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**For Want of Resources:  
Reimagining the State's Obligation to Use 'Maximum  
Available Resources' for the Progressive Realisation of  
Economic, Social and Cultural Rights**

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## ABSTRACT

This thesis provides insights into, additional commentary on and analysis of the fundamental role of resources in advancing Economic, Social and Cultural Rights (ESC rights). Its objective is to expand the policy space within which States can operate to fulfil their obligations related to these rights. It addresses a number of central questions about the resource dimension of ESC rights policy, including interpretation of the concept of 'maximum available resources' in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR). By applying a cross-disciplinary approach, the thesis investigates legal, economic and public policy dimensions of resource mobilisation, allocation and governance that are essential in advancing progressive realisation of ESC rights.

This thesis proposes that the obligation to take steps to the 'maximum available resources' for the progressive realisation of ESC rights can be made more meaningful by adopting a broader interpretation of the concept of resources and by taking active steps to maximise the quality and quantity of resources available through public sector revenue, international assistance and co-operation and private sector investment, all of which can be enhanced through institutional mechanisms and processes of allocation and governance. This proposition is supported by an in-depth qualitative analysis of relevant ESC rights literature, interpretive works of the ESCR Committee and Special Rapporteurs, periodic reports of States, institutional documents and case studies, which provide evidence on the current understanding and application of the concept of resources in this context.

Based on analysis of multiple sources of evidence on State practice, this thesis presents a cross-disciplinary model of the nature, scope and policy dimensions of resources for ESC rights and suggests how concerted State policy efforts can optimise their impact on the realisation of ESC rights.

**Keywords:** Maximum available resources, Economic, Social and Cultural Rights; economic policy; public policy; progressive realisation

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## Preface and Acknowledgments

My interest in advancing human rights is driven by a strong desire to see positive changes in the lives of people whose rights are violated or remain unfulfilled. My work at the Human Rights Commission of Maldives (HRCM) and interactions with human rights defenders and a number of National Human Rights Institutions in the Asia-Pacific region assured me of the value of the dedicated work of many individuals in promoting and protecting human rights. When I embarked on my PhD journey, I saw this as yet another personal step in making my own small contribution to this goal.

Within the broad spectrum of human rights, this research focuses on Economic, Social and Cultural Rights (ESC rights) and, in particular, on the concept of resources. This is mainly motivated by the wish to address the low level of interest in ESC rights in human rights scholarship and the lack of policy attention to these rights by many States. In fact, in most cases, States are unlikely to be named and shamed for failing to respect, protect and fulfil their ESC rights obligations. Is it possible that ESC rights receive less attention because of their resource-intensiveness? A preliminary review of existing literature and debates on ESC rights invariably points to resources and policy dynamics as relevant factors, which convinced me that it was essential to address these aspects if ESC rights are to be moved to the forefront of human rights policy. This problem has kept me occupied for the last 3 ½ years.

Researching and writing a doctoral thesis is not easy. The work has never been straightforward. It has been filled with moments of doubt, times of serendipity and then more doubt—what was crystal clear at one moment became totally mysterious a short time later. Moreover, the body of scholarship on ESC rights seems to be in a constant state of flux. Keeping pace with new and emerging ideas and an ever-expanding literature on ESC rights required enormous motivation and self-discipline.

Although I worked ‘alone’ on researching and writing this thesis, I have received invaluable support and guidance from a small contingent of people. First among them, my primary supervisor Professor David Kinley provided many valuable insights into the core arguments and the structure of thesis, and opened my eyes to many relevant aspects of the topic; without this input this thesis would definitely not have taken its current shape. The intellectual guidance and support provided by David went a long way towards making this thesis complete. My associate supervisor, Dr Jacqueline Mowbray, also helped by clarifying a number of key issues and provided useful comments. My research life at the University of Sydney also benefited immensely from interactions with a number of academics, within and outside the university. In particular, I received immensely helpful comments from Emeritus Professor Terry Carney, Professor Chris Sidoti, Adjunct Professor Hilary Yerbury, and Nikki Teo, which drew my attention to many flaws and gaps in my arguments in the draft. Dr Cherry Russell provided excellent editorial guidance, correcting grammar and style issues in the final text of the thesis. I thank you all.

My parents deserve a special mention and appreciation. My father Aboobakuru Ali and mother Khadeeja Moosa instilled in me a firm conviction that nothing is too difficult to achieve if approached with a strong determination and pursued with perseverance. My parents raised me in extreme poverty and hardship, but have always believed in me, and their love and affection always guided me through every hurdle in life and gave me the courage to always aim higher. The long and arduous journey of completing a PhD would not have been possible without the unwavering love and constant companionship of my wife, Shifana, and my two sons, Shaffan and Shayyan. You gave me the reason, the inspiration and the energy to complete this huge task. You believed in me and supported me throughout. I also thank members of my extended family and close friends who always stood by me.

Finally, I would like to extend special thanks to the people and the Government of Australia for giving me the opportunity to pursue doctoral studies under the Australia Awards (AA) and Australian Leadership Award (ALA) scholarships. I also thank the academics and other staff of the Sydney Law School for their support and encouragement throughout my candidature.

The real value of this research, at the end of the day, will depend on the potential contributions it makes in advancing human rights. Developing a deeper understanding of human rights is one thing, but applying these insights in human rights work on the ground with other human rights defenders and advocates to make a difference in the lives of people is what matters most.

## **Declaration of Originality**

I hereby certify that this thesis is entirely my own work and that any material written by others has been acknowledged in the text.

The thesis has not been presented for a degree or for any other purposes at The University of Sydney or at any other university or institution.

Ahmed Shahid

September 2015

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## List of Abbreviations

<b>ACTO</b>	Amazon Cooperation Treaty Organization
<b>ADB</b>	Asian Development Bank
<b>AGECI</b>	International Cooperation Agency (Ecuador)
<b>AIIB</b>	Asian Infrastructure Investment Bank
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BEPS</b>	Base Erosion and Profit Shifting
<b>BOP</b>	Bottom of the pyramid
<b>BPT</b>	Business Profit Tax
<b>BRHR</b>	Business Responsibilities for Human Rights
<b>CARICOM</b>	Caribbean Community
<b>CEDAW</b>	Convention on the Elimination of all forms of Discrimination against Women
<b>CESR</b>	Centre for Economic and Social Rights
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSR</b>	Corporate Social Responsibility
<b>DAC</b>	Development Assistance Committee
<b>DISHA</b>	Developing Initiatives for Human and Social Interaction
<b>DSF</b>	Debt Sustainability Framework for Low-Income Countries
<b>ECOSOC</b>	Economic and Social Council
<b>ESCR</b>	Economic, Social and Cultural Rights
<b>ESRF Index</b>	Economic and Social Rights Fulfilment Index
<b>EU</b>	European Union
<b>FAO</b>	Food and Agriculture Organisation
<b>FEMI</b>	Federation of Internal Medicine
<b>GBEs</b>	Government Business Enterprises
<b>GDP</b>	Gross Domestic Product
<b>GFI</b>	Global Financial Integrity
<b>GFTT</b>	Global Financial Transfer Tax
<b>GIFT</b>	Global Initiative for Fiscal Transparency

<b>GNI</b>	Gross National Income
<b>GNP</b>	Gross National Product
<b>GOCs</b>	Government-Owned Corporations
<b>GOEs</b>	Government-Owned Enterprises
<b>GSP</b>	Generalised System of Preferences
<b>GSP+</b>	Generalised System of Preferences Plus
<b>GST</b>	Goods and Services Tax
<b>GTF</b>	Global Trust Fund
<b>HDI</b>	Human Development Index
<b>HIES</b>	Household Income and Expenditure Survey
<b>HIPC</b>	Heavily Indebted Poor Countries
<b>HIV</b>	Human Immunodeficiency Virus
<b>HRBA</b>	Human Rights Based Approaches
<b>HRCM</b>	Human Rights Commission of Maldives
<b>IBASE</b>	Brazilian Institute for Social and Economic Analysis
<b>IBP</b>	International Budget Partnership
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICESCR-OP</b>	International Covenant on Economic, Social and Cultural Rights – Optional Protocol
<b>IDAF</b>	International Development Aid Fund
<b>IDASA</b>	Institute for Democracy in South Africa
<b>ILO</b>	International Labour Organisation
<b>IMF</b>	International Monetary Fund
<b>iPPP</b>	Innovative Public-Private Partnerships
<b>IPSAS</b>	International Public Sector Accounting Standards
<b>LDC</b>	Least Developed Country
<b>MBS</b>	Martus Bulletin System
<b>MERCOSUR /</b>	Mercado Común del Sur /Mercado Comum do Sul
<b>MERCOSUL</b>	(Southern Common Market)
<b>MMA</b>	Maldives Monetary Authority
<b>MOFT</b>	Ministry of Finance and Treasury

<b>OBI</b>	Open Budget Index
<b>OBS</b>	Open Budget Survey
<b>ODA</b>	Official Development Assistance
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OPERA</b>	Outcome–Policy Effort–Resources–Assessment
<b>PANTHER</b>	Participation, Accountability, Non-discrimination, Transparency, Human dignity, Empowerment, and Rule of law
<b>PEFA</b>	Public Expenditure and Financial Accountability
<b>PFA</b>	Public Finance Accountability
<b>PFM</b>	Public Finance Management
<b>PPP</b>	Public-Private Partnership
<b>PRMRP</b>	Public Resource Management Reform Programme
<b>PRSP</b>	Poverty Reduction Strategy Paper
<b>PSP</b>	Private Sector Participation
<b>QDA</b>	Qualitative Data Analysis
<b>SEFMP</b>	Strengthening Economic and Financial Management Programme
<b>SEKN</b>	Social Enterprise Knowledge Network
<b>SII</b>	Social Impact Investment
<b>SOEs</b>	State Owned Enterprises
<b>SWF</b>	Sovereign wealth funds
<b>TGST</b>	Tourism Goods and Services Tax
<b>TNCs</b>	Transnational Corporations
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UEE</b>	Universal Elementary Education
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation

<b>UNICEF</b>	United Nations Children's Fund
<b>USA</b>	United States of America
<b>VAT</b>	Value Added Tax
<b>WEF</b>	World Economic Forum
<b>WGI</b>	Worldwide Governance Indicators
<b>WHO</b>	World Health Organisation
<b>WTO</b>	World Trade Organisation

## **Dedication**

To  
Shaffan and Shayyan

'It is for you to realize these rights, now and for all time. Human rights are your rights. Seize them. Defend them. Promote them. Understand them and insist on them. Nourish and enrich them. They are the best in us. Give them life.'

*~ Kofi Anan (1997)*

# 1 Introduction

## 1.1 ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PERIL FOR WANT OF RESOURCES?

The drafters of the Universal Declaration of Human Rights (UDHR) envisioned a world in which all human beings enjoyed ‘freedom from want’ as well as ‘freedom from fear’.<sup>1</sup> In 1950, the United Nations General Assembly reiterated that ‘the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent’<sup>2</sup> and that, ‘when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man’.<sup>3</sup> The Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises that ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his [*sic*] civil and political rights’.<sup>4</sup>

In light of such aspirations, and the need to understand and insist on these rights expressed by the former Secretary-General of the United Nations (in the epigraph above), how is humanity as a whole faring in its efforts to achieve

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<sup>1</sup> United Nations, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948), Preamble.

<sup>2</sup> United Nations General Assembly, *Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights*, Resolution 421 E (V), (4 December 1950), [6]. This was further re-affirmed in the United Nations General Assembly, *General Assembly Resolution*, 543 (VI), 375<sup>th</sup> plenary mtg, (5 February 1952), Preamble.

<sup>3</sup> *Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights*, above n 2, [6].

<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Preamble (‘ICESCR’).

these fundamental human conditions more than six decades after the adoption of the UDHR and nearly five decades after the adoption of the ICESCR? Are the necessary conditions for realisation of these rights created at an adequate level?

According to estimates by the United Nations Food and Agriculture Organization (FAO), about 805 million people worldwide experience chronic malnourishment; of these, 791 million are in developing countries.<sup>5</sup> It was estimated that chronic under-nutrition in children caused stunting and other serious impairments to nearly 165 million children in 2014.<sup>6</sup> In early 2015, UNICEF reported that, approximately 28 million of the 650 million primary-school-age children in the world never enter school, nearly 58 million primary school-age children and 63 million adolescents of lower secondary school age were out of school, and 130 million children were not learning the basics of reading and numeracy despite reaching 4<sup>th</sup> grade.<sup>7</sup> According to the United Nations Human Settlements Programme (UN-Habitat), more than 863 million people were living in slums in 2012 and serious problems of homelessness and inadequate housing existed worldwide.<sup>8</sup>

Grim as they are, these examples of human suffering and deprivation are only part of the story. Because they represent only some of the economic, social and cultural rights recognised in the international human rights regime, the complete picture is likely to be much more complex. Moreover, fulfilment of these basic human needs is precisely the very human conditions that the international human rights regime, particularly the Economic, Social and Cultural Rights (ESC rights), calls to the attention and action of States parties.

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<sup>5</sup> Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World: Strengthening the enabling environment for food security and nutrition* (FAO, Rome, 2014), <<http://www.fao.org/3/a-i4030e.pdf>>.

<sup>6</sup> United Nations, *Interim report of the Special Rapporteur on the right to food*, UN Doc A/69/275 (7 August 2014), [36].

<sup>7</sup> UNICEF, *The Investment Case for Education and Equity* (UNICEF, New York, 2015), <[http://www.unicef.org/education/files/www.unicef.org\\_publications\\_files\\_Investment\\_Case\\_for\\_Education\\_Summary.pdf](http://www.unicef.org/education/files/www.unicef.org_publications_files_Investment_Case_for_Education_Summary.pdf)>.

<sup>8</sup> United Nations, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 69<sup>th</sup> sess, UN Doc A/69/274 (7 August 2014), [16-18].

Although duties on States under the international human rights regime do not necessarily translate into obligations to directly ‘provide’ the necessary conditions for all individuals to enjoy these rights,<sup>9</sup> the alarming gaps and high level of deprivation of basic conditions of life should alert human rights advocates and policymakers to the urgency of these challenges and prompt them to work towards a more meaningful level of protection and promotion of these rights. A preliminary review of existing literature on ESC rights suggests that the ability of States to effectively respect, protect and fulfil these rights is significantly challenged by the ‘resource-intensive’ and ‘programmatic’ nature of these rights.<sup>10</sup> A better understanding of this situation, therefore, requires deeper analysis of State policy and practice in order to identify the challenges, choices and opportunities that are available to States for improving ESC rights conditions, especially within the context of resources and policy.

As a human rights practitioner, my primary motivation in this thesis is to seek theoretically sound and practically relevant insights into the role of resources in the realisation of ESC rights, and to identify policy options for addressing resource constraints from the perspective of human rights policy and practice. The thesis presents an in-depth examination of the dynamics of State policy with the aim of identifying the nature, scope and significance of the resources required for the effective realisation of economic, social and cultural rights. It adopts a cross-disciplinary perspective underpinned by law, economics, public policy and public finance in order to capture multiple dimensions of State policy applicable to the question of resources.

This introductory chapter is divided into six sections: statement of the research problem; research objectives, research questions and core arguments; methodological approach; significance of the research and expected contributions to scholarship; and thesis overview.

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<sup>9</sup> This issue will be addressed in further detail in Chapter 2 and elsewhere throughout this thesis.

<sup>10</sup> See for example, 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; Shedrack C Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2014) 5(1) *Yale Human Rights and Development Journal* 177-216, 187.

## 1.2 RESEARCH PROBLEM: UNPACKING ‘MAXIMUM AVAILABLE RESOURCES’

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly on 16 December 1966 and came into force on 3 January 1976. As of August 2015, the Covenant had been ratified by 164 States parties, with another six signatory States yet to ratify it.<sup>11</sup> The Covenant enshrines a number of substantive rights including: the right to work (art 6); rights in work (art 7); trade union rights (art 8); social security rights (art 9); right to social protection (art 10); right to an adequate standard of living (art 11); right to health (art 12); right to education (art 13, 14); and cultural rights (art 15).

The general nature of obligations on States parties in relation to these substantive rights is most evident from Article 2(1) of the Covenant, which states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>12</sup>

This provision communicates a number of fundamental elements applicable to the nature of economic, social and cultural rights in practice.

First, it emphasises that States parties are expected ‘to take steps’ on their own and with international assistance and co-operation in relation to issues of both economic and technical in nature. This undertaking ‘to take steps’ forms the basis of the State’s obligation to ensure that the rights enshrined in the covenant are included in the core policies of the State. Given that a State’s

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<sup>11</sup> The six non-ratifying signatory States are: Comoros, Cuba, Myanmar, Palau, Sao Tome and Principe, and United States of America. The most recent ratifications are by Belize (9 Mar 2015) and South Africa (12 Jan 2015). United Nations, *United Nations Treaty Collection - Chapter IV Human Rights: International Covenant on Economic, Social and Cultural Rights* <[https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty)>.

<sup>12</sup> ICESCR, above n 4, art 2(1).

actions are manifest in policy actions and directions, this obligation requires the incorporation of ESC rights obligations into policymaking and implementation processes. This element of the obligation also implies that, while the State is the primary duty-bearer in taking necessary steps for the realisation of these rights, there is recognition that the State must *actively* seek and make use of international assistance and co-operation in order to ensure the realisation of these rights.

Secondly, 'to the maximum of its available resources' implies a duty to make the maximum use of resources (hence the capacity) of the State to ensure realisation of these rights. The phrase also indicates recognition of the essential role of 'resources' in ensuring realisation of these rights, with accompanying obligations to give priority in resource allocation to the rights recognised in the Covenant.

Thirdly, these rights must be realised fully through a 'progressive' policy approach, indicating that while actions targeting the enjoyment of rights may not achieve immediate success, there is nonetheless a clear obligation on the State to approach the realisation of these rights in a consistent and progressive manner with a clear aim of eventually achieving full realisation.

Fourthly, the phrase 'by all appropriate means' indicates that States must employ all policy tools and means available in order to achieve the realisation of these rights. The specific mention of 'legislative measures' indicates the seriousness of the intention in the application of these means, and the need to entrench policy actions within the overall governance of the State.

These individual conceptual elements derived from Article 2(1) have attracted significant interest and discussion among scholars.<sup>13</sup> The key issues arising include: the challenges associated with determining what 'taking steps' implies in terms of State action; the meaning of 'maximum available resources' in relation to resources and capacity; whether 'progressive realisation'

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<sup>13</sup> For example, Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford, 2009).

diminishes the immediacy and urgency of action; and identifying ‘all appropriate means’ that can be employed by the State.

Of these elements, the issue of ‘maximum available resources’ is the main focus of the present thesis. This concept has also attracted attention from scholars such as Sigrun Skogly, Diane Elson, Radhika Balakrishnan, and James Heintz, among others.<sup>14</sup> All these scholars identify the need to develop more comprehensive interpretations and theoretical models for the concept of ‘maximum available resources’ in order to achieve a better fit of the concept with ESC rights theory and practice. Inspired by and drawing on these studies, this thesis presents a detailed examination of the various facets and approaches to the concept of ‘maximum available resources’ within the context of the ICESCR, and seeks to make a constructive contribution to ESC rights scholarship.

### **1.2.1 ‘Maximum available resources’: Why the concept requires further clarity**

Resources at the disposition of a State represent both a benchmark by which the State’s efforts in ensuring the realisation of rights can be measured and a source of flexibility in the implementation of human rights obligations based on its existing resources and capacity.<sup>15</sup> There are challenges, however, in clearly defining what ‘resources’ are applicable in the context of this article and the nature of the State’s obligation to take steps towards the realisation of ESC rights, given the multifaceted nature of ‘resources’. It is also difficult to determine the quantum, quality, form and nature of resources at the State’s

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<sup>14</sup> Sigrun Skogly, ‘The Requirement of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12 *Human Rights Law Review* 393-420; Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women’s Global Leadership, New Jersey, 2011); Diane Elson, Radhika Balakrishnan and James Heintz, ‘Public Finance, Maximum Available Resources and Human Rights’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 13.

<sup>15</sup> See, David Weissbrodt, Joan Fitzpatrick and Frank C Newman, *International Human Rights: Law, Policy, and Process* (LexisNexis, 2009).

disposition given the vast array of economic, social and political variables that determine the ability of the State to mobilise and allocate resources to advance its policy objectives, including human rights. These conceptual difficulties are addressed in the work of several scholars, who identify the notions of 'maximum available resources' and associated progressive realisation as the 'wobble room'<sup>16</sup> or an 'escape hatch'<sup>17</sup> for States when it comes to their obligations with regard to implementing and ensuring the realisation of ESC rights.

The concept of 'maximum available resources' has also attracted significant consideration and extensive discussion by the Committee on Economic, Social and Cultural Rights (ESCR Committee),<sup>18</sup> Special Rapporteurs, and human rights scholars.<sup>19</sup> The importance and the need to further explicate this concept is evident in a statement issued by the ESCR Committee in 2007 entitled *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, which provides some insights into how the Committee interprets the concept.<sup>20</sup> Although the statement did not provide a comprehensive definition of resources required for the realisation of ESC rights, it identifies a number of broad conceptual parameters of resources including those available

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<sup>16</sup> 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* 693-714.

<sup>17</sup> See, 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* 402-435.

<sup>18</sup> The ESCR Committee comprises 18 independent experts and is responsible for monitoring the implementation of the Covenant and from time to time provides its interpretation of the provisions of the Covenant in the form of General Comments. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

<sup>19</sup> For example, Committee on Economic, Social and Cultural Rights, *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, 38<sup>th</sup> sess, UN Doc E/C.12/2007/1 (10 May 2007); María Magdalena Sepúlveda, *The Nature Of The Obligations Under The International Covenant On Economic, Social And Cultural Rights* (Intersentia, Utrecht, 2003); Danilo Türk, *The Realization of Economic, Social and Cultural Rights*, 44<sup>th</sup> sess, Agenda Item 8 of the provisional agenda, UN Doc E/CN.4/Sub.2/1992/16 (3 July 1992).

<sup>20</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 19, [4].

domestically and through international co-operation. It also proposed some 'indicators' that can be applied to measure State compliance in the context of resources. These include expenditure on ESC rights as against other expenditures within the State, comparisons with other States and comparisons against internationally identified indicators of human rights and human welfare.<sup>21</sup>

The ESCR Committee has also made further reference to 'maximum available resources' in a number of General Comments and Concluding Observations on the periodic reports of States parties under the ICESCR. However, despite these multiple references to States' use of 'maximum available resources' for the realisation of ESC rights, the nature of this obligation and what it implies in ESC rights policy and practice remain unclear at the practical level.

A preliminary review of ESC rights scholarship indicates a recognition of the difficulties involved in unpacking 'maximum available resources' in a manner applicable to ESC rights policy and practice and the need for a broader interpretation.<sup>22</sup> It is acknowledged that the formulation of this phrase is 'vague and imprecise'<sup>23</sup> and requires a more 'dynamic' understanding.<sup>24</sup> The phraseology of 'maximum available resources' creates difficulties not only in the interpretation of other related concepts in the article, but also makes monitoring of progressive realisation and State compliance more challenging. Key interpretive challenges identified in the literature include: comprehensively defining 'resources'; determining what resources are actually 'available' to the State; and identifying a 'maximum' of resources in relation to ESC rights policy

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<sup>21</sup> Ibid.

<sup>22</sup> For example, Balakrishnan et al, above n 14, 23; Manisuli Ssenyonjo, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15(6) *The International Journal of Human Rights* 969-1012; Robert E Robertson, 'Nutrition, human rights and resources' (1996) 21 *Food Policy* 57-71; Robertson, above n 16; Felner, above n 17; Audrey 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 University Press, Cambridge, 2007) 143.

<sup>23</sup> Chapman, above n 22, 148.

<sup>24</sup> For example, see John Tobin, *The Right to Health in International Law* (Oxford University Press, Oxford, 2011), 229.

inputs.<sup>25</sup> Therefore, in order to unpack the concept of ‘maximum available resources’, the following elements need to be considered.

### 1.2.2 Defining ‘resources’

The concept of resources is abstruse and difficult to define within a simple set of parameters. Resources represent a whole gamut of meanings within economics, politics and public policy, in addition to the understanding of resources in the legal language of the Covenant.

In common usage, ‘resources’ can be defined as ‘stock or supply of money, materials, staff, and other assets that can be drawn on by a person or organisation in order to function effectively’.<sup>26</sup> Even this simple definition encompasses multiple elements and dimensions that are applicable for a comprehensive understanding of the concept. The ESCR Committee elucidates that ‘resources’ in the Covenant refer to ‘all resources’ at a State’s disposition.<sup>27</sup> This includes both domestic and international resources that the State has ‘access to’.<sup>28</sup> However, despite these general parameters, the concept of resources at the disposition of the State or that which it has access to solicits further refining in order to make such definitions practical in human rights policy and advocacy.

Clearly, any discussion of resources available to the State must include the government’s budgetary resources as a key component. While financial resources are most easily identifiable, some scholars argue that the definition of resources should also include non-financial dimensions to comprise natural resources, technological resources, human resources, environmental

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<sup>25</sup> See for example, Skogly, above n 14.

<sup>26</sup> *Oxford Dictionaries (Online)*, Oxford University Press  
<<http://www.oxforddictionaries.com/>>.

<sup>27</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations (Art. 2, par. 1)*, 5<sup>th</sup> sess, UN Doc E/1991/23 (14 December 1990), [10].

<sup>28</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 19, 4.

resources, and organisational and social resources, all of which can be employed to achieve desired policy goals.<sup>29</sup>

Although these broad definitions provide insights into what resources are applicable for the purpose of ESC rights in general, given the ambiguous nature of the concept of ‘maximum available resources’ in human rights practice, further conceptual clarity can be valuable for both policy and advocacy purposes. Accordingly, this thesis takes up the challenge of further refining and incorporating these dimensions into the definition of resources to enhance their applicability to human rights practice.

### **1.2.3 What resources are ‘available’ to the State?**

Given the ESCR Committee’s concept of resources as encompassing those to which States have ‘access’, the scope of resources can extend beyond government revenue from tax and non-tax income to include such forms as international assistance and co-operation as well as private sector investments by domestic and foreign entities. Equally, as noted above, given that resources could be of many types and forms, including financial, natural, technological, human, environmental, organisational, legal, and social resources, States should consider mobilising such resources from the wider society, including the private sector.

Such broader characterisations of ‘resources at the disposition of the State’ extends potential resources beyond the traditional budgetary definition. While this approach enlarges the scope of resources that the State can potentially mobilise for the purpose of advancing ESC rights, it may also introduce a number of practical difficulties.

For instance, while the concept of ‘maximum available resources’ is presented as part of the State’s legal obligation in the context of ESC rights, the definition of *availability* of resources must be bound by the legal authority and power of the State and understood within its lawful jurisdictional authority in relation to

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<sup>29</sup> For example see, Robertson, above n 19; Skogly, above n 14.

mobilising and allocating these resources. Often, even in situations where the State has control over a given resource, it may still not be possible to legally apportion it for ESC rights purposes. For example, although a country's biodiversity, such as coral reefs and forests, is a valuable natural resource, it may not be appropriate to consider it as directly 'available' as part of ESC rights policy. Such resources are more valuable if preserved as part of the natural heritage rather than being exploited in the short-term to fund the realisation of ESC rights. In the long-term, such preservation and sustainable use of natural resources can be instrumental in achieving far superior human rights outcomes for a larger number of individuals at present and in the future.

An essential element of resource availability is that, through appropriate policy approaches, the State must be able to expand the horizon of resource availability, to include such areas as private sector and societal resources, as well as non-financial resources. In this context, some scholars have addressed characteristics of the relationship between resources and macroeconomic policy, including taxation, borrowing, and government expenditure.<sup>30</sup> In this perspective, resource availability should not be taken as a static representation solely of public finance resources or the budget. Instead, it must encompass concerted and targeted efforts of all institutions of the State to increase public sector resources for ESC rights and other social development programmes. Therefore, when a State is required to take steps to achieve an important policy goal, it must employ more proactive approaches to maximising resources.

While the elements listed above set out the key parameters of defining which resources are available to the State, they require further elaboration and connection to policy areas and methods of implementation if viable policy directions for ESC rights realisation are to be developed.

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<sup>30</sup> For example, Olivier De Schutter, *Report of the Special Rapporteur on the right to food*, A/HRC/13/33/Add.6, 13<sup>th</sup> sess, Agenda Item 3, (19 February 2009).

### 1.2.4 'Maximum' of resources

In the context of resources, the concept of 'maximum' should connote maximising both the mobilisation and allocation of resources. Here, 'maximum' should be taken as the 'greatest amount, extent, or intensity possible, permitted, or recorded',<sup>31</sup> which in the case of State resources must represent the broadest possible definition of resources in mobilisation and the most inclusive methods of allocation.

Identifying the optimum level of resource allocation, thus determining what is 'maximum' for the purpose of State obligation, involves complex and multiple considerations. Allocative decisions and choice-making as well as calculating trade-offs in various policy decisions require stronger empirical analysis and often does not have a simple or conclusive economic answer.<sup>32</sup> Granted that the State has limited resources and a large number of competing priorities (including non-human rights policy objectives), determining what proportion of the available resources must be allocated for ESC rights goals and, by implication, the level under which the State should not fall in terms of its resource commitments for ESC rights, becomes a key issue in the ESC rights policy process.

Because many of the core functions of a State require a significant amount of resources, decisions about resource allocation between and among competing objectives and priorities is often not driven by informed and calculated obligation matrices or even by public expectations. These decisions are, more often than not, driven by political considerations and are not necessarily reflective of public expectations and demands at all times. This congruence between public expectation and policy design depends on the nature of governance, democratic institutions, and cultural and economic factors, as well as on the overall organisation and capacity of civil society.

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<sup>31</sup> *Oxford Dictionaries (Online)*, Oxford University Press  
<<http://www.oxforddictionaries.com/>>.

<sup>32</sup> See for example, Malcolm Langford, 'Social Security and Children: Testing the Boundaries of Human Rights and Economics' in Bard A Andreassen, Stephen P Marks and Arjun Sengupta (eds), *Freedom from Poverty as a Human Right: Economic Perspectives* (UNESCO, 2009).

While a variety of different approaches can be employed to plug-in priority areas to these political decision matrices, such decisions can be further complicated by the ambiguity of the objectives themselves and by pressure from advocates who promote the objectives. In this context, it is recognised that:

The allocation of scarce resources is inevitably subject to an array of political, economic, cultural and philosophical demands, of which human rights standards are but one claim. And no matter how fervently we might wish it otherwise, that is the *Realpolitik*.<sup>33</sup>

In other words, as suggested here by Ben Saul, David Kinley and Jacqueline Mowbray, resource allocation decisions are not driven only by human rights goals, but also by a number of other public policy goals and priorities. At the same time, it is worth noting that the democratic voice and demands of the society are also part and parcel of *realpolitik* itself, which therefore can be influenced through better organised and concerted participation and advocacy. Such efforts have the potential to significantly change the way States behave in terms of their human rights obligations. The allocation of scarce resources is no exception.

A key requirement to get this assertiveness and increased effectiveness in ESC rights advocacy is to bring greater clarity to the process through which resource mobilisation and allocation decisions are shaped and how they can be better targeted towards achieving human rights objectives. Therefore, it is reasonable to argue that, in order to achieve this level of clarity and assertiveness, the underlying practical issues with regard to defining 'maximum available resources' and progressive realisation policies should adopt a cross-disciplinary approach; in particular, including law, economics, public policy and public finance perspectives, which have direct relevance and provide insight into the mechanisms involved in these decision processes.

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<sup>33</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2014), 148.

In summary, considerations related to resource requirements for ESC rights—in particular, the interpretation of ‘maximum available resources’—involve a complex set of applicable concepts and models. Further scholarly effort is required to relate these concepts to human rights theory and practice. Such efforts should be informed by understanding that human rights objectives are part of the broad social, economic and political objectives of the State and that resource requirements for these areas are heavily influenced by political and social priorities.

The requirement for allocation of the ‘maximum of available resources’ for ESC rights objectives must be considered in the context of the State resource allocation matrix. For this to be practical, more nuanced explanations of the process of public sector finance and policy priority-setting in the allocation of resources for programmes and activities are necessary. This will go a long way towards objectively identifying State efforts in the area of ESC rights realisation.

### **1.3 RESEARCH OBJECTIVES**

As discussed above, the concept of ‘resources’ for the realisation of ESC rights has been increasingly recognised as a key element of interest within ESC rights scholarship. In particular, in recent years, scholars have explored various aspects of the obligation to use ‘maximum available resources’ for the progressive realisation of ESC rights and have addressed some conceptual parameters of resources in this context, including the definitional problems of ‘maximum available resources’.<sup>34</sup> These seminal works provide the necessary conceptual background to the present study and have guided its focus and practice orientation.

The main aim of this study is to provide a re-conceptualisation and broader interpretation of the concept of ‘maximum available resources’ proclaimed in

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<sup>34</sup> See for example, Robertson, above n 16; Balakrishnan et al, above n 14; Elson, Balakrishnan and Heintz, above n 14; Skogly, above n 14.

Article 2(1) of the ICESCR. It presents new perspectives on and practical interpretations of the concept of resources required for ESC rights realisation, with specific focus on theoretical development of the concept of 'maximum available resources'. A cross-disciplinary approach integrating theoretical, conceptual and practical elements of law, economics, public policy and public finance is used to enrich the human rights perspective in relation to the role of 'resources' in ESC rights realisation. This disciplinary synthesis broadens the scope of the concept of 'maximum available resources', which in turn strengthens the case for effective implementation of the ESC rights obligations within State policy and practice.

Specific objectives of the study were to:

- develop and expand an operational understanding of the concept of 'maximum available resources' and how various propositions and arguments put forward by academics interact and enrich these definitions
- develop a broad, cross-disciplinary framework of 'maximum available resources' to encompass theoretical, conceptual and practical elements of resources in relation to human rights obligations under the ICESCR
- broaden the intellectual, conceptual and theoretical space around ESC rights obligations and create practical connections within a cross-disciplinary interpretive framework for improved advancement of the realisation of ESC rights within public discourse and public policy practice.

To achieve these objectives, the thesis builds on existing scholarship on resources required for human rights and synthesises the theoretical, conceptual and practical aspects of relevant disciplines within a human rights framework.

### 1.3.1 Research questions

The concept of 'maximum available resources' as outlined in Article 2(1) of the ICESCR has far-reaching implications for the academic understanding of the nature of ESC rights obligations and State practice. The clarity with which this concept and its relevant parameters are articulated in human rights scholarship can, not only strengthen the case for a more serious commitment to ESC rights, but also help provide a more refined and cohesive approach to advocacy for ESC rights and monitoring violations of these rights.

To achieve this clarity within a cross-disciplinary framework and to expand the operational understanding and the intellectual, conceptual and theoretical space around the concept of 'maximum available resources', the following questions were addressed:

1. What are the existing scholarly interpretations of the concept of 'maximum available resources' in the context of the ICESCR and how do they reflect the nature of State obligations in practice?
2. How can the interpretation of the concept of 'maximum available resources' be further enriched by applying cross-disciplinary perspectives, including legal, economic, public policy and public finance dimensions, to address policy challenges and approaches to maximising mobilisation, allocation and governance of resources for the realisation of ESC rights?
3. What policy approaches can be employed to enhance the mobilisation, allocation and governance of resources for ESC rights, and what evidence is available in State practice regarding the practicability of such approaches?

### 1.3.2 Core thesis arguments

This thesis argues that, in order for the fulfilment of ESC rights to play a meaningful role in improving the human condition, these rights must be given more attention in academic and policy circles. This requires a deeper engagement with economics and policy dimensions of the State to better understand underlying factors that affect the realisation of these rights in practice. This position rests on the premise that resource-dependent obligations related to ESC rights can be fully appreciated by integrating macroeconomic, public policy and public finance approaches, which not only provide a robust definitional grounding but also offer insights into the dynamics through which resource mobilisation, allocation and governance decisions are made.

In relation to resource mobilisation, the argument is that current interpretations of 'maximum available resources' need to be broadened to include potential resources and capacities that the State can assemble through targeted macroeconomic policy options and contributions from the private sector and international partners. This inclusive understanding of 'resources' shows that States can significantly enlarge the scope of policy activities in the area of ESC rights and potentially increase the magnitude of resources at its disposition. This approach takes into consideration many practical challenges which States would need to overcome in order to maximise access to these resources and optimise their employment for ESC rights goals.

In relation to resource allocation and governance, the study demonstrates that application of public policy and public finance concepts can enhance the quality and impact of resources actually available for ESC rights programmes. The roles of various institutional mechanisms, processes and stakeholders in public policy decision-making relevant to enhancing the quality of resource allocation, utilisation and impact are considered from an ESC rights perspective.

The thesis maintains that human rights, as a claim against the State, embody crucial and interacting normative frameworks. As such, the power relations

between political, economic and social actors within this normative framework not only affect the level of realisation of ESC rights by specific rights-holders, but also the effectiveness with which they can claim and protect their rights.

Given the increasing relevance of ESC rights in today's globalised world, and taking into consideration the enormity of the challenges to human welfare in both developed and developing countries,<sup>35</sup> it is argued that reinvigorated and specifically targeted efforts to ensure the realisation of ESC rights have become ever more critical and pressing. Such deeper analysis of the concepts related to ESC rights implementation has the potential not only to guide the work of national governments but also to provide a foundation for the work of national human rights institutions (NHRIs) and of domestic and transnational human rights activists and advocates.

## 1.4 METHODOLOGY

The cross-disciplinary nature of the research problem identified in this thesis, with significant legal, economic and public policy elements, poses a challenge in determining the most suitable methodological approach. Literature on the taxonomy of legal research styles identify several approaches: doctrinal; expository; law reform; legal theory; and fundamental research in law.<sup>36</sup> In isolating and selecting a methodological approach for the thesis, careful consideration was given to strike a balance between theoretical and practical dimensions of the research question and what it aims to achieve. In particular, whether the research adopts a doctrinal, theoretical or conceptual approach was given utmost attention.

