] Birgit Toebes, 'The Right to Health', in Asbjorn Eide, Catharina Krause and Alan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd ed. (Dordrecht, The Netherlands: Martinus Nijhoff, 2001), pp. 169–190, at 176 ('in addition to the core to be realized immediately, there is the remainder of a right which is to be realized progressively').
[70] Young, 'The Minimum Core of Economic and Social Rights', 174.
[71] There is a troubling analogy between the 'core content' approach to economic and social rights and the 'negative income tax' proposed by Milton Friedman as the measure that would be best suited to combat poverty without distorting the market and creating the

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

More recently – troubled, perhaps, by such critiques – Chapman recognized that her 'violations approach' should, perhaps more suitably, be treated as just one methodology among others: 'It is obviously important to go beyond a "violations approach" so as to provide a positive guideline on how best to implement the rights in question, and to assess whether particular states parties are making reasonable progress in improving their human rights implementation'.[72] To 'go beyond' the 'violations approach', in this context, can only mean one thing: to abandon it, once it is recognized that this approach betrays the originality of the duty of States to 'progressively realize' the rights listed in the Covenant, which requires a permanent, and potentially limitless, effort to make them more real.

B. The 'Outcomes-Based Approach' to the Covenant

There is another escape route from the 'progressive realization' clause: it is to focus all our attention on the situation of the individual (on his or her *achievements*, one might say in Sen's terminology),[73] rather than on whether the State has put enough resources into improving that situation. Indeed, one may be tempted to argue, from the point of view of the individual rights-holder, outcomes matter, not means. He or she cares not about how public policies are shaped, for instance, but about whether housing, education and health care are affordable and of decent quality. Should it matter whether the State chooses to ensure such outcomes not by investing public resources, but by trusting private service providers? Consider a State in which the public sector represents a small proportion

wrong incentives: see Milton Friedman, *Capitalism and Freedom* (Chicago, IL: University of Chicago Press, 2002) (originally published in 1962), ch. 11. Young does not draw this analogy, however. Rather, she refers on this point to the work of Philip Harvey, who argues that economic and social rights challenge the utility maximization norm that is at the core of neo-classical economics and utilitarianism more generally (Philip Harvey, 'Human Rights and Economic Policy Discourse: Taking Economic and Social Human Rights Seriously' [2002] 33 *Columbia Human Rights Law Review*, 363; and Philip Harvey, 'Aspirational Law' [2004] 52 *Buffalo Law Review*, 701–726, at 705). Whatever the approach, it is clear that the subversive dimension of economic and social rights is that they are more than simply a relief measure, making tolerable the exclusion otherwise produced by the market mechanisms; it is this dimension that might be lost if we content ourselves with an approach focused on the 'core content'.

[72] Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights', 156.

[73] See in particular Amartya Sen, *Commodities and Capabilities* (Amsterdam, The Netherlands: North-Holland, 1985).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

of the GDP, and in which redistributive policies and spending for social policies are weak, but in which the outcomes are satisfactory. Should such a State be seen as acting in violation of its undertakings under the Covenant, although according to standard development indicators, the levels of enjoyment of economic, social and cultural rights are relatively high compared to similarly situated countries?

To answer, we must understand how outcomes cannot be fully separated from how, and by whom, the goods and services essential to the enjoyment of such rights are delivered. It is true, of course, that States are recognized broad discretion as to how they should discharge their duties under the Convention. Except for certain provisions that define which steps States should take,[74] the Covenant refrains from imposing specific obligations of conduct (except for the elementary but at the same time vague obligation to take active steps towards the realization of Covenant rights),[75] and provided other human rights norms are complied with (in particular, requirements of participation and accountability), it should not matter whether the outcomes required are achieved by supporting initiatives in the private sector or by public services. Indeed, that would seem to follow from the professed neutrality of the Covenant vis-à-vis different conceptions of the role of the State in the economy.[76]

Such a conclusion should be treated with caution, however. Privatization – broadly understood as the choice to ensure that private actors shall provide the services and deliver the goods required for the

[74] For instance, to adopt 'technical and vocational guidance and training programmes' for the fulfilment of the right to work (Art. 6, para. 2), or to 'disseminat[e] knowledge of the principles of nutrition' and to '[develop or reform] agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources' to guarantee freedom from hunger (Art. 11, para. 2, b). It follows from such prescriptions, that address not only the result to be achieved but also the means through which they should be attained, that States must commit the resources required for the implementation of such public policies.

[75] See Alston and Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', at 185 (stating that the Covenant obligations 'can best be understood as hybrids between obligations of result and obligations of conduct. They are obligations of result in the sense that states must match their performance with their objective capabilities. They are loose obligations of conduct in the sense that states are obliged to take active, though largely unspecified, steps toward their satisfaction. This hybrid mixture of obligation types is due to the fact that the concept of "progressive achievement" mandates the existence of an ongoing process of development the adequacy of which is loosely controlled by norms deduced from a state's objective capabilities').

[76] See General Comment No. 3, para. 9.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

enjoyment of social, economic and cultural rights, rather than such services or goods being provided by the State – may be problematic for three, analytically distinct reasons.[77]

1. The Risk of Exclusion

First, of course, there is the risk of exclusion. The provision by the private sector of services such as health care, education, housing, potable water or electricity (both of which are conditions of adequate housing),[78] may deprive certain groups of the population from access to such services. This may be the result of the imposition of users' fees by private actors who act with a profit motive.[79] It can also be the consequence of the building of infrastructures or the design of products favoring the high end of the market – for markets, we should never forget, are a form of plutocracy: they respond to *demand*, as expressed by those with the highest purchasing power, rather than to the real *needs* of people with low incomes, who do not have an equal ability to 'vote' to shape the demand curve.[80] The reality of such exclusion may in part be hidden by the burden shifting on families: the unpaid work of women may partly make up for the retreat of the State to provide services, and families can accumulate debt to compensate for their lack of income.[81] But such

[77] For fuller treatments of this issue, see Koen de Feyter and Felipe Gómez Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia, 2005); and Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (Philadelphia, PA: University of Pennsylvania Press, 2016).

[78] The 'adequate house', in the view of the Committee on Economic, Social and Cultural Rights, is one that, in particular, ensures access to 'safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities' and is 'in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities [in particular because] the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households', CESCR, General Comment No. 4: The Right to Adequate Housing, 13 December 1991, E/1992/23, para. 8(b) and (f).

[79] See in this regard, *inter alia*, Ian Macpherson, Susan Robertson and Geoffrey Walford (eds.), *Education, Privatization and Social Justice: Case Studies from Africa, South Asia and South East Asia* (Oxford: Symposium Books, 2014) (education); Matthias Finger and Jeremy Allouche, *Water Privatization – Trans-National Corporations and the Re-Regulation of the Water Industry* (London: Spon Press, 2002) (water); Karen Bakker, *Privatizing Water: Governance Failure and the World's Urban Water Crisis* (Ithaca, NY: Cornell University Press, 2010) (same).

[80] Tibor Scitovsky, *The Joyless Economy: The Psychology of Human Satisfaction* (Oxford: Oxford University Press, 1992), p. 8.

[81] In the area of housing, excessive borrowing by households has in effect become a substitute for redistributive social policies and subsidies to support access to housing:

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

'solutions' worsen the gender gap and they should be seen only, at best, as temporary stopgaps – not as solutions.

2. Quality Monitoring

The second risk is that even when the poor have access to the services concerned, the services provided may be of substandard quality. This may be true particularly in areas such as health care or education where quality matters as much as volume and may be more difficult to assess by the average user, so that private service providers may be tempted to sacrifice quality for profitability.[82] The risk is particularly high because the possibilities for the users to hold private service providers accountable are generally rather weak. Indeed, whereas in democratic States poor performance of public services may be challenged by voters, such accountability mechanisms are generally absent where private actors provide services: although the government could still be held accountable for its failure to control adequately such provision of services by the private sector, such a form of accountability is more indirect and generally less effective.[83]

see, on the links between the retreat of the State from the housing sector and the 2008–2009 financial crisis, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living to the 10th session of the Human Rights Council, 4 February 2009, A/HRC/10/7.

[82] On the problem of asymmetry of information making it difficult for the average consumer to sanction sellers of goods or service providers, see George A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics*, 3, 488–500. This inability for the user to assess the quality of the service provided is one of the reasons why the normal route through which the user may express dissatisfaction, which is to 'exit' to another service provider, may provide a very weak check against poor service quality, a limitation Albert O. Hirschman may have been insufficiently attentive to in the important book he published the same year the article by Akerlof appeared: Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge, MA: Harvard University Press, 1970). The other limitation, of course, is that many services that are essential to the enjoyment of economic and social rights – such as water, electricity or certain means of transportation such as railroads, services that are related to the right to water and to the right to housing – are 'natural monopolies': due to the costs of the initial infrastructural investment, it would be highly irrational from the economic point of view to have more than one service provider setting up the infrastructure. The implication is that, in many cases, the user will be facing only one service provider, in a monopoly position in the area concerned.

[83] Specific difficulties arise where foreign actors are tasked with the provision of services that contribute to the realization of economic, social and cultural rights: in addition to the often strong bargaining power they have in their relationship with the host government, their rights as investors are generally protected under customary international law or

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Privatization therefore may result in the richest segments of society receiving a better service, worsening the impacts of income inequality on the enjoyment of basic rights: even where the poorest groups do have access to goods or services provided by the private sector, such services may be of substandard quality, without any effective means for the poor to challenge this situation or even without them being aware of how much this is penalizing them. Therefore, whereas privatization is not per se prohibited by the Covenant even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong, private providers at the very least should be subject to strict regulations, imposing on them so-called public service obligations: in the provision of water or electricity, this may include requirements concerning universality of coverage and the continuity of the service, pricing policies, quality requirements and user participation;[84] it may concern the qualifications of teachers and the pupil/teacher ratio, or the quality of educational materials, in the provision of education.[85]

Whether appropriate regulation of that sort is always a substitute to the provision of such services by the State remains an open question. For non-governmental watchdogs and human rights bodies seeking to assess whether public budgets are effectively designed in accordance with the requirements of human rights, however, this uncertainty is vexing: should they focus, as a measure of whether the State invests enough in health, education or housing, on the level of investments in these

through investment treaties, weakening the possibilities for host States in which they operate to sanction any violation of economic, social and cultural rights that they may commit. See e.g., Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford and Portland, OR: Hart Publ., 2006), pp. 73–160.

[84] See e.g., Human Rights Council Resolution 15/9: Human Rights and Access to Safe Drinking Water and Sanitation, 6 October 2010, A/HRC/RES/15/9 (noting that 'the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations').

[85] See e.g., Human Rights Council Resolution 32/L.33: The Right to Education, 26 June 2016, A/HRC/RES/32/L.33 para. 2(e) (urging States to comply with their obligations 'to respect, protect and fulfil the right to education by all appropriate means, including by . . . [p]utting in place a regulatory framework for education providers, including those operating independently or in partnership with States, guided by international human rights obligations, that establishes, inter alia, minimum norms and standards for the creation and operation of educational services, addresses any negative impacts of the commercialization of education, and strengthens access to appropriate remedies and reparation for victims of violations of the right to education').

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

respective sectors as a percentage of the country's GDP, *combining* private and public investment, or should they focus instead on the level of *governmental* expenditure, as indicated for instance by the share of the public budget that goes to such sectors?

In low-income countries, where a large part of the population has a very low purchasing power – and one, certainly, too low for them to be an attractive market for private service providers, except at the expense of quality, it does seem sensible to require from governments that they make up for this massive market failure: however efficient (indeed, precisely *because* they are efficiency driven), markets shall not, and could not, compensate for widespread poverty. In such contexts, setting as a benchmark a minimum level of intervention of the government in meeting the costs of health care, education, electricity or transport appears as the only reasonable option. To ensure that the basic needs of the population are met in all countries, but that the availability, accessibility and adequacy of the services gradually increase as the ability for the government to deliver such services improves, two separate indicators may be designed, referring respectively to the minimum public expenditure per capita and to the expected public expenditure in the sector concerned as a percentage of the country's wealth.

Thus, when experts convened in Chatham House to define the appropriate level of governmental spending in health care, they settled on two targets, one representing the absolute governmental spending per capita per year that should go to health care (86 USD), and the other representing the percentage of the total GDP of the country that should go to health care (5 per cent): this latter indicator, the experts noted, is important to include, because '[w]hile $86 may ensure priority services for everyone, it is clearly insufficient to meet all important health needs, and GHE [governmental health expenditure] therefore needs to be progressively increased [in line with the overall growth of the country's economy]'; the former indicator, however, is equally important to maintain because 'GHE/GDP of 5 per cent may be insufficient to ensure priority services in poor countries', and therefore it is justified, in these poor countries, to set a minimum benchmark corresponding to what would seem to cover at least basic health needs. As to the 5 per cent figure as a measure of the government health expenditure to the GDP, it is seen as the percentage that is 'generally required for limiting the proportion of [out-of-pocket payments] to 20 per cent of [Total Health Expenditure (THE)], which in turn is generally needed for achieving low rates of

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

catastrophic and impoverishing health expenditure'.[86] It is noteworthy that these targets express a minimum level of public expenditure in health care: unless governments invest enough in health care, poor families risk having to pay beyond their means, leading to a spiral of indebtedness and poverty from which many may be unable to escape. Therefore, setting targets of *governmental spending*, rather than targets of *total health expenditures* (including both public and private spending), seemed the most appropriate route.

3. Positional Goods

That is not all, however. Indeed, privatization also poses a third challenge, that cannot be answered simply by the strengthening of the regulatory framework applicable to the private sector. Even in situations where even low-income groups have access to the good or service concerned and where appropriate supervision ensures that compliance with essential quality standards, can there be a risk that, while the needs of the poor are met, the rich still have access to much better services thanks to the coexistence of different channels through which one can have access to health care, housing or education? If there is such a risk, should this be a concern? A distinction should be made in this regard between rights that, to be effectively enjoyed, should be *distributed in conditions of relative equality*, and rights to some amount of a good or some level of provision of a service, *however much better the situation of others*. For instance, education is a positional good in ways in which housing is not: for the right to housing to be satisfied, it matters whether each household has access to adequate housing, but it does not matter whether some households can afford far more luxurious housing than others; in contrast, even if a pupil receives the minimum quality education that satisfies certain basic requirements, her situation is significantly less favorable if, in the same society, her peers have access to much better quality education thanks to their more affluent background because the existence of such a gap shall reduce the value of the kind of education she received.[87] Human rights law pays particular attention to the situation of

[86] John-Arne Røttingen et al., *Shared Responsibilities for Health: A Coherent Global Framework for Health Financing. Final Report of the Centre on Global Health Security Working Group on Health Financing* (London: Chatham House, Royal Institute for International Affairs, 2014), p. 12.

[87] See M. Hollis, 'Education as a Positional Good' (1984) 16 *Journal of Philosophy of Education*, 235–244. The notion of 'positional good' was introduced by Fred Hirsch in

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

the worse off in society, but it *also* ought to pay attention to the gaps between the worse off and the better off, *even in situations in which all individuals have attained a certain level of enjoyment of the right concerned*: the balance between the two preoccupations shall depend on the nature of the right considered.

Though the vocabulary of positional goods is not invoked as such, this idea explains the concerns raised by the growing trend towards the privatization of education that, as noted by the Special Rapporteur on the right to education, may be in the process of supplanting public education rather than complementing it.[88] The diversion of public funds to support private schools at the expense of the public education sector may in particular lead to higher levels of socio-economic segregation in education, or to the emergence of low-cost, poor-quality private schools, as a substitute for adequate investment in the public educational system: the Committee of the Rights of the Child, for instance, has urged Brazil to 'phase-out the transfer of public funds to the private education sector and review its policies with regard to fiscal and tax incentives for enrolment in private education institutions in order to ensure access to free quality education at all levels, in particular nurseries and pre-schools, for all children by strictly prioritizing the public education sector in the distribution of public funds'.[89] Similarly, when it examined the vouchers system introduced in Chile to support children from low-income families to have access to private schools, the Committee on Economic, Social and Cultural Rights expressed its concern 'that the lack of resources and, occasionally, the poor quality of public education continues to result in high levels of segregation and discrimination along socioeconomic lines, which has the effect of limiting social mobility in the State party', and it urged Chile to 'take the necessary measures to eliminate the sharp disparities in quality of education that currently exist between private, subsidized and public

his critique of traditional understandings of growth: Fred Hirsch, *Social Limits to Growth* (Cambridge, MA: Harvard University Press, 1976), p. 175, pp. 245–250.

[88] Report of the Special Rapporteur on the right to education to the 69th session of the General Assembly, 24 September 2014, A/69/402. At its 32nd session (13 June–1 July 2016), the Human Rights Council adopted a resolution urging all States to 'address any negative impacts of the commercialization of education': see 'The Right to Education', A/HRC/RES/32/L.33.

[89] Committee on the Rights of the Child, Concluding Observations: Brazil, 28 October 2015, CRC/C/OPAC/BRA/CO/1, paras. 75–76.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

schools and to ensure that all schools have adequate infrastructure and suitably trained teaching staff'.[90]

Such statements cannot be fully understood unless we see that the value of education to the worse-off pupils depends not only on them having access to an educational system complying with certain basic quality standards but also on them being able to compete, in future life, with others, in conditions of relative equality. It is generally thought, in the utilitarian framework, that although it may be rational to have a preference for equality, it is irrational to prefer an equal distribution of a certain good to an unequal distribution in which the smallest portion received is still larger than the portion that would be received by each in an equal distribution system. But positional goods are specific precisely insofar as the value of the good to the individual depends on others not having significantly more of the good: my master's degree is of much lesser value to me if I am in a society in which the vast majority have doctorates, and not just master's degrees.[91] The role of the State with respect to the allocation of such goods may be not just to ensure to each the enjoyment of *minimum* levels of satisfaction but also to ensure a certain *equality of distribution* across all members of society. To the extent that privatization (or the coexistence of a public system with a private system, as is often the case in the education sector) creates an obstacle to such equality of distribution, it should therefore be treated as suspect; and the non-discrimination requirement of Article 2, paragraph 2 of the Covenant should address this impact.

* * *

The 'violations approach' and the 'outcomes approach' have in common that they seek to spare us the burden of having to define the level of efforts States parties to the Covenant must invest in the fulfilment of economic, social and cultural rights to comply with the 'progressive realization' clause. But this is a burden we must accept. Going beyond a 'core obligations' approach requires that we equip ourselves to assess *progress* in the realization of human rights. This is turn calls for the development of indicators (measuring not only outcomes but also the

[90] Committee on Economic, Social and Cultural Rights, Concluding Observations: Chile, 19 June 2015, E/C.12/CHL/CO/4, para. 30. Similar concerns were expressed a few months later by the Committee on the Rights of the Child: Concluding Observations: Chile, CRC/C/CHL/CO/4–5, paras. 67–70.