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<sup>35</sup> For example, the UNDP Human Development Report 2014 states that 1.2 billion people live with \$1.25 or less a day, and according to the UNDP Multidimensional Poverty Index, almost 1.5 billion people in 91 developing countries are living in poverty with overlapping deprivations in health, education and living standards. See, United Nations Development Programme, *Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (UNDP, New York, 2014), <<http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>>.

<sup>36</sup> Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7 *Journal of Commonwealth Law and Legal Education* 5.

In doctrinal research in law, the most common form of theoretical framework is based on the legal system itself including its categories and concepts.<sup>37</sup> While legal doctrinal research is relatively comparable to methodologies in other disciplines, its nature is identified as ‘a mainly hermeneutic discipline’ in which the process of concept building and theorising are closely intertwined with describing and interpreting the law.<sup>38</sup> On the other hand, given the non-empirical approach to the current research and its reliance on multiple concepts and structures within law, economics and public policy, the research approach is theoretical and conceptually-based to a large extent.

Considering the conceptual basis and focus of this study to reimagine and advance a broader understanding of resources required for the realisation of ESC rights, a theoretical approach with focus on clarifying central conceptual parameters of the thesis was employed.

A theoretical approach was adopted because, this method ‘fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity’.<sup>39</sup> This approach, based on the policy research framework,<sup>40</sup> infers implications and effects of human rights law on domestic social institutions, including the governance and public policy machinery of the State. It calls for a cross-disciplinary perspective that combines the strengths of legal, economic and policy methodologies. Such an approach is particularly suitable for the present study given that the topic is inherently multidisciplinary and

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<sup>37</sup> Pauline C Westerman, ‘Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law’ (Working Paper University of Groningen, Faculty of Law, <<http://dx.doi.org/10.2139/ssrn.1609575> >.

<sup>38</sup> Mark Van Hoecke, ‘Legal Doctrine: Which Method(s) for What Kind of Discipline?’ in Mark Van hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of discipline?* (HART Publishing, 2011), 7.

<sup>39</sup> Enid Campbell and Don Harding (‘Pearce Committee’) Dennis Pearce, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* 1987), 1068, cited in Terry C Hutchinson, ‘Developing legal research skills: expanding the paradigm’ (2008) 33 *Melbourne University Law Review* 1065-1095.

<sup>40</sup> The characteristics of the policy research framework was adopted from Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, Sydney, 2010).

involves analysis at different levels of State practice within the ESC rights framework.

Another key consideration is that the thesis addresses fundamental and multifaceted issues related to resource mobilisation, allocation and governance using the parameters of social interests, judicial considerations and public choice. This requires detailed analysis of existing policies and related issues. Thus, the underpinning research paradigm not only reflects the legal doctrines of interpretation of the text of the ICESCR and aspects of human rights practice, but also builds on current knowledge of the application of international law in the domestic policy environment, particularly in economic and development policy areas relevant to the research question.

The methodological approaches, types of data and data analysis, as well as the background for the case studies are described below.

#### **1.4.1 Methodological approaches**

The choice of quantitative or qualitative research methods (or a combination of both) is a vital consideration in any research plan. Quantitative research methodologies are mainly concerned with quantification of the properties, states, characters and comparisons of the phenomenon,<sup>41</sup> whereas qualitative research focuses on generating in-depth understanding and underlying meaning of the properties and characteristics of the research object.<sup>42</sup> While both methodologies have their appeal for human rights research, the present study is best suited to a qualitative methodology. First, it focuses on a subjective dimension of State practice with regard to interpretation and practice of human rights obligations in general rather than on human rights violations alone. Secondly, the specific questions related to State practice in

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<sup>41</sup> Adri Labuschagne, 'Qualitative Research - Airy Fairy or Fundamental?' (2003) 8(1) *The Qualitative Report*.

<sup>42</sup> Ibid.

interpreting international human rights obligations can be better appreciated within a framework of subjective analysis of the relevant practices.

In addition, qualitative research methodology offers a wide range of approaches that can be used to provide 'an in-depth and interpreted understanding of the social world, by learning about people's social and material circumstances, their experiences, perspectives and histories'.<sup>43</sup> Thus it is more compatible with the objectives of understanding the 'societal and material circumstances' that affect the level of ESC rights realisation and the characteristics of policies associated with them.<sup>44</sup> Finally, given the fact that previous research on this topic is scarce and often fragmented, the methodology of inductive content analysis allows for the collection of many different pieces of evidence and their integration into a comprehensive model for resources within the framework of ESC rights.

For these reasons, a qualitative methodological approach was clearly advantageous in being able to capture cross-disciplinary components under one common theme and develop a practical understanding of a key concept in ESC rights advocacy.<sup>45</sup>

In this thesis, documentary data were analysed and the findings were supported by case studies. The core data sources were institutional and academic materials from the relevant disciplines and areas. The types of data, analysis methodologies and justifications for the case studies are given below.

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<sup>43</sup> Dawn Snape and Liz Spencer, 'The Foundations of Qualitative Research' in Jane Ritchie and Jane Elewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publications, London, 2003) 1, 22.

<sup>44</sup> Jane Ritchie et al (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications, 2013).

<sup>45</sup> While qualitative methodology is adopted as the primary research paradigm, the thesis makes use of elements of quantitative analysis where relevant to provide a more detailed and complete picture of the issue covered, especially in case studies.

## 1.4.2 Data types and data analysis

The types of data used by human rights researchers have widened over the years, especially with the increasing online accessibility of electronic data such as audio, video and other textual materials.<sup>46</sup> Traditional field data, including interviews, ethnographic observations and government records, have also become more accessible and are increasingly used by researchers for various forms of analysis.<sup>47</sup> Similarly, data analysis methods used by human rights researchers have come to include a variety of techniques, ranging from statistical analysis, modelling and correlational analysis to ethnographic analysis.<sup>48</sup>

All the data used in the present study already existed in the form of State reports, Concluding Observations, General Comments and reports of Special Rapporteurs as well as other institutional reports. The original data contained in these reports can be analysed and interpreted using many different frameworks and techniques. Hence, they can be said to represent valid and reliable data from original sources even though they have not been directly collected from the field. The context-rich and readily available State reports were an invaluable source of data that could be examined to interpret the ways in which States perceive their ESC rights obligations in policy and practice. Similarly, the Concluding Observations of the ESCR Committee provided rich interpretive material on how State compliance expectations are being developed in key policy areas relevant to ESC rights realisation in the respective States.

Because the focus here was to collect the widest possible range of evidence on State practice, the use of extant official data and reports from a large

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<sup>46</sup> Data analysis practices among human rights scholars is comprehensively examined by Isioma Elueze Lu Xiao and Jillian R Kavanaugh, 'Human Rights Researchers' Data Analysis and Management Practices' (Paper presented at the ASIST 2014, Seattle, 1-6 November 2013) <<https://www.asis.org/asist2014/proceedings/submissions/papers/72paper.pdf>>.

<sup>47</sup> See for example, Earl Babbie, *The Practice of Social Research* (Wadsworth, Belmont, 2010).

<sup>48</sup> Xiao and Kavanaugh, above n 46.

number of States offered a further advantage over field data collected from one or a few States. Moreover, in-depth case studies on selected topics significantly enhanced the reliability and validity of these data sources.

The main data sources used in this research are shown in Table 1.

Table 1: *Data types and focus of analysis*

<b>Document/Data source</b>	<b>Focus of analysis</b>
136 Periodic reports of States under the ICESCR. The most recent available report for each State was selected for analysis. <sup>49</sup>	Identify how the States recognise and implement resource mobilisation, allocation and governance aspects under Article 2(1) of the ICESCR.
136 Concluding Observations of the ESCR Committee.	Identify the Committee's approach to addressing the resource dimension of progressive realisation of ESC rights.
21 General Comments of the ESCR Committee.	Locate the views of the Committee on how the requirement to use 'maximum available resources' must be interpreted under the ICESCR.
Reports of Special Rapporteurs (in areas relevant to ESC rights).	Identify emerging issues, concerns and challenges of the realisation of ESC rights, especially in the context of resources.
Reports of International Organisations (e.g. UN, IMF, World Bank, ADB).	Gather evidence for State practice in relation to mobilisation, allocation and utilisation of resources for ESC rights objectives.
Reports and documents from national governments (e.g. Central Bank reports, statistics).	Gather evidence for State practice and challenges in policy implementation that affect the realisation of ESC rights.
5 case studies on Maldives <sup>50</sup> that were developed using information from government, central bank and international reports and other publicly available documents.	Illustrate challenges and policy options in addressing mobilisation of domestic resources, international assistance and co-operation, private sector participation, resource allocation and governance.

<sup>49</sup> The reports cover a period from 1978 (report of Barbados) to 2014 (report of Angola).

<sup>50</sup> The details of case studies, justifications and background are given in Section 1.4.3.

In addition, other sources of international jurisprudence and soft law norms on ESC rights developed through the works of the ESCR Committee, Special Rapporteurs and independent experts as well as the works of experts in the field of human rights were also analysed. Other widely recognised international documents such as the *Limburg Principles on the Implementation of ICESCR*, the *Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights*, and *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, were also used as key source materials for inferring relevant interpretations in building and supporting the analysis.<sup>51</sup> These documents provided a rich source of primary information about the ways in which States interpret, understand and act upon their ESC rights obligations. These data sources therefore served to uncover richer meanings and develop a deeper understanding of the issue under investigation.

The data from all these sources were canvassed through document analysis methodology to derive relevant and supporting evidence for the arguments put forward in the thesis.

Document analysis is a 'systematic procedure for reviewing or evaluating documents'.<sup>52</sup> It requires data to be rigorously examined and interpreted in order to elicit meaning, and to uncover supporting evidence to further empirical knowledge.<sup>53</sup> The procedure involves finding, selecting, appraising and synthesising data contained in documents.<sup>54</sup> Such analysis aims to locate data extracts (including excerpts and quotations) that can be organised into

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<sup>51</sup> The Limburg Principles were advanced by a group of distinguished international experts in internal law in 1986. The Principles have been widely used as forming expert views on the interpretation of the ICESCR norms. They have also been used extensively in national legal systems in relation to violations of ESC rights. The Maastricht Guidelines, which were adopted by a group of more than thirty experts in 1997, build on the Limburg Principles and identify the legal implications of State actions and omissions which lead to violations of ESC rights. While these Principles and Guidelines are non-binding, they are highly regarded as 'soft law norms' of international human rights system.

<sup>52</sup> Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27-40, 27.

<sup>53</sup> Also see, Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications, London, 2014).

<sup>54</sup> Labuschagne, above n 41; Bowen, above n 52.

categories or case examples to support the developing argument. This technique can be combined with other methods for purposes of triangulation, through which the key results of the document analysis can be corroborated by evidence from other sources.<sup>55</sup>

Gilbert et al identify four steps that are essential to the qualitative data analysis process: organising data; exploring data; interpreting and reflecting; and integrating data.<sup>56</sup> Organising and exploring data can be facilitated by the use of qualitative data analysis tools (QDAs), the most widely used of which are software programmes and applications such as NVivo,<sup>57</sup> MAXQDA,<sup>58</sup> ATLAS.ti,<sup>59</sup> and Palantir.<sup>60</sup> In addition, other applications such as OpenEvsys,<sup>61</sup> Martus Bulletin System (MBS),<sup>62</sup> are specifically designed for use in collecting and analysing human rights-related data. These analytical tools provide accurate and robust means of collecting, organising and systematically exploring the data for patterns, connections and underlying relationships, which assist in interpretation of and reflection on the data.

Given the nature of documents used in this research and the types of analysis needed to derive meaningful outputs from such analysis, NVivo was used as the main tool in organising, coding and structuring the qualitative data. This software provides a powerful platform to assemble State reports, concluding observations and other relevant documents and to identify patterns of relevance to the research questions. The software provided a useful platform on which to organise key characteristics of State Reports and discern relevant patterns on various topics of interest analysed. The coding schemes employed

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<sup>55</sup> Bowen, above n 52, 28.

<sup>56</sup> Linda S Gilbert, Kristi Jackson and Silvana di Gregorio, 'Tools for Analyzing Qualitative Data: The History and Relevance of Qualitative Data Analysis Software' in Michael J Spector et al (eds), *Handbook of Research on Educational Communications and Technology* (Springer, New York, 2014) 221-236.

<sup>57</sup> Details available at <[http://www.qsrinternational.com/products\\_nvivo.aspx](http://www.qsrinternational.com/products_nvivo.aspx)>.

<sup>58</sup> Details available at <<http://www.maxqda.com/>>.

<sup>59</sup> Details available at <<http://atlasti.com/>>.

<sup>60</sup> Details available at <<https://www.palantir.com/>>.

<sup>61</sup> Details available at <<http://www.openevsys.org/>>.

<sup>62</sup> Details available at <<https://martus.org/>>.

in NVivo and derivative methods of content analysis used for various thematic areas are covered in detail in relevant chapters. In addition to this systematic analysis of texts, the study also involved skimming and thorough reading of the documents to identify areas that require clarification before they can be discussed in the 'real world' context. This process of thorough reading was important to ensure that the data were examined with a critical eye and, most importantly, that the elements taken from the documents were relevant to the focus of the inquiry.

It has been argued that document analysis has the advantage of being a more efficient, less-time consuming process.<sup>63</sup> As well, according to Glenn Bowen, one of the main advantages of documents over interviews and observations is their lack of reactivity,<sup>64</sup> which makes the results of analysis more representative of reality. In the present study, this strength was optimised through triangulation of the findings with those from several case studies.

### 1.4.3 Case studies

Qualitative case study methodology is valuable in providing additional insights into the working of any phenomenon, particularly in relation to 'why' and 'how' questions. Case studies are powerful research tools for understanding a phenomenon in context, since they deliver a richer variety of variables of interest than single data points.<sup>65</sup> Case studies employ a 'multiplicity of perspectives which are rooted in a specific context', thus generating detailed, in-depth understanding of a phenomenon.<sup>66</sup>

Given the added value of case studies to document analysis methodology, this thesis includes five case studies (in Chapters 5-8) on the Maldives, each addressing a separate line of inquiry, namely: policy challenges and options in

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<sup>63</sup> Bowen, above n 52, 31.

<sup>64</sup> Ibid., 37.

<sup>65</sup> For detailed discussions on case study method, see, Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, London, 5th ed, 2013).

<sup>66</sup> Ritchie et al, above n 44, 51-52.

public sector resource mobilisation; maximisation of international assistance and co-operation; mobilising private sector and societal resources; resource allocation for ESC rights; and quality of resources and resource governance. While a comparative case study method using examples from different country contexts has its advantages, especially in situations where comparable information from different contexts can be effectively collected and analysed, this thesis adopted a single country case study to provide a more focused perspective on the issues covered. These case studies provide, from different perspectives, an in-depth understanding of the resource dimension in relation to ESC rights, which are built upon the wider context provided by the analysis of State Reports.

The Republic of Maldives was selected for these case studies for a number of reasons. First, as a small, middle-income country with significant internal and external challenges to development, a mixed history of progress in human development and a very insecure and volatile human rights policy environment,<sup>67</sup> the Maldives offers a rich set of examples of the policy dimension in relation to human rights. Secondly, very little research on human rights and public policy has been conducted on the Maldives; the present study therefore makes an important contribution to existing scholarship. Thirdly, the author of this study has first-hand experience of various aspects of Maldivian society, culture, language, politics and the state of human rights. This enhances the credibility of the case study analyses and adds substantial value to the overall argument.

The following section provides a brief overview of the economic, political, social, developmental, and human rights circumstances of the Maldives, which gives the substructure for the case studies in the subsequent chapters of this thesis.

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<sup>67</sup> For insights into the human rights environment and related challenges in Maldives, see Ahmed Shahid and Hilary Yerbury, 'A Case Study of the Socialization of Human Rights Language and Norms in Maldives: Process, Impact and Challenges' (2014) 6(2) *Journal of Human Rights Practice* 281-305; Aminath Didi, *The Maldives in Transition: Human Rights and Voices of Dissent* (PhD Thesis, Curtin University, 2012).

### 1.4.3.1 Background to the case studies: The Maldives

The Maldives is a small State, consisting of 1,192 islands situated across a strategic shipping route in the Indian Ocean. The economy has been closely associated with marine resources, including nature-based tourism and fishing. Despite a highly dispersed population of approximately 350,000 across 200 inhabited islands,<sup>68</sup> the Maldives has achieved notable development progress in recent decades through a combination of private-sector-led tourism development and improving public service provision. According to the World Bank, from being one of the world's 20 poorest countries in the 1980s, the Maldives has achieved middle-income status with a per capita annual income of over US\$6,300 by 2012.<sup>69</sup> The country has an executive presidential system; the president and vice president are directly elected for five year terms and an 87 member unicameral parliament is elected by popular vote for a term of five years.

The Maldives has achieved significant success in addressing extreme poverty and underdevelopment, although much more needs to be done. Poverty has declined sharply over recent decades, as indicated by the most recent Household Income and Expenditure Survey (HIES) for the period 2003-2010.<sup>70</sup> About 8 percent of Maldivians lived on less than US\$1.25 per day in 2009-10, compared to 9 percent in 2002-03.<sup>71</sup> Key human development indicators such as infant mortality, maternal mortality, and educational attainment have registered significant improvements in recent years, and the Maldives remains the best-ranked country in the UNDP's Human

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<sup>68</sup> Department of National Planning, *Statistical Year Book 2013* (DNP-Maldives, Male', 2014), <<http://planning.gov.mv/yearbook2013/yearbook.html>>.

<sup>69</sup> The World Bank, *Maldives Overview* (2014) <<http://www.worldbank.org/en/country/maldives/overview>>.

<sup>70</sup> Department of National Planning, *Household Income and Expenditure Survey- Maldives* (Department of National Planning/Ministry of Finance and Treasury- Maldives, Male', Maldives, 2012) <<http://planning.gov.mv/hies/HIES2012/FINAL%20HIES%20REPORT%20april%202012.pdf>>.

<sup>71</sup> Ibid.

Development Index (HDI) in South Asia,<sup>72</sup> especially in terms of health and welfare indicators.<sup>73</sup>

The Maldives is party to a number of international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was ratified on 19 September 2006.<sup>74</sup> The Constitution of Maldives also explicitly recognises a number of ESC rights, particularly in relation to rights to adequate food, water, clothing, housing, healthcare, sanitation, electricity (Article 23); right to education (Article 36); right to work (Article 37); and cultural rights (Article 39).<sup>75</sup> Also enshrined in the Constitution is the requirement to decentralise public services to the inhabited islands.

As is the case on other small island nations, however, cost-effective service delivery has always been difficult in the Maldives due to its dispersed population and geographic challenges. Despite these inherent challenges, the Maldives has made significant progress in some aspects of economic, social and cultural rights such as education, health and welfare, although other areas, such as employment, housing and standard of living, remain under-developed.

In relation to education, primary level enrolment currently stands at 94 percent, with about 62,000 students and 6,000 teachers in approximately 220 public

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<sup>72</sup> Ministry of Finance and Treasury and the United Nations Development Programme in the Maldives, *Maldives Human Development Report 2014 - Bridging The Divide: Addressing Vulnerability, Reducing Inequality* (UNDP, Government of Maldives, Male', Maldives, 2014) <[http://hdr.undp.org/sites/default/files/maldives\\_hdr2014\\_full\\_report\\_0.pdf](http://hdr.undp.org/sites/default/files/maldives_hdr2014_full_report_0.pdf)>.

<sup>73</sup> According to the World Bank data, life expectancy in Maldives is 74.8 years; child mortality under 5 is 11 out of 100,000; maternal mortality ratio is higher at 37 out of 100,000; adult literacy stands at 98.4 percent; and public expenditures on combined health and education stand at 17.86 percent of GDP. The World Bank, above n 69.

<sup>74</sup> Maldives ratified the Convention on the Prevention and Punishment of the Crime of Genocide (24 April 1984); International Convention on the Elimination of All Forms of Racial Discrimination (24 April 1984); Convention on the Rights of the Child (11 February 1991); Convention on the Elimination of All Forms of Discrimination against Women (1 July 1993); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (20 April 2004); International Covenant on Civil and Political Rights (19 September 2006) ; Convention on the Rights of Persons with Disabilities (5 April 2010). Maldives is yet to make any reports to the ESCR committee under the Covenant, although the initial and first periodic report are overdue.

<sup>75</sup> "Dhivehi Raajjeyge Jumhooriyyage Qaanoonu Asaasee" (*Constitution of the Republic of Maldives*) 2008.

schools.<sup>76</sup> Participation in secondary and tertiary education, however, still remains low, mainly because there are few higher secondary schools and tertiary institutions and there is significant disparity between the capital and the outer atolls.<sup>77</sup> Regarding rights to health and social welfare, all citizens are covered by the government's universal health insurance system (*Aasandha*), introduced in January 2012. In terms of expenditure, the scheme is estimated to represent about 2.8 percent of GDP,<sup>78</sup> which raises some concerns about its long term sustainability.<sup>79</sup> In addition, a comprehensive contributory and universal pension scheme provides significant welfare support to all those in need.<sup>80</sup> While the health insurance scheme addresses the issue of cost and access, the quality of health facilities and services remains poor, especially so in the outer atolls.

Despite progress in economic productivity and standard of living, there are still a number of serious challenges. For example, according to the UNDP Human Development Report 2014, although the incidence of poverty remained at 8 percent in 2010, there is growing poverty and inequality in the country, especially in the capital, Malé, due to unemployment and urban migration.<sup>81</sup> While the economy has been showing an upward development trend continuously for a number of years, the level and quality of employment has remained less impressive.<sup>82</sup> Similarly, the right to housing and related

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<sup>76</sup> The World Bank, *Maldives Development Update 2013* (The World Bank, Washington, D.C., 2013) <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/12/06/000356161\\_20131206154350/Rendered/PDF/829560REVISED00rief020130Dec0final.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/12/06/000356161_20131206154350/Rendered/PDF/829560REVISED00rief020130Dec0final.pdf)>, 11.

<sup>77</sup> Ministry of Education - Maldives, *School Statistics 2014* Ministry of Education - Maldives <[http://www.moe.gov.mv/assets/upload/School\\_Statistics\\_2014.pdf](http://www.moe.gov.mv/assets/upload/School_Statistics_2014.pdf)>.

<sup>78</sup> The World Bank, above n 76, 14.

<sup>79</sup> It has been argued that the system need to be reformed to make more sustainable by exploring ways to reduce medicine costs, overseas treatment costs, as well as focusing more on building a close-ended provider payment system.

<sup>80</sup> For details on the pension system, see, Ahmed Shahid, 'Ageing with Dignity: Old-Age Pension Schemes from the Perspective of the Right to Social Security under ICESCR' (2014) 15(4) *Human Rights Review* 455-471.

<sup>81</sup> Ministry of Finance and Treasury and the United Nations Development Programme in the Maldives, above n 72, 17.

<sup>82</sup> *Trading Economics*, (2014) <<http://www.tradingeconomics.com/>>.

provisions remains poorly met.<sup>83</sup> These key developmental challenges will be discussed in more detail in the case studies.

## 1.5 SIGNIFICANCE OF THE RESEARCH AND CONTRIBUTIONS TO SCHOLARSHIP

In recent years, there has been increased attention among academics and human rights advocates to ESC rights,<sup>84</sup> which has highlighted the need for greater clarity on the difficult concepts at the heart of the ESC rights policy. The coming into force of the Optional Protocol on the ICESCR in May 2013 was another important milestone in ESC rights promotion and protection which heightened interest in this topic. The Optional Protocol establishes three main mechanisms for bringing cases of violation of ESC rights before the ESCR Committee: an individual complaints mechanism; an inter-State complaints mechanism; and an inquiry procedure that the ESCR Committee can initiate.<sup>85</sup> Once these mechanisms begin to be used widely, it is hoped that, more attention will be given to ESC rights realisation by governments and policymakers, in addition to scholars and advocates.

Despite these developments, the voices of poor and marginalised individuals in both developing and developed countries attest to the serious dispossession of these fundamental rights on a daily basis.<sup>86</sup> This is particularly alarming given the ample capacity of the global community (either

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<sup>83</sup> Human Rights Commission of Maldives, *Rapid Assessment of the Housing Situation in the Maldives* (HRCM, Male', Maldives, 2008), <<http://hrcm.org.mv/publications/otherreports/HousingAssesmentDhiv.pdf>>.

<sup>84</sup> For example see, Amnesty International, *Human rights for human dignity: A primer on economic, social and cultural rights* (Amnesty International, London, 2014), <[http://globalinitiative-escr.org/wp-content/uploads/2014/11/AI\\_ESCR\\_PRIMER\\_FINAL.pdf](http://globalinitiative-escr.org/wp-content/uploads/2014/11/AI_ESCR_PRIMER_FINAL.pdf)>.

<sup>85</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 5 March 2009, General Assembly Res No A/RES/63/117 (entered into force 5 May 2013).

<sup>86</sup> For example, Deepa Narayan, *Can Anyone Hear Us?: Voices From 47 Countries* (Poverty Group, PREM and World Bank, 1999), <<http://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555199-1124115187705/vol1.pdf>>, Also see the other reports in the World Bank project "Voice of the Poor".

individually or through international co-operation mechanisms) to address these basic human needs. Added to this, the current uncertainties stemming from global economic instability have strained the ability of many governments to effectively manage human rights responsibilities. Consequently, the policy actions of expenditure consolidation and austerity measures in the aftermath of the 2007-2008 global financial and economic crises have significantly reduced the capacity of governments for resource mobilisation and allocation for ESC rights.<sup>87</sup>

Against the background of recent developments in ESC rights implementation and of global economic and social dynamics, this research is premised on recognition that the realisation of economic, social and cultural rights is essential for protecting and promoting individuals' dignity and self-worth. Hence, it aims to identify challenges to the realisation of ESC rights in a world of abundance and to bring these rights to the forefront of State policy through analysis of the economic and policy dynamics of 'maximum available resources', with particular reference to ESC rights activism and advocacy. The significance of each of these elements is elaborated below.

### **1.5.1 Identifying challenges to ESC rights realisation in a world of abundance**

Despite the upsurge in global wealth and affluence in recent decades,<sup>88</sup> alarming rates of poverty and inequality persist among much of humanity, with

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<sup>87</sup> For example, Adam McBeth, 'What do human rights require of the global economy? Beyond a narrow legal view' in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (Cambridge University Press, Cambridge, 2013) 8; Office of the High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on austerity measures and economic and social rights* (OHCHR, Geneva), <[http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)>; Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU institutions and the conclusion of Memoranda of Understanding* (Centre of European Law and Politics, University of Bremen: Nomos Verlagsgesellschaft Baden, Baden, 2014), <[http://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal\\_opinion\\_human\\_rights\\_in\\_times\\_of\\_austerity\\_policy\\_final.pdf](http://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal_opinion_human_rights_in_times_of_austerity_policy_final.pdf)>.

<sup>88</sup> See for example, Capgemini, *The Wealth Reports* Capgemini <<https://www.worldwealthreport.com/>>; Knight Frank, *The Wealth Report 2015* (Knight Frank, 2015), <<http://www.knightfrank.com/wealthreport>>.

many dying of hunger and curable diseases.<sup>89</sup> Global inequality and poverty constitute a grave human rights abuse and the scale of suffering is far too serious to be ignored. It is hard to comprehend tolerance and apathy when, as Scott Leckie points out, 'human suffering or death stem from preventable denials of the basic necessities of life such as food, health care or a secure place to live'.<sup>90</sup>

Existing ESC rights strategies in many States often discount the potential constraints inherent in the global economic system, particularly in neo-liberal economic policies that contribute to the violation of ESC rights.<sup>91</sup> From this perspective, it could be argued that ESC rights realisation is a victim of globalisation. As such, widespread deprivation of ESC rights can largely be attributed to the global economic and social system that structurally disadvantages the poor.<sup>92</sup> In fact, many scholars support the view that the global economic system contains inherent elements that lead to human rights violations and that globalisation has only made some prosper and left the majority behind.<sup>93</sup> Moreover, it is argued that the current structure is directly and indirectly responsible for causing some to be deprived of secure access to the means of fulfilling their human rights.<sup>94</sup> Therefore this *status quo* must

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<sup>89</sup> A detailed analysis of world poverty can be accessed at The World Bank and International monetary Fund, *Global Monitoring Report 2014/2015: Ending Poverty and Sharing Prosperity* (The World Bank / IMF, Washington, D.C., 2015), <[http://www.worldbank.org/content/dam/Worldbank/gmr/gmr2014/GMR\\_2014\\_Full\\_Report.pdf](http://www.worldbank.org/content/dam/Worldbank/gmr/gmr2014/GMR_2014_Full_Report.pdf)>.

<sup>90</sup> Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81-124, 83.

<sup>91</sup> Radhika Balakrishnan, Diane Elson and Raj Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53(1) *Development* 27-36, 28.

<sup>92</sup> Margot E Salomon, 'International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice' in Bård A Andreassen and Stephen P Marks (eds), *Development as a Human Right* (Harvard School of Public Health, 2006) 96-118, 96.

<sup>93</sup> Diane Coyle, *The Economics of Enough: How to Run the Economy as if the Future Matters* (Princeton University Press, New Jersey, 2011), 122.

<sup>94</sup> See for example, Thomas Pogge, 'Are we violating the human rights of the world's poor?' in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights: Old Problems, New Possibilities* (Edward Elgar, Cheltenham, 2013) 40.

be confronted and challenged if genuine advancement of human rights is to occur.<sup>95</sup>

Others, however, argue that globalisation in fact offers the best opportunity to address these deprivations and has brought about the greatest reduction in poverty. Paul Collier, for example, argues that the world's poorest billion people live in States that have not globalised and the wealthiest billion are citizens of the developed and globalised world, while the middle four billion are those whose standard of living is improving as a consequence of globalisation.<sup>96</sup> A more balanced approach acknowledges the reciprocity between globalisation and human welfare, especially human rights, and argues that activities of the global economy can serve as mechanisms for stimulating opportunities that can help achieve human rights goals.<sup>97</sup>

These contrasting views indicate the power of globalisation to change the lives of individuals and States for better or worse. The impact of globalisation on the ability of States to address 'resources' challenges is the main point of interest in the present study, which examines relevant aspects of globalisation from the perspective of resources and policy space. It does not delve into the debate around whether globalisation is good or bad but adopts a neutral position in which globalisation is treated as a force that can be 'enlisted' to enhance ESC rights realisation through appropriate policy action.<sup>98</sup>

Although development is often measured in terms of people's command over goods and services, unless societies create conditions for people to realise their economic, social and cultural rights, they cannot be regarded as

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<sup>95</sup> Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483-509, 508.

<sup>96</sup> Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can be Done about It* (Oxford University Press, New York, 2007).

<sup>97</sup> David Kinley, *Civilising Globalisation: Human Rights and Global Economy* (Cambridge University Press, Cambridge, 2009).

<sup>98</sup> The effect of globalisation on human rights and the room for complementarity have been covered by a number of scholars. For example see, Daniel Aguirre, *The Human Right to Development in a Globalized World* (Ashgate, Hampshire, 2008); Jeffrey L Dunoff, 'Does Globalization Advance Human Rights?' (1999) 25 *Brooklyn Journal of International Law* 125; Kinley, above n 97.

developed.<sup>99</sup> Therefore, a new paradigm is needed to address these shortcomings both in theoretical understanding and practical application of ESC rights obligations. This study identifies various challenges in the macroeconomic policy environment that must be addressed to provide incentives for empowerment and the creation of economic and social platforms essential for the realisation of ESC rights.

### 1.5.2 Bringing ESC rights to the forefront of State policy

It is vital for ESC rights to be fully entrenched in domestic practice through legal and institutional recognition and enforceable practices. As Amartya Sen has pointed out, although legislation alone is not enough to invoke human rights,<sup>100</sup> if a right is not legislated, then it is an ‘empty noise’<sup>101</sup> and may lack the ‘bite’.<sup>102</sup> It can equally be argued that the moral position for the protection of human rights also extends beyond the simple instrumentality of the legal regime to include socio-economic justifications, which would give weight to what John Rawls calls ‘public reasoning’ in determining the viability of human rights.<sup>103</sup> Such public reasoning is essential for bringing ESC rights concerns to the attention of policy makers and ensuring that they are given proper attention at all times.

As pointed out earlier, in addition to being identified as ‘resource-intensive’<sup>104</sup>, ESC rights have long been seen more as ‘hortatory goals’<sup>105</sup> or ‘programmatic

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<sup>99</sup> Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity' (2008) 26(4) *Development Policy Review* 387-405, 387-388.

<sup>100</sup> Amartya Sen, 'Human Rights and Development' in Bård A Andreassen and Stephen P Marks (eds), *Development as a Human Right* (Harvard School of Public Health, 2006) 1-8, 4.

<sup>101</sup> *Ibid.*, 2.

<sup>102</sup> *Ibid.*, 1.

<sup>103</sup> John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *The University of Chicago Law Review* 765–807; Sen, above n 100, 3.

<sup>104</sup> For discussions on resource-intensiveness, see Vierdag, above n 10; Agbakwa, above n 10, 187.

<sup>105</sup> 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

objectives<sup>106</sup> that are 'aspirational' rather than 'enforceable'.<sup>107</sup> Hence ESC rights have often been characterised as the 'poor cousin' of Civil and Political rights<sup>108</sup> and have received less attention in national and international human rights advocacy platforms.

In order to change this characterisation and to bring ESC rights to the forefront of State policy 'a complex interaction of policies and programs in a wide range of sectors and institutions'<sup>109</sup> is needed. This can be accomplished by paying due regard to State practice and providing theoretical space for the identification of practical and enforceable elements of these rights. Such an approach is also essential to entrench ESC rights within various spheres of State policy and to provide a more coherent, defensible and pragmatic basis for the application of these rights, which is necessary for the protection of human dignity and the realisation of social justice.

It can be argued that human rights norms should guide the accountability of governments for policies and actions that affect their citizens.<sup>110</sup> Despite this legal assurance, however, individuals often have no effective guarantee that they will be protected against State inaction in the realisation of ESC rights, nor are they likely to have any assurance of continuous improvement in their economic, social and cultural conditions.<sup>111</sup> While this is a reflection of the hard reality of the politics of human rights in general, the impact of such uncertainty on ESC rights enjoyment is particularly severe. Therefore, given the strong moral and instrumental case for human rights and dignity,<sup>112</sup> the ability of

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to Food, Water, Housing, and Health?' (2004) 98(3) *The American Journal of International Law* 462-515, 464.

<sup>106</sup> Ibid.

<sup>107</sup> Todd Landman, 'Measuring Human Rights and the Impact of Human Rights Policy' (Paper presented at the Conference on Human Rights Impact Assessment, Brussels, 19-20 November 2001) 6.

<sup>108</sup> Saul, Kinley and Mowbray, above n 33, 1.

<sup>109</sup> Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 *Human Rights Quarterly* 866-887, 871.

<sup>110</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge, London, 2010), 10.

<sup>111</sup> Vierdag, above n 10, 101.

<sup>112</sup> Arjun Sengupta, 'The Human Right to Development' in Bård A Andreassen and Stephen P Marks (eds), *Development as a Human Right* (Harvard School of Public Health, London,

individuals to enjoy their fundamental human rights should be among the paramount objectives of society and government policy.

Accordingly, one of the key aims of this study is to identify policy approaches that can help bring ESC rights to the forefront of government action, specifically in relation to budgeting, design and implementation of public policy programmes. This is based on the recognition that, there is need to develop a more unified conceptual framework on the nature, quality and quantity of resources required for the realisation of ESC rights and to identify the key considerations under which these resources must be allocated and utilised for the realisation of these rights. Such a framework will not only enrich the human rights understanding of these concepts but will also deepen understanding of these individual concepts in their own right. The exercise of positioning these economic and public policy concepts within the rubric of legal thought on international human rights obligations and incorporating a practitioner's perspective adds more value to this approach.

### **1.5.3 Economics and policy dynamics of 'maximum available resources'**

The role of economics and public policy in shaping how human rights concerns can be asserted within the State is one of the key questions to emerge from this discussion. Given the essentially economic and political nature of public sector resources management practice, a cross-disciplinary analysis can be invaluable to better understand the many challenges to and opportunities for strengthening the case for ESC rights realisation.

It is argued that, while human rights contribute to freeing people from fear, economics makes its contribution by freeing people from want.<sup>113</sup> Hence there is an 'economic dimension to human rights as much as a human rights

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2006) 9-35, 25; Andrew Fagan, *Human Rights: Confronting Myths and Misunderstandings* (Edward Elgar Publishing, Cheltenham, 2009), 17.

<sup>113</sup> Manuel Couret Branco, *Economics versus Human Rights* (Routledge, London, 2009).

dimension to economics'.<sup>114</sup> Despite these overlaps between human rights and economics, there is minimal interaction between the two disciplines. It is important to understand, for example, whether the current problems in economic policy are the outcomes of doing the wrong economics rightly or doing the right economics wrongly.<sup>115</sup> Therefore, the inter-relationship between human rights and economics cannot be ignored if we are to develop and implement an effective system of human rights protection. Balakrishnan, Elson and Patel argue that:

Human rights have significant economic implications, since promoting, protecting and fulfilling them require resources and involve costs. In turn, economic policies have significant impacts on human rights; they shape the nature of the threats to the economic and social rights of different groups of people, and can both harm and assist the realization of human rights.<sup>116</sup>

This relationship is especially relevant with regard to ESC rights, given the essential economic policy characteristics of ESC rights implementation. For example, the right to work and the right to an adequate standard of living (including the right to housing, food, and water) and the right to education, health and welfare are closely intertwined with national economic policy. Many of these rights and what they imply in practice could be better understood from the perspective of economics and public policy practices.

Economics and public policy decisions also drive the State's attitude towards public sector resources and how they are used, which effectively impacts the individual's ability to enjoy ESC rights. In recent years, especially since the global financial and economic crises of 2007-2008, there has been an increase in the number of governments adopting policies of reducing public expenditure by cutting or capping previously significant expenditures such as public sector wages and welfare subsidies.<sup>117</sup> These austerity measures have a major

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<sup>114</sup> Ibid., 1.

<sup>115</sup> Ibid., 3.

<sup>116</sup> Balakrishnan, Elson and Patel, above n 91, 28.

<sup>117</sup> See for example, Jim Brumby and Marijn Verhoeven, 'Public Expenditure after the Global Financial Crisis' in Otaviano Canuto and Marcelo Giugale (eds), *The Day After Tomorrow: A Handbook on the Future of Economic Policy in the Developing World* (The World Bank, Washington D.C., 2010) 193.

impact on the level of enjoyment of ESC rights and have had significant negative impacts on the overall standard of living for many.<sup>118</sup> Yet, while the global financial and economic crises have pushed millions of people into penury— often as a result of the government policy actions to address the crisis—at the same time the number of wealthy people and their overall net wealth have increased.<sup>119</sup> According to Oxfam, for instance, in 2014 the richest 1 percent owned 48 percent of the world’s wealth while the least well-off 80 percent currently own just 5.5 percent.<sup>120</sup> Taking into consideration this imbalance in resource ownership is critical to understanding resource challenges to ESC rights.

State efforts to increase resources can also have serious political and social repercussions if not properly implemented. For example, various interest groups and issues around the political power balance could easily derail a tax-broadening reform programme, not only holding back future revenue but also seriously damaging political stability and economic progress. Therefore, as Philip Alston and Gerard Quinn argue, flexibility for States to implement ESC rights in a progressive realisation framework should be seen as a necessary accommodation to the ‘vagaries of economic circumstances’.<sup>121</sup> The delicate balance that needs to be struck in addressing resource mobilisation and allocation decisions needs to be recognised.

In the case of ESC rights, political and economic contexts are ‘necessarily and fundamentally determinative’<sup>122</sup> and must encompass ‘political, social and

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<sup>118</sup> For example see, Georg Wenzelburger, 'Fact or fiction? Welfare cuts and fiscal adjustments' (2014) 34(01) *Journal of Public Policy* 63-92.

<sup>119</sup> Paul O’Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 59, 65.

<sup>120</sup> Oxfam, *Wealth: Having it all and wanting more* <<http://policy-practice.oxfam.org.uk/publications/wealth-having-it-all-and-wanting-more-338125>>. Oxfam further identifies that in 2014, the richest 85 billionaires have the same wealth as the bottom half of the world’s population.

<sup>121</sup> Alston and Quinn, above n 13, 175.

<sup>122</sup> Saul, Kinley and Mowbray, above n 33, 170.

economic dimensions, as well as that of the law.<sup>123</sup> For this reason, law, economics, public policy and public finance disciplines create their own understanding of the workings of ESC rights implementation. The cross-disciplinary approach adopted in this thesis will enhance understanding of this crucial aspect of the human rights regime and will provide a useful resource for human rights advocates, policymakers, human rights organisations and the victims of ESC rights violations.

#### **1.5.4 ESC rights activism and advocacy: Enhancing policy accountability of the State**

An effective and representative State is grounded on the values of open, transparent and accountable political and social arrangements and on institutions that promote human rights, rule of law and inclusivity. At the heart of the success of these States are empowered citizens who hold their governments to account through established institutional mechanisms. Accordingly, the ability of human rights to challenge 'entrenched political and social behaviour'<sup>124</sup> through moral persuasion is fundamental to effect change in the current status of fulfilment of ESC rights.

Despite increasingly loud calls for equal treatment of ESC rights with other rights<sup>125</sup> and the fact that they have received increased attention in many parts of the world in recent years,<sup>126</sup> effective protection of these rights still leaves much to be desired. Although there is recognition that ESC rights are essential to the effective realisation of other fundamental rights and to living with

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<sup>123</sup> Amartya Sen, 'Human Rights and the Limits of the Law' (2006) 27(6) *Cardozo Law Review* 2913-2927, 2913.

<sup>124</sup> Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 *Human Rights Law Review* 349-372, 366.

<sup>125</sup> See for example, United Nations General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993); Robinson, above n 109, 866.

<sup>126</sup> For example, Paul Hunt, 'Taking Economic, Social and Cultural Rights Seriously' (2006) 31 *Alternative Law Journal* 120.

dignity,<sup>127</sup> these rights ‘remain less well articulated conceptually than Civil and Political rights, less accurately measured, and less consistently implemented.’<sup>128</sup> Delay in developing these key components of ESC rights clearly disadvantages their implementation and proper realisation. Ensuring that States take ESC rights more seriously in their policy priorities requires further advancement of core concepts and practices of the rights enshrined in the Covenant to reflect the changing landscape of global human rights.

One of the key goals of human rights discourse is to secure each individual the ‘necessary conditions for leading a minimally good life’.<sup>129</sup> Such a definition of human dignity focuses on the human condition of *being* rather than *having*.<sup>130</sup> According to Martha Nussbaum, all human rights, which are essentially understood as ‘entitlements to capabilities’, have material and social preconditions and necessitate government involvement and action.<sup>131</sup> Similarly, Mary O’Rawe argues that ‘human rights are part of the human condition, not mere favours granted by States’.<sup>132</sup> Thus, these human rights can be seen as rights to particular capabilities that can be enjoyed by individuals and groups within any given society.

Given the primary role of individuals and advocates to be empowered to create State accountability for the realisation of ESC rights, this thesis aims at making a significant contribution in terms of illuminating the State’s obligation to

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<sup>127</sup> Sital Kalantry, Joycelyn Getgen and Steven Arrigg Koh, ‘Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) 32 *Human Rights Quarterly* 253-310, 256.

<sup>128</sup> Shareen Hertel and Lanse Minkler, ‘Economic Rights: The Terrain’ in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007), 1; Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford, 1996); Rolf K nnemann, ‘A Coherent Approach to Human Rights’ (1995) 17(2) *Human Rights Quarterly* 323-342.

<sup>129</sup> Fagan, above n 112, 30.

<sup>130</sup> Bas de Gaay Fortman, *Political Economy of Human Rights: Rights, Realities and Realization* (Routledge, London, 2011), 7.

<sup>131</sup> Martha Nussbaum, ‘Capabilities and human rights’ (1997) 66(2) *Fordham Law Review* 273-300.

<sup>132</sup> Mary O’Rawe, ‘The United Nations: Structures versus Substance (Lessons from the principal treaties and covenants)’ in Angela Hegarty and Siobhan Leonard (eds), *Human Rights: An Agenda for the 21st Century* (Cavendish Publishing, London, 1999) 15-33, 21.

*respect, protect* and *fulfil* these rights within many areas of State capacity, especially within the economic, political and policy domains, through an activist approach. This line of inquiry will contribute to the empowerment of human rights activists and advocates to demand government action and accountability when and where such action is deemed necessary for the enjoyment of these rights.

## **1.6 THESIS STRUCTURE**

This thesis is divided into nine chapters, including this introduction and a concluding chapter. This chapter has presented the background, rationale, objectives and methodology. The seven substantive chapters are grouped into three parts.

Part I (Chapters 2 and 3) provides a detailed account of the academic perspectives relevant to the international legal obligations derived from the ICESCR and a comprehensive literature review on the concept of 'maximum available resources'. Chapter 2 begins with an overview of the obligations on States derived from the ICESCR. Against this background, the chapter outlines the language and character of human rights obligations derived from the ICESCR and other international human rights instruments and locates the 'resources' requirements for the realisation of these rights. Chapter 3 reviews the concept of 'maximum available resources' in detail, drawing on existing human rights literature and relevant information from the drafting history of the Covenant. A cross-disciplinary conceptual model for 'maximum available resources' in the context of ESC rights is then developed to provide the foundation for subsequent arguments and analyses.

Part II (Chapters 4, 5 and 6) elaborates on the cross-disciplinary approach to the obligation to use 'maximum available resources' presented in Chapter 3, and addresses policy approaches to resource maximisation. Chapter 4 explores the macroeconomic dimensions of maximising domestic financial resources, with particular emphasis on government revenue and expenditure,

including taxation and relevant aspects of public finance management. Challenges and appropriate policy directions are identified. Chapter 5 continues to apply the conceptual framework developed in Chapter 3 to international assistance and co-operation. It includes arguments relevant to the extraterritorial obligation of States to provide assistance and co-operation and to those aspects of policy that are necessary to maximise the quantity, quality and effectiveness of international assistance and co-operation in the area of ESC rights. Chapter 6 discusses strategies for orienting macroeconomic policy to attract private investment in ESC rights areas and the mobilisation of non-financial resources for ESC rights.

Part III (Chapters 7 and 8) builds on these discussions to analyse policy and related aspects of resource allocation and governance. Drawing on arguments from human rights, economics and public policy, Chapter 7 addresses policy challenges and options related to resource allocation, with special emphasis on allocative efficiency and public policy approaches to public sector budgeting from an ESC rights perspective. Chapter 8 provides a detailed account of issues related to resource governance, with emphasis on transparency and accountability in resource mobilisation and allocation practices essential for maximising resources available for advancing ESC rights policy objectives.

Chapter 9 concludes with a re-statement of the thesis argument and discusses the academic contributions and practical implications of the study. Directions for future research are identified.

In summary, the task of fulfilling the State obligation to use ‘maximum available resources’ towards the ‘progressive realisation’ of ESC rights is beset by definitional ambiguities and the complexity of the challenges involved. This chapter has provided the background to the central purpose of this thesis—to develop a better understanding of the concept of resources required for the realisation of ESC rights—and paved the way for detailed analysis of the question of ‘maximum available resources’ in subsequent chapters.

# **PART I**

## **Unpacking ‘Maximum Available Resources’**

**Chapter 2 Economic, Social and Cultural Rights and the Obligation to Take Steps to the ‘Maximum of Available Resources’**

**Chapter 3 Resources at the Disposition of the State: Towards a Comprehensive Model of ‘Maximum Available Resources’ for ESC Rights**

This Part provides an overview of the academic perspectives relevant to international legal obligations derived from the ICESCR and proposes a cross-disciplinary model for ‘maximum available resources’.

Chapter 2 presents background information on the nature of obligations derived from the ICESCR, locates the resources requirements and establishes the basis for subsequent discussions. Chapter 3 provides a critical review of the concept of ‘maximum available resources’ based on extant human rights literature, the drafting history of the Covenant and analysis of other materials such as the Concluding Observations and State reports. A cross-disciplinary framework for ‘maximum available resources’ in the context of ESC rights is then developed.

# 2

## Economic, Social and Cultural Rights and the Obligation to Take Steps to the 'Maximum of Available Resources'

### 2.1 INTRODUCTION

Economic, Social and Cultural Rights (ESC rights) are subject to progressive realisation, lay claim on public resources and, and to a large extent, depend on the positive obligations on the States. For these and other historic reasons, ESC rights are seen as a 'qualitatively different category' from other rights in that they are seen not only as rights but also as goals of economic and social policy.<sup>1</sup> The nature of ESC rights is also understood to be distinct from that of Civil and Political rights because they are seen to have less relevance as individual claims but are, rather, simply 'statements of public policy goals'.<sup>2</sup> This is despite the fact that rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are equally justiciable on an individual basis.<sup>3</sup>

The aim of this chapter is to provide historical and textual background to ESC rights and the nature of State obligations within the international human rights

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<sup>1</sup> Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229, 158.

<sup>2</sup> Shareen Hertel and Lanse Minkler, 'Economic Rights: The Terrain' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007), 23.

<sup>3</sup> For example see, Malcolm Langford, Aoife Nolan and Bruce Porter, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (CHRGJ Working Paper No. 15, Centre For Human Rights and Global Justice, 2007); Hertel and Minkler, above n 2; 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(3) *The American Journal of International Law* 462-515.

system in the context of the ICESCR and, specifically to locate the obligation to use ‘maximum available resources’ for the realisation of ESC rights in the context of the Covenant and other relevant instruments of the international human rights regime.

In the first part of this chapter, the language of ‘obligation’ in the Covenant is explained to contextualise its application and different conceptualisations of ESC rights obligations within the international legal framework are discussed, with emphasis on State obligations to *respect*, *protect* and *fulfil*. Other associated concepts, such as minimum core content, limitations and non-retrogression, are explained in the context of relevant international human rights and legal principles. The chapter ends with a discussion of evidence on the State obligation to maximise and allocate adequate resources for ESC rights, with reference to the *travaux préparatoires* of the ICESCR and the Concluding Observations of the ESCR Committee.

## **2.2 ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) comprises a Preamble and 31 articles divided into five parts. Part I recognises the right to self-determination and outlines the associated rights. Part II establishes the general principles of ‘progressive realisation’ and ‘non-discrimination’ as well as related principles such as limitations and non-retrogression. Part III establishes the substantive rights (Article 6-15). These rights include the right to work (Article 6); right in work (Article 7); trade union rights (Article 8); social security rights (Article 9); right to social protection (Article 10); right to an adequate standard of living (Article 11); right to health (Article 12); right to education (Article 13, 14); and cultural rights (Article 15). Part IV describes reporting and monitoring procedures and, Part V covers ratification, and other administrative aspects of the Covenant.

Many of the substantive ESC rights recognised under the ICESCR also form key provisions in other international human rights instruments. For example, the rights to education, employment, and health are specified in the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) and require the State to take positive measures to eliminate discrimination and ensure equal opportunity.<sup>4</sup> Similarly, the *Convention on the Rights of the Child* (CRC) makes direct reference to the economic, social and cultural rights of the child<sup>5</sup> and requires the State to undertake appropriate measures for the implementation of these rights. The *Convention on the Rights of Persons with Disabilities* (CRPD) also provides for specific ESC rights, particularly the rights to education, health, work and adequate standard of living for persons with disabilities.<sup>6</sup>

A number of rights under the ICESCR also reflect pre-existing international norms. For example, right to work (Article 6), rights in work (Article 7) and trade union rights (Article 8) are better understood within the frameworks put in place by numerous conventions and standards set out by the International Labour Organisation (ILO), while rights related to education and health are closely related to standards and rules of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation (WHO) respectively.<sup>7</sup>

ESC rights are also recognised in a number of international, regional and multilateral human rights regimes as well as in domestic constitutions and laws in a number of States. For example, the European Social Charter covers much

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<sup>4</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249, p. 13 (entered into force 3 September 1981), art 10, 12 ('CEDAW').

<sup>5</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), preamble, art 4 ('CRC').

<sup>6</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UN 3 (entered into force 3 May 2008), art 24,25,27,28 ('CRPD').

<sup>7</sup> For example see, Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2014), 7.

the same ground as the ICESCR<sup>8</sup> and, in the Inter-American human rights mechanism, the Protocol of San Salvador includes recognition of ESC rights, although their enforceability is often questioned.<sup>9</sup> The African Charter on Human and Peoples' Rights included from the outset the full range of human rights including ESC rights.<sup>10</sup> Despite a slow start, ESC rights also enjoy constitutional status in countries in Africa, Asia, Europe, and Latin America, in sub-national units in North America and elsewhere,<sup>11</sup> and in regional and international human rights instruments.<sup>12</sup>

These instruments of the international human rights regime lay down general and specific obligations on the States parties to respect, protect and fulfil the rights recognised in them. The nature of these obligations and the manner in which they are interpreted and understood in international law as well as their domestic application are fundamental aspects of human rights scholarship. The specific terminology of human rights obligations provides guidance on how these commitments are understood, implemented and monitored.

### 2.2.1 Terminology of ESC rights obligations

The general nature of human rights obligations has generated a vast array of terminological classifications. Henry Shue uses the term a 'continuum of

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<sup>8</sup> Council of Europe, *European Social Charter*, opened for signature 18 October 1961, CETS No. 035 (entered into force 26 February 1965).

<sup>9</sup> See for example, Oswaldo R Ruiz-Chiriboga, 'The American Convention and the Protocol Of San Salvador: Two Intertwined Treaties Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2013) 31(2) *Netherlands Quarterly of Human Rights* 159-186.

<sup>10</sup> Manisuli Ssenyonjo, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15(6) *The International Journal of Human Rights* 969-1012, 972- 973.

<sup>11</sup> For example, International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (International Commission of Jurists, Geneva, 2008).

<sup>12</sup> Katharine G Young, *Constituting Economic and Social Rights* (Oxford Scholarship Online, Oxford, 2012), 1 (Online) <10.1093/acprof:oso/9780199641932.001.0001>.

obligations',<sup>13</sup> while Judge Kate O'Reagan and Rolf Künneemann refer to a 'continuum of a variety of duties'<sup>14</sup> and a 'spectrum of obligations',<sup>15</sup> respectively. At one end of this spectrum, the State has an obligation of no interference and, at the other end, positive duties are imposed on the State.<sup>16</sup> The nature of State obligations arising out of the ICESCR may be represented at any point in the continuum and must be fully complied with in order to make ESC rights realisation meaningful.

The drafting history of the ICESCR shows that the language of general and substantive obligations in the text of the Covenant did not go through a full 'rationalisation' process before adoption, which left a number of 'inconsistencies'.<sup>17</sup> This has resulted in some incongruities in terminology and the level of descriptive detail included in the articles.<sup>18</sup> Significantly, the language of obligations used in different articles on substantive rights adopts a broad array of terminology. For example, the terms 'recognise', 'ensure' 'respect' and 'guarantee' are used in reference to the substantive rights without any discernible pattern or logic.<sup>19</sup>

Despite this lack of clarity in some areas of State obligation, the Covenant provides a firm legal basis, in plain and unequivocal language, for the States parties to take appropriate steps towards the realisation of all substantive rights recognised therein.

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<sup>13</sup> Cited from María Magdalena Sepúlveda, *The Nature Of The Obligations Under The International Covenant On Economic, Social And Cultural Rights* (Intersentia, Utrecht, 2003), 137.

<sup>14</sup> Cited from *ibid.*

<sup>15</sup> Rolf Künneemann, 'A Coherent Approach to Human Rights' (1995) 17(2) *Human Rights Quarterly* 323-342.

<sup>16</sup> Sepúlveda, above n 13, 14.

<sup>17</sup> Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1995), 51.

<sup>18</sup> For example, the amount of details in Article 11 and 13 is not maintained in Article 9, which provides very little insight into the nature of the right.

<sup>19</sup> See, Todd Landman, *Protecting Human Rights* (Georgetown University Press, Washington, D.C., 2005), 49.

## 2.2.2 Obligation of respect, protect and fulfil

In line with the general approach to human rights obligations on the States parties, ESC rights scholarship identifies multiple forms of duties on the State to ensure the fulfilment of these obligations.<sup>20</sup> For example, the ESCR Committee uses the terminology of *respect*, *protect* and *fulfil* in relation to different levels of obligations on the States that arise out of international human rights norms.<sup>21</sup> The Committee further breaks down the obligation to fulfil into obligations to *facilitate*, *promote* and *provide* in the context of ESC rights.<sup>22</sup> These typologies represent policy attitudes and dispositions of the State in relation to individual human rights that, reinforce and complement each other and would, therefore, be meaningful if observed with the same level of seriousness and commitment.

In its general usage, the obligation to *respect* is a negative obligation on the State to refrain from interference with the exercise of human rights by individuals and groups. For example, an individual's right to housing must be respected by the State by refraining from any policy intervention or action which could prevent, restrict or limit the enjoyment of this right. From the perspective of the tripartite typology, the obligation to respect presupposes an individual's ability to enjoy the right in the absence of State or third party interference. Thus, the obligation to respect these rights can be meaningful only in situations where the individuals are initially able to enjoy or afford them.<sup>23</sup> In other words, if individuals are unable to enjoy the rights in the first

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<sup>20</sup> Sepúlveda, above n 13, 12.

<sup>21</sup> This 'tri-partite typology' of state obligations, which divides State obligations into obligations to *respect*, to *protect* and to *fulfil* human rights was first applied by Henry Shue (duties of *avoidance*, *protection* and *aid*), and later further developed and refined by several other experts, including Eide, Van Hoof, Steiner and Alston, and later adopted by the ESCR Committee itself.

<sup>22</sup> For example see, Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art. 9)*, 39<sup>th</sup> sess, UN Doc E/C.12/GC/19 (4 February 2008), [47].

<sup>23</sup> Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights' (2003) 72(1) *Nordic Journal of International Law* 3-39, 12.

place, non-intervention or respecting of this right by the State could not be very meaningful for these individuals.

The obligation to *protect* requires the State to take legislative, administrative and other steps, to prevent and forbid the violation of rights and freedoms by third parties. Obligation to protect involves a higher level of State expenditure, particularly in relation to the legal and administrative mechanisms required for the prevention of third party violations. For example, in order to protect the right to work, the State must put in place proper legal and regulatory safeguards to ensure that individuals are able to enjoy this right free from abuse and violations by employers and others.

The obligation to *fulfil* requires the State to take positive measures and ensure the effective realisation of the rights.<sup>24</sup> Although the term 'fulfil' has a positive connotation, this should not be taken to mean that the State only has an obligation to directly provide for individual rights. Rather, the State must focus on facilitating, promoting and, only where necessary, providing to ensure the enjoyment of these rights. The key part of this obligation is the responsibility and commitment to take appropriate measures to enable and empower individuals and groups to provide the facilities and services for themselves in order to enjoy their rights. The State's obligation to *provide* is relevant only 'in situations where the individuals are not able to ensure adequate access by their own means',<sup>25</sup> or 'providing the remainder of what individuals cannot provide for on their own'.<sup>26</sup>

Supplementing individuals' efforts to realise their rights by providing the necessary support is in keeping with the idea of 'bringing capabilities for people'.<sup>27</sup> This approach better aligns with notions of human dignity, as

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<sup>24</sup> Peter R Baehr, *Human Rights: Universality in Practice* (Palgrave, London, 2001), 33.

<sup>25</sup> Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, Geneva, Agenda Item 14 (g) of the provisional agenda, UN Doc E/2007/82 (25 June 2007), 10.

<sup>26</sup> Künnemann, above n 15, 328.

<sup>27</sup> Sigrun Skogly, 'Is there a right not to be poor?' (2002) 2(1) *Human Rights Law Review* 59-80, 63.

discussed in Chapter 1, and makes the human rights endeavour relevant and sustainable. From this perspective, State intervention is invoked only when individuals do not have the means that enable them to enjoy the rights. For example, enjoyment of the right to an adequate standard of living is, first and foremost, achieved through individual effort. However, the State has an obligation to create the necessary socio-economic conditions and legal environment that will facilitate full enjoyment of this right. The State's responsibility to *provide* becomes indispensable only if individuals are unable to achieve the standard of living expected for a dignified life from the perspective of ESC rights fulfilment.

While the tripartite terminology of respect, protect and fulfil captures the spectrum of responsibilities on the State to ensure the enjoyment of human rights by the rights-holders, expectations of direct policy action can also be discerned in the obligations of *conduct* and *result*.

### 2.2.3 Obligations of conduct and result

The language of the obligation of *conduct* and *result* is useful to recognise the actions and outcomes in relation to the State's behaviour in advancing human rights.

In the context of international law, the obligation of *result* involves a guarantee of outcome, whereas the obligation of *conduct* is in the nature of best efforts obligations—that is, 'obligations to do all in one's power to achieve a result, but without ultimate commitment'.<sup>28</sup> The primary distinction here is that the State is responsible for the outcomes, whether or not these outcomes are the direct result of State policy or actions.<sup>29</sup> Hence, it can be argued that a stronger

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<sup>28</sup> Ineke Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues Under UN Human Rights Treaties' (2009) LVI *Netherlands International Law Review* 167-205, 171.

<sup>29</sup> Sital Kalantray, Joycelyn Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253-310, 298.

focus on the outcomes of ESC rights realisation would make a better case for State obligations.

The distinction between obligations of conduct and result also imply differences in the mechanisms for monitoring State compliance with these two obligations. In the case of ESC rights to health and education, for example, the level of State compliance with obligation of conduct includes the provision of programmes that directly improve the quality of and access to education and health services. Such compliance can be compared with the obligation of results, which includes the level of State efforts to guarantee these rights by providing appropriate opportunities for individuals to enjoy them.

As previously noted, ESC rights form an essential part of the international human rights system, which lays down obligations on the States to respect, protect and fulfil the rights and to ensure that the legal, administrative, economic, and social conditions necessary for the realisation of these rights are put in place. Moreover, the international human rights regime recognises that all human rights are universal, indivisible and interdependent and interrelated,<sup>30</sup> therefore ESC rights require the same level of attention in State policy. As the primary duty-bearer, the State is expected to incorporate these human rights obligations into policy and to actively engage in their implementation to ensure the widest possible enjoyment of these rights.

## **2.3 GENERAL AND SUBSTANTIVE OBLIGATIONS UNDER THE ICESCR**

Human rights scholars categorise the obligations derived from the ICESCR as 'rights-based obligations', 'procedural obligations' and 'general or basic obligations'.<sup>31</sup> *General or basic obligations*, outlined in Part II of the Covenant are not directly related to specific rights but are concerned with the manner in

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<sup>30</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993), action 5.

<sup>31</sup> See for example, Sepúlveda, above n 13, 16.

which a State acts with regard to its obligations. *Rights-based obligations* are related to the substantive rights outlined in Part III of the Covenant.<sup>32</sup> *Procedural obligations* are derived from Part IV of the Covenant and include obligations that are mostly of a monitoring and reporting nature.

### 2.3.1 General Obligations

General obligations under Part II of the ICESCR provide guidelines and parameters for States in order to ensure the realisation of the substantive rights identified in Part III of the Covenant. This part includes provisions covering the obligation to take steps for the realisation of the rights recognised in the Covenant in Article 2(1), non-discrimination (Article 2(2)), equal rights of men and women (Article 3), limitations (Article 4), and non-derogation of the rights (Article 5). These general obligations are discussed in more detail below.

#### 2.3.1.1 Key obligations under Article 2(1)

The nature of general State obligations under the Covenant is described in Article 2(1), which sets out the parameters of these obligations and what is expected of the State in relation to the substantive rights outlined in Part III of the Covenant. Article 2(1) states that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>33</sup>

As discussed in Chapter 1, the nature of obligations arising out of this article has attracted considerable scholarly debate. Many of the conceptual and implementation challenges arising out of this article have been discussed by

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<sup>32</sup> The right to self-determination, although set out in Part I (Article 1), can be included as a substantive right. However, in this thesis, focus will be given on Part III substantive rights in order to maintain general focus on state action and resource policies.

<sup>33</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

Robertson,<sup>34</sup> Balakrishnan et al,<sup>35</sup> Skogly,<sup>36</sup> Elson, Balakrishnan and Heintz,<sup>37</sup> Apodaca,<sup>38</sup> Felner,<sup>39</sup> Fukuda-Parr, Lawson-Remer and Randolph,<sup>40</sup> and Saul, Kinley and Mowbray,<sup>41</sup> among others. In addition, the ESCR Committee and Special Rapporteurs have addressed various aspects of the application of these concepts in practice.

While this article sets out the foundational premise of obligations, its exact formulation and interpretation has been seen as problematic. The article has been described as a ‘somewhat confused and unsatisfactory provision’<sup>42</sup> and it has been asserted that ‘the combination of convoluted phraseology and numerous qualifying sub-clauses seems to defy any real sense of obligation’.<sup>43</sup> Moreover, the wording of the article is also seen as giving States an almost

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<sup>34</sup> 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* 693-714.

<sup>35</sup> Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women's Global Leadership, New Jersey, 2011).

<sup>36</sup> Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 *Human Rights Law Review* 393-420.

<sup>37</sup> Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 13.

<sup>38</sup> Clair Apodaca, 'Measuring the Progressive Realization of Economic and Social Rights' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007) 165.

<sup>39</sup> 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* 402-435.

<sup>40</sup> 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' (Economics Working Papers - Paper No 200822, University of Connecticut, Department of Economics).

<sup>41</sup> Saul, Kinley and Mowbray, above n 7.

<sup>42</sup> Matthew Craven, 'The Justiciability of Economic, Social and Cultural Rights' in Richard Burchill, David John Harris and Anne Owers (eds), *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law* (University of Nottingham Human Rights Law Centre, Nottingham, 1999) 1-12, 5.

<sup>43</sup> Ibid.

'total freedom of choice and action as to how the rights should be implemented.'<sup>44</sup>

Four key elements of the obligation can be discerned in this Article: undertaking to take steps; utilising maximum available resources; achieving progressively the full realisation of rights; and employing all appropriate means to achieve these objectives.<sup>45</sup> The following discussion addresses these four areas but deviates slightly from this schema, by separately addressing the component of international assistance and co-operation.

### 'Undertake to take steps'

A central question in the interpretation of this article is whether 'to undertake' amounts to a promise to do or accomplish something by the State. This raises a number of important questions about the nature of the obligation. For example, does the term 'undertaking' carry any practical implications? Does the undertaking to take steps imply immediate application and indicate a readily identifiable obligation? The drafting history of the Covenant and the work of the ESCR Committee shed light on these questions.

During the preparatory work on the Covenant, there was debate on whether to include 'to guarantee' or 'to take steps' in the text of this article. There were also proposals to use the terms 'to ensure' and 'to pledge themselves', neither of which made it into the Covenant text.<sup>46</sup> The choice of 'to take steps', while not as strong as 'to guarantee', still provides for a commitment on the part of the State to actively pursue the objectives necessary for the effective enjoyment of these rights. The more guarded expression 'to take steps' indicates a softer commitment than what could be inferred from 'to

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<sup>44</sup> Ibid.

<sup>45</sup> See for example, Saul, Kinley and Mowbray, above n 7, 136.

<sup>46</sup> See, for example, Alston and Quinn, above n 1, 165.

guarantee'.<sup>47</sup> Alston and Quinn maintain that 'undertaking' is indicative of an obligation of conduct rather than an obligation of result.<sup>48</sup>

The ESCR Committee emphasised in its General Comment No. 3 that, the obligation 'to take steps' is 'not qualified or limited by other considerations'.<sup>49</sup>

The Committee noted that:

The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is 'to take steps', in French it is 'to act' ('s'engage . . . agir') and in Spanish it is 'to adopt measures' ('a adoptar medidas'). Thus while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>50</sup>

Hence, while the full realisation of the rights may be achieved progressively, this phraseology indicates that steps towards the goal must be taken immediately or within a reasonably short period of time after the ratification of the Covenant.<sup>51</sup>

*'Individually and through international assistance and co-operation, especially economic and technical'*

States have the primary responsibility to take steps required for the realisation of these rights. It is also recognised that the State is best situated to protect and fulfil human rights as the primary duty-bearer,<sup>52</sup> which requires the State to take the responsibility of ensuring and creating necessary conditions for the realisation of these rights. At the same time, however, this responsibility extends beyond the borders of the State in the form of international assistance

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<sup>47</sup> See *ibid.*; Saul, Kinley and Mowbray, above n 7.

<sup>48</sup> Alston and Quinn, above n 1, 165. They also contend that, although it represents a legal undertaking, its resulting obligation is 'less demanding than a guarantee'.

<sup>49</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations (Art. 2, par. 1)*, 5<sup>th</sup> sess, UN Doc E/1991/23 (14 December 1990), [2].

<sup>50</sup> *Ibid.*

<sup>51</sup> Alston and Quinn, above n 1, 166.

<sup>52</sup> Hertel and Minkler, above n 2, 11.

and co-operation, which can (and in many cases must) be sought to ensure the effective fulfilment of these obligations.

Given this international dimension, international assistance and co-operation activities are fundamental to the effective realisation of many ESC rights in developing States.<sup>53</sup> Apart from their reference as part of the general obligations in Article 2(1), international assistance and co-operation activities are also identified as essential in the realisation of the right to an adequate standard of living,<sup>54</sup> the right to be free from hunger,<sup>55</sup> and in relation to cultural rights.<sup>56</sup> For example, Article 11 on the right to an adequate standard of living specifically recognises the ‘essential importance of international co-operation based on free consent’<sup>57</sup> and the need for international assistance and co-operation targeted at enhancing food production and distribution methods.<sup>58</sup>

In this context, the ESCR Committee goes on to make specific references to the provisions contained in Articles 11, 15, 22 and 23, implying that apart from the general provisions under Article 2(1), these specific provisions also create obligations to provide co-operation and assistance.<sup>59</sup> The Committee also makes reference to Articles 55 and 56 of the Charter of the United Nations and to well-established principles of international law along with the provisions of the Covenant that international co-operation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States.

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<sup>53</sup> The language of international assistance and cooperation is found, among others, in the United Nations, *Charter of the United Nations*, UN Doc 1 UNTS XVI (24 October 1945), preamble, article 1(3) and art 55); United Nations, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948), art 22 and 28; ICESCR, above n 33, art 2(1), 11(11), 11(12), 15(14), 22, and 23; United Nations General Assembly, *Declaration on the Right to Development*, 41/128, 41<sup>st</sup> sess, 97th plenary mtg, UN Doc A/RES/41/128 (4 December 1986), article 3, and 4(2).

<sup>54</sup> ICESCR, above n 33, art 11(1).

<sup>55</sup> Ibid. Article 11(2).

<sup>56</sup> Ibid. Article 15(4).

<sup>57</sup> Ibid. Article 11(1).

<sup>58</sup> Ibid. Article 11(2b).

<sup>59</sup> *CESCR General Comment No 3*, E/1991/23, above n 49, [13].

It is identified that this obligation is particularly ‘incumbent upon those States which are in a position to assist others’.<sup>60</sup>

This element of the Covenant is often referred to by the Committee as extraterritorial or international ‘responsibility’ or ‘commitment’, which suggests that the character of this obligation is still under development.<sup>61</sup> Skogly and Gibney use the term ‘extraterritorial’ effect and application in international law to refer to ‘acts that are taken by one actor (State) that have some kind of effect within another country’s territory with or without this second country’s implicit or explicit agreement.’<sup>62</sup> To this effect, they argue that:

If human rights protection was something that individual states could (and would) do individually, there would be no need for any international conventions. Stripped to their barest essentials, what each one of these treaties represents is nothing less than this: that everyone has an ethical as well as a legal obligation to protect the human rights of all other people. In that way, extraterritorial obligations are not something that is peripheral to human rights. Rather, extraterritorial obligations are an essential component of human rights.<sup>63</sup>

The former Special Rapporteur on the rights to food, Jean Ziegler identifies extraterritorial obligation as one of the ‘emerging issues’ in relation to his mandated area.<sup>64</sup> According to Ziegler, the extraterritorial obligations flowing from ICESCR challenges the ‘traditional territorial boundaries of human rights’, thus to comply with their obligations, particularly with regard to the right to food, States must respect, protect and support the fulfilment of the right to food of people living outside their state boundaries.<sup>65</sup>

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<sup>60</sup> Ibid., [14].

<sup>61</sup> Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2009), 364.

<sup>62</sup> Sigrun Skogly and Mark Gibney, ‘Economic Rights and Extraterritorial Obligations’ in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007), 267.

<sup>63</sup> Ibid., 274.

<sup>64</sup> Commission on Human Rights, *The right to food: Report of the Special Rapporteur on the right to food, Jean Ziegler*, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/47 (24 January 2005).

<sup>65</sup> Ibid.

Despite the binding provisions in international human rights instruments, there is considerable disagreement on the nature of the extraterritorial obligation, particularly the obligation to provide international assistance and co-operation.<sup>66</sup> Therefore, while significant doctrinal and institutional advances have been made,<sup>67</sup> the concept of extraterritorial human rights obligations in relation to ESC rights requires further conceptual clarity and frameworks for broader application, particularly in the context of ‘the globalised world beset by stark inequalities and a race for new markets, lands and resources’.<sup>68</sup> The relevance of international assistance and co-operation in the implementation of ESC rights policies and approaches to maximising resources through international assistance and co-operation are discussed in more detail in Chapters 3 and 5, respectively.

*‘To the maximum of its available resources’*

The *travaux préparatoires* of the ICESCR indicate that resources were not understood by the drafters in their restricted meaning but included economic aid and ‘optimization efforts and other “technical” approaches to maximizing the use of available resources.’<sup>69</sup> For example, when the Third Committee of the General Assembly was considering whether to have a single draft of the human rights covenant or a separate covenant on economic, social and cultural rights, it alluded to the resource dynamics of the realisation of ESC rights. The French proposal to include specific reference to ‘maximum

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<sup>66</sup> 'Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', (2011), <<http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPinciples.htm>>; 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* 1084-1169, 1094.

<sup>67</sup> See for example, Margot E Salomon and Ian Seiderman, 'Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 3(4) *Global Policy* 458-462, 459.

<sup>68</sup> Malcolm Langford et al, 'Introduction: An Emerging Field' in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, Cambridge, 2012), 31.

<sup>69</sup> Brian Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11(2) *Human Rights Law Review* 275-327, 283.

available resources' was well received by most delegates.<sup>70</sup> The Canadian delegation argued that ESC rights 'represented essentially long-term aims to be achieved gradually'<sup>71</sup> and that 'the rate of progress towards the achievement of those aims would depend directly upon the degree of economic development, the level of education, climate, and the natural and human resources of the various countries'.<sup>72</sup>

The requirement to refer to 'resources' in the Covenant was debated and there was general recognition that the Covenant rights require State action as well as resources. While the requirement to use 'maximum available resources' is contingent on the State, the Danish representative stated that: 'It would be unrealistic to attempt to dictate to States how they should allocate their resources in that respect'.<sup>73</sup> Later, the General Assembly recognised that, given the nature of ESC rights and the close relationship between the realisation of those rights and the economic and social conditions of the countries concerned,

it would be unrealistic to require each State party to the Covenant to do more than "undertake to take steps", "to the maximum of its available resources", with a view to "achieving progressively" the full realization of the rights recognized in the covenant.<sup>74</sup>

Nonetheless, it was also acknowledged that the enjoyment of ESC rights 'depended in part upon available resources and upon domestic and international economic and social conditions over which the State exercised only incomplete control and which not only varied from country to country but were also liable to sudden change'.<sup>75</sup> On the other hand, it was admitted that,

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<sup>70</sup> Commission on Human Rights, *France: Draft articles to be inserted before article 20*, 8<sup>th</sup> sess, Agenda Item 4, UN Doc E/CN.4/L.55 (25 April 1952).