[91] See Harry Brighouse and Adam Swift, 'Equality, Priority and Positional Goods', *Ethics* 116 (2006), 471–497, at 474–475.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

normative framework adopted by the State and its efforts in moving towards such outcomes[92]), but also that we agree on clear criteria to assess whether the degree of realization of rights, in any particular State, is sufficient to meet the requirements of the Covenant. We start by proposing a conceptual framework to that effect.

IV. The Resources-Spending-Outcomes Conceptual Framework

In order to assess whether a State party to the Covenant is discharging its duty to progressively implement Covenant rights to the maximum of its available resources, it is important to consider *resource mobilization* jointly with *spending*, and to relate both dimensions to *outcomes*, i.e. to the effective levels of enjoyment of economic, social and cultural rights. Unsatisfactory outcomes (for instance, a large number of homeless persons in the State concerned or an inability for all to have access to adequate health care) will only be an infringement of the Covenant if such outcomes reflect not simply an *inability* of the State to improve the situation but also an *unwillingness* to do. This implies showing that resource mobilization could have been improved, or that spending priorities could have been defined differently, or both, to achieve better outcomes. The relationship between resources, spending and outcomes is depicted in Figure 19.1.

In this equation, resource mobilization and spending choices complement each other, to produce the required outcomes. However, it would be incorrect to imply from this that weaknesses concerning one part of the equation may be compensated by sound policies concerning another part of the equation – for instance, that a failure to mobilize domestic resources effectively may be excused by sound choices being made in spending. A State that would be increasing spending on social policies (for social security, food, health, education and housing), but that would

[92] For a discussion of some of the difficulties associated with the use of indicators to measure compliance with human rights, see Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23 *Human Rights Quarterly* 4, 1062–1097; Todd Landman, 'Measuring Human Rights, Practice and Policy' (2004) 26 *Human Rights Quarterly*, 906–931; or, more recently, Gauthier de Beco, 'Measuring Human Rights: Underlying Approach' (2007)*European Human Rights Law Review*, 266–278; Bronwyn Anne Judith Welling, 'International Indicators and Economic, Social, and Cultural Rights' (2008) 30 *Human Rights Quarterly*, 4, 933–958; AnnJanette Rosga and Margaret Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 *Berkeley Journal of International Law*, 2, 253–315. A synthesis is provided by Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Abingdon, UK: Routledge, 2010).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

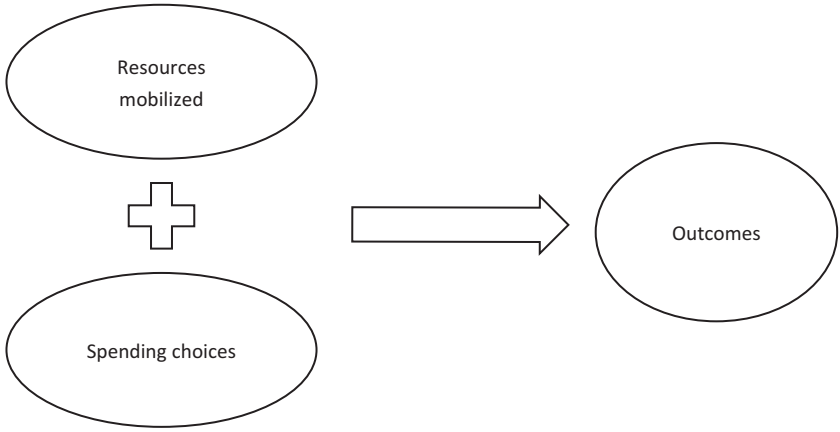

Figure 19.1 The R-S-O conceptual framework for the human rights analysis of budgetary choices by states

be doing so relying on a highly regressive taxation policy, may be found in violation of its obligations under the Covenant. To illustrate, consider the assessment this author made in his official capacity as the Special Rapporteur on the right to food following his mission to Brazil in 2009. While praising the country for having consistently increased spending on social priority areas, the assessment added the following cautionary note:[93]

> The tax structure in Brazil remains highly regressive. Tax rates are high for goods and services and low for income and property, bringing about very inequitable outcomes. According to one estimate, families with an income amounting to less than two minimum wages pay an average of 46 per cent of their income in indirect taxes, while families earning over 30 times the minimum wage pay around 16 per cent in indirect taxes. A recent report by the Tax Services confirms the very low levels of property taxes. In particular, the rural territorial tax collected, in 2008, a mere R$ 416 million (US$239 million) nationwide. As a percentage of GDP, this amounts to 0.01 per cent and, as a percentage of total taxation, the tax accounts for only 0.04 per cent. Given the very high level of land concentration and the large incomes generated by the agricultural sector, this is highly regressive. In contrast, taxes on goods and services, as well as

[93] Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 13th session of the Human Rights Council, Addendum: Mission to Brazil, 12–18 October 2009, A/HRC/13/33/Add.6, para. 36.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

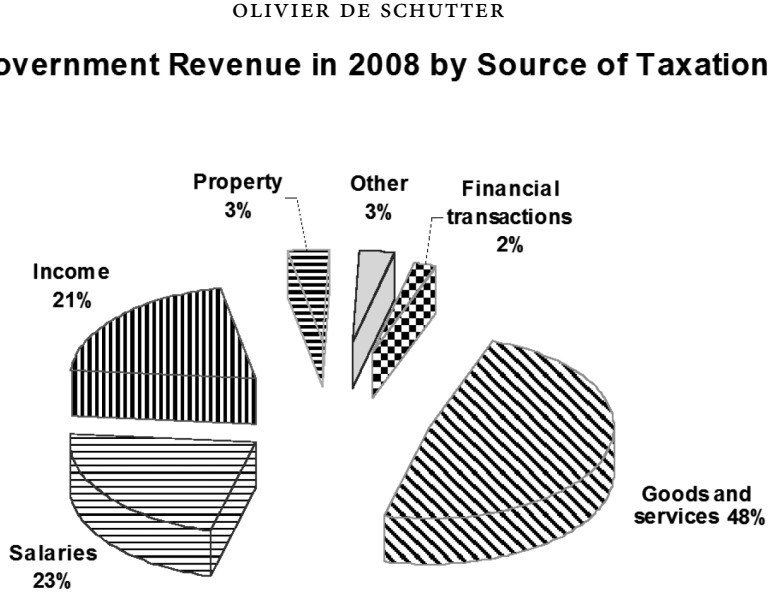

Figure 19.2 Government revenue in 2008 by source of taxation, 2009 mission to Brazil by the Special Rapporteur on the right to food © United Nations

> social contributions to pensions and social security accounted for the lion's share of Government income: over 70 per cent in 2008 [see Figure 19.2]. The Special Rapporteur concludes that, while the social programmes developed under the 'Zero Hunger' strategy are impressive in scope, they are essentially funded by the very persons whom they seek to benefit, as the regressive system of taxation seriously limits the redistributive impact of the programmes. Only by introducing a tax reform that would reverse the current situation could Brazil claim to be seeking to realize the right to adequate food by taking steps to the maximum of its available resources.

The opposite is equally true, of course: a State that would have a highly progressive tax structure, but that would nevertheless maintain a low level of social spending, would not be acting consistent with its duties under the Covenant. Dedicating the 'maximum available resources' to the realization of the rights of the Covenant means *both* mobilizing sufficient resources *and* using such resources as effectively as possible to maximize the contribution of public investment to the fulfilment of economic, social and cultural rights. It may be tempting to think that a State making a smart use of its resources could be excused for maintaining a regressive

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

tax structure or, conversely, that a State efficiently mobilizing resources could be allowed to squander (within reasonable limits) some of these resources in unwise spending choices. Such an approach, however, would not do justice to the norm of progressive realization embodied in Article 2, paragraph 1 of the Covenant, which requires that States do everything they can to realize the Covenant rights, *both* at the collecting and at the spending sides of the equation.

We may provisionally conclude that, while the three elements of the equation – resource mobilization, public spending and outcomes – are interdependent, they are only imperfect substitutes for one another. Poor resource mobilization is a problem even if the State is highly efficient in using the scarce resources it does manage to mobilize, and inadequate definition of spending priorities is a problem even if the resources available are plentiful and allow the State to meet the basic needs of the population: in both instances indeed, the State could, and therefore should, do more. And where outcomes are achieved in areas such as housing, education or health care without much public resources being invested, the results may be considered as fragile, and the risks of discrimination on grounds of wealth and segregation in many cases real: where allocation of scarce goods is left to the market, the poorest may be priced out from access, and even if mechanisms such as subsidies, education vouchers or maximum fees are introduced to reduce that risk, serious problems of accountability towards the public remain.

It is within the broad conceptual framework that we can examine its different elements. For the question remains entirely open: how much should States do, and how to measure whether they are doing enough? The following sections attempt to provide an answer.

V. Resource Mobilization

The resources needed for the realization of economic, social and cultural rights may be mobilized both domestically and internationally. The most important sources of domestic revenues include trade tariffs (on imports and on exports), taxation, the royalty fees obtained from companies (both domestic and foreign) exploiting natural resources, as well as fees that may be imposed on the users of public services such as schools or hospitals. States may also seek international assistance and cooperation in meeting their obligations towards the population. Finally, States may benefit from development aid or borrow to finance their policies. Although taking loans may come at the risk of increasing their annual

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

public deficit and, ultimately, their public debt, it may be justified particularly in times of economic downturn and insofar as the debt finances policies that may be seen as investments rather than merely as a stopgap to meet current expenditures.[94]

While it would not be possible to review all the possible sources of public revenue in relation to the Covenant, it may be relevant to comment on three sources in particular, due to their specific relationship to the Covenant and to their importance: these are the royalties from the exploitation of natural resources, taxation and request for international support through development assistance or financial loans. They are examined in turn.

A. Exploitation of Natural Resources

As mentioned previously, consistent with the right to self-determination, revenues from the exploitation of natural resources (such as minerals, oil and gas, but also agriculture) should benefit the local population.[95] But we again must take into consideration the complementarity between resource mobilization and spending: if the local population is to benefit, that presupposes that the royalties are set at a high enough level to allow the state to make the appropriate social investments.

A reading of the requirement of progressive realization under Article 2, paragraph 1 of the Covenant as imposing such duties concerning the definition of the royalties to be paid and the use of revenues accruing from the exploitation of the resource may find support in the right to development, which the General Assembly defined in 1986 as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.[96] The Declaration on the right to development expects States to 'formulate appropriate national

[94] Rathin Roy and Antoine Heuty (eds.), *Fiscal Space: Policy Options for Financing Human Development* (New York: Earthscan and UNDP, 2009).

[95] See Report of the Special Rapporteur on extreme poverty and human rights, para. 18.

[96] UN General Assembly, resolution 41/128 of 4 December 1986 (adopted with only one negative vote [United States], and eight abstentions) 4 December 1986, GA res A/RES/41/128, annex 41 UN GAOR Supplement. (no 53) 186 (A/RES/41/53) (1986). For an excellent and well-informed account of the attempts done, since the Declaration, to clarify the implications of the right to development, authored by one key actor in this process, see Stephen P. Marks, *The Politics of the Possible: The Way Ahead for the Right to*

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.[97] It sees development as a process that should benefit 'the entire population and . . . all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom', which implies that States ensure the adequate participation of the local communities concerned by investment projects, and that the decision-making process is fully transparent.[98] The revenues gained from the agreements concluded between host States and investors for the exploitation of natural resources should thus serve to fulfil the rights of the population, consistent with the duty of States to 'ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income'.[99]

The conclusion was drawn by the Working Group on the Right to Development when it noted that the right to development had a direct impact on how foreign direct investment should support the fulfilment of the 8th Millennium Development Goal to develop a global partnership for development: that right, it stated, 'implies that foreign direct investment (FDI) should contribute to local and national development in a responsible manner, that is, in ways that are conducive to social development, protect the environment, and respect the rule of law and fiscal obligations in the host countries. The principles underlying the right to development . . . further imply that all parties involved, i.e. investors and recipient countries, have responsibilities to ensure that profit considerations do not result in crowding out human rights protection. The impact of FDI should, therefore, be taken into account when evaluating progress in Goal 8 in the context of the right to development'.[100]

Development (Berlin, Geneva and New York, NY: Dialogue on Globalization, Friedrich Ebert Stiftung, June 2011).

[97] Art. 2.3.

[98] Preamble, para. 2. See also Art. 6.3. and 8.2.

[99] Art. 8.1. On the human rights–based economic development that is prescribed by the Declaration on the Right to Development, see Margot E. Salomon, *Global Responsibility for Human Rights, World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007), pp. 129–132.

[100] Report of the Working Group on the Right to Development. 7th session (conclusions) E/CN.4/2006/26, para. 59.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Both bad practices and good practices can be identified in this regard. Bad practices consist in granting 'tax holidays' or specific privileges to companies exploiting the subsoil, a tendency that is particularly suspect in the absence of transparency and accountability of the public officials negotiating the agreement – and that is especially damaging where investors' rights are protected by specific provisions of investment treaties or free trade agreements, locking host governments into choices that may not benefit the population. Unfortunately, such bad practices are a frequent occurrence. This is largely to be explained by the very nature of the resources concerned and of the means of exploiting them. The exploitation of mineral resources typically takes the form of large-scale projects in which a small number of individuals control vast amounts of wealth. The capture of the benefits can therefore be highly unequal, unless affirmative measures are taken to ensure that they will be fairly distributed across a large number of people. Moreover, natural resources are non-renewable: they are 'assets in the ground' whose value depends on technology, market prices and political risk. The exploitation of mineral resources thus should be seen as the consumption of capital, rather than only of a stream of incomes.[101] The temptation is thus huge for those in power both to exploit those resources to create as much wealth as possible within the shortest possible time (for they do not know for how long they will stay in power) and to sell off the right to exploit resources to the highest bidder (to cash in immediately the equivalent of all future income streams that could result from exploiting the resource), but sometimes with scant attention being paid to the long-term impacts or to the interests of the local communities. Awareness has grown about the potential human rights implications of agreements concluded between investors and host governments for the exploitation of natural resources. How the level of royalties should be set and how the revenues accruing to the State should be spent has only rarely been considered, however.[102]

[101] Macartan Humphreys, Jeffrey D Sachs, and Joseph E. Stiglitz (eds.), *Escaping the Resource Curse* (New York, NY: Columbia University Press, 2007), at p. 8.

[102] It is telling, for instance, that none of the 10 principles listed by the Special Representative of the Secretary-General on Business and Human Rights in the guidance he set out in 2011 refers to either of these two key questions (see Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Good practices, in contrast, are found in instances in which a procedure is set up to ensure that the exploitation of the natural resources shall bring about important benefits to the local population. For instance, Peru's auctioning of public land is designed to ensure favourable contract terms and, by 'eliminating direct negotiations between private buyers and public officials', to reduce the risks of corruption.[103] During the auction process, the government makes public the investment commitment, the bid value of the land, data on the land size and business plans. Furthermore, if the land is not used for its intended business plan within one year of it being transferred, it will revert back to the original owner. Public auctioning of exploitation rights can be a highly effective way to raise the levels of royalties: after Cameroon introduced a public tendering system for awarding logging rights, thus introducing competition between potential investors, payments from companies wishing to gain the access to forests (forest royalties, in particular) increased from a baseline of 0.6 USD per hectare per year in 1990 (a level set at the time by the authorities) to 5.6 USD per hectare per year for forest management units in 2006 and 13.7 USD per hectare for timber sales in 2005.[104]

Attempts have also been made to ensure the redistribution of revenues to the local population. They have rarely been successful. Cameroon, for instance, adopted a regulatory framework on forest, wildlife and fisheries that requires logging companies to pay an Area Fee (AF), which is intended to benefit the communities neighbouring the logging concessions.[105] Between 1998 and 2009, 50 per cent of royalties went to the

State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3).

[103] Global Witness, *Dealing with Disclosure: Improving Transparency in Decision-Making over Large-Scale Land Acquisitions, Allocations and Investments* (April 2012), p. 34. Peru's land auctioning process entails the following steps: (1) the government reviews all rights and claims to the land and determines what rights can be transferred; (2) auction announcements, including bidding terms, are published on the government's website, in the government gazette, and in the media for 90 days; (3) to be eligible, bidders are then required to prequalify by posting a bond equal to 'at least 60% of the minimum bid price, plus the intended amount of investment'; and (4) all bids are ranked according to price offered and the project investment amount.

[104] Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to Cameroon, 16–23 July 2012, A/HRC/22/50/Add.2, para. 61 (citing World Bank and PROFOR, *Forêts tropicales humides du Cameroun. Une décennie de réformes* [by Giuseppe Topa, Alain Karsenty, Carole Megevand and Laurent Debroux] (Washington, DC, 2010), 232 pages, at p. 44; it is unclear from the study whether these figures refer to real or nominal amounts).

[105] See ibid., para. 57.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Treasury, 40 per cent to municipal councils and 10 per cent to village committees that manage forest royalties.[106] Following the adoption of Act No. 2009/019 of 15 December 2009 on local tax systems, a share of revenue could henceforth be allocated to non-forest communities: 50 per cent of the revenues from forest exploitation now go to the Treasury, 20 per cent to FEICOM – the community mutual assistance fund –, 20 per cent to municipal councils and 10 per cent to local committees. An assessment of the system, 10 years after it was launched and after the equivalent of 85 million USD had been redistributed across about 50 village councils, showed mixed results at best: the mayors, who play a key role in the management of AF resources, have often been accused of embezzlement; accountability mechanisms proved hardly effective, as even mayors who had poorly managed funds were generally re-elected. Moreover, the system did not secure the possibility of long-term planning: in addition to a smaller proportion of the funds going to the local village councils after the 2009 reform, the levels of royalties to be paid by the logging companies were in fact reduced at the time, as the central government sought to soften the impact of the global financial crisis on the companies.[107]

Probably the best-known international effort of that sort is the Chad–Cameroon Petroleum Development and Pipeline Project. Initiated in 2001, the project was launched with significant support from the World Bank, which provided loans both through the International Finance Corporation and through the International Bank for Reconstruction and Development. The bank, however, made its support conditional on the use of a portion of the revenues generated by the project to social development objectives, in the areas of health and education in particular. A monitoring mechanism was established (the Petroleum Revenue Oversight Committee, including members of both the Chadian government and civil society) to ensure that the oil revenues given to Chad would benefit the population. A Future Generations Fund, tasked with funding health, education and other development projects, and a fund to compensate the communities living in the region where the oil was

[106] This followed the adoption of Act No. 94–01 of 20 January 1994, on forests, wildlife and fishing.