<sup>71</sup> United Nations General Assembly, *Official Records*, 6<sup>th</sup> sess, UN Doc A/C.3/SR.362 (8 December 1951), [31] (Canada).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Summary record of the 236th meeting of the Commission on Human Rights*, E/CN.4/SR.236, 7<sup>th</sup> sess, (2 July 1951).

<sup>74</sup> United Nations General Assembly, *Annotations on the text of the draft International Covenants on Human Rights*, 10<sup>th</sup> sess, Agenda Item 28, UN Doc A/2929 (1 July 1955), chapter V, para 21.

<sup>75</sup> *Ibid.*, para 24.

if the State's obligation to take steps is dependent on the 'maximum available resources', then 'lack of resources could always be pleaded'.<sup>76</sup> Throughout its interpretive work, the ESCR Committee noted that the drafters of the Covenant took the meaning of 'maximum available resources' to include both resources within the State and those available from the international community through co-operation and assistance.<sup>77</sup>

Given the resources focus of this thesis, the concept of 'maximum available resources' is discussed separately in Section 3 of this chapter.

### 'Progressively the full realization'

The expression 'progressive realisation' in the ICESCR is a reflection of the flexibility necessary for States to work towards the realisation of ESC rights, given the social, economic and political realities of the world. This does not, however, diminish the State's obligations in relation to the overall objectives of the Covenant. During the Covenant's drafting process, there was debate as to whether the concept of 'full realisation' of the rights should be seen within the scope of the rights *ratio materiae*, *ratio personae* and *ratio loci* and whether a 'particular right could be said to be fully realised only when all people in all parts of the country enjoy the right at the requisite level'.<sup>78</sup>

The word 'progressively' was seen to be both necessary and valuable since it 'introduced a dynamic element, indicating that no final fixed goal had been set in the implementation of the economic, social and cultural rights, since the essence of progress was continuity'.<sup>79</sup> Hence, the provisions of progressive realisation afforded the States necessary leeway in implementing ESC rights policies. However, while 'progressive realisation' provision gives poorer States some flexibility in meeting their obligations, some concern was raised at the

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<sup>76</sup> Ibid., para 23.

<sup>77</sup> *CESCR General Comment No 3*, E/1991/23, above n 49; Specific provisions contained in articles 11, 15, 22 and 23 also underline the role of such co-operation.

<sup>78</sup> Craven, above n 17, 88.

<sup>79</sup> *Summary record of the 236th meeting of the Commission on Human Rights*, above n 73, p. 20.

drafting stage that the same flexibility could also be used by richer States to justify their lack of assistance for poorer States.<sup>80</sup>

The ESCR Committee noted that, while the full realisation of rights may be achieved progressively, ‘steps towards that goal must be taken within a reasonably short time’ and that such steps should be ‘deliberate, concrete and targeted as clearly as possible towards meeting the obligations’.<sup>81</sup> This implies that States must move ‘as expeditiously and effectively as possible’ towards the goals of rights realisation.<sup>82</sup> This thesis adopts the position that there is a need to focus State policies on expediting ‘progressive realisation’ within the maximum resources and capacity.

*‘By all appropriate means, including particularly the adoption of legislative measures’*

The ESCR Committee was of the view that ‘all appropriate means’ should be given its full and natural meaning, that the ‘appropriateness’ of the means is dependent on the circumstances of the rights, and that States parties have the obligation to report to the Committee the steps they have taken and how these steps are considered ‘appropriate’ for a given circumstance.<sup>83</sup> The Committee identified the enactment of legislation as a highly desirable step in many instances and even maintained that this is indispensable in many cases, such as to combat discrimination.<sup>84</sup> Provision of judicial remedies was also suggested as an important and appropriate step.<sup>85</sup> Administrative, financial, educational and social measures were also regarded as additional ‘appropriate’ measures for the purpose of Article 2(1).<sup>86</sup>

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<sup>80</sup> Saul, Kinley and Mowbray, above n 7, 153-154.

<sup>81</sup> *CESCR General Comment No 3*, E/1991/23, above n 49, [2].

<sup>82</sup> *Ibid.*, [9]. The Committee suggests that provisions in articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) are capable of immediate application judicial and other organs of national legal system.

<sup>83</sup> *Ibid.*, [4].

<sup>84</sup> *Ibid.*, [3].

<sup>85</sup> *Ibid.*, [5].

<sup>86</sup> *Ibid.*, [7].

The provisions of the ICESCR are, however, unclear as to whether States are required to introduce or implement domestic legal mechanisms, particularly the incorporation of the Covenant rights to domestic law. While the language of the Covenant does not provide evidence for an obligation to incorporate the Covenant rights into domestic law, no such matter was considered during the drafting of the Covenant.<sup>87</sup>

Domestic legislation of the rights in the Covenant is not mandatory under the terms of the Covenant and its necessity is therefore a matter for the States to determine.<sup>88</sup> For this reason, if any existing legislation is in violation of the obligations under the Covenant, States are required to take 'legislative action', as per the reading of Article 2(1).<sup>89</sup> The protection of these rights through legislation provides better guarantees for victims to be able to make demands on the State and seek remedies, and can be taken as a benchmark to measure progressive policy action by the government.

A variety of strategies and policies needs to be adopted for realisation of ESC rights domestically. These include the establishment of effective mechanisms and institutions for: investigating and examining alleged infringements of ESC rights; identifying responsibilities; publicising the results of investigations; and offering necessary administrative, judicial and other remedies to compensate victims and providing means of redress or remedies.<sup>90</sup> Other appropriate State actions include the adoption of policies, strategies and national action plans. 'Appropriate means' also has many dimensions:

Government policies and goals, administrative guidelines and best practices, economic incentives and rewards, and perceptions of community standards, as well as statutes, secondary rules and judicial and other arbitral body determinations are all part of the panoply of "appropriate means" that are

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<sup>87</sup> Alston and Quinn, above n 1, 166.

<sup>88</sup> As a general rule in international law, unless the treaty calls upon the states to introduce or implement domestic legal mechanisms, the ratification of a treaty need not necessarily entail such action by the States.

<sup>89</sup> Alston and Quinn, above n 1, 167.

<sup>90</sup> Ssenyonjo, above n 10, 976.

typically invoked by states in their efforts to promote and protect economic, social and cultural rights.<sup>91</sup>

In summary, the obligation ‘to take steps’, ‘individually and through international assistance and co-operation’, ‘to the maximum available resources’, ‘to achieve the full realisation’ of the rights ‘by all appropriate means’ lies at the core of State obligations under the Covenant.

The following sub-sections discuss the obligations of non-discrimination, non-retrogression and minimum core content, which guide the implementation of all substantive obligations.

### **2.3.1.2 Obligation of non-discrimination**

It is fundamental that all rights articulated in the ICESCR should be exercised without discrimination. The prohibited grounds for discrimination under the article are: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>92</sup> This list is not exhaustive and should be interpreted to include the widest possible meaning of the concept of prohibited grounds for discrimination.<sup>93</sup> Article 3 further emphasises the prohibition of discrimination based on sex and, the requirement for States to undertake to ensure equality for men and women in the enjoyment of ESC rights.<sup>94</sup>

In addition to discrimination on general grounds, the Committee also emphasised the prohibition of discrimination on the basis of disability and older age. Although the Covenant does not unambiguously refer to persons with disabilities, the ESCR Committee was of the view that the equal dignity and rights of all human beings as recognised in the Universal Declaration of

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<sup>91</sup> Saul, Kinley and Mowbray, above n 7, 157.

<sup>92</sup> ICESCR, above n 33, art 2(2).

<sup>93</sup> The ‘other status’ in the Covenant has been held to open many additional, non-specified grounds, including disability, age, sexual orientation and gender identity, among others.

<sup>94</sup> The rationale for the inclusion of article 3, with specific obligations of equality between men and women, according to the *travaux préparatoires* is to indicate the need for positive action to ensure that the ‘same rights should be expressly recognized for men and women on an equal footing’, beyond the prohibition of discrimination.

Human Rights (UDHR), as well as the provisions of Article 2(2) of the ICESCR apply to discrimination on the grounds of disability.<sup>95</sup> Persons with disabilities are often discriminated against more severely in areas such as education, employment, housing, transport, cultural life, and access to public places and services. Hence, States parties are required to take positive steps to reduce structural disadvantages for persons with disabilities so they can enjoy ESC rights like everyone else.<sup>96</sup> States are also required to take a number of steps such as compulsory old-age insurance, safer and appropriate working conditions, proper retirement preparation programmes and non-contributory old-age benefits for those who are not entitled to a pension.<sup>97</sup>

Elimination of all forms of discrimination, both formally and substantively, is necessary for the full enjoyment of ESC rights.<sup>98</sup> To this end, States parties are required to adopt necessary measures to 'prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination.'<sup>99</sup>

### **2.3.1.3 Minimum core content and minimum core obligations**

The Covenant does not explicitly provide for any minimum standard of achievement for specific rights. However, this does not afford States complete freedom in relation to the level of achievement of ESC rights and the necessity of maintaining a minimum standard of achievement. Through its interpretive work, the ESCR Committee identified the existence of 'minimum core content' or 'minimum core obligations' for the substantive ESC rights in relation to basic

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<sup>95</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 5: Persons with Disabilities*, 11<sup>th</sup> sess, UN Doc E/1995/22 (9 December 1994), [5].

<sup>96</sup> *Ibid.*, [9] [15] [22] [23] [24] [25].

<sup>97</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 6: The Economic, Social and Cultural Rights of Older Persons*, 13<sup>th</sup> sess, UN Doc E/1996/22 (8 December 1995), [27] [23] [24] [25] [30]; *CESCR General Comment No 5, E/1995/22*, above n 95, [28].

<sup>98</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 42<sup>nd</sup> sess, UN Doc E/C.12/GC/20 (2 July 2009), [8].

<sup>99</sup> *Ibid.*

elements necessary for a dignified life, such as protection from starvation, primary education, emergency health care and basic housing.<sup>100</sup> At the very least, ‘the minimum essential level of each right is incumbent upon every State party.’<sup>101</sup> Furthermore, the Committee observed 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. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être.<sup>102</sup>

The concept of ‘minimum core content’, which provides a more practical and attainable standard of compliance for States, at the same time also takes attention away from focusing on richer and broader goals of ESC rights. Some of the criticisms of the concept highlight the difficulty of applying the standard to States with various socio-economic conditions, and its tendency to rank and order some rights.<sup>103</sup> As Katharine Young points out, ‘it is a concept trimmed, honed, and shorn of deontological excess. It reflects a “minimalist” rights strategy, which implies that maximum gains are made by minimizing goals’.<sup>104</sup> On the other hand, the ESCR Committee has emphasised that the concept of ‘minimum core’ provides an understanding of the direction and that States should follow in their compliance and gives an indication as to when such policy action or direction can be considered retrogressive.<sup>105</sup>

According to the Limburg Principles and Maastricht Guidelines, minimum core obligations reflect the ‘minimum subsistence rights for all’ which apply

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<sup>100</sup> *CESCR General Comment No 3*, E/1991/23, above n 49.

<sup>101</sup> *Ibid.*, [10].

<sup>102</sup> *Ibid.*

<sup>103</sup> Karin Lehmann, ‘In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core’ (2006) 22(1) *American University International Law Review* 163.

<sup>104</sup> Katharine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *The Yale Journal of International Law* 113-175.

<sup>105</sup> See for example, *CESCR General Comment No 3*, E/1991/23, above n 49; Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, 35<sup>th</sup> sess, UN Doc E/C.12/GC/18 (6 February 2006).

‘irrespective of the availability of resources of the country concerned or any other factors and difficulties.’<sup>106</sup> Thus, it can be argued that the minimum core reflects a ‘minimalist’ rights strategy, which trades rights-inflation for rights ambition,<sup>107</sup> and the minimum core obligations set standards which cannot be sacrificed even for measures aimed at medium or long-term improvements of rights.<sup>108</sup> The minimum core obligations thus should be given first priority by the State and sufficient resources should be allocated for their realisation.<sup>109</sup> Meeting these minimum core obligations ‘should trump all other policy considerations.’<sup>110</sup>

#### **2.3.1.4 Non-retrogression, limitations and derogations**

Although the Covenant does not explicitly prohibit retrogression<sup>111</sup> of rights, it is recognised as part of the State obligations under the Covenant. The idea is that States should not allow the existing protection of ESC rights to deteriorate unless there is strong justification for any regressive measure.<sup>112</sup> Recognising that the enjoyment of ESC rights is necessary for the enjoyment of all other rights,<sup>113</sup> the Committee emphasised that regressive measures should be allowed only after careful consideration of the merits and reasons advanced

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<sup>106</sup> UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, UN Doc E/CN.4/1987/17 (8 January 1987); International Commission of Jurists (ICJ), 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1997).

<sup>107</sup> Young, above n 104, 114.

<sup>108</sup> Sabine Michalowski, 'Sovereign Debt and Social Rights - Legal Reflections on a Difficult Relationship' (2008) 8 *Human Rights Law Review* 35-68, 45.

<sup>109</sup> *Report of the United Nations High Commissioner for Human Rights*, E/2007/82, above n 25, [12(d)].

<sup>110</sup> Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1(2) *Journal of Human Rights Practice* 277-293, 283.

<sup>111</sup> Note that a number of authors use the terms 'regression' as well as 'retrogression' in this context. This thesis uses 'retrogression' to reflect the ESCR Committee's usage.

<sup>112</sup> *CESCR General Comment No 3*, E/1991/23, above n 49.

<sup>113</sup> Hertel and Minkler, above n 2, 2-8.

by the State.<sup>114</sup> It is therefore held that the principle of non-retrogression is an extremely crude measure of compliance.<sup>115</sup>

Under Article 4 of the ICESCR, limitations are allowed for reasons of 'promotion of general welfare' but not for reasons of 'national security', 'public order' or 'public morals'. The purpose of this is to give States flexibility in balancing individual rights with public interests.<sup>116</sup> However, such limitations are to be determined by law, which is not required in the case of derogations.<sup>117</sup> Alston and Quinn argue that, in the present context, Article 4 was clearly seen by its drafters as dealing with limitations other than those that could be imposed under Article 2(1) on the grounds of limited resource availability.<sup>118</sup> The permissive function of the limitations clause is to allow States to impose limitations where:

- (1) an unlimited interpretation of a right would lead to absurd results and would deny a state the necessary authority to enact detailed regulatory provisions; and
- (2) the various rights would otherwise clash with each other or with the legitimate interests of the state.<sup>119</sup>

Examination of the drafting history of the Covenant reveals the kinds of difficulties that were encountered in identifying suitable approaches to the inclusion of limitations to the ESC rights in the text.<sup>120</sup> For example, the United States delegation insisted that: 'It was not always possible to grant the same thing to everybody at the same time and in the same way',<sup>121</sup> therefore

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<sup>114</sup> *CESCR General Comment No 3*, E/1991/23, above n 49, [9].

<sup>115</sup> Mary Dowell-Jones, *Contextualizing the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff Publishers, Leiden, 2004), 52.

<sup>116</sup> Amrei Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557-601, 570.

<sup>117</sup> *Ibid.*, 565.

<sup>118</sup> Alston and Quinn, above n 1, 194.

<sup>119</sup> *Ibid.*, 197.

<sup>120</sup> *Summary record of the 236th meeting of the Commission on Human Rights*, above n 73, 4-5.

<sup>121</sup> *Ibid.*, 6.

limitation provisions had to be incorporated in the Covenant. It was argued that a limitation clause is meant to provide protection to individuals against undue limitations by the State.<sup>122</sup>

The general obligations discussed above form the basis of State policy with regard to the substantive rights recognised in the Covenant, which are equally applicable in all areas of State policy where the substantive rights are affected. The following sections outline the nature of substantive rights in Part III of the ICESCR.

### 2.3.2 Substantive rights and obligations

The substantive rights under the ICESCR include: right to work (Article 6); right in work (Article 7); trade union rights (Article 8); social security rights (Article 9); right to social protection (Article 10); right to an adequate standard of living (Article 11); right to health (Article 12); right to education (Article 13, 14); and cultural rights (Article 15). Each of these is described below, with emphasis on the nature of State obligation in relation to each right.

The **right to work** recognised under Article 6 of the Covenant is one of the earliest established rights within international human rights norms.<sup>123</sup> Hence, the 'right to work' and 'rights in work' are at the core of the ESC rights as well as all other fundamental rights. The ESCR Committee asserted that the right to work affirms the obligations on the States to 'assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly'.<sup>124</sup> While the right to work is 'not an absolute and unconditional right to obtain employment', the essential elements of availability, accessibility,

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<sup>122</sup> Ibid.

<sup>123</sup> See for example Krzysztof Drzewicki, 'The Right To Work And Rights In Work' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001) 223-243, 224.

<sup>124</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, 35<sup>th</sup> sess, UN Doc E/C.12/GC/18 (6 February 2006), [4].

acceptability and quality are required for the right to work to be fully realised.<sup>125</sup> The State is also obliged to take steps to make the right to work meaningful, and to use fiscal policy and financial incentives to create an environment conducive to this right.<sup>126</sup> The ESCR Committee also identified the State's obligation to implement policies to address unemployment<sup>127</sup> and to adopt specific legislative measures which take into consideration issues such as a national monitoring mechanism for the employment strategy, numerical targets and time frames for implementation, national benchmarks, and the involvement and roles of the civil society and private sector.<sup>128</sup>

The right of everyone to the enjoyment of **just and favourable conditions of work** under Article 7 covers aspects of remuneration, safe and healthy working conditions, and equal opportunity for promotion, rest, leisure and reasonable limitation of working hours. The obligation for fair wages and equal remuneration should be based on a level that enables workers to have a reasonably decent living for themselves and their families.<sup>129</sup> States must recognise these rights and take appropriate steps to safeguard their realisation. This effectively requires wages and other remunerations to be set in light of average cost of living in the country, and due consideration should be given to ensuring that wages exceed the poverty line.

Trade union rights are included in both the ICESCR and ICPPR.<sup>130</sup> The obligation to respect the individual **right to form and join trade unions** of one's choice under Article 8 requires States to refrain from any action that would restrict this right, except as prescribed by law to protect the interests of national security or public order or for the protection of the rights and freedoms

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<sup>125</sup> Ibid., [6][12].

<sup>126</sup> Drzewicki, above n 123, 61.

<sup>127</sup> *CESCR General Comment No 18*, E/C.12/GC/18, above n 124, [26].

<sup>128</sup> Ibid., [38].

<sup>129</sup> This is based on the assumption of a living wage, which allows the workers to meet their own basic needs and that of their family.

<sup>130</sup> See for example, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Oxford University Press, Clarendon, 2005); Saul, Kinley and Mowbray, above n 7.

of others.<sup>131</sup> The article also details the right of trade unions to establish national federations or confederations and to form or join international trade union confederations. Trade unions should also be given freedom to function freely, within the limits set by law, for the protection of the interests of national security or public order or for the protection of the rights and freedoms of others. The State is also obligated to ensure the right to strike, within the prescription of the law.

The obligation to recognise the ***right of everyone to social security***, including social insurance, under Article 9, encompasses the right to ‘access and maintain benefits’ in cash or kind for protection from negative welfare consequences arising out of conditions such as sickness, disability, maternity, employment injury, unemployment, old age or death of a family member, unaffordable access to health care, and insufficient family support, particularly for children and adult dependents.<sup>132</sup> These benefits should be accessible on either a contributory or non-contributory basis depending on the ability of the individual.<sup>133</sup> The obligation does not require States to provide social security to all; rather, privately-run schemes and self-help measures can also be incorporated into a national policy.<sup>134</sup> However, as the Committee emphasises, social security is inextricably and fundamentally linked to human dignity, therefore its legal recognition should be given priority in law and policy, and a national strategy for the implementation of social security and allocation of adequate fiscal and other resources are fundamental.<sup>135</sup>

The obligation to recognise the widest possible ***social protection*** to be accorded to the family, especially in its formation and while it is responsible for child care, under Article 10, covers special protection for mothers before and after childbirth and paid leave or leave with social security benefits for working

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<sup>131</sup> ICESCR, above n 33, art 9.

<sup>132</sup> *CESCR General Comment No 19*, E/C.12/GC/19, above n 22, [2].

<sup>133</sup> *Ibid.*, [4]. The Committee also emphasises that through its redistributive character, social security contributes significantly to the reduction and alleviation of poverty, prevent social exclusion and promote social inclusion.

<sup>134</sup> *Ibid.*, [5].

<sup>135</sup> *Ibid.*, [41].

mothers. Similarly, children and young persons are accorded special protection, which requires States to put in place special measures of protection and assistance, without discrimination, and to ensure that social exploitation of children and young persons is prohibited and punishable by law.<sup>136</sup>

The right to an **adequate standard of living** and its correlative obligations under Article 11 covers adequate food, clothing and housing, and continuous improvement of living conditions. The overarching concept of the right to an adequate standard of living is the ability of everyone to be able, 'without shame and without reasonable obstacles, to be a full participant in ordinary, everyday interaction with other people'.<sup>137</sup> Similarly, this right also constitutes individuals' ability to 'enjoy their basic needs under conditions of dignity'.<sup>138</sup> In essence, an adequate standard of living implies a 'living above the poverty line of the society concerned'.<sup>139</sup> This would include the right to adequate food, which is inseparable from social justice and 'indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights', which obligates States to adopt appropriate economic, environmental and social policies oriented towards poverty eradication and fulfilment of all human rights.<sup>140</sup> Similarly, the adequacy of the right to water depends on factors necessary to prevent death from dehydration, and adequate amounts for consumption, cooking and other basic personal requirements.<sup>141</sup> It is generally understood that priority in the allocation of

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<sup>136</sup> ICESCR, above n 33, art 10.

<sup>137</sup> Asbjørn Eide, 'The Right to an Adequate Standard of Living including the Right to Food' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001) 133-148.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid., 134.

<sup>140</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (art. 11)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/5 (12 May 1999), [4].

<sup>141</sup> While the ICESCR does not include an explicit reference to a right to water, the ESCR Committee in its General Comment 15 has interpreted the provisions of the Covenant Articles 11 and 12 (right to an adequate standard of living and the right to the highest attainable standard of health) to imply such a right. Although this interpretation was somewhat controversial at the time, the right to water is also recognised by other international instruments as well as by the United Nations General Assembly on the 28 July 2010 (Resolution 64/292: The human right to water and sanitation).

water resources should be given to personal and domestic use, for the prevention of starvation and disease.<sup>142</sup>

The right to housing is to be seen as ‘the right to live somewhere in security, peace and dignity’ for all persons irrespective of their income or access to economic resources.<sup>143</sup> Moreover, housing should be adequate in the sense of ‘adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost’.<sup>144</sup> Some other factors that must be considered in determining the adequacy of the right to housing are legal security of tenure, availability of services, materials, benefits and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.<sup>145</sup> As part of the obligations to *respect* and *protect*, the State must refrain from forced evictions and put in place legal protection for occupants from third parties.<sup>146</sup> States parties are also required to review all legislations and policies for their compatibility with the obligations arising out of the right to housing and to repeal or amend any inconsistent legislation or policy.<sup>147</sup>

The obligations arising out of the right of everyone to enjoy the highest attainable standard of ***physical and mental health***, under Article 12, envision that the State will take action on prevention, treatment and control of epidemic, endemic, occupational and other diseases, as well as aspects of environmental and industrial health and hygiene. The freedoms and entitlements that encompass the right to health allow the rights-holders the right to control their health and body, including sexual and reproductive

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<sup>142</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29<sup>th</sup> sess, UN Doc E/C.12/2002/11 (20 January 2003), [6].

<sup>143</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11 (1)) of the Covenant*, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991), [7].

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, [8].

<sup>146</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions*, 16<sup>th</sup> sess, UN Doc E/1998/22, annex IV (20 May 1997), [8].

<sup>147</sup> *Ibid.*, [9].

freedom, the right to be free from torture, as well as the right to have access to a system of the highest attainable health services with equal opportunity.<sup>148</sup> The right to health is an inclusive right that comprises access to appropriate health care, factors that impact on health such as safe water, sanitation, food supply, nutrition, housing, occupational and environmental conditions and health-related knowledge.<sup>149</sup> Thus the right to health involves elements related both to 'health care' and to the underlying preconditions for physical and mental health.<sup>150</sup> The right to health encompasses elements of availability, accessibility (non-discrimination, physical, economic and information access), acceptability and quality.<sup>151</sup>

The obligation to recognise the **right to education**, under Articles 13 and 14, includes the requirement that primary education be compulsory and available free of charge to all and that, secondary education, including technical and vocational education, is to be made available and accessible to all by every appropriate means. There is also an obligation to the progressive introduction of free education. 'Compulsory education' is taken to mean that neither the parents, guardians nor the State is entitled to treat it as optional for a child to have access to primary education.<sup>152</sup> 'Free of charge' should be understood as meaning that primary education should be provided without charge to the child, parent or guardian.<sup>153</sup> The Committee identified essential features of the right to education as availability, accessibility (non-discrimination, physical and

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<sup>148</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000), [8].

<sup>149</sup> *Ibid.*, [11].

<sup>150</sup> Brigit Toebes, 'The Right to Health' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001) 169-190, 174.

<sup>151</sup> *CESCR General Comment No 14*, E/C.12/2000/4, above n 148, [12]; John Tobin, *The Right to Health in International Law* (Oxford University Press, Oxford, 2011).

<sup>152</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 11: Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/4 (10 May 1999), [6].

<sup>153</sup> *Ibid.*

economic accessibility), acceptability, and adaptability,<sup>154</sup> which should guide State policy in ensuring the right to education.

The State also has an obligation to make higher education equally accessible to all, to work towards progressive introduction of free education, and to encourage fundamental education for those who have not received or completed primary education.<sup>155</sup> The continued development of a system of schools at all levels, adequate fellowship systems and continuous improvement of the material conditions of teaching staff are also to be undertaken by the State. The State is also obliged to respect the liberty of parents and legal guardians to choose their children's schools, either public or private, which conform to the educational standards as approved by the State.<sup>156</sup>

States have an obligation to recognise the right of everyone to take part in **cultural life**, to enjoy the benefits of scientific progress and its application, and to benefit from intellectual property protection.<sup>157</sup> Article 15(2) details the nature of this obligation, with particular emphasis on steps aimed at the conservation, development and diffusion of science and culture.<sup>158</sup> The full realisation of cultural rights also obliges governments to adopt steps necessary for the 'conservation, development and dissemination of science and culture'<sup>159</sup> and other steps to ensure the freedom to enjoy these rights. The right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions should be seen

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<sup>154</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (article 13 of the Covenant)*, 21<sup>st</sup> sess, UN Doc E/C.12/1999/10 (8 December 1999), [6].

<sup>155</sup> ICESCR, above n 33, art 13(2c).

<sup>156</sup> *Ibid.*, art 13(3).

<sup>157</sup> *Ibid.*, art 15.

<sup>158</sup> The right of everyone to take part in cultural life is also recognized in article 27 of UDHR, which states that 'everyone has the right freely to participate in the cultural life of the community'.

<sup>159</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 43<sup>rd</sup> sess, UN Doc E/C.12/GC/21 (21 December 2009), [46] [47].

as a way to encourage active contribution of the creators of these works to the overall progress of society as a whole, rather than as sources of individual benefit alone.<sup>160</sup>

A comprehensive policy on ESC rights must necessarily target all these rights and must have adequate policy intervention to ensure their realisation. The policy efforts in relation to these rights are characterised by interrelated and essential features of availability, accessibility, acceptability, adaptability and adequacy in relation to rights such as education, health and housing.<sup>161</sup>

In this thesis, all these rights are treated as equally important components of national policy actions for progressive realisation, which also requires resources. The manner in which these obligations are to be carried out is expounded in the general and procedural obligations under the Covenant as discussed in the previous section.

### 2.3.3 Justiciability and adjudication

The basic idea of ESC rights justiciability is that State non-compliance with these rights can be subjected to third-party adjudication and award of remedies.<sup>162</sup> It is argued that the role of the courts in ESC rights adjudication should be to deepen the accountability of the State,<sup>163</sup> for which clear rules of

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<sup>160</sup> Committee on Economic, Social and Cultural Rights, *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 (article 15, paragraph 1 (c), of the Covenant)* 35<sup>th</sup> sess, UN Doc E/C.12/GC/17 (12 January 2006), [4].

<sup>161</sup> These features are outlined in *CESCR General Comment No 13*, E/C.12/1999/10, above n 154; *CESCR General Comment No 14*, E/C.12/2000/4, above n 148; *CESCR General Comment No 4*, E/1992/23, above n 143.

<sup>162</sup> Dennis and Stewart, above n 3, 463.

<sup>163</sup> Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) *Human Rights Law Review* 221-253, 253.

adjudication and a functioning independent and impartial judiciary are essential.<sup>164</sup>

One of the key oppositions to the idea of justiciability of ESC rights in the judicial process is based on the argument that matters involving resource allocation are better left to the political authorities. Many argue that judges, who are neither economists nor public policy experts, are not equipped to evaluate the most effective policy measures for realising the right and the impact it would have on other rights.<sup>165</sup> It has been argued, however, that the question of legitimacy of the courts to 'interfere' with the social and economic policy sphere, and the argument about the lack of technical capacity of courts to properly adjudicate and enforce these rights, are all based on misguided notions.<sup>166</sup> It is also contended that arguments used for non-justiciability of ESC rights are artefacts of historically constrained choices about how to construct the institutions of the human rights regime and of subsequent decisions at the national level about how to instantiate such rights in law.<sup>167</sup>

The ESCR Committee argued that courts are 'generally already involved in a considerable range of matters which have important resource implications'.<sup>168</sup> Hence putting the ESC rights beyond the reach of the courts would be incompatible with the principle of indivisibility and interdependence of all human rights, and would drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

The acknowledgment of 'justiciability' of ESC rights gives new impetus to a general understanding of their legally binding nature and, hence, to the

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<sup>164</sup> Christian Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies' in A von Bogdandy and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law, Volume 11* (Koninklijke Brill N.V., 2007) 317-337, 320.

<sup>165</sup> Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001) 55-84, 84.

<sup>166</sup> Langford, Nolan and Porter, above n 3.

<sup>167</sup> Hertel and Minkler, above n 2.

<sup>168</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, 19<sup>th</sup> sess, UN Doc E/C.12/1998/24 (3 December 1998), [10].

realisation of positive State obligations flowing from these rights.<sup>169</sup> For example, justiciability of ESC rights is evident from domestic jurisprudence in countries such as South Africa and India.<sup>170</sup> Judicial decisions on ESC rights-related cases have become more common in a number of other States.<sup>171</sup> Overall, the emerging case law shows that when governments are challenged on the grounds of ESC rights, they have the burden of proof to establish the reasonableness of the government policies and their impact on the progressive realisation of ESC rights.<sup>172</sup>

### 2.3.4 Violations and remedies

By definition, a violation of ESC rights occurs when ‘acts of commission or omission in the form of legislative, political, economic, administrative, and physical or otherwise causes deprivation of rights’.<sup>173</sup> The *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* articulates that failure to perform the obligations to respect, protect and fulfil constitutes a violation of such rights.<sup>174</sup> In this context, the obligation to fulfil requires States ‘to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights’.<sup>175</sup> Moreover, the guidelines make specific reference to resources and adopts the position that

<sup>169</sup> Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001) 29-54, 54.

<sup>170</sup> Some of the key cases include *Government of South Africa v Grootboom & Ors* (2000) CCT 11/00 (Constitutional Court of South Africa); *Minister of Health and others v. Treatment Action Campaign and others* (2002) Case CCT 9/02 (Constitutional Court of South Africa); *C E S C Limited v Subbash Chandra Bose* (1992) (1992 (1) SCC 441) (Supreme Court of India); *P G Gupta v State of Gujarat and Others* (1995) (1995 Supp (2) SCC 182) (Supreme Court of India).

<sup>171</sup> See for example, Bertrand G Ramcharan (ed), *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials* (Martinus Nijhoff Publishers, 2005).

<sup>172</sup> Ssenyonjo, above n 10, 42.

<sup>173</sup> Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81-124, 98.

<sup>174</sup> International Commission of Jurists (ICJ), above n 106, [6].

<sup>175</sup> *Ibid.*

‘resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.’<sup>176</sup>

The standards used to determine rights violations should give consideration to the absolute obligation of minimum core content, and relative obligation based on the ability of the State to go beyond the minimum core content. For instance, while involuntary poverty is a clear indication of an ESC rights violations that can be eliminated by total enforcement of ESC rights,<sup>177</sup> the presence or absence of poverty in itself does not necessarily indicate respect for or violation of ESC rights.<sup>178</sup> On the one hand, when a State fails to provide its people with the means to realise their basic needs that can be seen, it is argued, as a violation of their human rights and human dignity.<sup>179</sup> However, Künnemann suggests that what he calls the ‘the basic needs fallacy’—namely, that every instance of deprivation of human needs is seen as a violation of human rights—could mislead our efforts to address violations of ESC rights’.<sup>180</sup> In this regard, Pogge asserts:

An unfulfilled human right manifests a human rights violation only if there are one or more human agents who are bringing about the un-fulfillment of the human right in question even while they could and should have known that their conduct would have this result.<sup>181</sup>

Without proper measures to determine improvement or regression in the attainment of ESC rights, monitoring these rights may not be possible for the ESCR Committee, human rights advocates or domestic courts. Moreover, without such measures, States cannot be held accountable for their effort, or lack of effort to fulfil the ESC rights within their resources. Thus the Covenant

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<sup>176</sup> Ibid., [10].

<sup>177</sup> Hertel and Minkler, above n 2, 2.

<sup>178</sup> Maria Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 *Human Rights Quarterly* 1062-1097, 1075.

<sup>179</sup> Katherine Eddy, ‘On revaluing the currency of human rights’ (2007) 6(3) *Politics Philosophy Economics* 307-328.

<sup>180</sup> Künnemann, above n 15, 334.

<sup>181</sup> Thomas Pogge, ‘Are we violating the human rights of the world’s poor?’ in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights: Old Problems, New Possibilities* (Edward Elgar, Cheltenham, 2013) 40, 49.

norms should be recognised within the domestic legal and administrative order, with appropriate means of redress and remedies available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.<sup>182</sup> Accessible and effective remedies, which include compensation, reparation, restitution, rehabilitation, guarantee of non-repetition and public apologies, are the best approach to protecting ESC rights.<sup>183</sup> Taking appropriate legislative, administrative and other measures to prevent violations in the first place, in addition to prompt investigation, equal access to justice and providing effective remedies are key obligations on States.<sup>184</sup>

Given the inherent difficulty of establishing violations of ESC rights obligations, particularly by the States, distinguishing between a State's *inability* and *unwillingness* to comply with the obligations is likely to provide a clearer conceptual basis for violations monitoring.<sup>185</sup> The government's margin of appreciation (discretion) to make policy decisions should also be factored in to determine the degree of violation.<sup>186</sup>

### 2.3.5 Compliance and monitoring procedures

State reporting is an important measure to 'effectively evaluate the extent to which progress has been made towards the realization of the obligations'.<sup>187</sup>

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<sup>182</sup> *CESCR General Comment No 9*, E/C.12/1998/24, above n 168, [2].

<sup>183</sup> Liebenberg, above n 165, 55, 57; Ssenyonjo, above n 10, 976.

<sup>184</sup> United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16<sup>th</sup> sess, UN Doc A/RES/60/147 (21 March 2006).

<sup>185</sup> Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Leiden, 2001) 9-28, 26.

<sup>186</sup> Arne Vandenbogaerde and Wouter Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10(2) *Human Rights Law Review* 207-237, 223; International Commission of Jurists (ICJ), above n 106, [8].

<sup>187</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 1: Reporting by States Parties*, 3<sup>rd</sup> sess, UN Doc E/1989/22 (24 February 1989), [6].

This require States to identify benchmarks or goals against which their performance is assessed. Whereas the substantial rights set out in Part III form the core of the Covenant in terms of State obligations to *respect, protect* and *fulfil*, the procedural aspects outlined in Part IV identify reporting obligations as a basic tool to assist States parties to fulfil their obligations and for the ESCR Committee to monitor State compliance.

Critical analysis of the existing situation with regard to ESC rights is an essential step towards promoting these rights. The reporting process aims, among other things, to provide ‘the basis for the elaboration of clearly stated and carefully targeted policies’, to facilitate public scrutiny of government policies and to encourage ‘the involvement of various economic, social and cultural sectors of society in formulation, implementation and review of the relevant policies’.<sup>188</sup> The Committee also recognised that reporting serves the purpose of providing a comprehensive review with respect to national legislation, administrative rules and procedures, and practices, as well as monitoring the actual situation with regard to each right on a regular basis.<sup>189</sup>

The process of monitoring State reports was initially carried out by the Economic and Social Council (ECOSOC) through its Sessional Working Group on the Implementation of the ICESCR. Beginning in 1982, work was carried out by the Sessional Working Group of Government Experts on the Implementation of the International Covenant. The supervision mechanism was strengthened in 1985 through the establishment of the ESCR Committee under ECOSOC.<sup>190</sup>

The ESCR Committee requires States parties to include information on progress over time, using qualitative and quantitative processes and data to provide an adequate assessment of progress that can be used to better understand the problems and shortcomings of their own effort. In this context,

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<sup>188</sup> Ibid., [4] [5].

<sup>189</sup> Ibid., [1] [2] [3].

<sup>190</sup> The Committee on Economic, Social and Cultural Rights, *Monitoring the economic, social and cultural rights* <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>>; Saul, Kinley and Mowbray, above n 7, 4.