[107] Paolo O. Cerutti, Guillaume Lescuyer, Samuel Assembe-Mvondo and Luca Tacconi, 'The Challenges of Redistributing Forest-Related Monetary Benefits to Local Governments: A Decade of Logging Area Fees in Cameroon' (2010) 12 *International Forestry Review*, 2, 130–138.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

extracted were also set up to that effect. In 2006, however, Chad unilaterally announced its intention to amend the Petroleum Revenue Management Program, which was meant to ensure that the oil revenues would serve poverty reduction, leading the bank to freeze the funding to Chad. Though subsequent negotiations allowed the collaboration with the World Bank to be prolonged, after the Future Generations Fund was replaced in 2008 by a general stabilization fund, it had become clear that Chad was unwilling to comply with the monitoring scheme: the bank announced its retreat from what had been portrayed, in 2001, as the most significant investment ever on the African continent, and as setting a precedent for the use of natural resource exploitation revenue for positive change.[108] The failure was due to the choice of the Chadian government to prioritize investing in security forces, as it faced the threat of a guerrilla movement on its territory, rather than in poverty reduction. But part of the reason why the system initially agreed failed, was that the price of oil rose significantly between 2001 and the years 2006 to 2008, so that the initial calculations on the basis of which the allocation was designed became entirely unrealistic.[109]

The lesson is not that such attempts to ensure that revenues from the exploitation of natural resources are channelled towards human development objectives are doomed to fail. Appropriate procedural safeguards should be put in place, however, to ensure that the redistribution of the revenues will effectively take place, and that the authorities shall be held accountable to the population if the revenues do not support the right to development of the population.[110] Moreover, any arrangement should

[108] The statement of the World Bank read: 'Over the years, Chad failed to comply with key requirements of [the] agreement. A new agreement was signed in 2006, but once again the government did not allocate adequate resources critical for poverty reduction … Regrettably, it became evident that the arrangements that had underpinned the Bank's involvement in the Chad/Cameroon pipeline project were not working' (World Bank, *World Bank Statement on Chad-Cameroon Pipeline* [Washington, DC: The World Bank Group, 2008]).

[109] Though they were less publicized, similar issues arose with respect to Cameroon, also a party to the project. Cameroon failed in its bid to have modifications made to the initial contract, though its conditions (negotiated on the basis of the low price per barrel at the time) had become extremely disadvantageous to the country by the late 2000s, with transit costs of only US$0.41 per barrel.

[110] For instance, following his mission to Cameroon in July 2012 as the Special Rapporteur on the right to food, this author recommended as regards revenues from forest exploitation: '(a) guaranteeing the transparency of transfers, for example by requiring councils and local committees to publish figures on the royalties paid to villages, informing citizens in radio broadcasts about how the money has been used and publishing a list

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

strike the right balance between the requirement of stability (allowing for the planning of social investment) and the requirement of flexibility (allowing for adaptations ensuring that the arrangement remains economically viable and that incentives to deviate shall be minimized).

B. Taxation

Taxation constitutes a second, major source of revenue for the realization of economic, social and cultural rights. I argue that three key considerations could guide the assessment of the Committee on Economic, Social and Cultural Rights in assessing the tax structure adopted by States parties to the Covenant.[111] First, there is a need to expand the tax base to ensure that taxation, combined with other sources of public revenue, can fund public policies that support the realization of economic, social and cultural rights – including access to health care, to education and housing and to social security. Second, there is a need to speed up the reduction of poverty, and thus ensure effective enjoyment of economic and social rights for each individual, by ensuring that the tax structure is sufficiently progressive. Third, finally, there is a need to step up efforts to combat tax evasion: increasing tax levels without also addressing tax evasion would be like pouring water into a leaking bucket. These components of a human rights–compliant tax policy are reviewed in turn.

1. Widening the Tax Base to Ensure Adequate Funding for the Realization of Social Rights

In 2009, basing himself on data from 2000 to 2005, Martin Ravallion famously arrived at the conclusion that only by imposing 'prohibitive' tax rates (of 60 per cent and above, and often beyond 100 per cent) on the relatively rich (that is, on those whose incomes exceed 13USD per day in 2005 purchasing power parity (PPP), which corresponds to the level of consumption defining the poverty line in rich countries) would it be

of expenditures at the end of the budget year; (b) building the capacities of local communities, especially women and indigenous communities, to participate in taking decisions about the use of tax revenue; (c) encouraging investment of this revenue; and (d) strengthening monitoring, appeals and sanctions mechanisms', Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to Cameroon, para. 59.

[111] The argument summarized here is developed at greater length in a companion chapter by Philip G. Alston and Nikki Reisch eds., which appears in *Human Rights and Tax in an Unequal World* (forthcoming).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

possible for low-income countries to effectively end poverty. In other terms: although various other measures might be relied on to reduce poverty in these countries, poverty was considered to be so widespread, and wealth creation so woefully insufficient, that taxation was not a promising way to achieve this objective.[112] The implication was that, for these poor countries, redistribution of wealth was not a substitute for economic growth and international support: before wealth could be redistributed, there needed to be wealth to share.

Ten years have passed, however, during which economic growth has been strong for most of the countries of this group: more recent research, using a methodology very similar to that of Ravallion, has come to the conclusion that 'most developing countries [now] have the financial scope to dramatically speed up the end of poverty based on national capacities at the global poverty lines of [1.90 or 2.50 USD per day]'.[113] That means an untapped potential. In many countries, particularly developing countries, the tax base is very narrow, and does not allow the States concerned to mobilize sufficient resources for the fulfilment of the rights of the Covenant.[114] Inter-regional differences are huge in this area: in developed countries, revenue from personal income tax is 8.4 per cent of GDP, whereas in Latin American countries for instance, this tax generates only 1.4 per cent of GDP.[115] It has been noted that 'if all developing countries were able to raise 15 per cent of their national income in tax, a commonly accepted minimum figure (the

[112] Martin Ravallion, 'Do Poorer Countries Have Less Capacity for Redistribution?', Policy Research Working Paper 5046 (Washington, DC: World Bank, 2009).

[113] Chris Hoy and Andy Sumner, 'Gasoline, Guns and Giveaways: Is There New Capacity for Redistribution to End Three Quarters of Global Poverty?', CGD Working Paper 433 (Washington, DC: Center for Global Development, 2016), at p. 19.

[114] See for instance Report of the Special Rapporteur on the right to food to the 13th session of the Human Rights Council, Addendum: Mission to Guatemala, 3–5 September 2009, A/13/33/Add.4, para. 87.

[115] Ana Corbacho, Vicente Frebes Cibils and Eduardo Lora (eds.), *More Than Revenue: Taxation as a Development Tool* (New York: Inter-American Development Bank and Palgrave Macmillan, 2013), at p. 115. This discrepancy, as one indicator of the degree of progressivity of the tax system (i.e., of its ability to reduce inequalities), is hardly attenuated by considering the proportion the personal income tax represented in the total tax burden: in OECD countries, the total tax burden represents 34.8 per cent of the GDP, and it is 23.4 per cent in Latin America. Therefore, the personal income tax represents about one-quarter of the tax burden in OECD countries, but only 5.98 per cent of the tax burden in Latin American countries.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

OECD average is 37 per cent), they could realize at least an additional 198 billion USD per year, more than all foreign development assistance combined'.[116]

A specific area in which action could be taken to widen the tax base to fund the realization of economic and social rights is by reducing, or eliminating entirely, favourable treatment granted to foreign investors to attract capital. There is in fact ample evidence that such 'tax holidays' or even, more generally, legal protections granted to investors have little or no impact on the ability of the country to attract investment.[117] The major determinants of foreign direct investment (FDI) are economic factors such as the availability of skilled labour, market size and trade openness, as measured by exports and imports in relation to total GDP.[118] For other variables there is less consensus in the literature. Generally, however, the studies find that these political and economic factors are more important for the locational decision of foreign investment than the legal structure for protection of investors' rights and the ability to avoid double taxation by double-taxation treaties.[119] In other terms, if there is one means through which revenues from taxation could increase rather painlessly (and at a relatively low administrative cost), it

[116] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 56 (citing ActionAid, *Accounting for Poverty: How International Tax Rules Keep People Poor*, 2009, at 5).

[117] For a more systematic treatment, see Olivier De Schutter, Johan F. Swinnen and Jan Wouters, 'Introduction: Foreign Direct Investment and Human Development', in O. De Schutter et al. (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (London and New York, NY: Routledge, 2012), pp. 1–24.

[118] A greater emphasis has been placed in recent years on the latter determinant as a result of globalization and the development of global supply chains. Even in this regard, however, the relationship is by no means automatic, as illustrated by the situation of sub-Saharan African countries that are very open to trade but that nevertheless experience considerable difficulties attracting FDI.

[119] The available econometric studies confirm the suspicion expressed by some in the legal literature (M. Sornarajah, 'State Responsibility and Bilateral Investment Treaties' [1986] 20 *Journal of World Trade Law*, 79–98; Jason Webb Jackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' [2011] 51 *Virginia Journal of International Law*, 397): there is weak evidence that the conclusion of investment agreements guaranteeing extensive rights to investors has more than a marginal impact on FDI inflows, and where it does seem to have some effect, it is mostly as a substitute for poor institutional quality, particularly in sub-Saharan African countries or in transition economies swiftly moving towards open-market policies.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

is by raising the taxes owed by foreign corporations operating in the country, or by closing loopholes, such as price transfer mechanisms, allowing such corporations to reduce their tax liabilities or even to entirely escape payment of local taxes.

2. Implementing Progressive Tax Policies

The former Special Rapporteur on extreme poverty and human rights argued that States should be encouraged to

> set up a progressive tax system with real redistributive capacity that preserves, and progressively increases, the income of poorer households. . .. [A]ffirmative action measures aimed at assisting the most disadvantaged individuals and groups that have suffered from historical or persistent discrimination, such as well-designed subsidies or tax exemptions, would not be discriminatory. In contrast, a flat tax whereby all people are required to pay an equal proportion of their income would not be conducive in achieving substantive equality, as it limits the redistributive function of taxation.[120]

Her successor in the mandate, Philip Alston, emphasized this point further, regretting that we are still far from 'recognizing the fact that tax policy is, in many respects, human rights policy', despite the obvious contribution taxation makes to the fulfilment of human rights: 'The regressive or progressive nature of a State's tax structure, and the groups and purposes for which it gives exemptions or deductions, shapes the allocation of income and assets across the population, and thereby affects levels of inequality and human rights enjoyment'.[121]

It is time that these calls be heeded. Redistributive fiscal policies and social spending, particularly on social security, have made a major contribution to the reduction of the inequalities that would result from market incomes for different groups of the population. In Organisation for Economic Co-operation and Development (OECD) countries, public cash transfers, together with income taxes and social security contributions, were estimated to reduce inequality among the working-age population (measured by the Gini coefficient) by an average of about one-quarter across OECD countries during the period from the mid-1980s to

[120] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, to the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 16.

[121] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, to the 29th session of the Human Rights Council, 26 May 2015, A/HRC/29/31, para. 53.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

the late 2000s.[122] Of course, as noted previously, a progressive tax system only can have an impact on the reduction of inequalities if the revenue from the taxes collected is redistributed through social policies that benefit the poor, rather than being spent on investments that shall only allow the rich to become richer. But, both by reducing the level of pre-tax income inequalities and by increasing the fiscal capacity of the State, a progressive tax system has an important role to play in the fulfilment of social rights. The Committee on Economic, Social and Cultural Rights has therefore regularly expressed its concern at reforms of the taxation system that would make it less progressive (for instance, by shifting the burden from corporations to the families, or by increasing value-added tax [VAT] rates on essential items): in the most recent Concluding Observations addressed to the United Kingdom, it deplored 'the adverse impact that recent changes to the fiscal policy in the State party, such as the increase in the threshold for the payment of inheritance tax and the increase of the value added tax, as well as the gradual reduction of the tax on corporate incomes, are having on the ability of the State party to address persistent social inequality and to collect sufficient resources to achieve the full realization of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups'.[123]

Two remarks are in order, however. First, the ability for even a progressive tax system to reduce inequalities depends not only on the contribution of the richest part of the population to public revenue in percentage terms (as a *proportion* of the total tax burden) but also on the *absolute* levels of such contributions: if, for example, the richest decile of the population pays 90 per cent of the total income taxes collected in the country, the taxation system may be said to be progressive according to the most common measure of tax progressivity known as the Kakwani index. But if those richest 10 per cent are taxed at very low rates, the redistributive capacity of the taxation remains very limited: such a redistributive capacity is captured by another index, known as the Reynolds-Smolensky index, which measures the difference in income distribution before and after the tax is imposed.[124] One important consequence of this

[122] Organisation for Economic Co-operation and Development, *Divided We Stand: Why Inequality Keeps Rising* (Paris: OECD, 2011).

[123] Committee on Economic, Social and Cultural Rights, Concluding Observations: the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, E/C.12/GBR/CO/6, para. 16.

[124] The Kakwani and the Reynolds-Smolensky indexes appeared simultaneously in the economic literature: see Nanak C. Kakwani, 'Measurement of Tax Progressivity: An

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

distinction is that a tax reform that may at first appear as regressive because the proportion of the total tax revenue paid by the richest part of the population will decrease (if the reform extends the tax base to ensure that the effort is spread across a larger part of the population), nevertheless may have progressive consequences if the overall tax rates and thus the revenue capacity of the State are increased. This again provides an illustration of the need to consider revenue mobilization and spending together, as they relate to one another, rather than to treat them separately.

The second remark concerns the relationship between higher levels of taxation and the introduction of more progressive systems of taxation, on the one hand, and wealth creation, on the other hand. Contrary to a widely held assumption,[125] high levels of taxation, allowing the State to adopt robust redistributive policies and provide high-quality public services, are not an obstacle to economic growth: instead, the International Monetary Fund (IMF) found that 'the combined direct and indirect effects of redistribution, including the growth effects of the resulting lower inequality, are on average pro-growth'.[126] Indeed, more recent

International Comparison' (1977) 87 *The Economic Journal*, 345, 71–80; and Morgan O. Reynolds and Eugene Smolensky, *Public Expenditures, Taxes and the Distribution of Income: The United States, 1950, 1961, 1970* (New York: Academic Press, 1977). For a general presentation, see Jonathan Haughton and Shahidur Khandker, *Handbook on Inequality and Poverty* (Washington, DC: World Bank, 2009), ch. 15: 'The Effects of Taxation and Spending on Inequality and Poverty'. The reliance on these measures has been criticized on the ground that they fail to consider the changes in revenue that may result from the introduction of tax reforms: see Santiago Díaz de Sarralde, Carlos Garcimartín and Jesús Ruiz-Huerta, 'The Paradox of Progressivity in Low-Tax Countries: Income Tax in Guatemala' (2010) *CEPAL Review*, 102, 85–99.

[125] The assumption was popularized as the 'Kuznets curve' after the work of Simon Kuznets who hypothesized in the mid-1950s that inequality was an inevitable price to pay during industrialization in fast-growing nations (see Simon Kuznets, 'Economic Growth and Income Inequality' [1955] 45 *American Economic Review*, 1, 1–28). However, quite apart from the fact that such a reasoning could not be transposed to advanced industrial economies in which the processes of urbanization and structural transformation associated with industrialization are completed, the ideological uses made of his work do not correspond to the actual findings of Kuznets, nor do such uses have any (other) solid data to rely on.

[126] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 40, citing Jonathan D. Ostry, Andrew Berg and Charalambos G. Tsangarides, 'Redistribution, Inequality and Growth', IMF Staff Discussion Note, February 2014 (Washington, DC: International Monetary Fund, 2014). See also Andrew Berg and Jonathan D. Ostry, 'Inequality and Unsustainable Growth: Two Sides of the

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

research has generalized findings initially focused on OECD countries, which concluded that the concentration of incomes at the top impeded growth, whereas growth in contrast was stimulated by increasing the portion of total wealth going to the lowest quintile of the population or to the middle class. Consistent with the expectations of Keynesian macroeconomics,[127] researchers from the IMF thus found 'an inverse relationship between the income share accruing to the rich (top 20 percent) and economic growth':

> If the income share of the top 20 percent increases by 1 percentage point, GDP growth is actually 0.08 percentage point *lower* in the following five years, suggesting that the benefits do not trickle down. Instead, a similar increase in the income share of the bottom 20 percent (the poor) is associated with 0.38 percentage point *higher* growth. This positive relationship between disposable income shares and higher growth continues to hold for the second and third quintiles (the middle class).[128]

There is no trade-off, therefore, between the understandable desire of low-income countries to grow their economy, and the reduction of inequality within these countries by progressive taxation and redistribution schemes. Yet, for many governments, progressive taxation with powerful inequality-reducing impacts may be difficult to achieve. Capital is more mobile than labour and households, and it is therefore tempting to reduce the levels of taxation of capital, particularly by lowering the corporate tax and the personal income tax for the highest-income earners,[129] while compensating this by increasing the taxation of middle-class wage earners and households. Moreover, indirect taxes (such as VAT) are easier to collect, and therefore, despite their regressive impacts (because poor households spend a higher proportion of their incomes on buying consumer goods),[130] they may be the preferred way for governments with a weak administrative capacity to collect revenue.

Same Coin?', IMF Staff Discussion Note 11/08 (Washington, DC: International Monetary Fund, 2011).

[127] See text corresponding to note 7.

[128] Era Dabla-Norris, Kalpana Kochhar, Nujin Suphaphiphat, Frantisek Ricka and Evridiki Tsounta 'Causes and Consequences of Income Inequality: A Global Perspective', IMF Staff Discussion Note, June 2015 (Washington, DC: International Monetary Fund, 2015), at 7.

[129] IMF, Policy Paper Fiscal Policy and Income Inequality, January 2014, at 37 (estimating that top personal income taxes were lowered by about 30 per cent on average since 1980).

[130] Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights', in Nolan et al., *Human Rights and Public*

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Such indirect taxes are also politically less unpopular because they are included in the end price consumers pay and therefore often go largely unnoticed.

The result, however, is that we have fiscal policies that, instead of shifting more of the tax burden on to the wealthiest corporations and the richest individuals, as both economic common sense and human rights would require, end up taxing wage earners and consumers through VAT, with generally regressive consequences.[131] According to calculations of the World Bank, the average total tax rate payable by businesses on their commercial profits decreased globally from 53.5 per cent to 40.8 per cent between 2005 and 2015.[132] Although some countries moved in the opposite direction (Argentina and Chile are examples in Latin America; Malaysia and Niger provide illustrations in Asia and in Africa), the trend downwards is massive: for many countries, the reduction of corporate taxes is measured in double digits. On average, the total tax rates in the euro area countries went from 51.0 per cent to 43.6 per cent, a trend corresponding roughly to the tendency in the European Union as a whole. But the phenomenon is especially spectacular in the countries classified by the United Nations as least developed, where the rate went down on average from 75.4 per cent to 44.7 per cent; if we consider

Finance, pp. 13–39, at 28; Ignacio Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', in ibid., pp. 7–104, at 84.

[131] It is important to note, however, that although VATs are regressive when calculations are made on income (the poorest households contribute more as a proportion of their income), this regressivity either disappears or is significantly attenuated when calculated on the basis of consumption (that is, the higher levels of consumption of the rich and the high VAT rates on luxury items that are only affordable to the rich, leads to a situation in which the rich contribute more to the revenues collected through VAT than the poor). See Corbacho et al. (eds.), *More Than Revenue: Taxation as a Development Tool*, 167–168. In other terms, a more appropriate prescription to governments would be to raise VAT on luxury items and to lower it on essential items, while ensuring that increases in indirect taxes do not become a substitute for progressive direct taxation.