States are required to report on 'factors and difficulties' and to exchange information with other States as a basis for seeking international assistance.<sup>191</sup> However, the quality of State reporting on the ICESCR suffers from a number of deficiencies, including incompleteness, failure to address material issues and inappropriate or inadequate data.<sup>192</sup>

In the absence of a formal mechanism of complaints in relation to the rights recognised in the ICESCR, the need for an Optional Protocol was discussed by the ESCR Committee for some time. A report on a draft optional protocol was submitted to the United Nations Commission on Human Rights at the conclusion of the Committee's considerations at its 15<sup>th</sup> session.<sup>193</sup> The process of finalising and adopting the Optional Protocol, however, proved difficult, despite the commitments made in the *Vienna Declaration and Programme of Action*.<sup>194</sup> With the new mandate granted to the working group by the Human Rights Council in 2006, the draft was finalised and submitted to the Human Rights Council in 2008 and was adopted by the UN General Assembly on 10<sup>th</sup> December 2008. The Optional Protocol was opened for signature and ratification or accession on 24 September 2009 and, pursuant to Article 18(1), was to enter into force three months after the deposit of the 10<sup>th</sup> instrument of ratification.<sup>195</sup> As of August 2015, the Optional Protocol had been ratified by 21 States.<sup>196</sup>

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<sup>191</sup> *CESCR General Comment No 1*, E/1989/22, above n 187, [3] [7] [8] [9].

<sup>192</sup> Eibe Riedel, Gilles Giacca and Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, Oxford, 2014) 3-48, 23.

<sup>193</sup> Economic and Social Council, *Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights*, 53<sup>rd</sup> sess, Agenda Item 14, UN Doc E/CN.4/1997/105 (18 December 1996).

<sup>194</sup> *Vienna Declaration and Programme of Action*, A/CONF.157/23, above n 30, [75].

<sup>195</sup> Uruguay became the tenth state to ratify (on 5 February 2013) and the Optional Protocol entered into force on 5 May 2013.

<sup>196</sup> The States parties to the ICESCR-OP are: Argentina, Belgium, Bolivia, Bosnia and Herzegovina, Cabo Verde, Costa Rica, Ecuador, El Salvador, Finland, France, Gabon, Italy, Luxembourg, Mongolia, Montenegro, Niger, Portugal, San Marino, Slovakia, Spain, and Uruguay. See, United Nations, *United Nations Treaty Collection: Chapter IV Human Rights- Optional Protocol to the International Covenant on Economic, Social and Cultural*

The Optional Protocol to the ICESCR provides for three new procedures to advance the protection and promotion of ESC rights: an individual complaints procedure; an inter-State complaints procedure; and an inquiry procedure that can be initiated by the Committee based on reliable information about grave or systematic violations of ESC rights.<sup>197</sup> Violation of any of the rights recognised in the Covenant is admissible under the Optional Protocol, which may be presented only by 'individuals or groups of individuals or in the name of individuals or groups of individuals'.<sup>198</sup> These mechanisms are expected to provide a stronger system of protection for individuals and an avenue for States to address their grievances against other States in the area of the implementation of ESC rights.<sup>199</sup> While these mechanisms are just beginning to be used, it is expected that the Committee will soon begin to build a body of jurisprudence relating to the Covenant.

In summary, States parties to the Covenant are obliged to take steps to the maximum available resources to progressively realise the substantive rights recognised in the Covenant. This obligation must be carried out without discrimination and must ensure that the minimum core contents of the rights are safeguarded at all times, regardless of resource constraints. States are also required to report on their programmes aimed at the realisation of these rights. As stipulated in Article 2(1), the undertaking to take steps is linked to the 'maximum available resources'. This phraseology has been identified as a key component in defining the nature of the general obligations on the State and can have significant impact on the approach a State takes in implementing these obligations.

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*Rights* <[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-3-a&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en)>.

<sup>197</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 5 March 2009, General Assembly Res No A/RES/63/117 (entered into force 5 May 2013).

<sup>198</sup> *Ibid.*, rule 4.

<sup>199</sup> The experience of inter-state complaints have so far not been very positive with other Optional Protocols. The applicability and usefulness of this mechanism under OP-ICESCR remains to be seen.

## 2.4 'MAXIMUM AVAILABLE RESOURCES': WIGGLE ROOM FOR STATES?

The central importance of resources for the realisation of ESC rights is recognised in the formulation of its obligations as being fulfilled 'progressively'. Use of the term 'maximum available resources', however, presents the challenge of clearly establishing the nature of this obligation and what it entails in practice. Robert Robertson eloquently expresses this complexity:

It is a difficult phrase—two warring adjectives describing an undefined noun. “Maximum” stands for idealism; “available” stands for reality. “Maximum” is the sword of human rights rhetoric; “available” is the wiggle room for the state.<sup>200</sup>

Implementation of civil and political rights, as well as of economic, social and cultural rights requires positive action on the part of the State, which necessitates resource allocation.<sup>201</sup> Promotion and protection of human rights on the ground necessitate direct policies of the State to establish legal, institutional and administrative mechanisms to ensure that individuals and groups are able to enjoy these rights without interference from the State or from third parties. These mechanisms and systems invariably require resources.

Apart from the obligation to use 'maximum available resources' in Article 2(1) of the ICESCR, the need for resources in the implementation of human rights obligations is also recognised in other human rights instruments. Similar provisions regarding the use of resources for the realisation of rights are included in the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and a number of regional human rights covenants and protocols. For example, Article 4 of the Convention on the Rights of the Child (CRC) identifies State responsibility within the 'maximum extent of their available resources',<sup>202</sup> which resonates

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<sup>200</sup> Robertson, above n 34, 694.

<sup>201</sup> Skogly, above n 36.

<sup>202</sup> CRC, above n 5, art 4.

with the concept of 'maximum available resources' in the ICESCR. It also incorporates the element of international co-operation in the context of State action and resources. Article 23(2) of the CRC also refers to 'available resources' in the context of ensuring special care and assistance to the disabled child and those responsible for his/her care.<sup>203</sup> The Committee on the Rights of the Child has emphasised a broad application of the concept of resources to include both domestic and international resources.<sup>204</sup> According to the Convention on the Rights of Persons with Disabilities (CRPD), progressive realisation of the economic, social and cultural rights of persons with disabilities occurs in the context of 'maximum available resources', which includes international co-operation where needed.<sup>205</sup> There are also direct references to resource requirement in regional human rights documents.<sup>206</sup>

The resource-intensive nature of ESC rights, particularly in relation to the obligation to fulfil, was acknowledged in the drafting history of the Covenant and its Optional Protocol, as well as in the work of the ESCR Committee and other developments in the soft law regime. For example, debates during the drafting of the Optional Protocol to the ICESCR highlighted the concerns of many States about the resource-intensiveness of ESC rights.<sup>207</sup> While Finland and Portugal along with the NGO Coalition were of the opinion that only a small number of ESC rights have serious resource implications, Canada noted

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<sup>203</sup> Ibid., art 23(24).

<sup>204</sup> United Nations Committee on the Rights of the Child, *General Comment No 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)*, 34<sup>th</sup> sess, UN Doc CRC/GC/2003/5 (27 November 2003), [21].

<sup>205</sup> CRPD, above n 6, art 4(2).

<sup>206</sup> See for example, Association of Southeast Asian Nations (ASEAN), 'ASEAN Human Rights Declaration', <<http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>> [33]; African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2011), <[http://www.achpr.org/files/instruments/economic-social-cultural/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf)> [15].

<sup>207</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, 60<sup>th</sup> sess, UN Doc E/CN.4/2004/44 (15 March 2004), [55].

that ESC rights fulfilment implies ‘costs on a larger scale.’<sup>208</sup> In the Working Group meetings, concerns were raised about the ability of poor countries to fully comply with the obligations under the Covenant and their failure to meet the requirements may give rise to complaints against these states under the Optional Protocol.<sup>209</sup>

These sources identify key themes relevant to understanding the concept of maximum available resources. Most notably, they highlight the need to address questions of what ‘maximum available resources’ entails in practice, and what policy actions are required to address resource constraints in order to ensure effective allocation of resources for ESC rights objectives.

#### **2.4.1 The concept of ‘maximum available resources’: What does it entail?**

As previously mentioned, the drafting history of the Covenant, as evidenced in the *travaux préparatoires*, recognises and acknowledges the importance of State resources for the effective implementation of the rights recognised in the Covenant. The decision to include the phrase ‘to the maximum available resource’ was not taken lightly by the delegates. The discussions not only identified possible difficulties with this phrase, but also provided insight into how this concept should be interpreted in practice. There was consensus among the delegates that the concept of ‘maximum available resources’ should be interpreted as broadly as possible and should not be limited to public sector resources.

Later, the ESCR Committee specified that ‘maximum available resources’ refers to ‘both the resources existing within a State as well as those available from the international community through international cooperation and

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<sup>208</sup> *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, 62<sup>nd</sup> sess, UN Doc E/CN.4/2006/47 (14 March 2006), [90].

<sup>209</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, E/CN.4/2004/44, above n 207, [21].

assistance.<sup>210</sup> General Comment No. 3 notes that it was the intention of the drafters of the Covenant that ‘maximum available resources’ should be taken to include both the resources available in the State and through the international community, with specific reference to Articles 11, 15, 22 and 23 of the ICESCR.<sup>211</sup> This requirement to seek international assistance and co-operation is particularly relevant for developing States in relation to ‘resources’ required for the realisation of ESC rights.

The level of resource commitment for each substantive right can vary, depending on the economic and social conditions as well as the level of enjoyment of these rights at the time. In many countries, for example, effective implementation of the requirements for the right to education and health may need more resources than those required for the right to cultural rights. In many cases, economic and social development affects the direct resource burden on the State to ensure the enjoyment of these rights.

Many Concluding Observations refer to the requirement for resources in relation to specific rights and make recommendations for the State to take positive action, including allocation of resources for realisation of these rights. For example, the Committee identified resources required to strengthen gender equality mechanisms, including the financial and human resources needed to enhance the work of national institutions, and made recommendations for increased capacity of gender promotion agencies and their activities to eliminate gender stereotypes and attitudes.<sup>212</sup> Numerous references are also made to work-related rights, including monitoring

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<sup>210</sup> Committee on Economic, Social and Cultural Rights, *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, 38<sup>th</sup> sess, UN Doc E/C.12/2007/1 (10 May 2007), [5].

<sup>211</sup> *CESCR General Comment No 3*, E/1991/23, above n 49, [13].

<sup>212</sup> For example, CESCR, *Concluding observations: Serbia*, E/C.12/SRB/CO/2 (23 May 2014), [15]; CESCR, *Concluding observations: China (Hong Kong)*, E/C.12/1/Add.58 (21 May 2001), [17]; CESCR, *Concluding observations: Republic of Korea*, E/C.12/1/Add.59 (21 May 2001), [37]; CESCR, *Concluding observations: Kazakhstan*, E/C.12/KAZ/CO/1 (7 June 2010), [15].

conditions at work,<sup>213</sup> work place safety,<sup>214</sup> and strengthening labour inspectorates.<sup>215</sup> Equitable distribution of resources and better access to services for those in need are also discussed,<sup>216</sup> along with accelerated growth and employment creation strategies to combat poverty and disparity between urban and rural areas.<sup>217</sup>

While acknowledging challenges faced by developing countries in the implementation of ESC rights policies, the ESCR Committee also has reminded the States to be serious about their obligation to use 'maximum available resources'. For example, in the Concluding Observations on Nepal in 2008, the Committee stated:

While noting that Nepal is a low income country and its resources are correspondingly limited, the Committee reminds the State party that it is obliged to comply with its Covenant obligations to the maximum of its available resources.<sup>218</sup>

On Cambodia, the Committee noted that:

The Committee urges the State party to ensure that maximum available resources are allocated for the protection and fulfilment of economic, social and cultural rights, especially to the most vulnerable and marginalized individuals and groups.<sup>219</sup>

These examples indicate that resource commitment is broad and must cover all rights, although a particular quantity or level of commitment may not be easy to identify.

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<sup>213</sup> CESCR, *Concluding observations: Trinidad and Tobago*, E/C.12/1/Add.80 (5 June 2002), [43].

<sup>214</sup> CESCR, *Concluding observations: Ukraine*, E/C.12/1/Add.65 (24 September 2001), [26].

<sup>215</sup> CESCR, *Concluding observations: Russian Federation*, E/C.12/1/Add.94 (12 December 2003), [47]; CESCR, *Concluding observations: Uzbekistan*, E/C.12/UZB/CO/1 (24 January 2006), [51].

<sup>216</sup> CESCR, *Concluding observations: Benin*, E/C.12/1/Add.78 (5 June 2002), [29]; CESCR, *Concluding observations: Kyrgyzstan*, E/C.12/1/Add.49 (1 September 2000), [29].

<sup>217</sup> CESCR, *Concluding observations: Togo*, E/C.12/TGO/CO/1 (3 June 2013), [22]; CESCR, *Concluding observations: Gabon*, E/C.12/GAB/CO/1 (27 December 2013), [25].

<sup>218</sup> CESCR, *Concluding observations: Nepal*, E/C.12/NPL/CO/2 (16 January 2008), [40].

<sup>219</sup> CESCR, *Concluding observations: Cambodia*, E/C.12/KHM/CO/1 (12 June 2009), [38].

## 2.4.2 Addressing resource constraints through an ESC rights lens

The invocation of resource constraints as an explanation for any retrogressive steps involves a number of considerations: the level of development, economic situation, competing priorities on limited resources, availability of low-cost options, and ability to seek and receive resources from the international community.<sup>220</sup> The ESCR Committee has highlighted the primary role of the State ‘in formulating or adopting, funding and implementing laws and policies’<sup>221</sup> in relation to ESC rights realisation. At the same time, the Committee identified that the State has a margin of appreciation to ‘determine the optimum use of its resources and to adopt national policies and prioritise certain resource demands over others’.<sup>222</sup> These points indicate a clear recognition of the complexity of the nature of resource mobilisation and allocation in State policy and practice.

While resource constraints may constitute a genuine limitation on the ability of the State in relation to ESC rights policies, this does not ‘alone justify inaction’.<sup>223</sup> There is clear recognition that the obligation to take steps towards the realisation of ESC rights cannot be constrained by lack of resources. The Committee emphasises that:

Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.<sup>224</sup>

Here, ‘maximum available resources’ should not be interpreted as altering the immediacy of the obligation to take steps to achieve progressive realisation.

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<sup>220</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 210, [10].

<sup>221</sup> *Ibid.*, [11].

<sup>222</sup> *Ibid.*, [12].

<sup>223</sup> *Ibid.*, [4].

<sup>224</sup> *Ibid.*

Thus, in cases of failure to take positive steps or adoption of retrogressive steps, the burden of proof is on the State party 'to show that such a course of action was based on the most careful consideration and can be justified by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources.'<sup>225</sup>

In situations where resources available to a State are inadequate, the obligation to ensure that the available resources are used most effectively to ensure the widest possible enjoyment of rights remains, particularly with regard to protection of the rights of the most disadvantaged and marginalised groups in the society. In times of severe economic constraint, States have an obligation to take administrative, legal and other steps to the maximum of available resources at an 'adequate' or 'reasonable' level. The Committee's proposition in relation to adopting 'relatively low-cost' programmes suggests that the State should use the limited available resources in the most effective manner to achieve the greatest results.

The Concluding Observations provide further insight into the State's obligations under resource constraints. The issue is highlighted in a number of reports in which the Committee recognised the limited resources available to the State under review and to take steps to make the best allocation of these limited resources.<sup>226</sup> The impact of environmental degradation on the State's ability to mobilise resources for ESC rights is also identified in some cases.<sup>227</sup> It is recognised that the State is required to implement measures to protect the most vulnerable during economic and financial reform processes to minimise the negative impacts of these changes.<sup>228</sup>

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<sup>225</sup> Ibid., [9].

<sup>226</sup> CESCR, *Concluding observations: Georgia*, E/C.12/1/Add.42 (17 May 2000).

<sup>227</sup> CESCR, *Concluding observations of the Mongolia*, E/C.12/1/Add.47 (1 September 2000).

<sup>228</sup> CESCR, *Concluding observations: Kenya*, E/C.12/1993/6 (3 June 1993), [6].

### 2.4.3 Effective allocation of available resources: Targeting core obligations and the most vulnerable

Responsibility on the States to comply with core obligations under the ICESCR are not limited by the availability of resources, and any failure to utilise maximum of available resources towards the fulfilment of the rights amount to a violation of the Covenant obligations.<sup>229</sup> Thus, the State is required to 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.'<sup>230</sup> Here, the State must take into consideration the full range of options available in order to effectively target resources towards fulfilling core obligations.

In its more recent Concluding Observations, the Committee has taken a stronger stance on States not taking resource allocation seriously. For example, in the case of Armenia in 2014, the Committee expressed concern that 'maximum available resources are not used by the State party to progressively achieve the full realization of the rights recognized in the Covenant'<sup>231</sup> and went on to recommend that the State take specific steps 'to improve the capacity of line ministries on public finance management'<sup>232</sup> and to 'ensure that resources are effectively allocated according to programme budgeting criteria, and increase political awareness of the need to allocate substantial additional resources to health and education'.<sup>233</sup>

Resources required for the realisation of ESC rights are particularly relevant in the context of State budgetary resources and the implications of international assistance and co-operation.<sup>234</sup> Given that a State's programmes and activities are carried out and reflected through the national budget, which

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<sup>229</sup> International Commission of Jurists (ICJ), above n 106, [9] [10] [14] [15] [19].

<sup>230</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 210, [6].

<sup>231</sup> CESCR, *Concluding observations: Armenia*, E/C.12/ARM/CO/2-3 (23 May 2014), [9].

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> Skogly, above n 36.

indicates not only the policy priorities of the government but also the amount of resources committed for each programme, these resources are generally presented in terms of financial costing values. From the perspective of human rights, however, State resources cannot be limited to those of a financial nature.

In the context of the global financial and economic crises, the Committee urged that the States party's obligations to combat poverty, social exclusion and protection of the most vulnerable must be given priority even under resource constraints.<sup>235</sup> The discrepancy between available resources and actual ESC rights needs of the people,<sup>236</sup> and the resource impact of structural adjustment programmes were commented upon with reference to national resource allocation for debt servicing.<sup>237</sup> Even if the State has a low level of Gross Domestic Product (GDP) and limited resources, it is still obliged to comply with the Covenant obligations to the maximum of available resources.<sup>238</sup> The Committee also identified the negative impact of structural adjustment policies on the overall enjoyment of ESC rights and the high percentage of annual budget that is allocated for debt servicing as limiting factors on resources available to the State.<sup>239</sup>

The Committee's position as expressed in these Concluding Observations is that the resource requirement for the realisation of substantive ESC rights is important and the State is expected to play a major role in maximising the resources available to address ESC rights needs. It also points to the difficulty of clearly defining resources requirement, types of resources and resource allocation policies within any generally applicable standard.

In summary, this section has identified the key role of resources in the realisation of ESC rights and the challenges involved in clearly defining

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<sup>235</sup> CESCR, *Concluding observations: Iceland*, E/C.12/ISL/CO/4 (11 December 2012), [16].

<sup>236</sup> CESCR, *Concluding observations: Egypt*, E/C.12/1/Add.44 (23 May 2000), [44].

<sup>237</sup> CESCR, *Concluding observations: Ecuador*, E/C.12/1/Add.100 (7 June 2004), [9].

<sup>238</sup> CESCR, *Concluding observations: Nepal*, E/C.12/NPL/CO/2 (16 January 2008), [40]; CESCR, *Concluding observations: Yemen*, E/C.12/YEM/CO/2 (22 June 2011), [4].

<sup>239</sup> CESCR, *Concluding observations: Ecuador*, E/C.12/1/Add.100 (7 June 2004).

resources for this purpose. These elaborations are essential to appreciate the complexity of the concept and to contextualise relevant aspects of resources for subsequent discussion. The section has outlined the nature of obligations arising out of the undertaking to ‘take steps’ to the ‘maximum available resources’, which constitutes a clear obligation on States parties to maximise the amount of resources available and to effectively allocate and manage these resources in a manner that optimises their contribution to the realisation of ESC rights. While the drafting history of the ICESCR and the Optional Protocol to the ICESCR provide some insight into the nature of resources that are considered applicable, there is still no clear definition of ‘maximum available resources’ for the purpose of the ICESCR. Therefore, the role of the State as the human rights duty-bearer, mobiliser and administrator of resources for the realisation of human rights obligations requires further investigation.

## **2.5 CONCLUSIONS**

The International Covenant on Economic, Social and Cultural Rights obliges all States parties to actively engage in the implementation of policies and programmes and ensure the progressive realisation of the rights recognised in the Covenant, within their resources and capacity. This chapter has shown that the progressive realisation requirement does not diminish the importance and urgency of the obligation, nor does the lack of resources. In recognition of the inherent and inalienable nature of these rights, States have a duty to employ all the resources at their disposal to promote ESC rights, without discrimination.

This broad overview of the general and substantive rights under the Covenant provides the foundation on which subsequent discussions are built. The description of State obligations under the Covenant and in the interpretive work of the ESCR Committee in relation to all substantive rights indicates the fundamental nature of these rights and the seriousness with which States must address them. This chapter has explored the basic legal context for the

economic, political and (further) legal analysis of the notion of 'maximum available resources' through an examination of the development of the ICESCR and core concepts of ESC rights as outlined in the Covenant as well as in other relevant human rights instruments. The extent and nature of obligations on the States as derived from the ICESCR were also examined in order to identify key areas of policy application that will be the subject of the key arguments of this thesis.

The chapter has laid the foundations for discussion of the concept of 'maximum available resources' in the next and subsequent chapters. Building on the preliminary treatment of the ICESCR presented here, Chapter 3 provides a detailed analysis of the concept and develops a comprehensive model of resources for ESC rights policies.

# 3

## Resources at the Disposition of the State: Towards a Comprehensive Model of 'Maximum Available Resources' for ESC Rights

### 3.1 INTRODUCTION

The nature and quantity of resources at the disposition of the State have a significant policy impact on human rights and welfare of the population. Resources affect the level to which Economic, Social and Cultural rights (ESC rights) can be realised by way of necessary infrastructure and facilities for education, health, housing and employment. These must be provided and guaranteed by the State, especially when individuals are not able to realise these rights on their own. Thus the amount of resources available to the State is a vital indicator of its capacity to fulfil the conditions that are necessary for the enjoyment of ESC rights.

This chapter presents a detailed discussion of 'maximum available resources' in the context of general obligations to take steps for the realisation of ESC rights. It addresses general definitions of resources, what constitutes available resources and what is regarded as maximum, as well as practical issues of monitoring the State's resource allocation and utilisation policies. In theory, human rights obligations demand that States 'marshal all the resources needed'<sup>1</sup> for the realisation of these rights. For this expectation to be meaningful, it is vital to develop a thorough understanding of the concept of 'maximum available resources' and its operational parameters.

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<sup>1</sup> 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* 693-714, 700.

This chapter presents a review of the concept of 'maximum available resources' in the human rights literature and develops a more inclusive and concrete model of the concept of resources that is in keeping with the practical implications of ESC rights policy on the ground. It draws on seminal works in the area, builds on and expands the concepts of resources, mobilisation and allocation decisions and their impact on ESC rights realisation and uses a cross-disciplinary model to incorporate these concepts into public policy and general human rights practice.

This cross-disciplinary model for 'maximum available resources' draws its theoretical underpinnings from economics, public policy and public finance to provide better understanding of how States' resource policies should be shaped to reflect their human rights obligation under the ICESCR. Particular attention is given to the role of appropriate State policies, including fiscal and monetary policies and engagement with the private and international sectors, to enhance the quality and quantity of resources potentially available for ESC rights. The argument presented here supports and builds upon the view espoused by some ESC rights scholars that non-financial resources, such as human resources, natural resources and technological resources, can form part of the resources matrix.

The first section below discusses existing theoretical and conceptual interpretations of 'maximum available resources' and develops a new cross-disciplinary model. The following section explores arguments for maximising resource mobilisation, including financial and non-financial resources, and discusses the policy dimensions of resource mobilisation. The final sections deal with aspects of resource allocation and governance which form essential parts of the resource model presented in this chapter which, in turn, provides the basis for subsequent chapters.

## 3.2 A CROSS-DISCIPLINARY MODEL OF ‘MAXIMUM AVAILABLE RESOURCES’

As discussed in Chapter 1, poverty, hunger, lack of educational opportunity, and lack of access to proper healthcare and other services essential for a dignified life are all too familiar in a world of abundance. From a human rights perspective, the State has a legal obligation to address these conditions, not only as a matter of national development priority but also as a human rights obligation. This requires an affirmative and active policy stance on the part of the State.

This section begins with a review of existing models of ‘maximum available resources’ and their strengths and weaknesses in relation to the realisation of ESC rights in practice. This is followed by arguments laying out the necessary elements for a new model of ‘maximum available resources’ for ESC rights within the context of globalisation and the dynamics of human rights implementation. A cross-disciplinary model of ‘maximum available resources’ is then presented.

### 3.2.1 Existing models of ‘maximum available resources’

In common usage, ‘resources’ are defined as ‘stock or supply of money, materials, staff, and other assets that can be drawn on by a person or organisation in order to function effectively’.<sup>2</sup> The ESCR Committee explains that the term ‘resources’ in the context of the Covenant refers to ‘all resources at a State’s disposition’,<sup>3</sup> and this definition includes both domestic and international resources that a State has ‘access to’.<sup>4</sup>

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<sup>2</sup> *Oxford Dictionaries (Online)*, Oxford University Press (2015)  
<<http://www.oxforddictionaries.com/>>.

<sup>3</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations (Art. 2, par. 1)*, 5<sup>th</sup> sess, UN Doc E/1991/23 (14 December 1990), [10].

<sup>4</sup> Committee on Economic, Social and Cultural Rights, *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, 38<sup>th</sup> sess, UN Doc E/C.12/2007/1 (10 May 2007), 4.

It is clear from these definitions that government resource allocation alone cannot be taken as a sufficient indicator of whether the State has used the maximum available resources for the realisation of ESC rights. Hence, it is important to look beyond budget allocation to determine if the State's *real* resources are being fully utilised<sup>5</sup> and to develop robust definitions of resources in the context of ESC rights.

In recent years, ESC rights scholars have proposed that, for full consideration of the obligation to use all appropriate means in Article 2(1), the concept of resources should be understood more broadly and creatively to include both financial and non-financial resources, as well as the quantitative and qualitative aspects of resources and their usage.<sup>6</sup> For example, Audrey Chapman and Sage Russell argue that the concept of resources should be seen to include not only the resources in State coffers but also the resources available in the wider society.<sup>7</sup> Scott Leckie proposes a wider perspective that includes resources other than the State budget.<sup>8</sup> Chapman argues that, in addition to government budgetary resources and resources obtained through international co-operation, private sector resources can also be used to realise ESC rights, either through private investment or by imposing wealth taxes.<sup>9</sup> The potential of these resources, however, is difficult to assess since it is possible to approach the meaning of 'maximum available resources' in different ways. One approach is to focus on the types of resources that can be added to the overall public sector resources mix, another is to expand the

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<sup>5</sup> Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229, 178.

<sup>6</sup> See, Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 *Human Rights Law Review* 393-420, 405.

<sup>7</sup> Audrey R Chapman and Sage Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, New York, 2002).

<sup>8</sup> Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81-124, 107.

<sup>9</sup> Audrey 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 University Press, Cambridge, 2007) 143-, 149.

policy horizons of resource mobilisation and allocation to include fiscal and monetary policy dimensions.

One of the best models of public sector financial resources in the context of ESC rights is the ‘Maximum Available Resources Star’ (‘MAR Star’) approach proposed by Balakrishnan et al, which provides a broader conceptual framework for the financial resources dimension.<sup>10</sup> The ‘MAR Star’ approach includes government expenditure, government revenue, development assistance, debt and deficit financing, and monetary policy and financial regulation as core constituents of the maximum available resources for the realisation of ESC rights (see Figure 1 below).

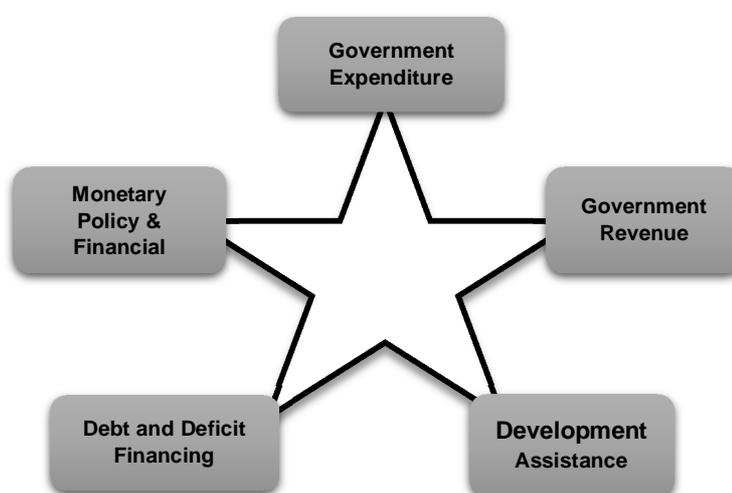


Figure 1: ‘Maximum Available Resources Star’ (‘MAR Star’)

Source: Balakrishnan et al (2011, p 5).

The ‘MAR Star’ approach is robust in that it covers many key aspects of the public finance management process within a State, such as taxation, monetary policy, fiscal policy and planning and budgetary policies, and has the potential to provide a clearer picture of what resources are actually and potentially available for the State. Despite this, the model does not adequately capture

<sup>10</sup> Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women’s Global Leadership, New Jersey, 2011).

the role of non-financial resources and resources that can be mobilised from the private sector for ESC rights objectives.

Non-financial resources (natural, human, informational, organisational and cultural resources) can also contribute significantly to the State's resource basket.<sup>11</sup> Some scholars also include cultural and scientific resources within financial and human resources.<sup>12</sup> While the role of different non-financial resources in the realisation of individual rights may not always be clearly delineated, it is argued that the overall realisation of ESC rights would be significantly enhanced by State mobilisation of such resources.<sup>13</sup> To this effect, utilisation of non-financial resources such as information, access to land and water, the human resources of the community and the State, and technology can make a significant contribution to the realisation of these rights.<sup>14</sup> While these resources are often more effectively used in conjunction with financial resources, they can contribute to the realisation of ESC rights in a number of ways on their own, and therefore need to be fully factored into the resource model.

### **3.2.2 A cross-disciplinary model of 'maximum available resources'**

As discussed in Chapter 1, globalisation has transformed the capacity and role of the State in effectively implementing human rights-related public policy programmes and activities. Within this context, this section presents a robust model of 'maximum available resources' developed by combining relevant elements of law, economics, public policy and public finance. The model addresses the key questions of what resources are potentially available to the State and how these resources could be most effectively allocated and utilised for the realisation of ESC rights.

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<sup>11</sup> Robertson, above n 1, 695-696; Robert E Robertson, 'Nutrition , human rights and resources' (1996) 21 *Food Policy* 57-71.

<sup>12</sup> Skogly, above n 6, 404.

<sup>13</sup> Robertson, above n 1, 697.

<sup>14</sup> *Ibid.*, 695-696.

The model envisions a proactive policy stance on the part of the State, which is grounded in the recognition that State intervention and participation are necessary for the economy and society to function effectively and to ensure equality and fairness in the distribution of the benefits of economic growth and development. The approach also pays attention to the key role of government in maintaining the momentum of growth, creating jobs and investment in social and physical infrastructure that allow private entrepreneurship to flourish,<sup>15</sup> and balancing human rights obligations with those related to the regulation of the market and conditions of competition. The active engagement of the State with the market and society helps to extend its policy objectives<sup>16</sup> and the resulting synergy creates the conditions for the realisation of ESC rights. This role of the State is represented in the model by incorporating various policy approaches for maximising the mobilisation of resources from different sources and ensuring that these resources are effectively allocated and governed.

In addition to the human rights case for States to be more active in addressing resource mobilisation, allocation and governance from an ESC rights perspective, key assumptions of this model are based on the notion of the State as a proactive player in the economy and society<sup>17</sup> through active political involvement of citizens, effective mechanisms of political participation and dialogue, public policies focused on achieving a healthy society and economy and effective mechanisms for distributing society's resources and addressing human rights requirements. This approach does not oppose policies of deregulation, privatisation and market solutions to society's needs. On the contrary, it encourages the State to be more responsive and creative in engaging with societal, market and international forces to ensure that its

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<sup>15</sup> For example, Jonah D Levy, *The State After Statism: New State Activities in the Age of Liberalization* (Harvard University Press, 2006).

<sup>16</sup> For example, Federico Caprotti, 'Financial crisis, activist states and (missed) opportunities' (2009) 5(1/2) *Critical perspectives on international business* 78-84; M Ramesh and Ian Holliday, 'The Health Care Miracle in East and Southeast Asia: Activist State Provision in Hong Kong, Malaysia and Singapore' (2001) 30(04) *Journal of Social Policy* 637-651.

<sup>17</sup> For example see, Arthur Lewis, 'The State of Development Theory' (1984) 5(8) *American Economic Review*; Albert O Hirschman, 'Exit, Voice, and the State' (1978) 31(1) *World Politics* 90-107.

primary purpose—to serve its citizens—is given full consideration. This approach is closely in line with the theoretical positions adopted by many developmental and heterodox economists in the context of the role of government in the economy.<sup>18</sup>

The model covers the scope and nature of resources (including both qualitative and quantitative dimensions), mobilisation, allocation and governance of these resources from an ESC rights perspective. It also incorporates essential features of State policy, including: key areas of social justice, equity and fairness in distribution of economic benefits; vigorous engagement with the market and the international community; combined action with the community and the private sector; and more transparent, accountable and efficient institutions for the mobilisation and allocation of resources. The model is represented in Figure 2 on the next page.

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<sup>18</sup> See for example, Frederic Lee, *A History of Heterodox Economics: Challenging the mainstream in the twentieth century* (Routledge, New York, 2009); Manuel Couret Branco, *Economics versus Human Rights* (Routledge, London, 2009); Radhika Balakrishnan and Diane Elson, 'Economic Policies and Human Rights Obligations' in Radhika Balakrishnan; Diane Elson (ed), *Economic Policy and Human Rights* (Zed Books, London, 2011) 257; Julien-Francois Gerber and Rolf Steppacher (eds), *Towards an Integrated Paradigm in Heterodox Economics: Alternative Approaches to the Current Eco-Social Crises* (Palgrave Macmillan, 2011).

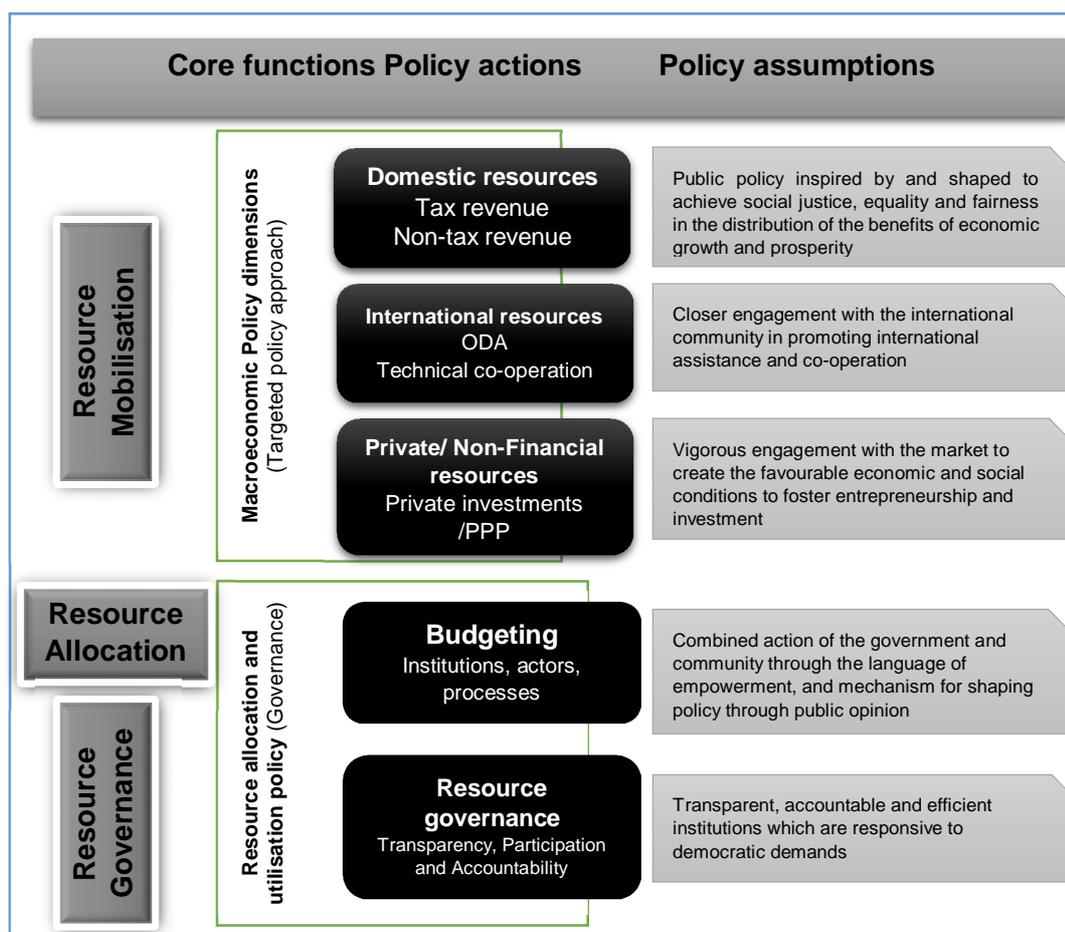


Figure 2: A cross-disciplinary model for 'maximum available resources'

This is a more comprehensive model of 'maximum available resources' within an ESC rights policy framework than those models discussed in section 3.2.1. Given the comprehensive coverage of related policy elements in this model, it has potential to significantly impact the way resources for ESC rights are mobilised, allocated and governed, and is most clearly justified in the context of globalisation dynamics and the changing role of the State.

### 3.2.3 Justifying a cross-disciplinary model of 'maximum available resources' in the context of globalisation dynamics

As discussed in Chapter 1, globalisation and the economic and social dynamics of the world have a significant impact on the overall enjoyment of

human rights, particularly ESC rights for much of the world's population. Changes in the manner and scope of interactions between States in a globalised world have transformed the conditions in which these rights can be realised.

The fact that the focus of the international human rights regime is on the dignity and well-being of each individual<sup>19</sup> makes it necessary to move beyond the narrow interpretation of international human rights obligations that neglects the human rights of individuals in order to shield States. As Mark Gibney argues, 'given the profound impact one State can have on the citizens of another State in the current global structure, requires the State obligations to be defined beyond the historical narrow perspective.'<sup>20</sup> International law is now faced with the dilemma of regulating conduct between States in an environment in which the States are no longer the only international actors.<sup>21</sup> This is particularly evident in the power and influence of transnational corporations and conglomerates and their impact on State policies, including those related to human rights.

Transforming the policy role of the State, thus, requires a model of an 'activist State' that is sensitive to democratic demands of the people, engages with the broader society in policy formulation and implementation, and takes an active role in promoting and supporting private enterprise while ensuring that national wealth and prosperity is achieved in a fair and equitable manner with a focus on human rights and the well-being of individuals. Such an activist stance can significantly strengthen the capacity of the State for resource mobilisation and allocation for ESC rights realisation.

Although the notion of an 'activist State' is not widely used in the contemporary literature, the concept has historical roots in the evolution of academic

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<sup>19</sup> Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp, 2006), 7-8.

<sup>20</sup> Mark Gibney, 'On Terminology: Extraterritorial Obligations' in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, Cambridge, 2012) 32-48, 46.

<sup>21</sup> Skogly, above n 19, 7.

positions on the role of the State in the economy.<sup>22</sup> The terms ‘activist State’ and ‘activist government’ have been used by scholars in both economics and policy, although neither has a single accepted definition.

An important characterisation of an ‘activist State’ is that of João Biehl, who speaks of it as ‘combined State and community actions and the work on public opinion’.<sup>23</sup> This view is based on the legal constructivist perspective and considers how the political exercise of power by the State shapes and influences the legal discourse.<sup>24</sup> Bruce Ackerman’s characterisation, on the other hand, is based on the impact on individuals of the decisions made by State officials, including economic, welfare, defence and other social consequences.<sup>25</sup> All these perspectives share the conceptualisation of the ‘activist State’ as a central synergistic force between State and society which helps create conditions that enable both the State and the society to overcome challenges in the implementation of socially desired policies. Thus, this approach broadens the fiscal and policy space around resources requirements for ESC rights.

The impact of globalisation on the realisation of ESC rights, especially through its effect on government resources and capacity, is significant and has the potential to undermine rights realisation at many levels.<sup>26</sup> It is also argued that macroeconomic policies such as privatisation and commodification of essential services in the current economic system have ‘reduced the promise of ESC rights to empty rhetoric, through undermining people’s ability to enjoy rights’.<sup>27</sup> If this claim is correct, relevant public policy stances must be

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<sup>22</sup> In economics literature, the role of the State in the economy can be viewed from very different opposing perspectives – of Adam Smith, in which the State is seen as an outsider (but often a violent intervener) in the economy; and that of Johann Heinrich Gottlob von Justi, for whom the State is a peaceful and productive participant within the economy.

<sup>23</sup> João Biehl, ‘The Activist State: Global Pharmaceuticals, AIDS, and Citizenship in Brazil’ (2004) 22(3) *Social Text* 105-132, 115. Biehl attributes this notion to the former President of Brazil Fernando Henrique.

<sup>24</sup> Bruce Ackerman, ‘Foreword: Law in an Activist State’ (1983) 92(7) *The Yale Law Journal* 1083-1128.

<sup>25</sup> *Ibid.*

<sup>26</sup> Paul O’Connell, ‘The Death of Socio-Economic Rights’ (2011) 74(4) *The Modern Law Review* 532-554, 533.

<sup>27</sup> *Ibid.*, 552.

scrutinised for their impact on ESC rights realisation. In this context, Inge Kaul and Pedro Conceição discuss the interrelationship between public finance and national policy, with particular emphasis on how globalisation affects the ability of the State to deliver the public services.<sup>28</sup> This is where State activism in relation to fiscal policy comes into play.

The undercurrents of globalisation significantly impact on the ability of the State to shape human rights and social policy, particularly in relation to command over resources for the implementation of these policies. Increased globalisation and the business activities of multinational corporations have created further challenges for developing countries in the area of revenue generation, especially in relation to tax evasion and avoidance by large multinationals.<sup>29</sup> It is argued that the existing rules and policy environment are insufficient to address these issues.<sup>30</sup> Hence, stronger rule-based tax laws and governance systems are essential at both national and international levels.<sup>31</sup>

These developments necessitate all States, especially developing States, to take a more active stance in re-shaping the policy environment to maximise their control over resources and policies in order to ensure the effective implementation of human rights policies. In the face of the diminishing power of States to control and direct their own destiny in the face of transnational

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<sup>28</sup> Inge Kaul and Pedro Conceição, 'Why Revisit Public Finance Today?' in Inge Kaul and Pedro Conceição (eds), *The New Public Finance: Responding to Global Challenges* (The United Nations Development Programme, New York, 2006) 1, 1.

<sup>29</sup> See for example, Wolfgang Obenland, 'Taxes and human rights' (Policy brief of the Tax Justice Network Germany, Tax Justice Network Germany; Christian Aid, 'Financing people-centred sustainable development' (Position Paper, Christian Aid, January 2015), <<http://www.christianaid.org.uk/Images/financing-people-centred-sustainable-%20development-january-2015.pdf>>; ActionAid International, *The Elephant in the Room: How to Finance our Future* (ActionAid, Johannesburg, 2014), <[http://www.actionaid.org/sites/files/actionaid/the\\_elephant\\_in\\_the\\_room\\_-\\_how\\_to\\_finance\\_our\\_future.pdf](http://www.actionaid.org/sites/files/actionaid/the_elephant_in_the_room_-_how_to_finance_our_future.pdf)>.

<sup>30</sup> For example, Joel Slemrod, 'Cheating Ourselves: The Economics of Tax Evasion' (2007) 21(1) *Journal of Economic Perspectives* 25-48; Timothy Besley and Torsten Persson, 'Why Do Developing Countries Tax So Little?' (2014) 28(4) *ibid.* 99-120; Grahame Dowling, 'The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?' (2014) 124(1) *Journal of Business Ethics* 173-184.

<sup>31</sup> Various aspects of taxation, tax evasion and avoidance are discussed in detail in Chapter 4.

influences, a policy stance grounded in proactive engagement with domestic and international actors has become ever more urgent.

### 3.3 KEY ELEMENTS OF RESOURCE MOBILISATION

Mobilisation of ‘maximum’ resources for ESC rights hinges on a number of key domestic policies. Administrative, social, educational and financial measures need to be fully engaged to generate the best quality resources for ESC rights. In addition to budget appropriations, the definition of resources must also take into account aspects of monetary policy, financial sector policy and deficit financing.<sup>32</sup> Hence, it can be argued that the question of resources goes beyond mere quantitative measures of the resources available to a State. Although quantitative and tangible dimensions of resources such as taxation, borrowing and financial aid remain at the centre of resource policy, qualitative dimensions related to the effective use of these resources must also be incorporated into State policy.

The *travaux préparatoires* of the ICESCR show that, during its drafting, concerns were raised with regard to the phrase ‘maximum available resources’ and the danger of this concept being interpreted too narrowly. For example, Chile argued that ‘the expression “to the maximum of their available resources” could, in the absence of a closer definition, be interpreted as applying only to the resources of the States available for that particular purpose, and not their overall resources.’<sup>33</sup> It was also contended that: ‘States might argue that their resources for the implementation of the rights concerned were limited’<sup>34</sup> and that governments are faced with allocation decisions that involve, for example, ‘reconciling defence requirements with those of the social services.’<sup>35</sup>

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<sup>32</sup> Balakrishnan et al, above n 10, 2.

<sup>33</sup> *Summary record of the 236th meeting of the Commission on Human Rights*, E/CN.4/SR.236, 7th sess, (2 July 1951), [19].

<sup>34</sup> *Ibid.*, [20].

<sup>35</sup> *Ibid.*

Although the definition of ‘resources’ did not go so far as to clearly identify the various forms and types of resources applicable, the general concerns were debated during the drafting of the Covenant. For example, the Lebanese delegation emphasised the broad nature of resources required, arguing that ‘the resources of a State should be interpreted broadly to include budgetary appropriations and also technical assistance, international co-operation and other elements’.<sup>36</sup> Egypt stated that the available resources of a small country would be insufficient ‘even if utilised to the maximum’ and ‘as a result, those countries would have to fall back to international co-operation’.<sup>37</sup> Denmark and the United States insisted that ‘available’ would apply to both national and international resources.<sup>38</sup>

As explained in Chapter 2, resources can be defined in broad terms to include financial and non-financial resources that are available within the State and from outside. ESC rights literature increasingly acknowledges the resource intensiveness of ESC rights<sup>39</sup> and the need to provide broader and more creative definitions of resources.<sup>40</sup> Linking such broad definitions of resources with the need to ‘maximise’, as discussed in Chapter 1, forms the core approach of this cross-disciplinary model.

### 3.3.1 Scope of resources: Financial and non-financial resources

Financial resources, as indicated in budget plans, are the most immediate and easily identifiable of the resources available to the State. Budgetary appropriations and budget priorities provide a strong platform to measure

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<sup>36</sup> *Summary Record of the 271<sup>st</sup> meeting of the UN Commission on Human Rights*, UN Doc E/CN.4/SR.271 (14 May 1952), [5].

<sup>37</sup> *Summary record of the 236<sup>th</sup> meeting of the Commission on Human Rights*, above n 33, [18].

<sup>38</sup> *Ibid.*, [20, 25].

<sup>39</sup> For example, Maurice Cranston, ‘Human Rights, Real and Supposed’ in D Raphael (ed), *Political Theory and the Rights of Man* (Indiana University Press, Bloomington, 1967) 43–53.

<sup>40</sup> For example, Shareen Hertel and Lanse Minkler, ‘Economic Rights: The Terrain’ in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007).

elements of the State's mobilisation of resources for ESC rights. Many aspects of financial planning and taxation regimes are relevant to the amount of financial resources accessible to a State. That public expenditure is essential for the realisation of ESC rights has been recognised by the ESCR Committee on several occasions, particularly in statements to the effect that ESC rights obligations 'often require positive budgetary measures'.<sup>41</sup>

While a focus on the budget and financial resources can be justified on the basis that these are the main tools for government intervention in the direct provision of public services, they do not complete the 'real' resource envelope of a modern State. The dominant focus on resources potentially limits debate on State obligations to take steps to acquire financial resources, thus narrowing the scope for advocacy. Even though budget allocations constitute the core resource over which the State has control in terms of policy implementation, the nature of ESC rights makes it possible to look for non-financial resources.

Non-financial resources for the purpose of ESC rights identified by ESC rights scholars comprise human resources, natural resources, technology, management capacity and cultural resources.<sup>42</sup> These resources are argued to be relevant and capable of complementing government efforts to enhance social services related to ESC rights.<sup>43</sup> They are in no way a substitute for financial resources: but they can play a crucial role in significantly enhancing the productivity and output of financial resources that are in place for realisation of these rights.

Non-financial resources, however, may not always be easy to quantify or be effectively applied to diverse policy purposes. For example, information as a resource may be applicable to one set of services but not for another, or at

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<sup>41</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 4, para 7.

<sup>42</sup> For example see, Robertson, above n 1; Skogly, above n 6; United Nations Committee on the Rights of the Child, *General Comment No 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)*, 34<sup>th</sup> sess, UN Doc CRC/GC/2003/5 (27 November 2003).

<sup>43</sup> For example see, Robertson, above n 1; Skogly, above n 6.

least not as effective in terms of outcome. Information resources may be cost-effectively utilised in significantly enhancing areas such as education and health services, but could have much limited application in other ESC rights areas. Similarly, the broader mobilisation of natural resources may be highly beneficial for enhancing the enjoyment of certain rights but may be of more limited application in another area. All these types of non-financial resources are most relevant as societal resources which can be mobilised through macroeconomic policies that facilitate and encourage their direction towards ESC rights realisation.<sup>44</sup>

### 3.3.2 Public sector resources

Public sector spending targeted at the provision of basic services generally includes not only budgetary appropriations but also many fiscal policy variables such as the aggregate level of public spending, the priority given to different sectors and spending associated with these sectors, as well as the relative importance attached to the provision of basic services in public expenditure as a whole.<sup>45</sup> These resources by their nature are more readily accessible to State.

At the domestic level, fiscal space is represented by elements of domestic revenue mobilisation and administration, external grants, debt and deficit financing through domestic and external borrowing, and expenditure-related policies.<sup>46</sup> Fiscal capacity is a measure of how much tax revenue the government can collect given the institutional capacity.<sup>47</sup> The World Bank argues that fiscal space can be expanded by a number of key policy actions

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<sup>44</sup> This aspect of non-financial resources will be covered in more detail in Chapter 6.

<sup>45</sup> 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* 402-435, 420.

<sup>46</sup> Rathin Roy, Antoine Heuty and Emmanuel Letouzé, 'Fiscal Space for What?: Analytical Issues from a Human Development Perspective' (Paper presented at the G-20 Workshop on Fiscal Policy, Istanbul, 30 June 30-2 July 2007) i.

<sup>47</sup> Timothy Besley and Torsten Persson, 'Taxation and Development' in Alan Auerbach et al (eds), *Handbook of Public Economics* (Elsevier, 2013) 51, 3.

including: reducing low priority spending; enhancing the government's implementation capacity; better targeting subsidies and transfer programmes; and rationalising administered prices of publicly provided goods and services.<sup>48</sup>

The ability of the State to fulfil ESC rights can be seen as primarily based on government resources, because without these resources, government's ability to provide the goods and services required for the realisation of rights will be limited.<sup>49</sup> On the other hand, even those governments with adequate resources may still fail to implement the policies and establish institutions for the realisation of ESC rights, simply because they lack the political will to do so.

Public sector revenue can be categorised as tax revenue, non-tax revenue and debt and deficit financing. The collection and disbursement of government revenue and government interventions in the provision of goods and services are best understood within the context of public goods, externalities, and market failure.<sup>50</sup> Government revenue and expenditure can be evaluated against 'socially optimal' policy outcomes, which brings into consideration the choices of action available to economic agents—policymakers and public consumers.<sup>51</sup> Whereas the neoclassical economic approach favours reduced government intervention in the economy through lower taxation and government revenue and reduced government expenditure, the developmental economists, mainly Keynesians and heterodox economists, favour greater involvement of the government in the economy through revenue raising and increased expenditure.<sup>52</sup> This view also supports government borrowing and debt financing as a means to provide social infrastructure and ensure the protection of the most vulnerable. Many poor countries, however,

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<sup>48</sup> The World Bank, *South Asia Economic Focus: Creating Fiscal Space through Revenue Mobilization* (The World Bank, Washington, D.C., 2012), <<http://www-wds.worldbank.org> xi.

<sup>49</sup> Lanse Minkler and Shawna Sweeney, 'On the Indivisibility and Interdependence of Basic Rights in Developing Countries' (2011) 33(2) *Human Rights Quarterly* 351-396, 356-357.

<sup>50</sup> Gareth D Myles, *Public Economics* (Cambridge University Press, Cambridge, 2001).

<sup>51</sup> *Ibid.*

<sup>52</sup> For a review of history and theory of heterodox economics, see Lee, above n 18.

are at a disadvantage not only in raising sufficient revenue but they are also often burdened with debt, both foreign and domestic, which weakens the State's ability to effectively manage its resources.

### 3.3.3 Resources through international assistance and co-operation

Resources that are available through international assistance and co-operation are imperative to supplement domestically available resources. While States that lack sufficient resources to implement the rights recognised in the ICESCR are under an obligation to seek international assistance, the question of the extent to which, if at all, resource-rich countries have an obligation to provide assistance is still debated.<sup>53</sup> Recently, during the drafting of the ICESCR-Optional Protocol, the Netherlands, Spain, Sweden and the United Kingdom emphasised that the State had the primary responsibility to implement its obligations<sup>54</sup> and that international co-operation does not constitute a legal obligation, although it can be understood as a moral obligation.<sup>55</sup>

The need for international assistance and co-operation was envisaged at the very early draft stage of the ICESCR.<sup>56</sup> The discussions show that the issue of international co-operation was discussed in the context of State resources, particularly the need for States with insufficient resources to be able to access international support for the realisation of these rights.<sup>57</sup> Thus, there was significant support from many States for the US proposal to include

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<sup>53</sup> Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521-556.

<sup>54</sup> *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, 62<sup>nd</sup> sess, UN Doc E/CN.4/2006/47 (14 March 2006), [81].

<sup>55</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session*, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/52 (10 February 2005), (UK, the Czech Republic, Canada, France and Portugal).

<sup>56</sup> See, Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2009), 299.

<sup>57</sup> United Nations General Assembly, *Official Records*, 3<sup>rd</sup> Comm, UN Doc A/3525 (9 February 1957), [131].

'international assistance and cooperation' in the Covenant text.<sup>58</sup> Emphasising the fundamental importance of protecting the minimum of rights included in the Covenant, Chile held that the State and the international community had an obligation to realise those rights fully by all possible means'.<sup>59</sup> Greece proposed inclusion of the words 'international mutual assistance' to replace 'international co-operation', because it would broaden the scope of this co-operation.<sup>60</sup> It was suggested that the phrase 'with international assistance and cooperation, especially economic and technical' be used to expand the term 'international co-operation'.<sup>61</sup> The US delegate expressed the view that the phrase 'international co-operation' is adequate for the purpose and the 'addition of qualifying phrases could only limit the range of possible co-operative activities'.<sup>62</sup> India stated that 'international cooperation was of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights'.<sup>63</sup>

Overall, the discussions revealed the importance of international co-operation and assistance activities and the need to base these on mutual respect and shared responsibility between the donors and recipients.

As well as emphasising the relevance of the concept of available resources to both resources within a State and those available from the international community through international co-operation and assistance,<sup>64</sup> the Limburg

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<sup>58</sup> Commission on Human Rights, *Summary Record of the 216<sup>th</sup> meeting of the UN Commission on Human Rights*, UN Doc E/CN.4/SR.216 (21 May 1951), (Chile); Commission on Human Rights, *France: Draft articles to be inserted before article 20*, 8<sup>th</sup> sess, Agenda Item 4, UN Doc E/CN.4/L.55 (25 April 1952), (France); *Summary record of the 231<sup>st</sup> meeting of the Commission on Human Rights*, E/CN.4/SR.231, 7<sup>th</sup> sess, (2 July 1951), (India); *Summary record of the 236<sup>th</sup> meeting of the Commission on Human Rights*, above n 33, (Greece, Egypt, Denmark).

<sup>59</sup> *Summary Record of the 271<sup>st</sup> meeting of the UN Commission on Human Rights*, E/CN.4/SR.271, above n 36, [17] (Santa Cruz).

<sup>60</sup> *Summary record of the 236<sup>th</sup> meeting of the Commission on Human Rights*, above n 33, [26].

<sup>61</sup> United Nations general Assembly, *Record of Third Committee*, UN Doc A/C.3/L.1046, (Bolivia, Chile, Columbia, Mali and Ecuador).

<sup>62</sup> United Nations General Assembly, *Third Committee, Summary Record, 1204<sup>th</sup> meeting*, A/C.3/SR.1204, 17 UN GAOR, (6 December 1962).

<sup>63</sup> *Summary record of the 231<sup>st</sup> meeting of the Commission on Human Rights*, above n 58.

<sup>64</sup> UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the*

Principles underscore the propositions that international assistance and co-operation should give priority to the realisation of all human rights, that such co-operation and assistance should be provided irrespective of differences in political, economic, and social systems among States,<sup>65</sup> and that international assistance must be based on sovereign equality among States.<sup>66</sup> The Principles also recognise that international assistance and co-operation should be part of the reporting mechanism under the Covenant and that State reports 'should indicate the areas where more progress could be achieved through international co-operation and suggest economic and technical co-operation programmes that might be helpful toward that end.'<sup>67</sup>

The ESCR Committee also drew attention to the need for States to identify their particular needs for technical assistance or development co-operation.<sup>68</sup> With reference to Article 55 and 56 of the United Nations Charter, principles of international law and the Covenant, the Committee emphasised that 'international co-operation for development and the realization of ESC rights is an international obligation of all States'.<sup>69</sup> It was further argued that particular effort is required to ensure that proper protection mechanisms are built into such programmes using the approaches known as 'adjustment with a human face' or 'the human dimension of development', which afford special attention to the poor and vulnerable.<sup>70</sup> The Committee's reference to international co-operation as a means to protect ESC rights during times of crisis and its particular attention to the provision of 'major debt relief initiatives'<sup>71</sup> suggest that it recognised the role of international assistance and co-operation for the realisation of these rights. The Committee maintained that 'maximum available

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*Centre for Human Rights ("Limburg Principles")*, UN Doc E/CN.4/1987/17 (8 January 1987).

<sup>65</sup> *Ibid.*, Principle 31.

<sup>66</sup> *Ibid.*, Principle 33.

<sup>67</sup> *Ibid.*, Principle 81.

<sup>68</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 2: International Technical Assistance Measures (Art. 22)*, 4<sup>th</sup> sess, UN Doc E/1990/23 (2 February 1990), [10].

<sup>69</sup> *CESCR General Comment No 3*, E/1991/23, above n 3, [14].

<sup>70</sup> *CESCR General Comment No 2*, E/1990/23, above n 68, [9].

<sup>71</sup> *Ibid.*

resources' creates an 'entitlement' to 'receive resources offered by the international community'<sup>72</sup> and noted that:

in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.<sup>73</sup>

Despite its significance, however, international assistance and co-operation is not understood as an automatic right for States but rather as a supplementary means of supporting the efforts of individual States. To date, the Committee has not clarified whether wealthy States have an obligation under the Covenant to assist poor States.<sup>74</sup> Based on the work of the Committee so far on the question of seeking development assistance and co-operation for the realisation of ESC rights, it can be argued that poorer States have a duty to 'actively seek' international assistance, in line with the Article 2(1) requirement.<sup>75</sup> States in need of international assistance can request this from wealthier States, UN agencies, inter-governmental and non-governmental organisations.<sup>76</sup> In this context, some argue that if a corresponding duty to assist does not exist, then the duty to seek assistance would not make any sense.<sup>77</sup>

During the drafting of the Optional Protocol, the nature of international co-operation was identified as not being limited to development aid, and it was noted that the obligations under the Covenant should be considered in the light of the various political declarations and commitments, including the Monterrey

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<sup>72</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 4, [5].

<sup>73</sup> *CESCR General Comment No 3*, E/1991/23, above n 3, [14].

<sup>74</sup> Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11(1) *Human Rights Law Review* 1-35, 9, 26.

<sup>75</sup> María Magdalena Sepúlveda Carmona, 'The obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8' (2009) 13(1) *The International Journal of Human Rights* 86-109, 94-95.

<sup>76</sup> *Ibid.*

<sup>77</sup> Gondek, above n 56, 354.

Declaration and the Millennium Declaration.<sup>78</sup> The open-ended Working Group to consider options regarding the elaboration of an optional protocol under the ICESCR also proposed the establishment of a fund to assist States in the implementation of recommendations and proposed remedies for violations of ESC rights.<sup>79</sup>

In relation to specific ESC rights, the Committee identifies the role of international assistance and co-operation as of utmost importance. For example, in its General Comment on the right to adequate housing the Committee noted that, in situations where a State finds the required steps are beyond its capacity, particularly the maximum available resources, a request for international co-operation must be made by the State requiring such assistance.<sup>80</sup> Similarly, in the area of monitoring the situation with respect to housing, States are also required to take steps, 'either alone or on the basis of international cooperation'.<sup>81</sup> On the right to food, States should 'recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food'<sup>82</sup> and 'should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required'.<sup>83</sup> The Committee also noted the importance of international assistance in the provision of disaster

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<sup>78</sup> *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, E/CN.4/2006/47, above n 54, [78].

<sup>79</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session*, E/CN.4/2005/52, above n 55, [105]; *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, E/CN.4/2006/47, above n 54, [7].

<sup>80</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11 (1)) of the Covenant*, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991), [10].

<sup>81</sup> *Ibid.*, [13].

<sup>82</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (art. 11)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/5 (12 May 1999), [36].

<sup>83</sup> *Ibid.*

relief and humanitarian assistance in times of emergency, and urged all States to ‘contribute to this task in accordance with its ability’.<sup>84</sup>

On the right to water, the Committee specified that all States and other actors in a position to assist are required to provide international assistance and co-operation, especially economic and technical.<sup>85</sup> In some instances, the Committee has also identified to States, based on their reports, areas that require international assistance.<sup>86</sup>

In relation to the right to the highest attainable standard of health, the Committee noted that ‘it is particularly incumbent on States parties and other actors in a position to assist,<sup>87</sup> to provide international assistance and co-operation, especially economic and technical. In relation to the right to education, it is stated that ‘international assistance and co-operation’ as well as ‘international action’ can be invoked in cases where the State lacks resources to fulfil this right. It is also noted that: ‘Where a State party is clearly lacking in the financial resources and/or expertise required to “work out and adopt” a detailed plan, the international community has a clear obligation to assist.’<sup>88</sup> With regard to cultural rights under Article 15, there is specific recognition in the Covenant that benefit should be ‘derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.’<sup>89</sup> These recommendations by the Committee indicate that developing States have an obligation to ‘seek

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<sup>84</sup> *Ibid.*, [38].

<sup>85</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29<sup>th</sup> sess, UN Doc E/C.12/2002/11 (20 January 2003), [38].

<sup>86</sup> Carmona, above n 75.

<sup>87</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000), [45]; *CESCR General Comment No 3*, E/1991/23, above n 3, [14].

<sup>88</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 11: Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/4 (10 May 1999), [9].

<sup>89</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 15(14) (*ICESCR*).

assistance' based on their needs, although the task of seeking international assistance and co-operation can be challenging for most States.

While international norms establish a strong case for assistance and co-operation, there are different forms of international assistance and co-operation. In the area of international financial assistance, bilateral and multilateral financial assistance can take the form of either grants or loans (debts). Apart from the option of seeking bilateral assistance, the States requiring such assistance can also seek help through multilateral or regional mechanisms. In addition to providing assistance and co-operation, States who are part of the decision-making processes of international organisations such as the International Monetary Fund and the World Bank have an additional obligation to do all they can 'to ensure that the policies and decisions of those organisations are in conformity with the obligations of States Parties under the Covenant'.<sup>90</sup>

In summary, developing States have a series of duties with regard to international assistance and co-operation which takes the form of seeking assistance if they do not possess necessary resources in order to ensure that everyone under their jurisdiction enjoys the rights recognised in the Covenant.<sup>91</sup> The matter is, however, not settled as to whether there is a clear and well-established principle of international law that 'obliges' States to provide international assistance and co-operation as a matter of international law.<sup>92</sup> Yet, the discussions above indicate that rich States are 'expected', if not obliged, to provide assistance and co-operation, particularly if such requests are received from developing States. The Committee's emphasis on encouraging States 'to do all they can' suggests that the Committee considers

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<sup>90</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations - United Kingdom of Great Britain and Northern Ireland, The Crown Dependencies and the Overseas Dependent Territories*, UN Doc E/C.12/1/Add.79 (17 May 2002), 26.

<sup>91</sup> Carmona, above n 75, 94-95.

<sup>92</sup> See for example, Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2014), 140.

that the obligation is not merely negative but involves a much more active role in assisting and co-operating with other States.

### 3.3.4 Resources from the private sector

In addition to public sector resources and international assistance, the private sector is important as a source of resources for ESC rights. This proposition is based on the premise that public sector spending is insufficient in most cases to address the huge gaps in social services and disparities in the realisation of human rights. In terms of total resources available within a State, private sector resources are much larger and more varied than those of the public sector. Hence, it is necessary for the State to allow and encourage the use of private sector resources for the purpose of addressing ESC rights.<sup>93</sup>

Private sector contribution is crucial for the realisation of some individual rights, which can be achieved through co-responsibility between the public sector and private parties. Such provision, however, should generally be voluntarily provided. Another approach to leveraging is a public-private partnership, which allows the private sector to carry out important investments that contribute to the provision of goods and services required for ESC rights.<sup>94</sup> In this context, the ESCR Committee has suggested that government can engage the private sector, through subsidies and tax credits, to provide some services for the realisation of rights, such as building low-cost housing.<sup>95</sup> The Committee further stated that governments, at both national and local levels, 'must take measures to ensure that limited resources, public as well as private, are used in the most effective manner to promote the realisation of rights'.<sup>96</sup>

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<sup>93</sup> Robertson, above n 1, 699.

<sup>94</sup> Balakrishnan et al, above n 10, 8.

<sup>95</sup> Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, Geneva, Agenda Item 14 (g) of the provisional agenda, UN Doc E/2007/82 (25 June 2007), [35].

<sup>96</sup> Ibid.

Highlighting the increasingly important role played by private sector entities, including non-State and corporate actors, the ESCR Committee commented that:

The corporate sector in many instances contributes to the realization of economic, social and cultural rights enshrined in the Covenant through *inter alia* input to the economic development, employment generation, and productive investment.<sup>97</sup>

The Committee went on to note that the States parties have the obligation to respect, protect and fulfil ESC rights in the context of corporate activities<sup>98</sup> and that: ‘Fulfilling rights entails that States Parties undertake to obtain the corporate sector’s support to the realization of economic, social and cultural rights.’<sup>99</sup>

A number of international and domestic instruments, such as the *Guiding Principles on Business and Human Rights* and the *UN Guiding Principles on Extreme Poverty and Human Rights*, provide some elements of a framework that can be useful in managing access to private sector resources for the purpose of ESC rights realisation.<sup>100</sup> The former Special Rapporteur, Danilo Türk, argues for ‘creating space’ for private sector initiatives to drive private sector resources and develop solutions to problems in ESC rights on the ground.<sup>101</sup>

Nonetheless there are concerns about the engagement of private sector resources in the provision of ESC rights-related services, particularly given the

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<sup>97</sup> Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, UN Doc E/C.12/2011/1 (20 May 2011), [1].

<sup>98</sup> *Ibid.*, [3].

<sup>99</sup> *Ibid.*, [6].

<sup>100</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (OHCHR, 2011), <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)>; Magdalena Sepúlveda, *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, 21<sup>st</sup> sess, Agenda Item 3, UN Doc A/HRC/21/39 (18 July 2012).

<sup>101</sup> Danilo Türk, *The Realization of Economic, Social and Cultural Rights*, 44<sup>th</sup> sess, Agenda Item 8 of the provisional agenda, UN Doc E/CN.4/Sub.2/1992/16 (3 July 1992).

complex manner in which these contractual arrangements are made and implemented.<sup>102</sup> These concerns, however, can be addressed through appropriate government policy approaches that take into consideration the strengths and weaknesses of the private sector in specific areas and by providing complementary government support to maximise outcomes. Private sector resources, then, must be mobilised through direct involvement of the government in public-private partnerships and other such mechanisms and by creating an environment conducive to private sector and community initiatives.

The challenges and policy approaches that can be adopted for such partnership mechanisms are discussed in Chapter 6.

### **3.3.5 Policy dimensions of resource mobilisation**

As identified in the resource model described in section 3.2.2, mobilisation of adequate resources for ESC rights involves redirection of the State's macroeconomic policy to maximise the quantity and quality of these resources. This requires targeted fiscal and monetary policy approaches that can improve public sector resources, increase engagement with the international community in relation to seeking appropriate aid and assistance, and facilitate the private sector to direct more resources into ESC rights areas.

The role of macroeconomic policy as a key component of ESC rights policy has been acknowledged in recent years. For example, the Special Rapporteur on Extreme Poverty presented a report to the Human Rights Council in May 2014 which outlined key areas of macroeconomic policy that are essential for the realisation of ESC rights. In that report, the Special Rapporteur addressed issues relevant to revenue-raising policies, especially tax measures and practices, from a human rights perspective, and proposed a 'human rights based approach' to revenue raising which incorporated widening of the tax

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<sup>102</sup> Balakrishnan et al, above n 10, 9.

base, improving efficiency, tackling tax abuse and broadening the contribution of the financial sector to address these objectives.<sup>103</sup>

Fiscal policies were identified as crucial in 'achieving equality, tackling discrimination, and strengthening governance and accountability, as well as combating poverty and funding development.'<sup>104</sup> Taxation policy is, thus, highly relevant in addressing inequality in the society because, even though the human rights system does not prescribe any policy guidelines on taxation, tax policies have a huge impact on the level of achievement of human rights. The need for a progressive tax system with re-distributive capacity is essential for redressing discrimination and ensuring equal access to ESC rights.<sup>105</sup>

Monetary policy tools such as interest rate, exchange rate, money supply and regulation of the financial sector, for example, can have a significant impact, not only on government revenue, but also on the overall economy and the ability of individuals to fulfil their basic needs and ESC rights.<sup>106</sup> Therefore, while monetary policy tools are used by the central bank, independent of the executive branch of the State, it is highly relevant for the considerations regarding the State's overall financial resources potential.

In summary, the argument here is that resources at the disposition of the State for the purpose of ESC rights policy can include both financial and non-financial resources that can be mobilised through public sector finance, international assistance and co-operation, as well through engagement with the private sector and societal resources. Mobilisation of these diverse types of resources must be incorporated into the macroeconomic policy framework

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<sup>103</sup> Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, 26<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/26/28* (22 May 2014).

<sup>104</sup> *Ibid.*, [1].

<sup>105</sup> *Ibid.*, [16-17].

<sup>106</sup> This relationship has been explored by some authors including Radhika Balakrishnan, *Why MES with Human Rights?: Integrating Macro Economic Strategies with Human Rights* (US Human Rights Network), <<http://www.rightingfinance.org/wp-content/uploads/2012/10/whymes2005.pdf>>.

and must be actively sought by the State. This is discussed in detail in Chapters 4, 5 and 6.

### 3.4 KEY ELEMENTS OF RESOURCE ALLOCATION

The ESCR Committee recognised and respected the ‘authority vested in relevant State organs to adopt what it considers to be its most appropriate policies and to allocate resources accordingly.’<sup>107</sup> The emphasis here is on the effective allocation of available resources. The importance of ‘equitable and effective use of and access to the available resources’,<sup>108</sup> and the need to give priority to subsistence rights is also recognised.<sup>109</sup> The State is, thus, required to be mindful of the manner in which available resources are targeted towards achieving the ESC rights objectives. This creates a stronger need for resource allocation decisions and opportunity cost calculations to factor in State obligations in relation to ESC rights. Therefore, this brings us to the question of resource allocation from an ESC rights perspective, and our attempt to understand the dynamics of public sector resource allocation decisions.

#### 3.4.1 Dynamics of public sector resource allocation decisions

The question of allocation of resources attracted a lot of debate during the drafting of the Covenant. For example, Chile argued that governments are challenged ‘to apportion allocations between the various branches of the social services or other budgetary appropriations’<sup>110</sup> thus dictating to States how to allocate resources would be unrealistic. Concerns were also raised during the drafting of the Optional Protocol that the complaints procedure

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<sup>107</sup> *An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, above n 4, [2].

<sup>108</sup> *Limburg Principles*, E/CN.4/1987/17, above n 64, Principle 27.

<sup>109</sup> *Ibid.*, Principle 28.

<sup>110</sup> *Summary record of the 236th meeting of the Commission on Human Rights*, above n 33, [20].

under the ICESCR-OP might interfere with the national policy making and budgetary process.<sup>111</sup> The key issues were that resource allocation decisions would better be left to the States and the Committee should not interfere with the process.<sup>112</sup> Some also questioned whether the allocation of resources can be a legitimate issue under the Optional Protocol.<sup>113</sup> These discussions clearly point to recognition of the State's primary role in resource allocation as an integral part of the realisation of the ESC rights.

One of the central, yet extremely difficult, questions in relation to resource allocation for ESC rights is that of the trade-offs involved in terms of what can be achieved today with available resources against what future resource potential that can be achieved through further investments in non-ESC rights areas. Calculations conducted by Susan Randolph and Patrick Guyer shows that fulfilling ESC rights now has the effect of enhancing future resources capacity thereby expanding the potential for enhanced ESC rights fulfilment in the future.<sup>114</sup> To this effect, the feasible level for a State to achieve its ESC rights obligations within available resources and the progress it makes in fulfilling these rights with increased available resources can be effectively analysed using the Achievement Possibility Frontier (APF) proposed by Randolph, Fukuda-Parr, and Lawson-Remer.<sup>115</sup> The APF can also be used to

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<sup>111</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, 60<sup>th</sup> sess, UN Doc E/CN.4/2004/44 (15 March 2004), [21]; Economic and Social Council, *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session*, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/52 (10 February 2005), [6].

<sup>112</sup> *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, E/CN.4/2006/47, above n 54, [14] [21] [89].

<sup>113</sup> *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, E/CN.4/2004/44, above n 111, [57].

<sup>114</sup> See for example, Susan Randolph and Patrick Guyer, 'Tracking the Historical Evolution of States' Compliance with their Economic and Social Rights Obligations of Result: Insights from the Historical SERF Index' (Working Paper No 18, The Human Rights Institute - University of Connecticut, <<http://web2.uconn.edu/economics/working/18.pdf>>.