[132] This is a non-weighted average: small economies count as much as large ones in the calculation of the average. The total tax rate, for the purpose of this calculation, is the 'amount of taxes and mandatory contributions payable by businesses after accounting for allowable deductions and exemptions as a share of commercial profits'. For more details, see http://data.worldbank.org/indicator/IC.TAX.TOTL.CP.ZS?end=2015&start=2005&view=chart (accessed 13 June 2018). Some countries have lowered corporate taxes faster than others: during this 10-year period, Albania lowered corporate taxes from 58.2 per cent to 36.5 per cent, Belarus from 137.3 per cent to 51.8 per cent and Uzbekistan from 96.7 per cent to 41.1 per cent; Canada went from 47.5 per cent to 21.1 per cent and Paraguay from 54.5 per cent to 35.0 per cent. Turkey moved from 52.8 per cent to 40.9 per cent.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

heavily indebted poor countries alone, the decrease is from 81.2 per cent to 52.7 per cent.

3. Effectively Combating Tax Evasion and Illicit Financial Flows

The fight against tax evasion is the third channel through which tax policies can be made to contribute better to the realization of economic, social and cultural rights. Tax evasion represents a huge loss to countries, and it is of particular consequence (as a percentage of their public budgets) in low- and middle-income countries. In 2008, Global Financial Integrity estimated that, during the 2002–2006 period, illicit financial flows represented an average of between 859 billion and 1.06 trillion USD on a yearly basis.[133] For Africa alone, a conservative estimate is that illicit financial flows have amounted to a total of 854 billion USD for the period 1970 to 2008.[134] These outflows have been steadily growing throughout the period at an average rate of 12.1 per cent per year (with peaks reached in oil-producing countries such as Nigeria and Soudan linked to increases in the price of oil). The impacts are considerable: by the end of 2008, the same study notes, the cumulative impact of these outflows meant that each African lost 989 USD to illicit financial outflows.[135] In fact, the total illicit financial outflows from Africa for 1970 to 2008 represents a sum far in excess of the external debt of all African countries (which was 279 billion USD in 2008): in other terms, taking into account these flows, Africa is a net *creditor* to the world, and by tackling such illicit financial flows, about 600 billion USD could have been mobilized for the fight against poverty on the continent.[136] Sixty to 65 per cent of the total illicit financial flows come from commercial tax evasion, which results from overpricing imports and underpricing exports on customs documents, and thereby illegally transferring money abroad. Although the situation in Africa is particularly troubling, the continent is not alone in this regard. For instance, according to the Inter-American Development Bank, evasion rates of personal and corporate income taxes average

[133] Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Developing Countries: 2002–2006* (Washington, DC: Global Financial Integrity, December 2008).

[134] Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Africa: Hidden Resource for Development* (Washington, DC: Global Financial Integrity, 2010).

[135] Ibid., at 12.

[136] This was also the conclusion reached by Léonce Ndikumana and James K. Boyce, *New Estimates of Capital Flight from Sub-Saharan African Countries: Linkages with External Borrowing and Policy Options* (Amherst, MA: University of Massachusetts, April 2008).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

50 per cent in 10 representative Latin American countries, with Guatemala topping the league with an evasion rate of 70 per cent.[137]

This is now described to be a priority in various international outcome documents. In the Addis Ababa Action Agenda, adopted at the Third International Conference on Financing for Development in July 2015, the Heads of State and Government and High Representatives recognizing that 'significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realizing sustainable development and achieving the sustainable development goals', committed to 'enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection'.[138] They pledged to 'work to improve the fairness, transparency, efficiency and effectiveness of [their] tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances'.[139] Though not explicitly defined as a human rights requirement, these commitments should be seen as a component of the duty of progressive realization.

To effectively combat tax evasion, a strengthening of tax administration (by dedicating sufficient personnel and resources to combating tax evasion) would be required.[140] The High-Level Panel on Illicit Financial Flows from Africa established under the auspices of the African Union and the UN Economic Commission for Africa recommended in this regard, in particular, 'developing the required capacities, establishing or strengthening necessary institutions including transfer pricing units, and providing resources for the effective functioning of these institutions', and 'holding multinationals accountable for fraudulent practices by setting up requirements for their transfer of funds and business

[137] Corbacho et al. (eds.), *More Than Revenue: Taxation as a Development Tool*, 121 (fig. 7.4.). These estimates are based on data from the period 2003 to 2010, with different years for the different countries (for Guatemala for instance, the reference year is 2006). They should, therefore, be treated with caution as a source of cross-country comparisons. They do provide, however, an idea of the magnitude of the problem.

[138] Outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015, para. 22.

[139] Ibid.

[140] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 57.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

practices'.[141] This should also be treated as a priority because the failure to effectively address tax evasion has regressive impacts, disproportionately affecting the poor:

> High net-worth individuals and large corporations . . . have a far greater ability to evade taxes as they are able to pay tax advisers, lawyers and accountants (who may sometimes provide inappropriate advice and assistance) and to open undeclared foreign bank accounts in low-tax jurisdictions. Tax abuse by corporations and high net-worth individuals forces Governments to raise revenue from other sources: often regressive taxes, the burden of which falls hardest on the poor. Therefore, if States do not tackle tax abuse, they are likely to be disproportionately benefiting wealthy individuals to the detriment of the most disadvantaged. Monitoring, preventing and punishing abuse is therefore essential in order to comply with human rights principles and improve the distributive effects of tax systems.[142]

Combating illicit financial flows is therefore a human rights issue. Indeed, recognizing that 'illicit capital flight undermines the capacity of State Parties to implement the African Charter on Human and Peoples' Rights and to attain the Millennium Development Goals', the African Commission on Human and Peoples' Rights has called upon States parties to the African Charter on Human and Peoples' Rights 'to examine their national tax laws and policies towards preventing illicit capital flight in Africa'.[143]

Strengthening domestic institutions tasked with combating tax evasion will not suffice, however. This is one area in which such efforts shall only be fully effective if supported by international assistance, as gradually strengthened by the recognition of extraterritorial human rights obligations. As noted by the Special Rapporteur on Extreme Poverty and Human Rights: 'Individual countries, in particular low-income countries, are severely constrained in the measures that they alone can take against tax abuse. Illicit financial flows are international in nature and therefore beyond the capacity of one State alone to tackle. The availability of offshore financial centres (tax havens) that offer low or no taxes and

[141] High-Level Panel on Illicit Financial Flows from Africa, *Illicit Financial Flows* (2014), at 66.

[142] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 60.

[143] Resolution adopted by the Commission at its 53rd ordinary session, 23 April 2013.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

secrecy is a major factor'.[144] This is made increasingly explicit by UN human rights treaty bodies. Thus, the Committee on Economic, Social and Cultural Rights noted in Concluding Observations related to the United Kingdom that 'financial secrecy legislation [allowing its Overseas Territories and Crown Dependencies to prosper as tax havens] and permissive rules on corporate tax are affecting the ability of the State party, *as well other States*, to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights', and it recommended that it 'intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse'.[145]

Nor is the Committee on Economic, Social and Cultural Rights isolated in this regard. A few months after the cited recommendation was addressed to the United Kingdom, the Committee on the Elimination of Discrimination against Women recommended that Switzerland '[u]ndertake independent, participatory and periodic impact assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights and substantive equality, and ensure that such assessments are conducted in an impartial manner with public disclosure of the methodology and finding'.[146] The recommendation was prompted by a report[147] presented by a coalition of NGOs and a human rights clinic, showing how cross-border tax abuse by corporations and individuals (in various forms including 'controversial profit-shifting, fraudulent under-reporting of the value of taxable transactions, and the use of off-shore accounts to hide taxable income'[148]) has an impact on the ability for developing countries to protect and fulfil women's rights. As the report explained:

[144] Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, presented at the 26th session of the Human Rights Council, 22 May 2014, A/HRC/26/28, para. 61.

[145] Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, UN doc. E/C.12/GBR/CO/6, paras. 16–17 (emphasis added).

[146] Committee on the Elimination of Discrimination against Women, Concluding Observations on the combined fourth and fifth reports of Switzerland, 18 November 2016, CEDAW/C/CHE/CO/4–5, para. 41.

[147] Alliance Sud, Centre for Economic and Social Rights, Global Justice Clinic of New York University School of Law, Public Eye and Tax Justice Network, *Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women's Rights*, 2 November 2016, http://chrgj.org/wp-content/uploads/2016/12/switzerland_cedaw_submission_2nov201628.pdf (accessed 13 June 2018).

[148] Ibid., at 1.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

> The loss of revenues to cross-border tax abuse contributes to the underfunding of essential services, institutions, and infrastructure on which women depend, from health care and education to public courts and transportation systems, as well as programs designed specifically to protect and promote women's rights. Inadequate spending on social services often takes a heavy toll on women in particular, as they typically bear the burden of care-giving and performing unpaid work when public institutions fall short.[149]

Extraterritorial obligations in the area of economic, social and cultural rights include a number of components.[150] Establishing a regulatory framework that ensures that poor countries shall not be deprived of the resources needed to finance their development, by clamping down on tax havens and by ensuring that corporations shall not commit tax abuse, is one particularly important component. But other forms of support – more direct, less structural – are equally pertinent to recall in this context.

C. *International Support*

When domestic resources are insufficient to allow a State party to the International Covenant on Economic, Social and Cultural Rights to meet its obligations, it should seek to attract support from outside the country. Among the external resources that could be mobilized are the resources from FDI (that the government could seek to attract to the country, as a means to create employment, to transfer technologies and to raise the standards of living)[151] and the resources that the international community could contribute through development cooperation or through the provision of loans.[152] Indeed, in its interpretation of Article 2 paragraph 1

[149] Ibid., at 2.

[150] The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights seek to bring together the rather disparate contributions from judicial and non-judicial bodies to this fast-developing area of human rights law. They were endorsed on 28 September 2011 by a range of NGOs and human rights experts, including mandate-holders within the Special Procedures established by the Human Rights Council. See Olivier De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly*, 1084–1171.

[151] See text corresponding to notes 117–119 (on the factors that attract FDI) and to notes 95–110 (on the specific case of natural resources).

[152] See Alston and Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 179–180 (referring to the positions of various governmental delegates negotiating what became the

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights considers that 'the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance', noting in this regard 'the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23 which refer to international cooperation'.[153] It also has repeatedly called on States to seek assistance where needed to realise economic, social and cultural rights.[154] Indeed, when it sought the clarify the meaning of the 'maximum available resources' clause in the context of the Optional Protocol opening a right to victims to file individual communications, the Committee on Economic, Social and Cultural Rights informed the States parties that 'should a State party use "resource constraints" as an explanation for any retrogressive steps taken, the Committee would consider such information on a country-by-country basis [in particular] in the light of ... whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason'.[155] Foreign aid and loans are considered in turn.

International Covenant on Economic, Social and Cultural Rights, and asserting that the resources available should be seen as including resources from international assistance and cooperation).

[153] General Comment No. 3, para. 13. See also Committee on Economic, Social and Cultural Rights, *Statement on an Evaluation of the Obligations to Take Steps to the 'Maximum Available Resources' under an Optional Protocol to the Covenant* (38th session, 2007), E/C12/2007/1, para. 5: 'The undertaking by a State party to use "the maximum" of its available resources towards fully realizing the provisions of the Covenant entitles it to receive resources offered by the international community. In this regard, the phrase "to the maximum of its available resources" refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.'

[154] See for instance, Committee on Economic, Social and Cultural Rights, Concluding Observations: Democratic Republic of the Congo, E/C.12/COD/CO/4, (2009), paras. 16–17.

[155] Committee on Economic, Social and Cultural Rights, *Statement on an Evaluation of the Obligations to Take Steps to the 'Maximum Available Resources' under an Optional Protocol to the Covenant*, para. 10(f).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

1. Seeking International Assistance and Cooperation

The duty of States to seek international support loses much of its significance in the absence of clear duties of other States, or of international agencies, to provide such support as may be requested. Such obligations, however, still remain 'imperfect', in the sense that they are too diffuse and general: both the duty-bearers and the content remain vague and contested, making such obligations unenforceable unless and until they are further clarified.[156] The Committee on Economic, Social and Cultural Rights has repeatedly affirmed that international assistance and cooperation for the realization of economic, social and cultural rights is 'particularly incumbent on those States in a position to assist',[157] as well as 'other actors in a position to assist'.[158] That, however, is hardly sufficient to allow a State in need of obtaining support to be able to claim such support from any State to which it turns for assistance.

There have been some attempts to overcome this difficulty.[159] From the point of view of international law, two considerations seem relevant.

[156] The notion of 'imperfect obligations', though originally derived from Kant, is inspired here by Amartya K. Sen, 'Rights and Capabilities', in A. K. Sen (ed.), *Resources, Values and Development* (Oxford: Blackwell, 1984), at pp. 310–315; Amartya K. Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), pp. 359–361 and 382–383. This raises the important question, of course, whether there can be a 'right' (in this case, a right of a State to be provided support) if the correlative obligations are only 'imperfect' (because neither the actor that should provide support, nor the level of support to be provided, are clearly defined). O. O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996), pp. 127–128, with A. K. Sen, 'A Positive Concept of Negative Freedom', in E. Morscher and R. Stranzinger (eds.), *Ethics: Foundations, Problems and Applications, Proceedings of the 5th International Wittgenstein Symposium* (Vienna: Holder-Pichler-Tempsky, 1981), pp. 2–20.

[157] General Comment No. 3, para. 14; General Comment No. 14, para. 45; CESCR, *Statement on Poverty Adopted on 4 May* 2001, E/C.12/2001/10, para. 16; CESCR, General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, 12 January 2006, E/C.12/GC/17, art. 15(1(c (37))).

[158] General Comment No. 14, para. 45; CESCR, *Statement on Poverty*, para. 16.

[159] See, *inter alia*, Sakiko Fukuda-Parr, 'Millennium Development Goal 8: Indicators for International Human Rights Obligations' (2006) 28 *Human Rights Quarterly*, 4, 966–997; Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford and New York: Oxford University Press, 2007), p. 193; Margot E. Salomon, 'Deprivation, Causation, and the Law of International Cooperation', in Malcolm Langford, Martin Scheinin, Willem van Genugten and Wouter Vandenhole (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York and Cambridge: Cambridge University Press, 2012), pp. 259–297.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

First, since the 1970s, it has been agreed that rich countries should dedicate 0.7 per cent of their gross national income to official development assistance.[160] This joint commitment has been reaffirmed in subsequent international declarations,[161] and the Committee on Economic, Social and Cultural Rights has taken it as a benchmark to define the obligation of international assistance. The rise of the notion of common but differentiated responsibilities among States,[162] and various examples of negotiated systems of burden sharing established to address challenges or duties of a global character,[163] confirms that international law is moving towards the recognition of differentiated duties, depending on the capacity and resources of each State.[164] Only a handful of countries are in fact delivering on this commitment, however,[165] and even when

[160] General Assembly, International Development Strategy for the Second United Nations Development Decade, GA Res. 2626, UN GAOR (25th session, 1970) (A/RES/25/2626 (XXV)), at 43 (1970) ('Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 percent of its gross national product at market prices by the middle of the decade').

[161] The 0.7 per cent target was mentioned in the 'Monterrey Consensus on Financing for Development', 22 March 2002, UN Doc. A/AC.257/32, at 42 (2002); in the 'Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review Implementation of the Monterrey Consensus', annexed to GA Res. 63/239, UN Doc. A/RES/63/239, at 43 (2009); and most recently in the Addis Ababa Action Agenda adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015, at para. 51.

[162] For example, UN Framework Convention on Climate Change, 1992, in force on 21 March 1994, 1771 UNTS 107; 31 ILM 851, art. 3.

[163] See, for instance, *IDA's Long-Term Financing Capacity* (International Development Association Resource Mobilization, February 2007); or *The Global Fund to Fight Aids, Tuberculosis and Malaria, Third Replenishment* (2011–2013) (The Global Fund, March 2010).

[164] See more generally Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006); and David Magraw, 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms' (1990) 1 *Colorado Journal of International Environmental Law and Policy*, 1, 69–99.

[165] For instance, an October 2016 report from Concord and AidWatch lamented that 'only five EU countries met their [0.7 per cent] target in 2015': these were Luxembourg, Sweden, Denmark, the Netherlands and the United Kingdom. See Concord/AidWatch Report 2016, *This Is Not Enough*, http://library.concordeurope.org/record/1834/files/DEEEP-REPORT-2016–081.pdf (accessed 13 June 2018), at 6. In the Addis Ababa Action Agenda, the governments expressed their 'concern that many countries still fall short of their ODA [Official Development Assistance] commitments and we reiterate

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

progress is made towards reaching the 0.7 per cent target, how that figure is calculated continues to be controversial.[166]

Second, where a result obtains which may engage the responsibility of one State (for instance, a famine develops due to the lack of international aid, although provision of support by that State might have averted the disaster), such responsibility is not diminished by the mere fact that the result might have been avoided if other States had adopted a different conduct.[167] Indeed, any other reading would lead to what might be called the 'paradox of the many hands': the larger the number of States involved in a situation that creates obstacles to one State fulfilling its human rights obligations, the more difficult it will be to assert a responsibility of any individual State in that situation. This problem is well known in the area of climate change.[168] But it is equally relevant here, where the question is

that the fulfilment of all ODA commitments remains crucial. ODA providers reaffirm their respective ODA commitments, including the commitment by many developed countries to achieve the target of 0.7 per cent of ODA/GNI and 0.15 to 0.20 per cent of ODA/GNI to least developed countries' (outcome document cited previously, para. 51). Outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015, para. 22. This is cited previously at note 128.

[166] For instance, it has been shown that rich countries sometimes include in the calculation of their ODA costs of the hosting of refugees or student grants: the Concord/AidWatch report referred to in note 165 notes that in 2015, 17 per cent of the aid reported by European Union countries 'did not reflect a real transfer of resources to developing countries, because it went to "in-donor" refugee spending, debt relief, student costs, tied aid and interest payments. Some EU member states increased their reported aid almost entirely through spending on refugees in their own countries, thereby becoming their own top beneficiaries' (Concord/AidWatch Report 2016, *This Is Not Enough*, 6).

[167] In the *Bosnian Genocide Case*, the International Court of Justice noted that, to find Serbia responsible for not having prevented acts of genocide, 'it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce' (International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* [Judgment of 26 February 2007], *ICJ Reports*, para. 430). According to the Court, how much the adoption by the State of a different conduct could have altered the outcome would only be relevant to the question of damages to be awarded (ibid., para. 461).