<sup>115</sup> 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' (Economics Working Papers. Paper 200822 University of Connecticut, Department of Economics; Randolph and Guyer.

calculate and estimate the level of achievement of substantive ESC rights, reflected by key socio-economic indicators, as against the resources of the State.<sup>116</sup>

As the body responsible for monitoring State compliance with ESC rights obligations, the ESCR Committee has, on many occasions, identified specific areas where it feels the State needs to increase and prioritise resource allocation. For example, rights relating to children's welfare, particularly with regard to exploitation, child labour, trafficking, poverty and malnutrition, were identified as areas in which States must increase their resource allocation.<sup>117</sup> In specific cases, the Committee has also called upon States to increase the 'resources allocated to reducing unemployment rate',<sup>118</sup> and expressed its dissatisfaction about the lack of resources allocated for education and the deterioration of educational facilities and materials.<sup>119</sup> The need to increase resources allocated for education targeted towards quality improvement, reducing dropouts, reducing gender disparity, and enhanced human rights education has been highlighted in many other reports.<sup>120</sup> The shortage of resources in the education sector and the weakening of educational standards were identified in the case of Azerbaijan in 1997.<sup>121</sup>

The Committee also recommended that, given the limited available resources,<sup>122</sup> States take measures to concentrate on other priority areas such

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<sup>116</sup> Randolph and Guyer, above n

<sup>117</sup> For example, CESCR, *Concluding observations: Bolivia*, E/C.12/1/Add.60 (21 May 2001); CESCR, *Concluding observations: Jamaica*, E/C.12/JAM/CO/3-4 (10 June 2013); CESCR, *Concluding observations: Indonesia*, E/C.12/IDN/CO/1 (19 June 2014).

<sup>118</sup> CESCR, *Concluding observations: Slovakia*, E/C.12/1/Add.81 (19 December 2002), [24].

<sup>119</sup> CESCR, *Concluding observations: Congo*, E/C.12/1/Add.45 (23 May 2000), [23].

<sup>120</sup> For example, CESCR, *Concluding observations: Togo*, E/C.12/TGO/CO/1 (3 June 2013), [34]; CESCR, *Concluding Observations: Latvia*, E/C.12/LVA/CO/1 (7 January 2008), [55]; CESCR, *Concluding observations: Gabon*, E/C.12/GAB/CO/1 (27 December 2013), [30].

<sup>121</sup> CESCR, *Concluding observations: Azerbaijan*, E/C.12/1/Add.20 (22 December 1997), [25].

<sup>122</sup> CESCR, *Concluding observations: Georgia*, E/C.12/1/Add.42 (17 May 2000), [26].

as social security<sup>123</sup> and social insurance.<sup>124</sup> The Committee has, in some cases, urged the State to ‘reallocate international development aid and other resources from non-priority sectors to priority sectors and to ensure that international development aid is utilised for the progressive realisation of the rights’<sup>125</sup> to achieve an adequate standard of living.

The Committee also highlighted the requirement for the allocation of resources for the right to housing on many occasions,<sup>126</sup> specifically in relation to the requirement for improving the overall housing situation in many States, resources required for the implementation of a housing policy targeted at the most vulnerable groups,<sup>127</sup> programmes aimed at granting security of tenancy and provision of access to credit and housing subsidies,<sup>128</sup> and studying the housing situation in order to understand the needs.<sup>129</sup> State resources are also required for the provision of financial support such as rental subsidies to allow low-income individuals to access private rental markets.<sup>130</sup> The resource requirement to implement a national housing plan was identified as a priority in many cases.<sup>131</sup> In some earlier cases, the Committee made direct reference

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<sup>123</sup> CESCR, *Concluding observations: Kyrgyzstan*, E/C.12/1/Add.49 (1 September 2000), [20].

<sup>124</sup> CESCR, *Concluding observations: Bosnia and Herzegovina*, E/C.12/BIH/CO/2 (16 December 2013), [21].

<sup>125</sup> CESCR, *Concluding observations: Congo*, E/C.12/COD/CO/4 (16 December 2009), [29].

<sup>126</sup> CESCR, *Concluding observations: Czech Republic*, E/C.12/CZE/CO/2 (23 May 2014), [16(d)]; CESCR, *Concluding observations: Ukraine*, E/C.12/UKR/CO/6 (23 May 2014), [18]; CESCR, *Concluding Observations: Estonia*, E/C.12/1/Add.85 (19 December 2002), [45].

<sup>127</sup> CESCR, *Concluding observations: Lithuania*, E/C.12/LTU/CO/2 (23 May 2014), [17]; CESCR, *Concluding Observations: Angola* E/C.12/AGO/CO/3 (1 December 2008), [30].

<sup>128</sup> CESCR, *Concluding Observations: Nicaragua*, E/C.12/NIC/CO/4 (28 November 2008), [25].

<sup>129</sup> CESCR, *Concluding observations: Russian Federation*, E/C.12/1/Add.94 (12 December 2003), [55]; CESCR, *Concluding observations: Moldova*, E/C.12/1/Add.91 (12 December 2003), [45].

<sup>130</sup> CESCR, *Concluding observations: France* E/C.12/FRA/CO/3 (9 June 2008), [44]; CESCR, *Concluding Observations: Belgium*, E/C.12/BEL/CO/3 (4 January 2008), [34].

<sup>131</sup> CESCR, *Concluding observations: Cambodia*, E/C.12/KHM/CO/1 (12 June 2009), [29]; CESCR, *Concluding observations: Congo*, E/C.12/COD/CO/4 (16 December 2009), [57]; CESCR, *Concluding observations: Chad*, E/C.12/TCD/CO/3 (16 December 2009), [27].

to the use of 'maximum available resources' for the provision of basic services related to housing.<sup>132</sup>

While noting the State's primary role in ESC rights realisation, the Committee referred to the inadequacy of resources allocated for some rights. In the case of Turkey, for example, the Committee made specific recommendations to ensure that new labour market policies were aimed at increasing employment opportunity and that 'more resources for job creation'<sup>133</sup> were allocated. The need to allocate adequate resources for reducing unemployment, particularly among youth, was identified in the Concluding Observation on Mauritania.<sup>134</sup> The inadequacy of resource allocation for primary and secondary education was noted in the 2001 review of Panama and the State was recommended to 'take measures aimed at increasing the resources available to fight illiteracy and promote primary and secondary education'.<sup>135</sup>

The Committee has made specific recommendations with regard to the allocation of resources for health services.<sup>136</sup> These recommendations have been consistent for both developing and developed States.<sup>137</sup> The Committee expressed regret over the insufficiency of material and technical resources including medication and hospital equipment and facilities,<sup>138</sup> low coverage and quality,<sup>139</sup> the non-implementation of reproductive health programmes due to lack of resources,<sup>140</sup> and inadequate resources for health services in rural

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<sup>132</sup> CESCR, *Concluding observations: Dominican Republic*, E/C.12/1994/15 (19 December 1994), [24].

<sup>133</sup> CESCR, *Concluding observations: Turkey*, E/C.12/TUR/CO/1 (12 July 2011), [16].

<sup>134</sup> CESCR, *Concluding observations: Mauritania*, E/C.12/MRT/CO/1 (10 December 2012), [12].

<sup>135</sup> CESCR, *Concluding observations: Panama*, E/C.12/1/Add.64 (24 September 2001), [23], [41].

<sup>136</sup> CESCR, *Concluding observations: Kyrgyzstan*, E/C.12/1/Add.49 (1 September 2000), [33].

<sup>137</sup> CESCR, *Concluding Observations: Finland*, E/C.12/1/Add.52 (1 December 2000), [31].

<sup>138</sup> CESCR, *Concluding observations: Georgia*, E/C.12/1/Add.83 (19 December 2002), [24]; CESCR, *Concluding observations: Turkmenistan*, E/C.12/TKM/CO/1 (13 December 2011), [24].

<sup>139</sup> CESCR, *Concluding observations: Ecuador*, E/C.12/1/Add.100 (7 June 2004), [29].

<sup>140</sup> CESCR, *Concluding observations: Nepal*, E/C.12/1/Add.66 (24 September 2001), [33].

areas.<sup>141</sup> It also noted the low quality of resource allocation for health services,<sup>142</sup> declining percentage of budget allocation to health services<sup>143</sup> and disparities in healthcare services between urban and rural communities.<sup>144</sup> In recent years, direct recommendations to increase the amount of resources allocated for health services,<sup>145</sup> and to the development of human resources for the health sector<sup>146</sup> have become common. The requirement to allocate sufficient resources to address extreme inequality and persistence of poverty has also been identified.<sup>147</sup>

Priority setting in government expenditure has been identified as an issue in some cases. For example, disproportionate military spending was identified as a serious issue in the report on the Philippines, with the Committee remarking that ‘a greater proportion of the national budget is devoted to military spending than to housing, agriculture and health combined.’<sup>148</sup>

These issues of resource allocation warrant deeper analysis in relation to the obligation to use maximum available resources.

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<sup>141</sup> CESCR, *Concluding observations: China (including Hong Kong and Macao)*, E/C.12/1/Add.107 (13 May 2005), [60].

<sup>142</sup> CESCR, *Concluding observations: Zambia*, E/C.12/1/Add.106 (23 June 2005), [29].

<sup>143</sup> CESCR, *Concluding observations: Egypt*, E/C.12/EGY/CO/2-4 (13 December 2013), [21].

<sup>144</sup> CESCR, *Concluding observations: Uzbekistan*, E/C.12/UZB/CO/1 (24 January 2006), [60-61].

<sup>145</sup> For example, CESCR, *Concluding observations: Madagascar*, E/C.12/MDG/CO/2 (16 December 2009), [29(d)]; CESCR, *Concluding observations: Colombia*, E/C.12/COL/CO/5 (7 June 2010), [26]; CESCR, *Concluding observations: Ethiopia*, E/C.12/ETH/CO/1-3 (31 May 2012), [25]; CESCR, *Concluding observations: Djibouti*, E/C.12/DJI/CO/1-2 (30 December 2013), [30].

<sup>146</sup> CESCR, *Concluding observations: China (including Hong Kong, and Macao)*, E/C.12/CHN/CO/2 (23 May 2014), [33(c)].

<sup>147</sup> CESCR, *Concluding observations: Brazil*, E/C.12/1/Add.87 (26 June 2003), [17][40].

<sup>148</sup> CESCR, *Concluding observations: Philippines*, E/C.12/1995/18, paras 101-133 (07 June 1995), [121].

### 3.4.2 Public policy dimensions of resource allocation in practice

The quantity and quality of resources made available for ESC rights programmes often reflects the interplay between economics, politics and policy which influences how public policy priorities are set. The process of making adequate financial and non-financial resources available for various programmes and activities that impact on ESC rights involves significant engagement with the policymaking process.

The nature of ESC rights makes them 'public goods'. Hence it is important to apply economic understanding of public goods and their policy implications so they become an integral part of public policy. Provision of many ESC rights requires government intervention in order to achieve socially-efficient levels of enjoyment.<sup>149</sup> Given that one of the primary functions of the State is to promote equality and inclusion in the economic and social allocation of resources,<sup>150</sup> human rights language provides for the State to take this responsibility of resource allocation.

As previously noted, the process of resource allocation must be guided by mechanisms of public engagement and the language of community empowerment. This is essential to identify areas where the greatest social and human rights impact can be achieved through government resources.

The policy process of resource allocation among competing priorities can be understood from the perspectives of institutional arrangements, laws and regulations, actors and the dynamics of their interactions. This is discussed in Chapter 7.

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<sup>149</sup> William Felice, 'Linking Law and Economics: Translating Economic and Social Human Rights Norms into Public Policy' (Paper presented at the Rights and Their Translation into Practice Conference, Rogers College of Law, University of Arizona, 22-24 April 2011) 9.

<sup>150</sup> Branco, above n 18, 19.

## 3.5 KEY ELEMENTS OF RESOURCE GOVERNANCE

The concept of ‘maximum available resources’ for ESC rights must be seen from both qualitative and quantitative perspectives. A number of factors contribute to the quality of resources. These include increased emphasis on the right to participation, accountability, transparency and access to information in relation to the fiscal policy of the State. The design, implementation and evaluation of fiscal policies should involve a participatory process and should be subjected to public scrutiny.<sup>151</sup> To this end, States are expected to put extra effort into the development of a better system for the transfer and redistribution of wealth through a progressive taxation system.

### 3.5.1 Qualitative aspects of resource governance and management

A key aspect of resource mobilisation and allocation is the quality of governance that impacts the effectiveness and efficiency of these processes. Thus, resource mobilisation and allocation policies must pay special attention to curbing corruption in order to enhance the quality of the use of these resources.<sup>152</sup>

Resource misallocation, wastage and ineffective utilisation have been identified by the Committee in a number of Concluding Observations.<sup>153</sup> States have been urged to be mindful of the obligation and to regularly assess whether ‘maximum available resources’ have been used to achieve the goals of progressive realisation, with particular reference to the Committee’s September 2007 Statement on the obligation to use ‘maximum available resources’.<sup>154</sup> The Committee also expressed regret about insufficient information on the use of maximum available resources and recommended

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<sup>151</sup> *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/HRC/26/28*, above n 103, [20-23].

<sup>152</sup> María Magdalena Sepúlveda, *The Nature Of The Obligations Under The International Covenant On Economic, Social And Cultural Rights* (Intersentia, Utrecht, 2003).

<sup>153</sup> CESCR, *Concluding observations: Panama*, E/C.12/1/Add.64 (24 September 2001), [18].

<sup>154</sup> CESCR, *Concluding observations: Armenia*, E/C.12/ARM/CO/2-3 (23 May 2014).

the State party to ‘regularly evaluate the impact of the measures taken, including against corruption, and the budget allocations made for the implementation of the Covenant’.<sup>155</sup>

Occasionally, the Committee has requested some States to ‘devote adequate attention to identifying its most urgent problems and concerns’<sup>156</sup> about ESC rights priorities. States have also been requested to enhance capacity of public finance management,<sup>157</sup> to ‘foster transparency and accountability’,<sup>158</sup> and implement organisational reforms to achieve more efficient use of resources, including ‘mobilizing the individual, the neighbourhood, and voluntary and private resources to supplement the efforts of the public authorities’.<sup>159</sup>

### **3.5.2 Challenges of monitoring the State’s resource allocation and governance policies**

The use of available resources for ESC rights realisation is an important area for monitoring. Danilo Türk argues that indicators which incorporate government expenditure and revenue, balance of payments, development assistance and external debt can provide a useful tool for monitoring the State’s available resources and the achievement of progressive realisation.<sup>160</sup> The requirement to take steps using ‘maximum available resources’ complicates the monitoring process in two ways: the difficulty in determining what resources are available to a State and the difficulty in determining

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<sup>155</sup> CESCR, *Concluding observations: Serbia*, E/C.12/SRB/CO/2 (23 May 2014), [10].

<sup>156</sup> CESCR, *Concluding observations: Sudan*, E/C.12/1/Add.48 (1 September 2000), [40].

<sup>157</sup> CESCR, *Concluding observations: Armenia*, E/C.12/ARM/CO/2-3 (23 May 2014), [9(a)].

<sup>158</sup> CESCR, *Concluding observations: Cambodia*, E/C.12/KHM/CO/1 (12 June 2009), [38].

<sup>159</sup> CESCR, *Concluding Observations: Norway*, E/C.12/1988/4 paras. 219-239 (1 January 1988), [221].

<sup>160</sup> Danilo Türk, *The New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and Cultural Rights; Progress Report Prepared by Danilo Türk*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 42<sup>nd</sup> sess, Agenda Item 7, UN Doc E/CN.4/Sub.2/1990/19.

whether the State has used these available resources to the maximum.<sup>161</sup> The establishment of standards, indicators and indices for measuring State compliance with the allocation of adequate resources for ESC rights may be an important step towards improving compliance monitoring.

There has been growing recognition of the need to develop more effective monitoring tools for compliance with the obligation to use maximum available resources. As a result, the development of indicators to measure progressive realisation of ESC rights within a 'maximum available resources' framework has been identified as essential by the human rights community.<sup>162</sup>

Over the years, various methodological approaches have been employed for this purpose. These include indicators and benchmarks, analysis of budget and expenditure or resource allocation, identifying violations, and econometric tools and methodologies that combine some of these approaches. One example is the report on the use of human rights indicators published by the Office of the High Commissioner for Human Rights (OHCHR) in 2012.<sup>163</sup>

The ESCR Committee has employed some indicators in the Concluding Observations to identify the level of utilisation of maximum available resources. For example, the percentage of national budget allocated for a specific right (such as health and education), often in relation to other areas of public expenditure;<sup>164</sup> and an increase or decrease in the overall percentage of resources allocated for specific rights.<sup>165</sup> While these methodological

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<sup>161</sup> Manisuli Ssenyonjo, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15(6) *The International Journal of Human Rights* 969-1012, 980; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford, 2009), [2.27].

<sup>162</sup> UN Special Rapporteur on the Realization of ESCR (Danilo Türk), *Realization of Economic, Social and Cultural Rights: Progress Report*, UN Doc E/CN.4/Sub.2/1990/19.

<sup>163</sup> Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (OHCHR, Geneva, 2012), <[http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)>.

<sup>164</sup> For example, CESCR, *Concluding observations: Senegal*, E/C.12/1/Add.62 (24 September 2001); CESCR, *Concluding observations: Philippines*, E/C.12/1995/18 paras. 101-133 (07 June 1995), [21].

<sup>165</sup> For example, CESCR, *Concluding observations: Congo*, E/C.12/COD/CO/4 (16 December 2009).

approaches are reasonable, they are not consistently applied in the Concluding Observations.

There is clearly an urgent need for State action in the area and the Committee needs to be proactive in creating objective standards and measures to ensure that the States are serious about the obligation to use ‘maximum available resources’.<sup>166</sup> To this effect, States also need to be more serious and proactive in reporting to the Committee about the nature of policy actions and challenges in relation to their implementation of ESC rights obligations.<sup>167</sup>

Several human rights monitoring tools include resource-related elements in their parameters. For example, the Social and Economic Rights Fulfillment Index (ESRF Index) developed by Fukuda-Parr, Lawson-Remer and Randolph uses the ‘ratio approach’ and the ‘achievement possibilities frontier method’ to measure progressive realisation subject to ‘maximum available resources’ based on available survey-based objectives, and focuses on State obligation rather than individual enjoyment alone.<sup>168</sup> The approach proposes two separate indices (ESRF-1 and ESRF-2) for low- and middle-income countries and high income countries, respectively.<sup>169</sup> Unlike other socio-economic indicators used to measure the rights-holders’ enjoyment of economic and social rights, the ESRF index incorporates the role of the State as the duty-bearer, and provides scores and rankings of State policies and their impact on the fulfilment of ESC rights. While this approach captures important elements of State policy, the high level of aggregation, statistical methodology and focus on cross-State comparison limits its applicability.

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<sup>166</sup> Saul, Kinley and Mowbray, above n 92, 145.

<sup>167</sup> For example, this was highlighted by the Committee in its Concluding Observations on Togo. See CESCR, *Concluding observations: Togo*, E/C.12/1/Add.61 (21 May 2001), [3].

<sup>168</sup> Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, ‘An Index of Economic and Social Rights Fulfillment: Concept and Methodology’ (2009) 8 *Journal of Human Rights* 195-221; 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’ (Economics Working Papers – Paper No 200822, University of Connecticut, Department of Economics).

<sup>169</sup> Fukuda-Parr, Lawson-Remer and Randolph, above n 168.

The OPERA Framework (Outcome–Policy Effort–Resources–Assessment) of the Centre for Economic and Social Rights addresses some key aspects of maximum available resources, particularly in its process of evaluating planned and actual resource expenditures, and evaluation of resource-generation processes.<sup>170</sup> The OPERA framework is highly adaptable to different contexts, and includes a four-step process for assessing ESC rights realisation through triangulation of outcomes, policies and resources. The first step involves identifying relevant development outcomes. The next step is to assess whether the State is taking action to address ESC rights commitments and the third step analyses the State budget from the perspective of ‘maximum available resources’. The results are combined in the final step.<sup>171</sup> Overall, this approach provides a robust methodology for addressing State policies in relation to ESC rights realisation.

Balakrishnan and Elson propose a compliance audit of States in relation to the allocation of maximum resources for ESC rights. Such an audit, they argue, should consider aspects of the State’s conduct as well as the constraints it faces, including those arising out of international trade and arrangements with international institutions.<sup>172</sup> They argue that such responsibility is more likely to be shared with other actors in the case of small and poor countries.<sup>173</sup> Compliance indicators compliance should be set to reflect the reality in the State, including the level of poverty and the institutional arrangements for entitlements.<sup>174</sup>

The human rights budgeting process is another key monitoring tool relevant to ‘maximum available resources’. Human rights budget work goes by different names: human rights budgeting; budgeting or budget work from a human

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<sup>170</sup> Center for Economic and Social Rights, *The OPERA Framework: Assessing compliance with the obligation to fulfill economic, social and cultural rights* (Center for Economic and Social Rights, 2012), <<http://www.cesr.org/downloads/the.opera.framework.pdf>>.

<sup>171</sup> Ibid.

<sup>172</sup> Radhika Balakrishnan and Diane Elson, ‘Auditing Economic Policy in the Light of Obligations on Economic and Social Rights’ (2008) 5 *Essex Human Rights Review* 1-19.

<sup>173</sup> Ibid., 10.

<sup>174</sup> Ibid., 12.

rights perspective; and budget analysis and ESC rights'.<sup>175</sup> Budget analysis takes various forms. Some analyses focus on the overall budgetary allocations for ESC rights in general, while others focus on specific rights. Some budget analysis methods focus on particular sectors of society, such as children, women or indigenous people. Budget analysis can be conducted for a given time period, for a given year or for a period indicating what is referred to as dynamic budget analysis.<sup>176</sup>

Another approach, proposed by Cingranelli and Richards, is a composite index of State 'effort' in fulfilling social and economic rights that takes into account the dimensions of willingness and ability.<sup>177</sup> This approach compares the level of achievement in countries with similar resource constraints but does not clearly assess the level of achievement of ESC rights in any given State.

Anderson and Foresti argue the importance of assessing not only the amount of resources available, but also the amount of resources needed for ESC rights realisation.<sup>178</sup> Hence, costing exercises would have to be used to assess a government's compliance with its obligation to realise the given ESC right.<sup>179</sup> The importance of costing human rights is also highlighted by Steenbergen who asserts, that in order for budget allocation to be identified as an indicator of State efforts to allocate resources for human rights, it is necessary to identify the resource requirements for the realisation of these rights.<sup>180</sup> It is also argued

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<sup>175</sup> Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 42.

<sup>176</sup> How budgetary decision-making impacts the ESC rights and the application of budget analysis tools to the process are covered in detail by Rory O'Connell et al, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

<sup>177</sup> David L Cingranelli and David L Richards, 'Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007).

<sup>178</sup> Edward Anderson and Marta Foresti, 'Assessing Compliance: the Challenges for Economic and Social Rights' (2009) 1(3) *Journal of Human Rights Practice* 469-476, 472.

<sup>179</sup> Ibid.

<sup>180</sup> Victor Steenbergen, *A Guide to Costing Human Rights* (equalinrights, The Hague, 2011), <[http://www.equalinrights.org/uploads/tx\\_wizzresources/EIR\\_VS\\_2011\\_Costing\\_Guide.pdf](http://www.equalinrights.org/uploads/tx_wizzresources/EIR_VS_2011_Costing_Guide.pdf)>, 11.

that costing exercises that examine the amount of money spent on a particular area may not be complete without a proper assessment of affordability.<sup>181</sup> This is related to the impact of revenue generation on other areas as well as trade-offs on the expenditure side.

These ESC rights monitoring tools and indicators can be used to assess progress towards progressive realisation over time and can provide information about the extent of rights enjoyment as well as yardsticks to compare progress among countries. Various issues and challenges relevant to the question of resource governance and the domestic policy variables that are applicable in maximising the resource mobilisation and allocation efforts will be covered in greater detail in Chapter 8.

### **3.6 CONCLUSIONS**

The model of ‘maximum available resources’ presented in this chapter incorporates multiple dimensions and elements associated with maximising the mobilisation, allocation and governance of resources for ESC rights. This cross-disciplinary framework encompasses the economic and public policy stances of the State that are necessary for resource optimisation. The chapter has outlined existing views on the concept of ‘maximum available resources’ and identified the key role of public sector resources in creating an environment in which ESC rights realisation and enjoyment can become a reality.

Existing definitions of ‘maximum available resources’ are inadequate to the task of fully appreciating the complexity of issues surrounding resource mobilisation and allocation and the full responsibility of the State. Moreover, the current definitions of State resources often disregard many crucial economic dimensions of actual and potential State resources.

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<sup>181</sup> Anderson and Foresti, above n 178, 473.

The chapter has considered the nature of resources employed in economic and social development programmes and the public provision of goods and services in the current economic environment. It has been argued that resources required for the provision of ESC rights must be defined broadly and must not be limited to those resources directly controlled and managed by the State. Resources available in the private sector and in the international community should be counted as part of the totality of resources that can be harnessed and mobilised for the realisation of ESC rights through appropriate State efforts.

Scholarly literature related to 'maximum available resources' has been reviewed and compared with institutional developments in the area, particularly with the approach taken by the Covenant drafting committee, the ESCR Committee and Special Procedures. Although academic definitions and arguments provide clarity on how 'maximum available resources' can be conceptualised, the reality of mobilising and allocating resources for human rights fulfilment will depend on the State and its governance and policy direction. Analysis of the Concluding Observations provided a solid reference point for the development of the concept over time and how States and the ESCR Committee interpret the obligation to use 'maximum available resources'.

Understanding the nature of resources at the disposition of the State requires a cross-disciplinary perspective and involves many and varied dimensions of governance. Central to these are the economic and public policy dimensions which are often the driving force behind government efforts to mobilise and allocate resources. Accordingly, this chapter has argued that an expanded conceptualisation of 'maximum available resources' incorporating economic and policy dimensions would be more practical for ESC rights advocates to monitor State compliance behaviour. Based on the model presented here, the next five chapters explore resource mobilisation, allocation and governance perspectives.

# **PART II**

## **Maximising Resource Mobilisation**

- Chapter 4 Maximising Public Sector Resources for ESC Rights: Macroeconomic and Policy Perspectives on Domestic Revenue Mobilisation**
- Chapter 5 Maximising Resources for ESC Rights through International Assistance and Co-operation**
- Chapter 6 Mobilising Private Sector and Societal Resources for ESC Rights through a ‘Synergistic Partnership’ Approach**

This Part elaborates the component of resource maximisation within the cross-disciplinary model of ‘maximum available resources’ presented in Chapter 3. Chapter 4 explores macroeconomic dimensions related to maximising domestic financial resources, with particular emphasis on government revenue and expenditure elements such as taxation and other relevant aspects of public finance management. Chapter 5 continues the application of the conceptual framework to maximise resources through international assistance and co-operation, including arguments relevant to extraterritorial obligations. Chapter 6 examines ways of shaping macroeconomic policy to attract private investment in ESC rights areas and approaches to the mobilisation of non-financial resources for ESC rights realisation.

## Maximising Public Sector Resources for ESC Rights: Macroeconomic and Policy Perspectives on Domestic Revenue Mobilisation

### 4.1 INTRODUCTION

Public sector resources directly available to the State for its programmes and activities constitute the first key component of the ‘maximum available resources’ model of resource mobilisation for ESC rights presented in Chapter 3. The quantum of public sector resources available for the State depends on a number of factors, such as the level of economic development, prevailing economic conditions, the strength and effectiveness of governance, overall fiscal capacity of the government and other institutional dynamics.

As explained in Chapter 3, from a human rights perspective, domestic resources at the disposition of the State can be either financial or non-financial. This chapter addresses the dimension of domestic financial resources, with particular attention to macroeconomic perspectives on revenue mobilisation at the domestic level.<sup>1</sup> The main purpose here is to identify what macroeconomic policy options are available for States to maximise domestic revenue for the realisation of ESC rights. To this end, the chapter explores fiscal and monetary policy theories and practice and identifies the most ESC rights-friendly approaches to maximising domestic revenue generation through taxation, non-tax revenue, debt and deficit financing. Macroeconomic perspectives on resource mobilisation are addressed by defining public sector resources from an economic point of view, exploring arguments about fiscal and monetary space, and identifying areas of resource availability.

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<sup>1</sup> Non-financial resources will be covered in detail in Chapter 6.

This inquiry aims at three main outcomes. First, macroeconomic elements of domestic resource mobilisation and their general application are examined and three main types of public sector revenue are identified. The objective of this section is to draw out relevant economic concepts that support the argument for increased attention to fiscal and monetary policy dimensions of State resources from the perspective of ESC rights obligations. This analysis demonstrates that, through the creation of a diversified fiscal policy space, including broader elements of taxation, non-tax revenue, and debt and deficit financing, the State can significantly enhance its capacity to generate revenue needed for the realisation of ESC rights obligations.

The next section addresses the challenges and policy options available to States in maximising domestic resources and constructs basic indicators that can be employed to identify State policy efforts in this area. These indicators represent common policy options and monitoring strategies available to the State in maximising domestic revenue. The subsequent section addresses a number of practical issues arising out of domestic resource mobilisation, using a qualitative analysis of State Periodic Reports under the ICESCR as well as a case study on the Maldives. These qualitative analyses are built around the indicators in order to demonstrate their applicability and practicality. The chapter concludes with a discussion of policy implications.

## 4.2 IDENTIFYING PUBLIC SECTOR REVENUE SOURCES

As noted in Chapter 1, human rights scholars are increasingly emphasising the importance of enriching the debate on ESC rights obligations through input from diverse disciplines, particularly economics.<sup>2</sup> Such an integrated approach

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<sup>2</sup> For example see, Rhoda E Howard-Hassmann, 'Reply to Paul O'Connell's Article on Neo-liberal Globalisation and Human Rights' (2009) 9(1) *Human Rights Law Review* 127-133, 131; Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity' (2008) 26(4) *Development Policy Review* 387-405, 389; Sanjay G Reddy, 'Economics and Human Rights: A Non-conversation' (2011) 12(1) *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centered Development* 63-72, 67.

can draw on the strengths of these disciplines to investigate the ESC rights policy environment and the factors that affect relevant decisions.

Resources are economic in nature. Therefore, different dimensions related to decision-making on resource mobilisation can be better understood from a number of economic approaches such as positive economics, normative economics, political economy, and public sector economics.

Positive economics adopts the position of an outside observer in analysing public policy decisions and their channels of impact, whereas normative economics is concerned with the best approach to serve the goals of public policy, such as improving the standard of living or providing essential services.<sup>3</sup> The normative economic approach thus considers the welfare effects of various policy choices.<sup>4</sup> The political economy approach, on the other hand, takes the behaviour of private and public sector agents as endogenous to the system and as driven by their particular objectives and constraints.<sup>5</sup> Public sector economics provides further insight into the role of the governments in the provision of essential public goods and services, including the effects of its involvement in the market, approaches to public finance, analysis and design of public policy, as well as the distributional and developmental effects of government fiscal policy.<sup>6</sup>

Drawing on these diverse economic perspectives, the following discussion examines key sources of domestic public sector revenue and the main issues around their application in economic policy. These inform the subsequent discussion on policy issues arising out of these macroeconomic tools.

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<sup>3</sup> Agnès Bénassy-Quéré et al, *Economic Policy: Theory and Practice* (Oxford University Press, Oxford, 2010).

<sup>4</sup> See for example, Brian E Dollery and Andrew C Worthington, 'The Evaluation of Public Policy: Normative Economic Theories of Government Failure' (1996) 7(1) *Journal of Interdisciplinary Economics* 27-39.

<sup>5</sup> Bénassy-Quéré et al, above n 3.

<sup>6</sup> See, Joseph E Stiglitz and Jay K Rosengard, *Economics of the Public Sector* (W W Norton, New York, 2015).

### 4.2.1 Tax Revenue

Taxation is one of the most important policy tools for raising government revenue, as well as the most powerful redistributive tool of macroeconomic policy. For these reasons, despite the remarkable shift in the tax-base and the ability of developing States to maximise tax revenue as a result of globalisation, trade liberalisation and financial openness,<sup>7</sup> taxation remains one of the few objective measures of the power and legitimacy of the State.<sup>8</sup>

The level of tax income depends on a number of policy fundamentals, including the types of taxation, tax rates and the efficiency of tax collection. Many developing countries have fewer types of tax, lower rates and inefficient tax collection capacity,<sup>9</sup> which is often due to lack of technical and human resource capacity. Governments are also subjected to ‘elite capture’, when pressure from a small elite of wealthy individuals and corporations results in reluctance to implement a wide-ranging, comprehensive taxation regime.<sup>10</sup> These factors will be addressed later in this chapter and in Chapter 8 in relation to resource management and governance.

A spectrum of taxes is available to governments, with each type presenting its own challenges in terms of the amount of revenue it can generate and the associated economic and social impacts. While some of these taxes may have a direct bearing on human rights, especially via redistribution and equity, the key concern in this discussion is the revenue potential of individual tax types from the perspective of resource mobilisation for ESC rights.

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<sup>7</sup> For some examples and discussions, see Joshua Aizenman and Yothin Jinjarak, 'Globalization and Developing Countries - a Shrinking Tax Base?' (2009) 45(5) *The Journal of Development Studies* 653-671, 14.

<sup>8</sup> Odd-Helge Fjeldstad, 'Taxation and development : A review of donor support to strengthen tax systems in developing countries' (WIDER Working Paper No. 2013/010, United Nations University), 10.

<sup>9</sup> Isabel Ortiz, Jingqing Chai and Matthew Cummins, 'Identifying Fiscal Space: Options for Social and Economic Development for Children and Poor Households in 182 Countries' (Social And Economic Policy Working Paper - October 2011, Unicef), 13.

<sup>10</sup> See for example, Daron Acemoglu, 'Institutions, Factor Prices, and Taxation: Virtues of Strong States?' (2010) *Papers & Proceedings(100) American Economic Review* 115–119.

Personal income tax has long played a major role in developed countries, both as a source of government revenue and as an instrument for the redistribution of wealth.<sup>11</sup> In many developing countries, personal income tax has played a much smaller part in raising revenue and reducing income inequality.<sup>12</sup> Revenue from these taxes in most low-income countries is less than 10 percent, compared to more than 25 percent in the Organisation for Economic Co-operation and Development (OECD) countries.<sup>13</sup> According to the International Monetary Fund (IMF), less than 5 per cent of the population in developing countries pays personal income tax, while the figure in developed countries is nearly 50 percent.<sup>14</sup> Such a low level of personal income tax in developing countries not only represents a missed opportunity in terms of State revenue. Given the ineffectiveness of personal income tax regimes in many developing countries, it also means that the effect of these taxes on wealth redistribution and poverty reduction is minimal,<sup>15</sup> which has an adverse effect on the realisation of ESC rights. Clearly, this is a fundamental area of tax policy that can have a significant positive impact on ESC rights resources, if properly designed and implemented.

Potential revenue from personal income tax is also reduced in many developing countries due to high levels of tax evasion and avoidance.<sup>16</sup> While many of the factors contributing to these distortions are often beyond the policy capacity of individual governments, simplifying personal income tax can be an important policy option for developing countries to increase their tax revenue. To address these challenges, some countries have already begun to simplify the personal income tax regime by levelling tax rate structures or by

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<sup>11</sup> Richard M Bird and Eric M Zolt, 'Redistribution via Taxation: the Limited Role of the Personal Income Tax in Developing Countries' (2014) *UCLA Law Review*.

<sup>12</sup> *Ibid.*

<sup>13</sup> Michael Keen, 'Taxation and Development - Again' (IMF Working Paper No WP/12/220, IMF, September 2012).

<sup>14</sup> International Monetary Fund, 'Revenue Mobilization in Developing Countries' (Policy Paper, IMF, 8 March 2011) <<http://www.imf.org/external/np/pp/eng/2011/030811.pdf>>.

<sup>15</sup> Bird and Zolt, above n 11.

<sup>16</sup> International Monetary Fund, above n 14.

introducing single-rate flat taxes.<sup>17</sup> These changes have made the collection of taxes more efficient, although the results have been mixed.<sup>18</sup>

Corporate tax is another important tool that can be better utilised by developing States. Despite the potential of corporate taxes as a source of public sector revenue,<sup>19</sup> many developing countries perform poorly in collecting adequate revenue from corporate taxes.<sup>20</sup> The power and influence of corporations, various forms of corporate tax incentives and institutional weaknesses in enforcing tax compliance are the likely causes.

It is argued that the use of tax incentives for domestic and multinational corporations as a policy measure to attract investment has the effect of reducing overall tax revenue as a percentage of economic production,<sup>21</sup> with very little real effect in increasing the overall level of investment. Therefore it is an unnecessary loss of revenue. Yet many countries are reluctant to reform or increase tax rates to avoid losing investment.<sup>22</sup> A common justification for reducing corporate tax rates is that it stimulates the economy and leads to further investment, but many reject this proposition, arguing that the evidence does not support it and that such tax cuts do not produce the expected benefits.<sup>23</sup> At the same time, the increasing scope and complexity of

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<sup>17</sup> An analysis of the pros and cons of a flat tax system is given by The Economist, *Simplifying tax systems: The case for flat taxes* The Economist <<http://www.economist.com/node/3860731>>.

<sup>18</sup> Deborah Itriago, *Owning Development: Taxation to fight poverty* (Oxfam, London, 2011), 24; Michael Busler, 'Income tax policy: is a single rate tax optimum for long-term economic growth?' (2013) 9(4) *World Journal of Entrepreneurship, Management and Sustainable Development* 246-254.

<sup>19</sup> International Monetary Fund, above n 14.

<sup>20</sup> See for example, Giulia Mascagni, Mick Moore and Rhiannon McCluskey, *Tax Revenue Mobilisation in Developing Countries: Issues and Challenges* (European Parliament, 2014), <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433849/EXPO-DEVE\\_ET%282014%29433849\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433849/EXPO-DEVE_ET%282014%29433849_EN.pdf)>.

<sup>21</sup> Enrique Delamonica and Santosh Mehrotra, 'How Can the Financing of Social Services Be Made Pro-Poor?' in Katja Hujo and Shea McClanahan (eds), *Financing Social Policy: Mobilizing Resources for Social Development* (Palgrave Macmillan, London, 2009) 89, 101.

<sup>22</sup> Ibid.