[168] Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law*, 1–22.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

whether any State may be held responsible for a situation – resulting in the lack of realization of economic and social rights in another State – for which not the conduct of the former State alone, but that conduct *in combination with that of a large number of other States*, has contributed to this result.[169]

Thus, a particular violation of economic, social and cultural rights may be attributed to the conduct of one State – for instance, a State refusing to help despite a request to that effect, although that State is 'in a position to assist', even if other, intervening causes, or the conduct adopted by a number of other States, have also played a role in the violation. But the argument remains theoretical and largely speculative: in practice, quite apart from the lack of enforcement mechanisms to coerce a State into discharging its obligations to provide international assistance and cooperation, alleging the responsibility of one State in a situation for which other States also bear some responsibility (potentially to an even larger degree) may be politically difficult to justify. This is especially the case in which the argument made is that the State in question should have done more to support the realization of economic and social rights in another State, for instance by increasing the level of development aid or by facilitating access of that State to international finance. For a State to be found responsible for implementing trade policies that destroy local producers' ability to compete on their own domestic markets, the classical tools of attribution and causality should suffice, once the extraterritorial implications of human rights obligations are accepted. It is a different task altogether to seek to engage the responsibility of that State for not providing a certain level of aid to the country that requests it, or for not ensuring that the multilateral trading system works for the benefit of the State that, due to its poor trade balance, finds it difficult to make progress on development indicators. This is because liability for taking certain actions is easier to justify than liability for omissions. But it is also because what is required here from the State is in fact to make up for the failings of an unjust international economic order, for which that State alone cannot be held responsible.[170]

[169] See, most notably, Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*.

[170] Part of the ambition of the Declaration on the Right to Development, 4 December 1986, A/RES/41/128, is precisely to overcome what may be seen as a gap in international human rights law. The Declaration provides that 'States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development' art. 3(3). Article 4, which stipulates a duty of all States 'to take steps, individually *and collectively*,

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

2. Seeking Loans

The State that cannot mobilize sufficient resources domestically may then turn to another source of financing to realize economic, social and cultural rights: it may seek a loan from another State or from international lending organisations such as development banks. This is a double-edged sword, however. On the one hand, running public deficits financed by debt may be important to compensate for a shortfall of capital where investments are needed, to stimulate the ability of the economy to grow and for public investment to lead to the creation of decent jobs; indeed, public investments in infrastructure and in education, as well as in institutions building, have a key role to play in attracting private investment. On the other hand, however, high levels of debt can lead creditors to impose conditions, linked in particular to macroeconomic policies and fiscal consolidation, that could negatively affect the ability of the borrowing country to fulfill economic, social and cultural rights.

In the recent past, the case of Greece illustrates this best.[171] After it was revealed, in October 2009, that the public debt of the country was much higher than had been reported, Greece faced speculation on the financial markets, making its debt impossible to finance at acceptable conditions. It therefore called for financial support, and three rescue packages were

to formulate international development policies with a view to facilitating the full realization of the right to development', with 'sustained action [being] required to promote more rapid development of developing countries'. The Vienna Declaration and Programme of Action further confirms that 'States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development' (Vienna Declaration and Programme of Action in relation to the right to development, adopted by the World Conference on Human Rights on 25 June 1993 and endorsed by General Assembly resolution 48/121 of 20 December 1993, para. 10); emphasis added.

[171] For an excellent summary, see Lina (Triantafyllia) Papadopoulou, 'Can Constitutional Rules, Even if "Golden", Tame Greek Public Debt?', in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds.), *The Constitutionalization of European Budget Constraints* (Oxford: Hart, 2014), pp. 223–247. See also, European Parliament Report 2009–14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 [INI]), A7–0149/2014, 28.2.2014; Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mission to Greece, 22–26 April 2013, UN doc A/HRC/50/15/Add.1, 27 March 2014.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

successively granted, in 2010, 2012 and 2015.[172] However, following the implementation of fiscal consolidation programmes adopted by the country at the request of its creditors (the other euro area member states represented by the European Commission, the IMF and the European Central Bank), various human rights bodies expressed their concern on the impacts of these programmes on social rights. The European Committee of Social Rights considered that amendments to labour legislation, introduced in the name of 'flexibility', violated various provisions of the European Social Charter,[173] and it arrived at the same conclusion concerning reductions to the levels of pensions.[174] UN human rights treaty

[172] Greece called for financial assistance on 23 April 2010. In response, the representatives of the euro area member states other than Greece decided on 2 May 2010 to provide stability support to Greece through a Loan Facility Agreement: in effect, an intergovernmental framework that allowed the pooling of bilateral loans in the form of an international contract. The euro area member States provided Greece with a total of 80 billion euros in loans on the understanding that the IMF, to which Greece had also turned for assistance, would provide another 30 billion euros (Loan Facility Agreement [2010], preambular § 3). The disbursements, however, were made conditional on the adoption of fiscal consolidation measures by Greece, the content of which was negotiated by the European Commission on behalf of the creditors. The 'Economic Adjustment Programme for Greece' included so-called austerity measures purportedly to restore Greece's fiscal balance (30 billion euros worth of spending cuts were decided for the period 2010–2014); the privatisation of State assets, in the amount of 50 billion euros; and 'structural measures', involving in particular the 'flexibilisation' of the labour market, as a means to restore the competitiveness of the Greek economy. In June 2011, after this first set of measures appeared insufficient, the euro area member states granted a second loan for an amount of 130 billion euros for the years 2012–2014. This second bailout was effectuated through the European Financial Stabilisation Mechanism and the European Financial Stability Facility. It was officially launched in March 2012. Finally, a third rescue package was agreed in July 2015, for an amount of 68 billion euros (see Council Implementing Decision [EU] No. 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece, OJ L 219, 20.8.2015, p. 12).

[173] ECSR, Decision on the merits, 23 May 2012, Complaint No 65/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY)* v. *Greece;* ECSR, Decision on the merits, 23 May 2012, Complaint No 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY)* v. *Greece*.

[174] ECSR, *Federation of Employed Pensioners of Greece (IKA-ETAM)* v. *Greece*, Complaint No 76/2012; *Panhellenic Federation of Public Service Pensioners* v. *Greece*, Complaint No 77/2012; *Pensioners' Union of the Athens–Piraeus Electric Railways (ISAP)* v. *Greece*, Complaint No 78/2012; *Panhellenic Federation of Pensioners of the Public Electricity Corporation (PAS-DEI)* v. *Greece*, Complaint No 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE)* v. *Greece*, Complaint No 80/2012.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

bodies expressed similar concerns at the impacts of the austerity measures introduced by Greece at the request of its creditors.[175] When it reviewed the situation of the country in October 2015, the Committee on Economic, Social and Cultural Rights expressed its concern that

> despite the measures taken by the State party to mitigate the economic and social impact of the austerity measures adopted in the framework of the memorandums of understanding in 2010, 2012 and 2015, the financial and economic crisis has had a severe impact on the enjoyment of economic, social and cultural rights, particularly by certain disadvantaged and marginalized groups with regard to the rights to work, to social security and to health.

It referred Greece to the Letter its Chair addressed on 16 May 2012 to the States parties on economic, social and cultural rights in the context of the economic and financial crisis, and recommended that Greece 'review the policies and programmes adopted in the framework of the memorandums of understanding implemented since 2010, and any other subsequent post-crisis economic and financial reforms, with a view to ensuring that austerity measures are progressively waived and the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery'. It added a broader recommendation that:

> The State party . . . ensure that its obligations under the Covenant are duly taken into account when negotiating financial assistance projects and programmes, including with international financial institutions.[176]

The Greek episode was one of the examples that prompted the Committee to adopt a statement, released on 24 June 2016, in which it noted in particular that:

> The State party seeking financial assistance should be aware that any conditions attached to a loan that would imply an obligation on that State to adopt retrogressive measures in the area of economic, social and

[175] See e.g., Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Greece, 1 March 2013, UN doc. CEDAW/C/GRC/CO/7; Committee on the Rights of the Child, Concluding Observations on the combined second and third periodic reports of Greece, 13 August 2012, UN doc. CRC/C/GRC/CO/2–3.

[176] Committee on Economic, Social and Cultural Rights, Concluding Observations: Greece, 27 October 2015, E/C.12/GRC/CO/2, paras. 7–8.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

> cultural rights that are unjustifiable would be in violation of the Covenant. The borrowing State should therefore ensure that such conditions do not unreasonably reduce its ability to respect, protect and fulfil the Covenant rights.[177]

The important lesson is that, while States that are unable to mobilize enough resources domestically to discharge their obligations under the International Covenant on Economic, Social and Cultural Rights should call upon international assistance and cooperation to seek support from other States and from international agencies,[178] any conditionalities attached to loans should be consistent with the requirements of the Covenant.[179] Indeed, in its resolution 20/10 endorsing the Guiding Principles on foreign debt and human rights, the Human Rights Council emphasized that 'every State has the primary responsibility to promote the economic, social and cultural development of its people and, to that end, has the right and responsibility to choose its means and goals of development and should not be subject to external specific prescriptions for economic policy'.[180]

The duties of countries confronted with a lack of domestic resources, making it impossible for them to fulfil economic and social rights without calling for international support, cannot therefore be assessed without considering the extent to which countries in a position to provide support are complying with their own international obligations. Yet, while there is a clear duty for States who are unable to mobilize sufficient domestic resources to fulfil the full range of Covenant rights, to call upon international assistance and cooperation and to seek to attract resources from abroad, the correlative duty to respond to any request for support remains ill-defined. As to loans a State may seek to obtain, they may of course serve to fill a financing gap; but whether this shall support the full realization of economic and social rights depends on the content

[177] Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, 24 June 2016, E/C.12/2016/1, para. 4.

[178] On this international dimension, see text corresponding to notes 151–170.

[179] See also Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, Guiding Principles on foreign debt and human rights, 10 April 2011, A/HRC/20/23, which the Human Rights Council endorsed at its 20th session in June 2012, in resolution 20/10, The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (A/HRC/RES/20/10), para. 2.

[180] Ibid., para. 6.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

of the structural adjustment programmes imposed on the State concerned by its creditors – and it is indeed striking that the Committee on Economic, Social and Cultural Rights has been paying attention in the past, more to the dangers involved in the accompanying conditionalities, than to the benefits of financing itself. Indeed, this interdependence between the financing needs of one State and the international support it may claim (and the form in which such support is provided) is even more strikingly illustrated by the obligation discussed in the preceding text, to support poor countries' efforts to combat tax evasion and abusive tax practices by controlling corporations' practices and reforming tax secrecy laws.[181]

***

Although this part has examined successively the royalties from the exploitation of natural resources, taxation and international financing as three major sources of public revenue, this remains a very incomplete list: the imposition of users' fees in the delivery of public services and trade tariffs on the import or export of goods or services should also have been considered in a more comprehensive effort to list such sources. Of all these sources of public revenue however, taxation should be seen as the most important. It is not necessarily so in purely quantitative terms: in some poor countries, revenues from trade tariffs are higher in volume than the taxes collected internally. But taxation creates a special bond between the State and its citizens because it results in a strong incentive both for the State to use public revenue for the good of the population, and for the population to control the use of public finance.[182] The reverse is true for the other sources of State revenue discussed previously: as noted by Angus Deaton, where governments

> are well funded by the sale of natural resources . . . they have no need to collect revenue from the population. Since he who pays the piper usually calls the tune, governments can use such revenues to maintain a system of cronies and patronage that has little interest in popular health or wellbeing. In extreme cases, particularly in Africa, foreign aid has been significant

[181] See text corresponding to notes 133–150.

[182] See Ignacio Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', in Nolan et al. (eds.), *Human Rights and Public Finance*, pp. 77–104, at 83 (referring to the 'accountability function' of taxation and citing on this point, in particular, Moore, 'How Does Taxation Affect the Quality of Governance?', Institute of Development Studies Working Paper 280 [2007]).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

> enough to act in this way too, providing governments with resources but undermining their incentives to spend them in the right way.[183]

This argument against foreign aid as a development tool already figured prominently in the pamphlets by William Easterly[184] and Dambisa Moyo,[185] published respectively in 2006 and 2009. These critiques tend to ignore that development aid, too, can be made more transparent and accountable to the populations.[186] But taxation remains specific in that it requires an effort from the population, encouraging it to hold governments accountable for the results.

VI. Spending

Mobilizing domestic resources and calling on international support – and being supported by international cooperation in seeking to mobilize domestic resources – is one step towards complying with the duty to dedicate the 'maximum available resources' to the fulfilment of economic, social and cultural rights. But it is a step that, though necessary, still remains insufficient. The other part of the equation is to define spending priorities, in the public budget, that aim at achieving the full realization of these rights. It is perhaps in this area that the need for guidance is most obvious. The following sections describe different proposals that have been made to clarify how much efforts we can expect from States.

[183] Deaton, *The Great Escape*, p. 121. See also Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', 83.

[184] William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Books, 2006), pp. 15–17 ('Feedback and Accountability').

[185] Dambisa Moyo, *Dead Aid. Why Aid Is Not Working and How There Is a Better Way for Africa* (Penguin Books reprint, 2010), p. 58 ('In most functioning and healthy economies, the middle class pays taxes in return for government accountability. Foreign aid short-circuits this link. Because the government's financial dependence on its citizens has been reduced, it owes its people nothing'.).

[186] See Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 10th session of the Human Rights Council, *The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation*, 11 February 2009, A/HRC/10/5, para. 26 ('A human rights framework requires that we deepen the principles of ownership, alignment and mutual accountability, by shifting our attention to the role of national parliaments, civil society organizations, and the ultimate beneficiaries of aid – the rights-holders – in the implementation and evaluation of foreign aid. It is this triangulation, away from a purely bilateral relationship between Governments, which the adoption of a human rights framework requires'.).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

A. *Social Investment Ratios*

A first set of proposals provide benchmarks to assess whether the efforts invested by States are sufficient to comply with the need to fulfil economic, social and cultural rights, based on certain assumptions as to the needs to be covered. The human expenditure ratio proposed by the UN Development Programme (UNDP) falls under the category. In the second of its series of annual *Human Development Reports* (HDRs), published in 1991, the UNDP proposes to analyze how public expenditures can be mobilized in favor of human development objectives. The 1991 HDR proposes the use of four ratios in this regard.[187] The *public expenditure ratio* is the percentage of national income that goes into public expenditure: it represents the weight of the public sector in the total GDP of the country. The *social allocation ratio* is the share of social services in total government spending: it measures how much of the public budgets goes to finance health, housing or education, rather than to other expenses such as those related to national defence or infrastructural projects. The *social priority ratio* measures, within the public spending that goes to social services, what goes to basic health care, primary education and the extension of basic water systems to poor areas in of both cities and rural areas, all that are called 'human priority concerns'. These three ratios can be combined to lead to a fourth ratio, which the HDR calls the *human expenditure ratio*, representing the share of total GDP that goes to human priority concerns.

Where human development outcomes are poor, it may mean that the decisions on the respective allocations are inadequate and should be revised. The UNDP estimates that the human expenditure ratio 'may need to be around 5 % if a country wishes to do well in human development'. This, the UNDP suggests, should ideally be done 'keeping the public expenditure moderate (around 25 %) [for instance by cutting down on military spending, on internal policing, on debt servicing or on the costs associated with loss-making public enterprises], [but allocating] much of this to the social sectors (more than 40 %) and [focusing] on the social priority areas (giving them more than 50 %)'; in contrast, a less efficient option is to 'withdraw a large proportion of national income into the public sector, to depress private investment and initiative and to restrict the economic growth and resource expansion that can ultimately

[187] UN Development Programme, *Human Development Report 1991: Financing Human Development*, ch. 3, p. 39.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

finance human development'.[188] Countries with a high public expenditure ratio but a low ranking of social priorities would therefore constitute the worst case: based on data from 1988, the HDR 1991 places in this category countries such as India (with a public sector representing 37 per cent of the GDP [public expenditure ratio] but only 2.5 per cent of the GDP going to human priorities [human expenditure ratio]), Nigeria (29 per cent public expenditure ratio and 2.2 per cent human expenditure ratio), Pakistan (25 per cent and 0.8 per cent respectively) or Indonesia (25 per cent and 0.6 per cent).

Drawing attention to such figures is useful to stimulate a public debate about whether a State is setting the right priorities that are consistent both with human development aims and with the progressive realization of the corresponding economic and social rights. As such, however, the benchmarks set by the UNDP cannot form a substitute for a deeper analysis relating outcomes to the actions or omissions of the State. First, some public investments that would not count as corresponding to 'human priority' issues or even to 'social services', in fact matter significantly to the realization of economic and social rights. That is largely what, in the respect-protect-fulfil typology of State obligations,[189] the duty to 'facilitate' – as part of the broader duty to fulfil – refers to. The duty to facilitate may be described as duty to take proactive measures to create the conditions that will ensure that individuals may enjoy the right in concern: it consists, in brief, in a duty to create the required 'enabling conditions' for such enjoyment.[190] Such conditions may require

[188] Ibid., p. 39.

[189] See on this typology Olivier De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2014), pp. 280–291.

[190] Sub-Commission for the Promotion and Protection of Human Rights, *The Right to Adequate Food and to Be Free from Hunger. Updated Study on the Right to Food*, submitted by Mr. Asbjørn Eide in accordance with Sub- Commission decision 1998/106, 28 June 1999, E/CN.4/Sub.2/1999, para. 52 ('the State has the obligation to facilitate opportunities by which the rights listed can be enjoyed'); Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjørn Eide, Catharina Krause and Alan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd ed. (Dordrecht, The Netherlands: Martinus Nijhoff, 2001), pp. 9–28, at 24; General Comment No. 12, para. 15 ('The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security'.). As Eide has remarked, the International Covenant on Economic, Social and Cultural Rights occasionally refers explicitly to duties that belong to this category: Article 11(2), for instance, describing the duty to ensure 'basic freedom from hunger' and to ensure the right to food, provides that the State shall take measures to improve production, conservation and distribution of

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

investment in infrastructures, ranging from roads and grain storage facilities to clean energy and agricultural research and development, that do not fall under the narrow definitions of either 'human priority' or 'social services'. Yet, such investments can be vital both to human development and to the realization of certain economic and social rights such as the right to food or the right to housing. In 1991, when the HDR on *Financing for Development* was published, it was perhaps necessary to emphasize the need to focus more on the needs of the poor in social spending, as investments in infrastructures had been mobilizing both domestic resources and international donors' contributions during the previous two decades[191]; but two and a half decades later, we now understand better the limitations of an approach that aims to respond to the most urgent needs, without addressing the deeper causes of the inability of the poor to climb out of poverty and graduating out from short-term support measures.

In addition, it cannot be ruled out that a State shall ensure an adequate level of fulfilment of human rights even though it dedicates less than the ratio of 5 per cent to total GDP to social priority issues, the ratio suggested by the UNDP if countries want to 'do well in human development'.[192] Where, for example, a smaller percentage of the total GDP goes to health care in State A than in State B, but health care is both more affordable and of better quality in State A than in State B, should we consider that State B complies with the requirements of the right to health, when State A does not? Perhaps the total GDP per capita is significantly higher in State A, so that in absolute terms, the public spending per pupil in State A is higher than in State B[193]; or perhaps

food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems.

[191] It will be noted, however, that the UNDP does acknowledge the important role of the State in providing such public goods, in particular through infrastructural projects: the State should 'create physical infrastructure such as roads, railways, harbours, electric power stations and telecommunications', all that often will be best provided by the State (*Human Development Report 1991: Financing for Development*, 39; the UNDP adds, however, that 'where private enterprises can provide it efficiently, and does so, policies must promote private investment').

[192] *Human Development Report 1991: Financing for Development*, 40.

[193] The UNDP provides examples, based on data from 1988 to 1990: 'The Republic of Korea and Malaysia spend similar amounts on social priority concerns per person ($128), even though Malaysia's human expenditure ratio is twice that of the Republic of Korea, because the latter's GNP per capita is twice that of Malaysia. Similarly, Kuwait's human expenditure ratio is half that of Botswana, yet its absolute expenditure per person is

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

the resources are used more efficiently in State A than in State B, for instance because of a greater emphasis being put on preventive medicine. Should we care more about the *results* achieved, or about whether the *efforts* deployed by the State correspond to the resources available – its capacity to fulfil rights?

Of course, the notion of 'progressive realization' of economic and social rights 'to the maximum of [each State's] available resources', as prescribed by Article 2 paragraph 1 of the Covenant, bridges the conceptual gap between obligations of result and obligations of means, by requiring from States not that they achieve certain *results* (by whichever means they see fit), but that they dedicate a sufficient share of the resources at their disposal to move towards the full realization of economic and social rights, in a never-ending quest for improvement. Yet, apart from the fact that this would provide no indication as to which share is 'sufficient', it does not take into account that beyond a certain level of enjoyment, the financing of economic and social rights has a decreasing marginal utility, which means that determining fixed percentages of public expenditure (or of a country's total incomes) is hardly defensible: in a country where access to all levels of education is free and where the educational services are of good standard, is it justified to still demand that any increase in GDP results in a proportionate increment in the sums dedicated to education? To answer such questions, we need what the health economist Victor Fuchs has called a holistic view of well-being, one that is aware of the need for trade-offs between different aspects of well-being.[194] The comparison between Figures 19.3 and 19.4 show, for instance, that whereas there is a relatively strong correlation between the growth of a country's GDP and spending on health care (from both private and public sources), the gains in terms of increased life expectancy reach a plateau beyond approximately 3,000 USD per person per year (see Figure 19.4). In other terms, beyond that level, it makes less sense to invest more in health care because the benefits (at least as assessed in the number of lives saved) will be minimal compared to the additional resources absorbed:

nearly seven times that of Botswana's' (*Human Development Report 1991: Financing for Development*, 40).

[194] Victor R. Fuchs, 'The Financial Problems of the Elderly: A Holistic Approach, in Stuart H. Altman and David I. Shactman (eds.), *Policies for an Aging Society* (Baltimore, MD: John Hopkins University Press, 2003), pp. 378–390.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

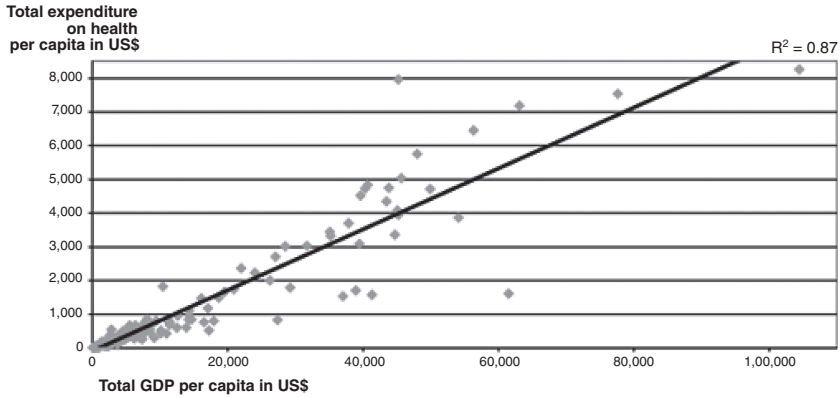

Figure 19.3 The correlation between wealth and health expenditure (2009). Reprinted from WHO factsheet No. 319: Spending on Health: A Global Overview (April 2012) http://www.who.int/news-room/fact-sheets/detail/spending-on-health-a-global-overview (accessed 8th October 2018)

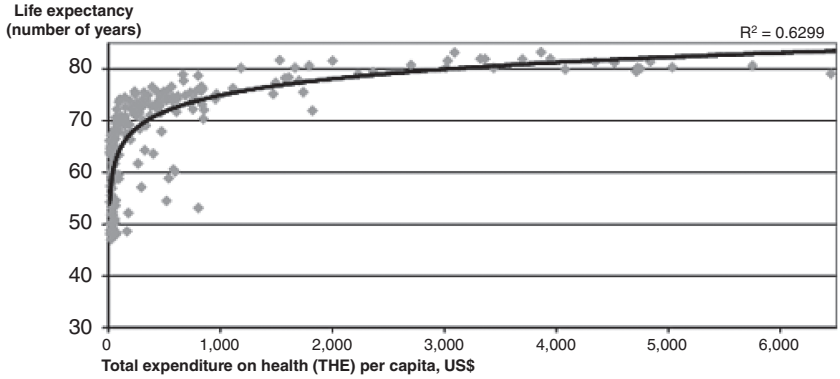

Figure 19.4 Correlation between expenditure on health and outcomes (2009). Reprinted from WHO factsheet No. 319: Spending on Health: A Global Overview (April 2012) http://www.who.int/news-room/fact-sheets/detail/spending-on-health-a-global-overview (accessed 8th October 2018)

If resources were infinite and if there were no trade-offs between different dimensions of well-being (and the corresponding rights of the Covenant), it would perhaps be understandable to set fix measures, so that each increase in a country's wealth should lead automatically to a commensurate increase in the spending on health, education or social housing. But resources are finite, and trade-offs may be required.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Other benchmarks have been proposed, however, also with a view to assessing States' efforts, but focusing on specific rights, based on an estimate to what is required to fulfil them at the appropriate level. The World Health Organization (WHO) for instance, estimated in 2012 that the 'minimum spending per person per year needed to provide basic, life-saving services' represented 12 USD. During that same year, the average amount spent on health care in OECD countries was 4,380 USD per person and per year; in the United States, with a record 8,362 USD per person and per year, the spending was almost double that average for rich countries. However, the respective contributions of households and of the State diverged widely from country to country: whereas Luxembourg had the highest level of public spending on health per person and per year (with 6,906 USD, which compares to the meagre 2 USD per person per year Myanmar spent in 2010), Switzerland has the highest level of private spending (or out-of-pocket spending per household), with 2,412 USD.[195] As we have seen, other (more recent) studies have proposed more ambitious targets, both absolute (86 USD per person per year in the 2014 Chatham House report, for instance) and as a percentage of the country's GDP (5 per cent, according to that same report).[196] This is a higher estimate even than the one proposed in the 2010 World Health Report, which concluded that low-income countries would need to spend on average 60 USD per capita by 2015 to deliver a set of essential health interventions.[197]

We are concerned here, not with the numbers as such, but with the methodological questions raised by such an attempt. There is broad agreement on some issues. It is clear, for instance, that it is more appropriate to define a target in terms of *governmental expenses (public spending) as a percentage of the GDP*, rather than in terms of the *percentage of total governmental spending that should go to a sector* such as health care. A target expressed as a percentage of public spending[198]

[195] All these figures, based on 2010 data, are from the WHO factsheet No. 319: *Spending on Health: A Global Overview* (April 2012), www.who.int/mediacentre/factsheets/fs319/en/ (accessed 13 June 2018).

[196] See *Shared Responsibilities for Health*, 12.

[197] World Health Organization, *World Health Report 2010: Health Systems Financing: The Path to Universal Coverage* (Geneva: World Health Organization, 2010), p. 10; see also World Health Organization (High-Level Taskforce on Innovative International Financing for Health Systems), More Money for Health and More Health for the Money (2009).

[198] See, for instance, the *Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases*, adopted at the African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, convened in Abuja, 26–27 April 2001 (in which the

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

obviously ignores the fact that some States may have a much larger public sector than others, and that States in which the public sector is least developed may have far more unused fiscal space. It is also clear that the same levels of investment may have more or less impact on the fulfilment of the right to health, depending on how efficiently the resources are used and, in particular, on whether they go to meeting the priority needs of the population, particularly those of the low-income groups within the population. Thus, *who is reached* matters, at least as much as *how much governmental spending* goes to any particular sector. And far more attention should go to combating inefficiencies: the Institute of Medicine in Washington, D.C. for instance estimated that in 2009, more than a third of health-care costs in the United States were unnecessary or wasted, for a total amount ranging between 750 and 765 billion USD.[199]

These problems are similar to those already noted regarding the UNDP proposal to define a human expenditure ratio as a target for States to reach on 'human priority' programmes. Other illustrations could be provided for other social rights. For instance, UNICEF has presented a model to assess the financial needs of the education sector, taking into account a number of variables such as the number of children to be educated (itself a function of the percentage of school-age children in the total population), the desirable pupil-teacher ratio (40 being the target), the recurrent funding to cover salaries and materials, the additional costs of enrolling marginalized children and capital expenditures, including in particular classroom construction and maintenance.[200] Yet, 'transforming resources into outcomes' raises specific challenges (in other terms, to ensure that the money is spent efficiently, and the education provided is of adequate quality), and so does ensuring that the resources are used equitably – for instance, reaching the poorest regions or addressing the education needs of the lowest quintiles of the population.[201]

Some of these problems could be addressed in the simplest of ways: by taking a rights-based approach to the delivery of services such as health,

Heads of State and Government of the Organisation of African Unity [OAU] pledged to allocate 'at least 15% of our annual budget to the improvement of the health sector') (OAU/SPS/ABUJA/3), www.un.org/ga/aids/pdf/abuja_declaration.pdf (accessed 13 June 2018), at para. 26.

[199] Institute of Medicine, *Best Care at Lower Cost: The Path to Continuously Learning Health Care in America* (Washington, DC: National Academies Press, 2013).

[200] See United Nations Children's Fund (UNICEF), *The Investment Case for Education and Equity* (New York, 2015) (Box 5: Model to compute the financial allocations needed to achieve universal primary education), at p. 44.

[201] See ibid., sections 3.5 and 4.2, respectively.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

education or housing. That means defining clearly the level of support that individuals may claim from the State, as well as the eligibility conditions; providing potential beneficiaries with access to remedies, before independent bodies including courts, so that they may challenge a refusal to provide the support they claim; and informing them about their rights. Such an approach, ideally, would be able to address questions of underinclusiveness or discrimination, or inadequate targeting of the efforts. Where the level of support or the coverage of the population are insufficient, the question however remains: which weight should be given to the argument that the State simply cannot dedicate more resources to the public programme in question? How are we to assess whether the State has done 'enough', although it appears that its efforts are insufficient to meet the needs? Neither the UNDP's approach based on the human expenditure ratio, nor similar approaches as developed by WHO or UNICEF, answer that question. These attempts do assist in setting targets, but they do not allow us to assess whether a State could do more. Obviously, if this is the purpose, the definition of needs by setting absolute figures (the per capita public expenses for health care, for instance, or the public expenses for each pupil attending primary education) is of little help. Defining a percentage of the country's GDP that should go to particular sectors is more useful in this regard. But is this the right measure of a country's ability to realize economic, social and cultural rights? That is the question raised by recent attempts to define an achievement possibility frontier (APF) for States, to which we now turn.

B. The Achievement Possibility Frontier

One attempt to propose criteria by which to assess States' capacity to fulfil human rights is by Sakiko Fukuda-Parr and her collaborators. Fukuda-Parr, formerly a loan officer at the World Bank, later joined the UNDP, for which she worked a number of years in Africa. As the Director of the Human Development Report Office between 1995 and 2006, she was a lead author of the annual flagship publication of the UNDP, the *Human Development Report*, which is best known for popularizing the 'Human Development Index' (HDI) as a measure of development alternative to GDP growth per capita.[202] Now a professor at the

[202] The UNDP website describes the HDI as 'a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living', which should provide a measure of progress in

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

New School in New York, she brings the human development perspective to human rights, seeking in her recent work to define a metrics through which to assess the fulfilment by States of their obligations towards economic and social rights, taking into account their capacity (in terms of resource availability) to do so. In a 2008 paper, Fukuda-Parr and her colleagues offer to assess whether a particular economic and social right is adequately fulfilled (z) by examining the ratio between the extent of rights enjoyment, as measured through socio-economic indicators commonly used in the development field (x), and State resource capacity, using GDP per capita as a proxy for such capacity (y), so that $z = x/y$.[203] Under this approach, countries such as Moldova, Malawi and Tanzania, though scoring low on the HDI, would score well on the SERF Index (Social and Economic Rights Fulfilment Index, initially referred to as the Economic and Social Rights Fulfilment Index [ESRF Index]); the reverse would be true for Mexico and Malaysia, two countries that, although relatively well ranked on the HDI, could do much better to fulfil economic and social rights given the resources at their disposal.[204]

Alternatively, in another, slightly different version of the same approach, the degree of fulfilment of the right (z) could be assessed as a value between 0 and 1, calculated as the ratio between the actual achievement of the country (x) and the maximum level of achievement

development alternative to the growth of GNI per capita and thus may allow us to ask 'how two countries with the same level of GNI per capita can end up with different human development outcomes', http://hdr.undp.org/en/content/human-development-index-hdi (accessed 13 June 2018).

[203] Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment* (The Human Rights Institute of the University of Connecticut, Economic Rights Working Paper Series, Working Paper 8, 2008), 13–15. The authors consider that the capacity to fulfil economic and social rights does not increase linearly with the growth of GDP per capita, however: a Country A with a GDP per capita that is 10 times that of Country B cannot be expected to perform 10 times better on socio-economic indicators related to economic and social rights outcomes. This non-linear relationship between GDP per capita growth and development outcomes was initially noted in studies measuring the Physical Quality of Life Index – a composite index based on indicators of infant mortality, life expectancy at age one and adult literacy rate – under the auspices of the Overseas Development Council in the late 1970s (see David Morris, *Measuring the Condition of the World's Poor: The Physical Quality of Life Index* [New York: Pergamon, 1979]). Moreover, separate index scores would be developed for low- and middle-income countries, on the one hand, and high-income countries, on the other hand, to consider the very different situations of these respective groups of countries.

[204] Ibid., p. 31.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

possible at the *per capita* income level of the country concerned, such a maximum being based on the highest level of the indicator historically achieved by any country at that per capita GDP level (y). This latter approach is called the APF approach, a terminology that adequately conveys that it seeks to assess a country's performance against the best-performing country at the same level of development, as indicated by the GDP per capita.[205] Its main advantage, the authors note, lies in the 'theoretical coherency of assessing a country's fulfilment of its obligation of progressive realization based on the level at which a country with a given per capita GDP *could* perform'.[206] The APF approach does not differ in fundamental ways from a proposal made in 2007 by Cingranelli and Richards that we adopt as a standard (to assess the performance of any particular government in implementing economic and social rights): 'whether the condition of the poorest people in a country is better or worse than the condition of the poorest people in other countries that are peer benchmarks, because the available wealth per capita is similar'.[207] The major difference, evidently, is that whereas the APF approach provides a relatively stable baseline (as it is based on historical precedent), the Cingranelli-Richards standard is constantly shifting, based as it is on the changing average performance of the peers, which makes comparisons across time more difficult: even a country making significant progress could be scoring less well if the other countries at the same stage of development move forward even faster.

The approach developed by Sakiko Fukuda-Parr and her colleagues, now systematically exposed in a book-length publication,[208] provides an elegant way to distinguish between how a State performs on human development indicators, and how it performs on indicators of economic and social rights fulfilment: indeed, to rank countries on this second metrics, we must distinguish between a country's *unwillingness* to do more to support economic and social rights and its *inability* to do so, and that is what the definition of an APF should help to achieve.

At the same time, the demarche of Fukuda-Parr and her colleagues is incomplete. The method of analysis per definition cannot integrate the

[205] Ibid., p. 18.
[206] Ibid., p. 20.
[207] David L. Cingranelli and David L. Richards, 'Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark', in Hertel and Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues*, pp. 214–232, at 223.
[208] Sakiko Fukuda-Parr, Terra-Eve Lawson Remer and S. Randolph, *Fulfilling Social and Economic Rights* (New York, NY: Oxford University Press, 2015).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

duty of the State to seek international support, when the domestic resources that could be mobilized are insufficient.[209] Perhaps more fundamentally, the method proposed confronts us with the question of how the capacity of a State to fulfil economic and social rights should be measured. Such capacity is determined essentially by reference to the GDP per capita, as a proxy for the resources available to the country. While this may be questioned, as such a measure of capacity fails to take to take into account factors other than GDP per capita that influence such a capacity, this simplification may not make a significant difference in fact. Cingranelli and Richards found from their empirical analysis that using other indicators of the ability to fulfil economic and social rights, beyond GDP per capita, such as FDI, portfolio investment, official development assistance or foreign debt (the latter obviously affecting negatively the ability to fulfil economic and social rights), does not result in a change of ranking between countries. Indeed, econometric studies have concluded that GDP per capita may be taken to be an adequate proxy for the various factors that could be anticipated to affect the ability of the country to move towards the fulfilment of economic and social rights.[210]

There is at least no doubt that GDP per capita is a more appropriate measure of capacity to fulfil economic, social and cultural rights than public revenue because the latter depends on policy choices (concerning in particular the rates of taxation) that cannot be relied upon by governments to justify a weaker performance in the fulfilment of economic and social rights. But as the authors acknowledge,[211] just like public revenue

[209] The deliberate choice to exclude foreign aid from the count of available resources for the purposes of constructing the SERF Index is justified by the authors by a lack of reliable data, by the weakness of the evidence concerning the effectiveness of aid and finally by the fact that 'the resources at a country's disposal from the international community are in part a reflection of the country's policy choices' (Fukuda-Parr et al., *Fulfilling Social and Economic Rights*, pp. 54–55). These seem rather weak justifications for this methodological choice.

[210] Cingranelli and Richards, 'Measuring Government Effort to Respect Economic and Social Human Rights', pp. 225–226 (referring to David Richards, Ronald D. Gelleny and David H. Sacko, 'Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries' (2001) 45 *International Studies Quarterly*, 2, 219–239.

[211] Fukuda-Parr et al., *Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment*, p. 13; and Fukuda-Parr et al., *Fulfilling Social and Economic Rights*, p. 54 (noting that 'per capita GDP at any given time is not a fully exogenous measure of resource availability, since a low per capita GDP can result from poor macroeconomic policy choices by a state', yet adding that 'SERF

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

depends on budgetary choices made by States (and thus contestable), a low GDP per capita could be the result of poor macroeconomic policy choices by governments, or of the mismanagement by a government of the country's economy. Indeed, some cases of mismanagement could be such that they could amount to a violation of the obligations imposed on the State by the Economic, Social and Cultural Rights Covenant, where the failure to take appropriate policy measures impedes the realization of economic and social rights.

The model is incomplete, also in that it does not allow to distinguish between the different reasons *why* a country scores poorly on the proposed measure of economic and social rights fulfilment – either because of a relatively poor ratio between its achievements on certain outcome indicators and the resources it could mobilize to improve such indicators further or compared to what, historically, countries at a similar level of development could achieve. But this would seem to matter. For instance, even with an identical GDP per capita, the ability of countries to perform well on socio-economic indicators related to health or child malnutrition (as measured by stunting rates) may differ widely in the presence of epidemics or where climatic conditions affect the quality of harvests; access to water and sanitation may be more difficult to achieve in countries with a population dispersed over a large territory, than in countries where the population is concentrated in certain areas; and certain social or cultural norms, such as those that reduce the mobility of women or their decision-making power within the household,[212] may be difficult to transform in the short run.

In assessing whether a country is setting its priorities adequately, such constraints cannot be ignored. Indeed, that is what makes the use of indicators in development studies different from their use to promote human rights accountability: while there are many reasons why socio-economic indicators are poor in certain countries – including natural

Index findings are virtually the same' under an approach that, to overcome this endogeneity problem, would rely on 'a country's predicted rather than actual per capita GDP').

[212] It has been shown that women's empowerment can significantly affect the educational, nutritional and health outcomes for children: see Lisa C. Smith and Lawrence Haddad, *Explaining Child Malnutrition In Developing Countries: A Cross-Country Analysis*. Research Report 111 (Washington, DC: International Food Policy Research Institute, 2000); Mark M. Pitt, Shahidur Khandker, Omar H. Chowdhury and Daniel L. Millimet, 'Credit Programs for the Poor and the Health Status of Children in Rural Bangladesh' (2003) 44 *International Economic Review*, 1, 87–118.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

calamities, lack of resources or constraints imposed by the international environment, the allegation that human rights violations have occurred, potentially leading to a finding of responsibility, presupposes that the State is in a position to improve such outcomes, in other terms, that the deprivations are the result of a lack of political will. The 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights put it succinctly: 'In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations'.[213] But does a low GDP per capita necessarily result in an inability to fulfil rights and, conversely, can we presume that a high GDP per capita necessarily allows a State to overcome any obstacles it may face?

In some respects therefore, the approach by Fukuda-Parr and her colleagues underestimates the ability of a country to transform the conditions it is confronted with; in other respects, such an ability seems to be overestimated, and the real constraints it faces ignored. In fact, to assess State conduct, we need to treat the lack of implementation of social, economic and cultural rights as a question of political economy: what really matters is to whom the failure is attributable. It is this question of attribution that is at the heart of another approach, our third approach, that we may call *diagnostic monitoring*: the identification, by a causal analysis, of the reasons why certain outcomes are unsatisfactory and of the measures that could be adopted to remove such obstacles.

C. *Diagnostic Monitoring: Causality Analysis*

Diagnostic monitoring is the label attached, for ease of exposition, to the approach initially pioneered by Eitan Felner.[214] Felner proposes to use quantitative data, combined with qualitative information, to move from outcomes (economic and social rights deprivations and disparities of outcome) (step #1 of the three-steps approach), to the identification of the 'main determinants of these outcomes so as to identify the policy

[213] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 13.

[214] Eitan Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability' (2008) 9 *Sur – International Journal on Human Rights*, 109–146. See also, for an operationalization of this approach, Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights' (2009) 1 *Journal of Human Rights Practice*, 3, 402–435.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

responses that can reasonably be expected of the state' (step #2), and finally (in step #3) to the assessment of the extent to which 'deprivations, disparities and lack of progress can be traced back to failures of government policy'.[215] Only by identifying why a State scores poorly on certain socio-economic indicators, can certain questions be asked about State conduct: for instance, in a State with a low schooling rate for girls, whether that outcome is attributable to social or cultural norms or, instead, to the lack of economic incentives (for instance, due to discrimination against women in employment, which is a disincentive to invest in girls' education), leads to different expectations as to what the response of the State should be.[216] Such a causality analysis should make it possible to identify which deprivations of social and economic rights (as measured by outcome indicators) are attributable to a failure of the State to comply with its obligations, and which are instead the result of a lack of capacity of the State. Indeed, the final stage of the analysis (step #3) should enable the identification of 'cases in which the government had the capacity to deal with some of the determinants of specific deprivations and inequalities identified in Step #2, but failed to do so'.[217]

But how should such a capacity be assessed, and how can we determine what a reasonable response of the State should be? Felner proposes a variety of ways (five in total) to identify the relevant benchmarks. Some of the answers proposed are irrelevant to the question of how a country's responses are to be assessed where the outcomes are unsatisfactory because, by design, they rule out the possibility that the country could invoke factors beyond its control to provide a justification for poor achievements: this corresponds to violations of the prohibition of discrimination, or of the core obligation of the State, which should not be made to depend on State capacity.[218] The other answers fall in two

[215] Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', 116.

[216] Ibid., at 126.

[217] Ibid., at 122.

[218] This is the case where Felner notes that international human rights standards should provide the benchmark. He provides the following example: '[T]he obligation of universal primary education sets a benchmark of 100% primary education completion rate. Comparing rates in the focus country with the relevant international human rights obligation can reveal shortfalls in the enjoyment of a right in the focus country' (ibid., at 115). But that amounts to substituting an obligation of result for an obligation of means, and does not provide an adequate methodology for identifying the standard of conduct to be adopted by a country with a view to progressively realize a social or economic right as required under Article 2, paragraph 1, of the International Covenant on Economic,

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

groups: they consist either in taking the State concerned as the reference point or in defining the benchmark through cross-country comparisons. The first approach may consist in relying on an objective a State has set for itself, for instance by endorsing an international goal such as one contained in global development goals (the Millennium Development Goals until 2015, the Sustainable Development Goals today) or by specific commitments, say, to increase the budget going to public housing by 20 per cent in two years, or in the past performance of the State constituting the benchmark against which to assess further progress. The main advantage of this approach is that the benchmark is not imposed from the outside but is the result of the concerned State, which makes it difficult to challenge on legitimacy grounds. Yet, it begs the question of how to assess whether the goals set by the State are adequate, given the resources at its disposal: has the State been ambitious enough in setting an objective, and if progress was made in comparison to previous years, was that progress sufficient? As Felner recognizes, referring to the suggestion of evaluating the performance of a State against the targets it has set for itself, this commitment in turn 'should also be scrutinized, as it could be flawed from a human rights perspective'.[219] The same holds, of course, for global development goals (and their associated targets) as set by the international community, which have often been denounced for not being sufficiently ambitious when contrasted with the kind of outcomes that international human rights would require.[220]

Social and Cultural Rights; it corresponds in fact to the methodology some commentators would use for assessing compliance with 'core obligations' corresponding to the 'essential minimum levels' of enjoyment of a particular right such as the right to education, discussed in Part II of this chapter. The same is true for another method proposed by Felner that consists in using disaggregated data by ground of potential discrimination (sex, membership in an indigenous group or in a particular ethnic group, etc.) to 'identify disparities, and therefore possible discrimination, among population groups in the access to and enjoyment of economic and social rights' (ibid., at 116). Here again, the conclusion that a violation has occurred is based on the identification of an outcome that is unsatisfactory, an approach that – though defensible from the normative point of view – does not answer the question of progressive realization and of the corresponding obligation of means imposed on the State.

[219] Ibid.

[220] For extensive discussions about this mismatch, see Mac Darrow, 'The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda' (2012) 15 *Yale Human Rights and Development Law Journal*, 55–127; Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly*, 3, 755–829.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

The second approach is more promising. It relies on cross-country comparisons, using as a reference point countries of a same region at a similar level of development: such cross-country comparisons, Felner argues, 'could reveal whether the levels of deprivation of the focus country are lower than expected given the country's development level'.[221] The choice of relying on countries of the same region and at a similar level of development (by which Felner presumably means countries with a similar GDP per capita), should be seen as a compromise. A more rigorous methodology should take into account a variety of factors in multiple regression analyses, to control for the various obstacles that a country may be confronted with. Such obstacles could include, though not be limited to, the country being landlocked, having a weak population density making the delivery of services more expensive and more difficulty or being heavily dependent on a narrow range of commodities as a source of export revenues. But taking into account a large range of factors that might potentially affect a country's ability to fulfil economic and social rights would soon make monitoring compliance with social and economic rights an unmanageable task: for the sake of simplicity, Felner therefore proposes to limit the comparison to the countries of the same region (geographical proximity being a proxy for the range of obstacles faced).[222]

To understand the original contribution of this 'new frontier in economic and social rights advocacy' proposed by Felner, it may serve to recall its origins in a joint project of the Center for Economic and Social Rights and the Central American Institute for Fiscal Studies on the right to education in Guatemala.[223] Guatemala is a country with potentially many resources that could be mobilized to address socio-economic deprivation, in particular access to members of the large indigenous

[221] Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', 116.

[222] Ibid., 149–150 (note 27) ('To avoid controlling for a whole set of possible relevant factors (such as weather/climate reasons, conflict spillovers, population density and cultural beliefs) which would require making the quantitative tools proposed here more complex (because of the use multiple regressions), it is instead suggested here to only use comparisons across countries of the same geographic region, a standard practice used as a simple alternative to controlling for these potentially relevant factors').

[223] See ibid., at 135; and the reference to a then forthcoming report, published since, by the Center for Economic and Social Rights and the Central American Institute for Fiscal Studies, *Guatemala: Rights or Privileges? Fiscal Commitments to the Rights to Health, Education and Food in Guatemala* (New York and Guatemala: Child Rights International Network, 2009).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

community to education. It fails, however, largely as a result of a regressive taxation system that an oligarchical minority refuses to change. In such a situation, it is of vital importance to demonstrate that poor outcomes can be traced back to State policy, to categorize such outcomes as violations of human rights obligations and thus to improve accountability.

As its background illustrates, the principal merit of Felner's approach is that it allows for a highly contextualized analysis. Even when the levels of deprivation in certain areas (such as health, education or food) are identical in countries at a same level of development, different recipes will correspond to their respective conditions. Because the demarche proposed here is inductive, taking outcomes as a departure point and moving backwards along the causality chain to identify the policies that explain the outcomes, it avoids falling into the trap of presupposing that there are certain policies valid across time and geography to address social and economic deprivation. Instead, there is room for deliberation: where one country from a group underperforms, the question must be asked why it does not succeed, and whether, given the constraints that country faces and in the light of how other countries at a same level of development address similar constraints, it could perform better.

However, even placing Felner's proposals under the best possible light, it fails on one point: it does not take into account that certain obstacles that appear in a static perspective as being constraints imposed on the State can be treated in a dynamic perspective as a State's own creation.[224] This is in part compensated by Felner's proposal to develop cross-country comparisons across time, to show, for instance, that 'while India had a much higher income growth than its neighbors in South Asia, its reduction in the child mortality rate during the same period was one of the lowest in this sub-region' or that 'the proportion of urban Kenyans with access to an improved water source has been declining since 1990, in contrast to many of Kenya's neighbors that have made progress during the same period'.[225] But even that would not address explicitly the

[224] On the danger of treating the background of legal controversies as given rather than as shaped by State action – and shaped, in particular, by legal norms, see among many others Laurence H. Tribe, 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics' (1989) 103 *Harvard Law Review*, 1, 1–39; or Cass Sunstein, 'Lochner's Legacy' (1987) 87 *Harvard Law Review*, 5, 873–919.

[225] Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', 151 (referring to the work of the

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

question of the shifting boundary between what the State may be held responsible for in the assessment of the duty of progressive realization, and what are factors beyond its control: if India were to impute its failure to reduce child mortality to inadequate feeding practices by women, and if Kenya were to attribute its poor record on access to water and sanitation to budgetary constraints, should these factors be treated as exogenous or as endogenous? And if treated as exogenous in the short run (India, say, was surprised to find that increases in food availability did not result in improved nutritional outcomes due to poor feeding practices), should they not be treated as endogenous in the long run (after India had time to conduct information campaigns towards the population about feeding infants)? This is the challenge associated, in legal thought, with the realist school of jurisprudence, which questions the apparent neutrality of baselines that, although they may seem pre-political, in fact are a creation of the State;[226] it is one that still must be met in scholarship on economic and social rights.

Perhaps unsurprising, the approach pioneered by Felner was later built upon by the New York–based NGO Center for Economic and Social Rights (CESR), of which he was the former executive director. In 2012, CESR proposed a systematic attempt to define the duty of 'progressive realization' according to such a contextual approach, attentive to the political economy dimensions of States' efforts (allowing to focus on the reasons why certain policies were not adopted that might have improved the situation of rights-holders). The result of this effort is presented as the OPERA framework.[227] The acronym OPERA stands for 'outcomes, policy efforts, resources, assessment', describing the various steps that, according to this framework, human rights advocates should take to assess whether a State is doing enough for the fulfilment of economic and social rights.[228] The steps may be briefly summarized as follows:

Center for Economic and Social Rights and in particular to 'Factsheets' it produced, respectively, on India and on Kenya).

[226] For contemporary revivals, see for instance, Sunstein, 'Lochner's Legacy', 873–919; or Tribe, 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics'.

[227] For a description of the framework and of how it came about, see Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', pp. 77–104.

[228] Center for Economic and Social Rights, *The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social and Cultural Rights* (New York, NY: Center for Economic and Social Rights, 2012).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

1. Outcomes: advocates should assess the level of enjoyment of rights (including in particular whether the 'minimum core obligations' are complied with), disparities in rights enjoyment (corresponding to the duty of non-discrimination), and whether there is progress over time (corresponding to the duty of progressive realization).
2. Policy efforts: advocates should examine the legal and policy commitments of the State and whether these are sufficient to demonstrate a commitment to 'take steps' for progressive realization of rights; the policies adopted (and whether such policies ensure availability, accessibility, adequacy, adaptability and quality of the rights concerned); and the process through which the policies are designed and implemented (and specifically, whether such policies comply with the principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and remedies – the so-called PANTHER (participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law) principles, initially presented in this form by the Right to Food unit of the UN Food and Agricultural Organisation in 2006).[229]
3. Resources: advocates should assess whether States dedicate enough resources to rights fulfilment and whether they duly mobilize all resources available (both domestic and international), as well as the process through which decisions concerning resource mobilization (including taxation) and spending are made.
4. Assessment: advocates finally should assess whether the policy efforts and resource mobilization and spending are sufficient.

The final step of 'assessment' shall, of course, be the most heavily contested: as the CESR publication notes, it is here that we must 'distinguish deprivations that might be the result of factors genuinely beyond the control of the state from those for which the state should be held accountable'.[230] The CESR summarizes its effort at this stage of the analysis as follows:

> By triangulating the findings from the first three steps – outcomes, policy efforts and resources – it is possible to bring to light the obstacles that are

[229] See the Food and Agriculture Organization's The Right to Food, www.fao.org/righttofood/about-right-to-food/human-right-principles-panther/en/ (accessed 13 June 2018).

[230] Center for Economic and Social Rights, *The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social and Cultural Rights*, 27.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

> preventing commitments made on paper translating into practical action that has a meaningful impact improving the situation on the ground. Much like a diagnostic chart, this approach helps to establish the often opaque causal links between these elements. The analysis may show, for example, that the problem is attributable to inadequate or discriminatory use of resources, inadequacy of policy efforts, a lack of participatory processes, or other factors. On the basis of this analysis, a picture should emerge, from which it is possible to draw conclusions about the reasonableness of the state's efforts to progressively fulfill the right(s) under review to all sectors of the population without discrimination and employing the maximum of its available resources.[231]

The 'reasonableness' criterion thus assumes a considerable burden. This is hardly surprising. It is this criterion too that, borrowed from the jurisprudence of the South African Constitutional Court,[232] appears in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which uses this term in defining the approach the Committee on Economic, Social and Cultural Rights should take when examining individual communications.[233] The distinct contribution of 'reasonableness' is to call for a highly contextual assessment, in which the range of reasons that could be invoked on either side of the argument is not limited *a priori* as in rules-based argumentation. 'Reasonableness', in

[231] Ibid., at 29.

[232] Constitutional Court of South Africa, Case CCT 11/00, *Government of the Republic of South Africa and Others* v. *Grootboom and Others*, 2000 (11) B.C.L.R. 1169 (judgment of 4 October 2000) (leading judgment of Yacoob, J.). Taking as departure point s. 26 of the Constitution, which guarantees the right to housing and provides in paragraph 2 that 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right', the Constitutional Court notes in particular that 'the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. . .. There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable' (para. 46).

[233] See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted on 10 December 2008 during the 63rd session of the General Assembly by resolution A/RES/63/117, in force since 5 May 2013, UNTS No. 14531, art. 8(4) ('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 [listing the substantive rights] 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').

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

other terms, does not work as a *rule*, if we understand a rule (as does Joseph Raz) as a second-order reason to exclude certain first-order reasons from a decision-making process.[234] Instead, it is an invitation to a *deliberative* process, in which the question whether the State has done enough in mobilizing resources and in defining its budgetary priorities can only be answered taking into account not only the outcomes (the results achieved) but also the full range of constraints faced by the State, and – as already mentioned[235] – the time the State had (or did not have) to amend policies that failed to produce the expected outcomes.

Was the State caught by surprise, or unable to take action, due to a lack of resources? Or was it negligent or unwilling to amend policies that were failing? That question can only be answered by taking into account what the State knew or should have known and which processes it put in place to remedy situations showing poor outcomes. In such an approach to the duty to dedicate the maximum available resources to the progressive realization of economic and social rights, the question of which procedures have been designed to make progress towards the full realization of economic, social and cultural rights becomes decisive: *how* the decisions were reached to mobilize resources and in making spending decisions shall matter as much as *what* decisions were made.

D. From Substance to Procedure: Democracy in Budgetary Decision-Making

There are three strong arguments for shifting the focus from the substance of policies for resource mobilization and spending to the procedure through which such policies are designed and implemented. First, strengthening participation, transparency and accountability in

[234] See Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1975), pp. 15–84; Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), pp. 3–33. Raz sees rules as second-order reasons of a particular type: as *exclusionary* reasons. That is, rules require that we exclude certain (first-order) reasons we may have to do a certain thing (or to refrain from doing a certain thing), so that we will be constrained not to act considering the full range of reasons that would otherwise be relevant in making the decision. This is what distinguishes rules-based decision-making from decision-making that seeks to be optimal 'all things considered'.

[235] See Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability', 151 (text immediately following note 225).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

budgetary decision-making is a way to ensure that budgetary priorities shall take into account the interests of the most marginalized groups within society. The point barely requires elaboration. Economic marginalization (the deprivation of social and economic rights) typically is paired with, and largely to be explained by, political disempowerment (in violation of civil and political rights, in particular the right to take part in the conduct of public affairs). This leads to a vicious cycle in which, because the poor are unable to influence political processes, the policies shall serve the elites rather than respond to their needs.[236] Strengthening the participation of the poor in shaping policies can help to break this cycle, leading in turn to the adoption of policies that will be more attentive to their needs.[237]

Second, improving participation in budgetary decision-making will strengthen the negotiating position of departments dealing with health, education or social welfare, whose demands frequently compete with

[236] See Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, to the 29th session of the Human Rights Council, 26 May 2015, A/HRC/29/31, para. 21 (citing *Combating Poverty and Inequality: Structural Change, Social Policy and Politics* [United Nations publication, Sales No. E.10.III.Y.1], p. 6) ('Economic inequalities seem to encourage political capture and the unequal realization of civil and political rights. High levels of economic inequalities "may create institutions that maintain the political, economic and social privileges of the elite and lock the poor into poverty traps from which it is difficult to escape"'). For instance, the governing elites may veto tax reforms that would lead to a more progressive system of taxation, and they may undermine efforts at combating the practices of tax evasion that they, more than the average citizen, may be able to rely on: see Corbacho et al. (eds.), *More Than Revenue: Taxation as a Development Tool*, p. 3 ('One of the rent-seeking mechanisms that the most affluent have imposed on the rest of society is the regressive design of the tax structure. Opportunities to evade taxes that vary greatly across income groups compound this perverse structure, shrinking the effective tax bases and resulting in low levels of revenue').

[237] See e.g., World Health Organization, *World Health Report 2010*, p. 25 ('Dealing with universal health coverage also means dealing with the poor and the marginalized, people who are often politically disenfranchised and lack representation. This is why making health a key political issue is so important and why civil society, joined by eminent champions of universal coverage, can help persuade politicians to move health financing for universal coverage to the top of the political agenda'). For a powerful empirical study relating the diffusion of power in society (i.e., its degree of democratization) to the adoption of pro-poor policies, see Mwangi S. Kimenyi, 'Economic Rights, Human Development Effort, and Institutions', in Hertel and Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues*, pp. 182–213, as well as the previous effort of this scholar finding a statistical correlation between indicators of power diffusion and progress along the Human Development Index: Mwangi S. Kimenyi, *Institutions of Governance, Power Diffusion and Pro-Poor Growth and Policies* (Nairobi, Kenya: African Economic Research Consortium, 2005).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

those from departments concerned with law and order – the Interior, National Defence or Justice. The bargaining position of advocates of social investment within governments is especially weak in countries in which controlling the population and law enforcement are seen are major challenges on which the very stability of the government may depend: if civil society is involved in defining the budgetary priorities, it is likely that it will support the 'human development' sectors within the State. The competition, however, is not only between the 'left hand' of the State and its 'right hand', to borrow from Pierre Bourdieu's distinction;[238] it also is between macroeconomic policies that keep the public debt under control and thus reassure the external creditors of the State, and the needs of the population. Here too, the role of participation may be key, this time to strengthen the bargaining position of the government in its negotiation with its creditors and with international financial institutions in particular. While this makes it more difficult for the government to find an agreement with creditors in situations where it needs financial support, the creditors may take solace in the fact that transparency and accountability may improve the efficiency of public policies, and maximize the effectiveness of public investment in reducing poverty and placing the country on the track of sustainable human development.[239]

Third, the focus on norms of participation, accountability and transparency in budgetary decision-making helps to move beyond the apparent tension between national democratic self-determination and supervision by courts or by international human rights bodies. Such a tension occurs obviously where courts or expert bodies question the budgetary priorities set by national governments, on the basis of a reading of the International Covenant on Economic, Social and Cultural Rights that remains so vague about the implications of the requirement that States parties should dedicate the 'maximum available resources' to the full realization of the Covenant rights. Democratic self-determination should not be treated as synonymous with the fiat of the governing elite, however: once the scrutiny by human rights bodies focuses not only on outcomes, relating them to resources and spending choices, but also on

[238] Pierre Bourdieu, *Sur l'Etat : Cours au Collège de France 1989–1992* (Paris: Seuil, 2012), p. 582.

[239] World Health Organization, *World Health Report 2010*, p. 25 ('Improving efficiency and accountability may also convince ministries of finance, and increasingly donors, that more funding will be well used').

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

procedural requirements of participation, accountability and transparency, its effect is to reinforce self-determination, not to undermine it.

It is perhaps telling that, when human rights mechanisms address States' duties under the Covenant, they tend to refrain from imposing specific outcomes – to increase the taxation on corporate income by a certain amount, for instance, or to dedicate a certain percentage of the revenue to education or the health. Instead, they insist that budgetary decisions be adopted through a *process* that recognizes the primacy of human rights. Thus, after the Committee on Economic, Social and Cultural Rights expressed its concern about fiscal reforms introduced by the United Kingdom, such as increases of the threshold for the payment of inheritance tax and of the rate of the VAT, or cuts to the tax rates of corporations, it recommended that the United Kingdom 'conduct a human rights impact assessment, with broad public participation, of the recent changes introduced to its fiscal policy, including an analysis of the distributional consequences and the tax burden of different income sectors and marginalized and disadvantaged groups'.[240] Similarly, deploring the impacts on poor families of the Welfare Reform and Work Act enacted by the United Kingdom in 2016, the Special Procedures of the Human Rights Council criticized the lack of credibility of the impact assessments preceding the cuts to welfare benefits, noting that these cuts were based on often unproven assumptions and that the government had failed to explore the full range of alternative options to ensure the sustainability of the welfare system; and they asked the government to indicate whether they had 'consulted the individuals, groups and families most likely to be affected by the Act'.[241] The implicit

[240] Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, UN doc. E/C.12/GBR/CO/6, para. 17.

[241] See the Allegation Letter addressed to the United Kingdom by the Special Rapporteur on adequate housing, the Special Rapporteur on the rights of persons with disabilities, the Special Rapporteur on extreme poverty and human rights, and the Special Rapporteur on the right to food (8 April 2016, ref. AL GBR 1/2016). See in particular questions 5 ('What evidence is available to demonstrate that the Employment Support Allowance for persons in the WRAG [Work Related Activity Group: people deemed unfit to work as result of health problems or a disability] has created a disincentive for them to take steps towards work? Further, what evidence is available to demonstrate that they would be incentivised to move towards work by reducing the Employment Support Allowance, in view of the fact that they have been assessed not fit for work?'), 7 ('What evidence is available to establish that your Excellency's Government has considered alternative options to the benefit cut, in the context of the full use of maximum available resources?'), 12 ('Please indicate whether there has been an independent review and

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

suggestion is that more democratic and inclusive decision-making, better informed by impact assessments, might have led to better policies – more pro-poor, more imaginative,[242] and ultimately more in line with the United Kingdom's international commitments.

The same set of austerity measures adopted by the United Kingdom in recent years attracted strong criticism from the Committee on the rights of persons with disabilities: after the Committee launched an inquiry into the situation in the United Kingdom – an exceptional procedure that, according to the terms of the Optional Protocol to the Convention on the Rights of Persons with Disabilities,[243] can only be triggered when the Committee receives 'reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention',[244] it found in October 2016 that this high threshold had indeed been reached.[245] The conclusions included a broad, but vague,

assessment of the Act and if so, provide details. Please also indicate whether the human rights of persons likely to be subject to the benefit cut have been considered in the review/assessment and what the findings were'), and 13 ('Could you please indicate what mechanism will be available to monitor negative effects of the Act?'). The response of the United Kingdom was sent on 14 July 2016 (Verbal Note of the UK Mission to the United Nations in Geneva, No. 231). On these procedural dimensions, it states simply: 'As per the usual Parliamentary process, the Public Bill Committee took 6 oral evidence sessions with a range of stakeholders representing interest groups, which are recorded in the parliamentary record. Furthermore, an open call for evidence was held with 86 pieces of evidence submitted and considered over the course of 8 months of Parliamentary scrutiny and 26 Parliamentary sessions'. The scantiness of the response on this procedural front is in direct proportion, perhaps, to the disruptiveness of the question.

[242] In what Katharine Young calls a 'governance' approach to the constitution of economic and social rights (which she contrasts with the more classic 'constitutionalist' approach in which courts and the legal means of enforcement of rights are given priority), the involvement of social actors is seen as important, in particular, to broaden our political imagination as to how such rights might be implemented in specific settings (Katharine G. Young, *Constituting Economic and Social Rights* [Oxford: Oxford University Press, 2012], pp. 262–275). The 'human rights informed' democracy envisaged here (enriched by the use of impact assessments and indicators of progress and including mechanisms to ensure that the voices of the poor are heard) presents strong similarities with that 'governance' approach.

[243] Opened for signature in New York on 13 December 2006 by GA Resolution 61/206, in force since 3 May 2008 (2518 UNTS 283).

[244] Article 6 of the Optional Protocol.

[245] Committee on the Rights of Persons with Disabilities, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under Article 6 of the Optional Protocol to the Convention. Report of the Committee, 6 October 2016, UN doc. CRPD/C/15/R/2/Rev.1, para. 113 ('there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been met in the State party').

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

recommendation that the United Kingdom '[e]nsure that public budgets take into account the rights of persons with disabilities, that sufficient budget allocations are made available to cover extra costs associated with living with a disability and that appropriate mitigation measures, with appropriate budget allocations, are in place for persons with disabilities affected by austerity measures'.[246] But the procedural recommendations are the more precise and, perhaps, the most actionable. They include a requirement that the United Kingdom '[c]onduct a cumulative impact assessment of the measures adopted since 2010 ... on the rights to independent living and to be included in the community, social protection and employment of persons with disabilities', which should be 'rights-based and meaningfully [involve] persons with disabilities and their representative organizations';[247] that the government '[a]ctively consult and engage with persons with disabilities through their representative organizations and give due consideration to their views in the design, implementation, monitoring and evaluation of any legislation, policy or programme action related to the rights addressed in the present report'[248] and that it '[s]et up a mechanism and a system of human rights-based indicators to permanently monitor the impact of the different policies and programmes relating to the access and enjoyment by persons with disabilities of the right to social protection and an adequate standard of living, the right to live independently and be included in the community and the right to work, in close consultation with persons with disabilities and their representative organizations'.[249]

Such procedural mechanisms go beyond ensuring democratic decision-making, based on the regular holding of elections: they involve the search for a deeper and more inclusive type of democracy, in which affirmative measures are taken to ensure that the poorest and most marginalized groups of the population have their views taken into account, and in which democratic politics is not just about institutions and procedures but also about concrete outcomes. To borrow from a distinction of Sanskrit jurisprudence revived by Amartya Sen, this involves moving from electoral *niti*, in which attention is paid only to institutional fitness, to democratic *nyaya*, which involves critically

[246] Committee on the Rights of Persons with Disabilities, Inquiry, para. 114(d).
[247] Ibid. at para. 114(a).
[248] Ibid. at para. 114(g).
[249] Ibid. at para. 114(j).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

examining the implications in terms of substantive justice of particular arrangements.[250] It is not any kind of democracy, but a form of democracy informed by human rights, and because it is inclusive, forced to pay attention to the outcomes on the most marginalized groups.

VII. Conclusion

This inquiry started as an attempt to clarify the meaning of the duty of States parties to the International Covenant on Economic, Social and Cultural Rights to dedicate the 'maximum available resources' to the progressive realization of economic, social and cultural rights. It closes with a plea for budgetary decision-making procedures that are based on participation, accountability and transparency, involving in particular the poorest groups of the population in setting priorities.

The substantive and the procedural dimensions of the inquiry are mutually supportive. In 2004, the International Human Rights Internship Program and other organizations published *Dignity Counts*, intended as a guide to use budget analysis to advance human rights, using the analysis of health-related expenditures in the Mexican national budget as a case study.[251] They noted the dangers of dissociating political empowerment from the task of budget analysis, if accountability is to improve:

> Despite the importance of funding for recognizing the economic rights of marginalized people, programs that benefit the poor are often among the first to face cuts in times of budget deficits. There are many reasons for this. Other items such as interest on the debt, the public-sector wage bill, and military expenditures are more likely to have first claim on scarce funds. Other groups such as business leaders or urban elites often have more effective and experienced lobbyists. Too often vulnerable people are comparatively 'invisible' to government elites who may socialize with and circulate among the well-to-do. And even when funds have been allocated to anti-poverty programs or other services benefiting vulnerable communities, weak expenditure and program management and the lack of political power among the poor can mean that the money never reaches the intended beneficiaries.[252]

[250] Sen, *The Idea of Justice*, pp. 20–21 and 348–350.

[251] Fundar (Centro de Análisis e Investigación), International Budget Project and International Human Rights Internship Program, *Dignity Counts: A Guide to Use Budget Analysis to Advance Human Rights* (Washington, DC, 2004).

[252] Ibid., at 29.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

Indeed, budget analysis and political empowerment are mutually supportive. Whereas budget analysis will barely improve accountability if it is performed in a technocratic fashion, with no or only limited participation of the public, it can be deeply empowering in its own right, as it will promote transparency in the use of public revenue. By comparing sources of government revenue with expenditures, instances of 'leakage' can be identified, and corruption, nepotism or clientelism by government officials can be highlighted by examining who benefits from public programmes. Such a scrutiny may take many forms, including social audits at community level, that can be empowering even to the poor and illiterate.[253] By thus enhancing accountability, budget analysis is a major asset in ensuring that public policies are more pro-poor, and that they will therefore benefit the realization of economic and social rights. In and of itself, budget analysis is nothing more than a tool, and it could be limited to an expert-led exercise. But once the tool is used by the people or by their representatives, it can represent a serious check against abuse of power and a wrong ranking of priorities.

Under such an approach, substantive rules and procedural requirements are deeply intertwined. The insistence on the strengthening of participatory processes in budgetary choices should not be mistaken with a plea for a 'representation-reinforcing' theory of rights adjudication, according to which, in the words of its most explicit proponent, judicial review 'can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack'.[254] Instead, the insistence on compliance with procedural norms

[253] The various forms of social audits include the practice of government officials reporting publicly on the use of funds allocated to certain programmes, and on the allocations received by each of the beneficiaries (such as individuals provided employment in cash-for-food schemes or schools supported in school feeding schemes) to village assemblies; the publication of revenues and disbursements on the Internet, allowing NGOs to track instances of misuse or diversion of funds; citizens' report cards as in India or the Philippines; community score cards as in Kenya and the Gambia; or budgetary audits conducted by Javanese farmers in Indonesia. See e.g., Leonid Peisakhin and Paul Pinto, 'Is Transparency an Effective Anti-corruption strategy? Evidence from a Field Experiment in India' (2010) 4 *Regulation & Governance*, 3, 261–280; UNESCO (United Nations Educational Scientific and Cultural Organization), *Social Audits for Strengthening Accountability: Building Blocks for Human Rights-Based Programming – Practice Note* (Bangkok: UNESCO, 2007). For a more skeptical approach, Frances Cleaver, 'Paradoxes of Participation: Questioning Participatory Approaches to Development' (1999) 11 *Journal of International Development*, 597–612.

[254] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), p. 181.

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

is a way to ensure that the substantive norms will be effectively taken into account and complied with. Strengthening participation is not only an end in itself. It also has an instrumental value, ensuring that broad prescriptions concerning the consistency of budgetary choices with human rights shall be effectively implemented, by reforming how such choices are made.

Indeed, greater participation, accountability and transparency in budgetary processes and compliance with the 'constitutional background norms' described in Part II of this chapter are mutually supportive: just like improved decision-making can ensure the background norms are complied with, a reference to such norms can strengthen the demands emanating from civil society and social movements. They were supplicants, and they had to overcome their political marginalization to count in the political process; once they rely on a human rights framework, they become claimants, and they can enlist the support of the domestic human rights machinery – NGOs, independent human rights institutions and even courts – in their struggle for social justice.[255]

The traditional approach has seen human rights and democratic self-determination as competing requirements, and human rights scholars have dedicated considerable energy at justifying the role of courts in upholding rights against the will of popularly elected majorities. This view now looks increasingly outdated. It was based both on an impoverished representation of the functioning of democracy, as if democracy could be assimilated to the ritual of fair and regularly held elections, and on the idea that the State was the chief threat to human rights, rather than an institution indispensable, through its redistributive role, for their full realization. In these times when governments in all world regions, invoking the need for fiscal orthodoxy, are tempted to remove budgetary choices from democratic scrutiny – in

[255] See Paul O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity', in Nolan et al., *Human Rights and Public Finance*, pp. 59–76, at 73; and Shareen Hertel and Lanse Minkler, 'Economic Rights: The Terrain', in Hertel and Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues*, pp. 1–36, at 29 ('By invoking the normative force of human rights in defense of their own needs, . . . grassroots protesters can change the nature of their interaction with powerful government or private sector representatives. Instead of offering petitions for help, they can demand that rights be fulfilled. . . . In so doing, they transform their status from that of supplicants to claimants').

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press

effect constitutionalizing austerity,[256] we need more democracy, not less, for economic and social rights to be fulfilled through supportive macro-economic policies. More democracy, however, does not mean democracy as usual, just like pro-poor economic policies are not pro-growth policies as usual. Democracy can be made more responsive to the rights of the poor: it can be enriched, by democratic deliberations relying more systematically on rights-based impact assessments involving the poor, by independent monitoring of progress in the realization of human rights and by more participatory forms of budgeting. It is towards creating this virtuous cycle, in which stronger participation leads to policies that are more pro-poor, and in which the contribution of taxation and spending policies to the fulfilment of social rights encourages civil society and social movements to monitor budgetary choices, that efforts should now converge.

[256] This is illustrated for instance by the adopted in the European Union of the 'Fiscal Compact', introduced in 2012 to impose stronger fiscal discipline on the member states: The Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) signed on 2 March 2012 commits the States parties to seek to maintain balanced public budgets, or even to strive for having a surplus (Article 3(1) a)). To this end, Article 3(2) of the TSCG imposes that the balanced-budget rule be stipulated in rules of constitutional rank in the domestic legal order: this is the so-called golden rule, to which the Fiscal Compact is often reduced. See Federico Fabbrini, 'The Fiscal Compact, the "Golden Rule", and the Paradox of European Federalism', 36 *Boston College International and Comparative Law Review* 1 (2013). This temptation is not limited to Europe, however. At the time of writing, the Brazilian Senate was considering the adoption of a constitutional amendment (Constitutional Amendment 55, or PEC 55 in its Portuguese acronym), which would freeze public spending in real terms until 2036. In a press release of 9 December 2016, the Special Rapporteur on extreme poverty and human rights, Mr. Philip Alston, stated that 'It is completely inappropriate to freeze only social expenditure and to tie the hands of all future governments for another two decades. If this amendment is adopted it will place Brazil in a socially retrogressive category all of its own'. (Brazil 20-year public expenditure cap will breach human rights, UN expert warns, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006&LangID=E [accessed 13 June 2018]).

https://doi.org/10.1017/9781108284653.020 Published online by Cambridge University Press