<sup>23</sup> Institute on Taxation and Economic Policy, "'High Rate" Income Tax States Are Outperforming No-Tax States: Don't be fooled by Junk Economics' (Policy Brief, ITEP), <<http://www.itep.org/pdf/junkeconomics.pdf>>; Ignacio Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective' in Aoife Nolan, Rory O'Connell and Colin

international tax rules have created an environment that encourages tax avoidance, especially by large corporations through transfer pricing and other such practices.<sup>24</sup> These issues will be addressed later in this chapter.

In recent years, a number of governments have introduced a Goods and Services Tax (GST)/ Value Added Tax (VAT)<sup>25</sup>, which is a broad-based tax levied on consumption. Although a regressive form of taxation, it is estimated that currently more than 130 countries implement GST, which has helped many States reduce their reliance on trade taxes.<sup>26</sup> GST is also identified by economists as one of the most efficient taxes in terms of implementation and collection and it has been adopted in most emerging markets without broadening the tax base.<sup>27</sup>

Some critics, however, argue that GST discourages firms operating in the informal sector to move out to the formal sector, thereby negatively impacting development and welfare.<sup>28</sup> The self-enforcing nature of GST in developed countries—incentives for downstream firms reporting purchases so that they can get rebates—is often absent in poor countries because a substantial part of production takes place in the informal sector and sales are often made in cash.<sup>29</sup> For these reasons, the standards used in developing and implementing GST often ignore very important economic considerations, namely, the existence of non-tradable and intermediate goods, differential

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Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 77.

<sup>24</sup> Delamonica and Mehrotra, above n 21, 101.

<sup>25</sup> GST and VAT are used by different countries but with the same meaning. For example, while in Australia it is referred to as GST, in Britain it is referred to as VAT. Both terms are used interchangeably in this thesis. For consistency, 'GST' will be used in this thesis to refer to this category of taxes.

<sup>26</sup> Fjeldstad, above n 8.

<sup>27</sup> International Monetary Fund, *Fiscal Monitor: Taxing Times* (IMF, Washington, D.C., 2013), <<http://www.imf.org/external/pubs/ft/fm/2013/02/pdf/fm1302.pdf>>.

<sup>28</sup> M Shahe Emrana and Joseph E Stiglitz, 'On selective indirect tax reform in developing countries' (2005) 89 *Journal of Public Economics* 599-623.

<sup>29</sup> Joseph E Stiglitz, 'Development-Oriented Tax Policy' (Initiative for Policy Dialogue Working Paper, IPD, October 2009), <[http://academiccommons.columbia.edu/download/fedora\\_content/download/ac:154001/CONTENT/IPD\\_WP\\_Development-Oriented\\_Tax\\_Policy.pdf](http://academiccommons.columbia.edu/download/fedora_content/download/ac:154001/CONTENT/IPD_WP_Development-Oriented_Tax_Policy.pdf)>.

administrative costs of different taxes, smuggling and cross-border shopping.<sup>30</sup> Despite these concerns, overall evidence shows that countries with GST raise more revenue in general, which is a sign of a more efficient tax system.<sup>31</sup>

In many developing countries, trade taxes (import duties) also form a major part of public revenue, even after the decline of tariff revenues under WTO trade liberalisation programmes.<sup>32</sup> While trade-related border taxes are the easiest to collect for countries with a low level of fiscal capacity, the question of whether trade liberalisation opens up sufficient avenues for these States to recover the lost revenue from trade taxes through other tax measures remains contentious. It is estimated that trade taxes are likely to decline still further in developing countries, although replacing these with other taxes is not going as far as needed.<sup>33</sup> On the other hand, excise duties<sup>34</sup> levied on products such as alcohol, tobacco, and vehicles are also positive in terms of revenue generation.<sup>35</sup>

These forms of taxation represent the most common government-levied taxes and generate the bulk of tax revenue. A range of other forms, such as property taxes, earmarked taxes, green tax, emission tax, inheritance taxes, stamp duties, licensing and fines, also contribute to the overall revenue of the State. As well, new types of taxes are being introduced in many countries.<sup>36</sup> Financial transactions taxes, taxes on bonus payments, bank debit taxes, and tax on

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<sup>30</sup> Emrana and Stiglitz, above n 28, 619.

<sup>31</sup> Keen, above n 13; Fjeldstad, above n 8.

<sup>32</sup> Delamonica and Mehrotra, above n 21, 90.

<sup>33</sup> International Monetary Fund, above n 14.

<sup>34</sup> Excise duties are inland duties, unlike trade taxes which are levied at the border. These duties are typically very heavy rates applied to a narrow range of products, which are normally based on the per unit basis.

<sup>35</sup> Delamonica and Mehrotra, above n 21, 96.

<sup>36</sup> See for example, Deborah A Carroll and Benjamin J Sharbel, 'The Property Tax: Past, Present and Future' in Howard A Frank (ed), *Public Financial Management* (Taylor & Francis, London, 2006) 151, 151; Delamonica and Mehrotra, above n 21, 96; Santosh Mehrotra (ed), *The Economics of Elementary Education in India: The Challenge of Public Finance, Private Provision and Household Costs* (Sage Publishers, 2005).

purchases and sales of equity shares are also levied in some countries.<sup>37</sup> While the efficacy and effectiveness of these taxes in raising revenue and their overall impact on the economy may be country-specific, all these revenue tools represent opportunities for developing countries to maximise public sector revenue.

#### 4.2.2 Non-tax revenue

In addition to the tax-based revenue sources identified above, the State can raise revenue through a number of non-tax sources. These include revenues collected through royalties, profits and dividends from public sector enterprises, revenue from lease of land and other natural resources, sovereign wealth funds, and reserves held by the government and the central bank. All these sources can further support the State to fulfil human rights obligations.

Revenues from natural resource exploitation/extraction are obtained through a variety of instruments, including royalties, profit or rent taxes, production sharing arrangements, auction of exploration and production leases, excise and trade taxes, production by State-owned firms, and State participation through paid-up equity or carried interest.<sup>38</sup> Forms of mining or extractive industries royalties include: unit based royalties; ad valorem royalties; profit-based royalties; tax on economic rent; hybrid systems combining the above systems; and other methods such as production sharing.<sup>39</sup> Many States are also establishing special revenue/royalty arrangements with resource sectors such as mining, oil and gas to expand the State revenue stream. In Peru, for example, mining levies have been expanded and the proceeds used for

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<sup>37</sup> See for example, Ortiz, Chai and Cummins, above n 9.

<sup>38</sup> Robin Boadway and Michael Keen, 'Rent Taxes and Royalties in Designing Fiscal Regimes for Non-Renewable Resources' (CESIFO Working Paper No. 4568, CESIFO, January 2014), 2.

<sup>39</sup> International Mining for Development Centre, 'Mineral royalties and other mining-specific taxes' (Policy Paper, IMDC, 2012), <[http://www.eisourcebook.org/cms/March\\_2013/Mineral%20royalties%20%26%20other%20mining-specific%20taxes.pdf](http://www.eisourcebook.org/cms/March_2013/Mineral%20royalties%20%26%20other%20mining-specific%20taxes.pdf)>. The special mining royalties are often directed on the net value of the mineral resources which are often levied at the project level, rather than at the consolidated entity level, after deducting the cost of production.

investment in health and education programmes.<sup>40</sup> While the extractive industries provide a significant source of government revenue in many developing countries, in many cases the revenue thus generated is below the potential.<sup>41</sup>

Some countries have managed natural resource revenue through special arrangements for the allocation and use of resources, resource funds, and special budgetary and treasury procedures for the use of natural resource revenue, separate investment bodies, separate oversight bodies, and special legal frameworks.<sup>42</sup> For example, Timor Leste and São Tomé and Príncipe use the maximum sustainable amount from oil savings in the fiscal year and leave savings for an amount equal to the real value for later fiscal years.<sup>43</sup> Such earmarking of revenue resources for investment purposes has proved successful in countries such as Norway and Chile.<sup>44</sup>

Revenue from public sector enterprises<sup>45</sup> is also an important source of finance for many States. With increased privatisation of State enterprises, revenue from such entities has declined substantially for some governments although in many others, fully- or partially-owned State enterprises provide significant revenue for the government.<sup>46</sup> This is particularly the case in economies where State enterprises are involved in substantial business

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<sup>40</sup> Ortiz, Chai and Cummins, above n 9.

<sup>41</sup> See for example, Martin Stürmer, 'Let the good times roll? Raising tax revenues from the extractive sector in sub-Saharan Africa during the commodity price boom' (Discussion Paper, Deutsches Institut für Entwicklungspolitik), <<http://www.u4.no/recommended-reading/let-the-good-times-roll-raising-tax-revenues-from-the-extractive-sector-in-sub-saharan-africa-during-the-commodity-price-boom/downloadasset/692>>.

<sup>42</sup> Teresa Dabán and Jean-Luc Héris, 'A Public Financial Management Framework for Resource-Producing Countries' (IMF Working Paper WP/10/72, International Monetary Fund, March 2010), <<http://www.imf.org/external/pubs/ft/wp/2010/wp1072.pdf>>.

<sup>43</sup> Ibid., 16.

<sup>44</sup> Ibid.

<sup>45</sup> These entities are known as State Owned Enterprises (SOEs), Government Owned Enterprises (GOEs), Government Business Enterprises (GBEs), Government Owned Corporations (GOCs), and by many other names.

<sup>46</sup> Isabel Ortiz, Matthew Cummins and Kalaivani Karunanethy, 'Fiscal Space for Social Protection Options to Expand Social Investments in 187 Countries' (ESS Working Paper No. 48, International Labour Organization), <<http://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=51537>>.

activities such as mining, oil and gas, railways, electricity, telecommunication and general trading. The revenue from these sources often goes into the State budget or is managed through sovereign wealth funds.

A Sovereign Wealth Fund (SWF) is a 'government-owned fund that invests globally in real and financial assets or in alternative investments such as private equity or hedge funds'.<sup>47</sup> The current market size of SWFs is estimated to be around US\$2.5 to 3 trillion, which is expected to grow to between US\$10 to 15 trillion by 2015.<sup>48</sup>

In relation to the huge resources under SWFs, some scholars have expressed concerns about mismanagement of investments in pursuit of political or economic power objectives, exacerbation of financial protectionism, financial market turmoil, and conflicts among countries with substantial SWFs on issues of regulatory treatment.<sup>49</sup> Despite these concerns, the emergence of international regulatory mechanisms such as the Santiago Principles is likely to have a positive effect on the management and impact of these SWFs in the future.<sup>50</sup> The main idea behind SWFs is to channel revenue from natural resources and other public sector enterprises into productive social development programmes.

National financial reserves are another potential resource that can be used to enhance State revenue, particularly when other revenue sources are

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<sup>47</sup> International Monetary Fund, *Global Financial Stability Report: Moving from Liquidity- to Growth-Driven Markets* (International Monetary Fund, Washington, DC, 2014), <<http://www.imf.org/external/pubs/FT/GFSR/2014/01/pdf/text.pdf>>. IMF classifies SWF as stabilisation funds; savings or future generations funds; reserve investment corporations; strategic development funds; and pension reserve funds.

<sup>48</sup> Sovereign Wealth Fund Institute, *Source on Sovereign Wealth Funds and Public Institutional Investors* <<http://www.swfinstitute.org/>>. Singapore's Temasek Holdings, Australian Future Fund, Chinese Investment Corporation are some examples of such wealth funds, which further invest in different business undertakings.

<sup>49</sup> Edwin M Truman, *Sovereign Wealth Funds: Threat or Salvation?* (Peterson Institute for International Economics, Washington, D.C., 2010).

<sup>50</sup> See for example, Richard A Epstein and Amanda M Rose, 'The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow' (2012) 76(111) *University of Chicago Law Review*; Peter Kunzel, Cornelia Hammer and Iva Petrova, 'Sovereign Wealth Funds: Current Institutional and Operational Practices' (IMF Working Paper WP/08/254, International Monetary Fund).

inadequate.<sup>51</sup> By definition, *total reserves* comprise holdings of monetary gold, special drawing rights, reserves of the IMF members held by the IMF, and holdings of foreign exchange under the control of monetary authorities.<sup>52</sup> Of these, foreign exchange reserves are held by central banks, usually in a foreign-denominated currency, as a measure of protection against global economic shocks.

Although such protection is vital, the accumulation of large foreign exchange reserves represents idle resources for countries where resources are scarce.<sup>53</sup> Thus, it is legitimate to question whether these reserves could be minimised through other means, such as better capital control policies, particularly those designed to limit the cross-border flow of speculative capital.<sup>54</sup> This would free these resources for much-needed investment for the realisation of human rights.<sup>55</sup> As a rule, many central banks maintain more reserves than the three-month safety benchmark, which suggests that a significant amount of resources can be freed up for urgent expenditure.

The non-tax revenue sources discussed above have the potential to make a significant contribution to the overall revenue stream of the State. The policy implications related to these sources of revenue from an ESC rights perspective are addressed in more detail later in the chapter.

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<sup>51</sup> See for example, Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 13; Ortiz, Cummins and Karunanethy, above n 9.

<sup>52</sup> Data on the total reserves of states are available at <<http://data.worldbank.org/indicator/FI.RES.TOTL.CD>>

<sup>53</sup> Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women's Global Leadership, New Jersey, 2011), 22.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.; James Heintz, *Central Banks: Do They Have Human Rights Obligations?* ESCR-Net <<http://www.escr-net.org/node/364736>>.

### 4.2.3 Debt and deficit financing

Debt and deficit financing allows States to supplement resources that are raised through tax and non-tax measures. By running a budget deficit which is financed through borrowing or printing money, deficit financing allows governments to spend in excess of total revenue. Common forms of debt instruments include loans from other countries, international financial institutions and commercial banks, as well as other financial instruments such as bonds. The main consideration in public sector borrowing and deficit finance is that, while achieving a balanced budget is an important long-term policy goal, the need to address current shortfalls in revenue makes borrowing a crucial policy tool.

The economic benefits and risks associated with public sector debt have attracted significant scholarly debate. Progressive and heterodox economists in particular argue for larger budgets with high levels of revenue and expenditure and advocate budget deficits in periods of economic down-turn to maintain full employment.<sup>56</sup> The challenge is to develop a more concrete understanding of the trade-offs involved in situations where ESC rights obligations and international debt servicing obligations are often in conflict.<sup>57</sup>

Treasury bills (T-bills) and bonds are among the most common of sovereign debt instruments; these can be either general obligation or revenue bonds.<sup>58</sup> The global bond market is enormous, with an outstanding value estimated at US\$100 trillion in 2012.<sup>59</sup> Bonds may be short-term, often a few months, or long-term of many years; both the period of borrowing and the interest rate are specified.<sup>60</sup> The government is required to pay the bond-holder the principal

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<sup>56</sup> Radhika Balakrishnan, Diane Elson and Raj Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53(1) *Development* 27-36, 33.

<sup>57</sup> Sabine Michalowski, 'Sovereign Debt and Social Rights - Legal Reflections on a Difficult Relationship' (2008) 8 *Human Rights Law Review* 35-68.

<sup>58</sup> Treasury bills are short-term obligations issued with a term of one year or less and sold at a discount, and does not carry an interest before maturity, while bonds are long-term securities that have a stated interest rate that is paid semi-annually until maturity.

<sup>59</sup> See Mary Dowell-Jones, 'Financial Institutions and Human Rights' (2013) 13(3) *Human Rights Law Review* 423-468.

<sup>60</sup> Balakrishnan et al, above n 53, 15.

amount and interest on maturity. In today's interconnected global financial markets, bonds once issued can be traded within or outside the country in bond markets.

Revenue from bonds can be highly dependent on the level of investors' confidence in the ability of the government to pay. If the price of bonds in the bond market is low, this implies that the government is raising less money for its bonds and is required to pay a higher rate at maturity.<sup>61</sup> During any economic crisis, bond-holders tend to pressure the bond issuing government to increase the rate of return of the bonds, which in turn creates increased fiscal pressure on the government.

In many developing countries, governments issue short-term bonds and T-bills which are bought by the domestic banking sector, a practice which eventually diminishes the government's overall control of the bond market and increases the power of banks to determine the conditions under which the bonds are sold.<sup>62</sup> Given the highly concentrated ownership of government bonds in developing countries, debt-servicing payments go to a few rich individuals or banks, making this akin to a highly regressive resource transfer from the government.<sup>63</sup> Thus, the higher level of bond repayment represents a transfer from the poor to the rich, which is detrimental to the principles of equity.<sup>64</sup>

For these reasons, while debt is a key source of revenue for the government, debt distress or debt crises also have the potential to disrupt the overall health of the economy. Important alternatives to addressing debt management include: emerging hybrid and alternative financing tools such as debt-for-development, which work through debt-equity swaps and commercial debt-for-nature exchanges (for example, in Ecuador and Costa Rica); and bilateral or multilateral debt financing arrangements (such as the Debt2Health exchange

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<sup>61</sup> Ibid., 16.

<sup>62</sup> Ibid., 17.

<sup>63</sup> Ibid., 18.

<sup>64</sup> Dowell-Jones, above n 59 provides an in-depth discussion on the interaction of the global financial market and its impact on the enjoyment of human rights.

between Australia and Indonesia).<sup>65</sup> Debt-for-social-protection exchanges are also an important approach to increasing public sector resources in States where financial constraints are limiting development programmes.<sup>66</sup>

The level and nature of borrowing are also linked to the economic cycle. It is important for the government to maintain public expenditure during economic downturns through increased debt financing. If the government cuts back on spending during such periods, the economy can deteriorate.<sup>67</sup> Such 'counter-cyclical fiscal policy' is an essential consideration for human rights.<sup>68</sup> It is argued that pro-cyclicality of the financial markets represents a significant risk for governments and overall human rights enjoyment which can exaggerate natural cycles in the finance market and have devastating effects on the economy of poor States.<sup>69</sup> Another important consideration is the impact of macroeconomic variables such as interest rates on the ability of the government to raise financial resources through treasury bills and bonds.

The World Bank predicts that the global imbalance of risk in financial markets could lead in the future to a widening of the emerging market bond spread and sudden swings in investor sentiment, which could result in more debt-servicing burdens on these most vulnerable economies.<sup>70</sup> The consequence of increased public debt is likely to be a move towards a system of intergovernmental fiscal relationships, increased global market risk, reduced capacity to address future fiscal shocks and limited ability to meet social services through debt finance.<sup>71</sup> It is estimated that, although the overall debt

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<sup>65</sup> See for example, Ross Buckley, *Debt-for-Development Exchanges: History and New Applications* (Cambridge University Press, New York, 2011).

<sup>66</sup> John Langmore, 'Poverty Reduction through Social Protection: A Potential Form of Debt-for-Development Exchange' in Ross Buckley (ed), *Debt-for-Development Exchanges: History and New Applications* (Cambridge University Press, New York, 2011) 209.

<sup>67</sup> Balakrishnan et al, above n 53, 17.

<sup>68</sup> Ibid.

<sup>69</sup> Mary Dowell-Jones and David Kinley, 'Minding the Gap: Global Finance and Human Rights' (2011) 25(2) *Ethics & International Affairs* 183-210, 200.

<sup>70</sup> The World Bank, *Global Development Finance: Mobilizing Finance and Managing Vulnerability* (The World Bank, Washington, D.C., 2005).

<sup>71</sup> KPMG International, *Future State 2030: The Global Megtrends Shaping Governments* 2013), 30.

burden of developing countries has eased over the last two decades, a few countries still face an increased burden.<sup>72</sup> Governments will be required to develop further capacity to address these fiscal policy challenges.

### **4.3 DOMESTIC REVENUE MOBILISATION CHALLENGES AND POLICY OPTIONS: INDICATORS OF STATE EFFORT**

Having identified the role of tax, non-tax, debt and deficit financing in domestic revenue mobilisation above, this section discusses resources mobilisation and fiscal policy challenges confronting developing countries. Some of the key factors that affect the ability of the State to raise adequate resources for development and human rights provisions include: levels of economic development; economic structure, including the size of the informal sector; demography and related labour productivity; urbanisation, especially in relation to royalties and land rent; natural resource wealth; public service provision; human capital; institutions and governance.<sup>73</sup> Weak tax institutions, a limited tax base and high rates of tax evasion and avoidance further weaken the State's capacity to mobilise adequate revenue.

This section examines structural, process and outcome challenges and policy options, with a focus on qualitative indicators that are applicable to the State's efforts to increase domestic revenue mobilisation. These indicators are based on the commitment-effort-results schema developed by the OHCHR, which is useful for assessing government policy priorities in relation to the obligation to use 'maximum available resources' for ESC rights realisation.<sup>74</sup> These policy

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<sup>72</sup> The World Bank, above n 70.

<sup>73</sup> The World Bank, *South Asia Economic Focus: Creating Fiscal Space through Revenue Mobilization* (The World Bank, Washington, D.C., 2012), <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/26/000333037\\_20120926014704/Rendered/PDF/728960ESW0whit000SAEF0June020120web.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/26/000333037_20120926014704/Rendered/PDF/728960ESW0whit000SAEF0June020120web.pdf)>, 8-9; Raghendra Jha, 'Fiscal Policy in Developing Countries: A Synoptic View' (ASARC Working Paper 2007/01, Australia South Asia Research Centre).

<sup>74</sup> Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (OHCHR, Geneva, 2012), <[http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)>.

indicators are validated using a case study and a qualitative review of State reports.

### **4.3.1 Structural challenges and policy options: Institutional capacity in revenue management**

Structural challenges for States in maximising revenue include: the size and composition of the economy; legal and institutional arrangements for tax collection and enforcement; and fiscal management capacity. Each is discussed below.

#### **4.3.1.1 Size and composition of the economy**

The size of the informal sector plays a key role in determining the amount of tax revenue the government can raise, especially in poor countries. Because of entry barriers, only a few firms make it to the formal economy; the vast majority remain in the informal sector. Those few who make it are easily taxed by the government because they are visible and receive larger economic rents.<sup>75</sup> In these States, therefore, a relatively small number of medium to large formal sector businesses are targeted by tax administrators, while a significant number of informal sector businesses escape 'tax coercion'.<sup>76</sup> This has significant revenue implications for the State.

While this situation allows for the State to raise a substantial amount of revenue from fewer sources, expanding the revenue base by increasing the number of firms in the formal sector can be more beneficial. Oxfam estimates that, by addressing the informal economy, the 52 countries included in their study could collect additional revenue of between US\$50.5 and 101 billion per year.<sup>77</sup> Maximisation of revenue would, thus, require lowering the barriers to

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<sup>75</sup> Emmanuelle Auriol and Michael Warlt, 'Taxation base in developing countries' (2005) 89(3) *Journal of Public Economics* 625-646, 18.

<sup>76</sup> Mick Moore, 'How Does Taxation Affect the Quality of Governance?' (IDS Working Paper No. 280, Institute of Development Studies, April 2007), 29.

<sup>77</sup> Itriago, above n 18, 7.

entry to the formal sector, thereby increasing the number of firms and individuals in the formal sector.

The tax base can also be broadened by bringing presently untaxed activities, goods and services into the tax net and simplifying the tax structure.<sup>78</sup> The direct tax base can be broadened by expanding the types of income covered and by reducing tax preferences.<sup>79</sup> If governments pay more attention to widening the tax base and including the informal sector, there is a significant potential increase in revenue. While it is often difficult to tax small businesses, evidence shows that withholding taxes and advanced collection schemes help to improve compliance.<sup>80</sup> A key challenge, therefore, is to enlarge the size of the taxable economy through appropriate reforms in the tax regime.

#### ***4.3.1.2 Legal and institutional arrangements for tax collection and enforcement***

*Tax effort*, which is the overall capacity of the State to raise revenue through taxation, is a key factor in the success of governments in raising tax revenue. For many developing countries, tax effort is an area that requires huge improvement. Enhancing a government's fiscal capacity not only improves the overall effectiveness of the tax regime, but also changes the incentive for individuals to comply with tax requirements. Therefore, investments in fiscal capacity can have high returns for the State and are a key aspect of state-building, especially since taxation is a key defining feature of State power.<sup>81</sup> The ability of the State to raise adequate revenue is thus instrumental in shaping the relationship between the State and society, and taxation policy strengthens the social contract and social institutions that are driven by the

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<sup>78</sup> The World Bank, above n 73, 17.

<sup>79</sup> *Ibid.*

<sup>80</sup> International Monetary Fund, above n 14.

<sup>81</sup> *Ibid.*, 8.

revenue imperative.<sup>82</sup> This requires increased effort on the part of the government to develop the tax system.

Enhancing tax compliance is another important challenge. In many developed countries, tax systems are based on taxpayer-active frameworks in which the vast majority of taxpayers comply with their tax obligations without direct intervention or enforcement from the tax administration authorities.<sup>83</sup> Cultural and institutional structures in many poor countries, however, are not strong enough to achieve this form of compliance. Hence, by investing in strengthening these areas through tax design, institutional capacity and awareness-building can play a crucial role in improving compliance.

Recommendations offered by tax scholars and international financial institutions to strengthen tax compliance in developing countries include the use of withholding taxes and advanced collection schemes to encourage and 'tilt the balance' towards more compliance.<sup>84</sup> Some authors identify entities that fail to comply with tax regimes as 'ghosts' (unregistered for tax or remain unknown to the authorities) or 'icebergs' (registered but underpaying). To address these issues, the tax regime must identify and register taxpayers more effectively, conduct audits and ensure enforcement.<sup>85</sup>

#### **4.3.1.3 Fiscal management capacity**

Fiscal policy tools can shift the level of aggregate demand, especially when the economy's resources are under-utilised. It can also be argued that stronger fiscal policies help to extend the capital stock of the economy,<sup>86</sup> which is essential not only for enhancing State resources, but also for creating an

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<sup>82</sup> Deborah A Bräutigam, 'Introduction: Taxation and State-Building in Development Countries' in Deborah A Bräutigam, Odd-Helge Fjeldstad and Mick Moore (eds), *Taxation and State-Building in Developing Countries* (Cambridge University Press, Cambridge, 2008) 1, 1.

<sup>83</sup> John L Mikesell and Liucija Birskyte, 'Lessons of Tax Compliance Research for Lawmakers and Tax Administrators: Getting Best Returns from Limited Resources' in Howard A Frank (ed), *Public Financial Management* (Taylor & Francis, London, 2006) 207, 207.

<sup>84</sup> Keen, above n 13.

<sup>85</sup> *Ibid.*, 16.

<sup>86</sup> Philip Arestis and Malcolm Sawyer, *Re-examining Monetary and Fiscal Policy for the 21st Century* (Edward Elgar, Cheltenham, 2004), 130.

enabling environment for individuals to realise their rights. Identifying the optimal level of taxation that takes account of fairness and progressivity, addressing pro-cyclicality, managing debt and deficit and the overall effectiveness of the tax policy are key considerations in this context.

As discussed earlier, financial constraints on developing countries are exacerbated by borrowing, especially in non-bond financing. It can be argued that such policies weaken the distinction between fiscal and monetary policy and crowd out private sector investment.<sup>87</sup> The unsustainability of current account deficits and fiscal deficits creates another set of difficulties for developing countries, particularly in relation to meeting internal and external deficit sustainability conditions. This widens the gap between internal and external rates of interests, with higher domestic rates tending to weaken the level of domestic investment and growth.<sup>88</sup> As a result, the impact of deficits can also vary depending on the modes of finance.

Although dependence on broader taxation is a sign of good quality in government,<sup>89</sup> under-resourcing, misallocation of resources for tax administration authorities and lack of necessary skills are concerns in many developing countries.<sup>90</sup> The ability of institutions to collect taxes, especially in hard-to-reach areas such as the informal sector,<sup>91</sup> depends very much on the level of investment and capacity of these institutions.

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<sup>87</sup> Jha, above n 73.

<sup>88</sup> Ibid., 20.

<sup>89</sup> Mick Moore, 'Between coercion and contract: competing narratives on taxation and governance' in Deborah A Bräutigam, Odd-Helge Fjeldstad and Mick Moore (eds), *Taxation and State-Building in Developing Countries* (Cambridge University Press, Cambridge, 2008) 34, 34.

<sup>90</sup> International Monetary Fund, above n 14.

<sup>91</sup> See for example, Timothy Besley and Torsten Persson, 'Taxation and Development' in Alan Auerbach et al (eds), *Handbook of Public Economics* (Elsevier, 2013) 51, 22.

### 4.3.2 Process challenges: Optimising fiscal and monetary policies

While the structural factors identified above are fundamental to the effectiveness of the revenue regime, implementation of these policies is often the most challenging process. Challenges include those associated with implementing revenue policies, including optimal tax administration, tax efficiency and compliance, and managing debt sustainability.

#### 4.3.2.1 Optimal tax administration

Ineffective tax administration is one of the main constraints on the ability of States to collect revenues in general and direct taxes in particular.<sup>92</sup> Low revenue collection in many developing countries is a result of factors such as lower growth, institutional weakness and dependence on trade taxes,<sup>93</sup> and the general weakness of government and institutional capacity.

The inability of governments in many poor countries to improve personal income tax collection has been linked to a narrow tax base, administrative and political weakness, poor capacity to expand the tax base, and resistance from wealthy segments of the society.<sup>94</sup> Policies aimed at reforming and strengthening the institutions of taxation and revenue collection have potentially negative effects such as increased corruption, which generates more money for tax collectors and less for the public coffers.<sup>95</sup> The efforts by donors to reform taxation systems in developing countries are generally geared towards improving tax policy and design, creating effective tax administration and enhancing constructive State-society engagement on tax issues.<sup>96</sup> Accordingly, improvements in tax administration can result in high gains inefficiency and reduce leakages from corruption and other malpractices.

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<sup>92</sup> Odd-Heige Fjeldstad and Joseph Semboja, 'Why people pay taxes: The case of the development levy in Tanzania' (2001) 29(12) *World Development* 2059–2074.

<sup>93</sup> Delamonica and Mehrotra, above n 21, 90.

<sup>94</sup> Fjeldstad, above n 8.

<sup>95</sup> Stiglitz, above n 29.

<sup>96</sup> Fjeldstad, above n 8.

A number of policy and institutional reforms are required to optimise tax administration. These include: strengthening tax institutions, formalising as much of the informal economy as possible, reducing tax avoidance and evasion, reducing tax exemptions, and increasing direct taxes.<sup>97</sup> Building further administrative capacity of the tax authorities, putting in place clear laws and regulations and taxpayer protection systems, and eliminating exceptions can also make the overall tax system more efficient.<sup>98</sup> The composition of a broad-based taxation system is another important policy option for developing countries in which the resource-base is narrower. However, opinions differ among economists and policymakers on the types and levels of taxation that are appropriate, particularly in relation to their short-term and long-term impacts on overall government revenue and the extent to which they ensure 'higher yet more just taxation'.<sup>99</sup>

Another important aspect of taxation policy is the need to have the policy aligned with cyclical economic fluctuations. This is relevant from a human rights perspective since economic downturns may have disproportionately negative impacts on the poorest members of the society. Suggestions for government actions to minimise the negative impact of economic downturns include the creation of reserve funds that can be used to maintain spending during bad times.<sup>100</sup> Introduction of stimulus programmes are also often essential during economic downturns in order to maintain the level of human rights enjoyment. Such measures could help maintain a more equitable society during difficult times, instead of cutting taxes for the rich.<sup>101</sup>

#### **4.3.2.2 Tax efficiency and compliance enforcement**

One of the foremost challenges to overall tax efficiency is the maintenance of a strong set of enforcement and compliance procedures. The tax literature identifies a number of weaknesses in tax administration and governance in

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<sup>97</sup> Itriago, above n 18, 7.

<sup>98</sup> International Monetary Fund, above n 14.

<sup>99</sup> Balakrishnan, Elson and Patel, above n 56, 34.

<sup>100</sup> Balakrishnan et al, above n 53, 13.

<sup>101</sup> Ibid.

developing States which result in poor enforcement and high levels of tax evasion and avoidance. Tax evasion and avoidance create problems for all countries, but their negative impact is particularly serious for developing countries given their low tax base and weak institutional capacity.

The Tax Justice Network estimates that more than US\$3.1 trillion was lost to tax evasion globally in 2011, which is significantly larger than the total international aid received by all developing countries.<sup>102</sup> It is also estimated that countries in Africa alone lose more than US\$79 billion annually due to tax evasion, which is almost equal to the total expenditure for health and education in the whole continent.<sup>103</sup> The International Bar Association's *Tax Abuses, Poverty and Human Rights* report in 2013 classifies tax abuses as 'tax evasion, tax fraud and other illegal practices – including the tax losses resulting from other illicit financial flows such as bribery, corruption and money laundering.'<sup>104</sup> Base erosion and profit shifting (BEPS), tax holidays and offshore investment accounts are also relevant to tax abuse.<sup>105</sup>

Tax havens encourage multinationals to take advantage of low tax rates and lax regulatory environments to avoid and/or evade taxes. Some estimates place the amount of lost revenue for developing countries between US\$1.26 and US\$1.44 trillion, most of which results from the trade mis-pricing practices of multinational corporations.<sup>106</sup> Tax evasion may be encouraged by the increase in capital movement and the lack of capacity of governments to monitor these movements and individual transactions. Mispricing and transfer pricing techniques are commonly used by multinational corporations to divert

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<sup>102</sup> The Tax Justice Network, 'The Cost of Tax Abuse' (Briefing Paper on the cost of tax evasion worldwide, The Tax Justice Network), <[http://www.tackletaxhavens.com/Cost\\_of\\_Tax\\_Abuse\\_TJN%20Research\\_23rd\\_Nov\\_2011.pdf](http://www.tackletaxhavens.com/Cost_of_Tax_Abuse_TJN%20Research_23rd_Nov_2011.pdf)>.

<sup>103</sup> Ibid.

<sup>104</sup> International Bar Association, *Tax Abuses, Poverty and Human Rights* (London, 2013), <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=4977CB3D-4988-4C9C-84C7-9050A5CB2311>>, 7.

<sup>105</sup> See for example, Dhammika Dharmapala, 'What Do We Know about Base Erosion and Profit Shifting? A Review of the Empirical Literature' (2014) 35(4) *Fiscal Studies* 421-448; Gillian Brock and Thomas Pogge, 'Global Tax Justice and Global Justice' (2014) 1(1) *Moral Philosophy and Politics* 1-15.

<sup>106</sup> Itriago, above n 18, 5.

their tax burden to low tax havens, depriving the host government of the tax revenue.

The main challenges in tackling tax avoidance include State culpability for allowing tax avoidance to be practised by companies in other States and in frustrating the efforts of other States to combat these practices. Fair, transparent, accountable and equitable taxation systems are key requirements for maximising State resources for ESC rights realisation. Yet tax evasion and avoidance drain developing countries of billions of dollars each year as the result of systemic and deliberate minimisation of the tax share of companies and wealthy individuals.<sup>107</sup> Such illicit financial flows from non-tax-abuse activities in developing countries to secrecy jurisdictions is a significant component of capital flow from developing countries to developed countries which negatively impacts resources available for these States.<sup>108</sup> This is particularly relevant in the area of corporate tax planning practices that are deliberately designed to avoid taxes.

Another key area of concern are the various types of tax incentives, such as tax holidays and tax concessions, which are used by governments to attract investors in selected areas. It is argued that tax incentives are ineffective in countries with a poor investment climate.<sup>109</sup> The practice of tax exemptions and tax incentives also creates huge revenue problems for developing countries. According to the OECD, tax incentives tend to reduce government revenues by 1-2 percent of GDP.<sup>110</sup> Tax incentives for investments may not always achieve their objectives, and may not be sustainable in the future. It

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<sup>107</sup> CIDSE Resources for Development Working Group, *Financing Sustainable Development: Are we up to the challenge?* (CIDSE, 2014), 5.

<sup>108</sup> For example see, Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2003-2012* (Global Financial Integrity, Washington, D.C., 2014); Petr Janský, 'Updating the Rich Countries' Commitment to Development Index: How They Help Poorer Ones Through Curbing Illicit Financial Flows' (2014) *Social Indicators Research* 1-23.

<sup>109</sup> International Monetary Fund et al, *Supporting the Development of More Effective Tax Systems: Report to the G-20 Development Working Group* (IMF, 2011), <<http://www.oecd.org/ctp/48993634.pdf>>.

<sup>110</sup> Tax Justice Network-Africa and ActionAid International, *Tax competition in East Africa: A race to the bottom?* (TJNA & ActionAid, 2012), <[http://www.actionaid.org/sites/files/actionaid/eac\\_report.pdf](http://www.actionaid.org/sites/files/actionaid/eac_report.pdf)>.

has been shown that, unlike in developed countries, lowering of business tax rates has actually resulted in a reduction in total revenue.<sup>111</sup>

National-level work in the area has been boosted by recent developments in the multilateral system to address tax justice, including campaigns by the Global Alliance for Tax Justice and the newly adopted Lima Declaration on Tax Justice and Human Rights. Yet effective enforcement of tax compliance, especially by large multinationals, still remains a significant challenge for both developed and developing States.<sup>112</sup> For these reasons, States must take deliberate, concrete and targeted steps, separately and jointly through international co-operation, in matters relating to bilateral and multilateral trade, investment, taxation finance, environmental protection and development co-operation.<sup>113</sup>

#### **4.3.2.3 Managing debt sustainability**

As noted above, debt and deficit financing are essential components of public sector revenue generation.<sup>114</sup> However, it is important to balance the need to provide for the ESC rights of the people with repayment of the State's debt. Debt burden has negative effects on the protection of ESC rights, not only in the form of debt repayment, but also because it limits the policy flexibility of the debtor country.<sup>115</sup>

In relation to potential violations of ESC rights resulting from sovereign debt, some argue that if countries with insufficient resources for debt servicing and

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<sup>111</sup> Itriago, above n 18, 6.

<sup>112</sup> The ongoing Senate inquiry into corporate tax avoidance in Australia is a case in point. Submissions to the inquiry reveal the seriousness of transfer pricing, base erosion and profit shifting activities by large multinationals and the challenges faced by the Australian Tax Office in effectively addressing these practices. This is illustrative of how difficult it would be for developing countries to address issues of this nature.

<sup>113</sup> See for example, Global Alliance for Tax Justice, *Make multinationals pay their share! With tax justice we can make a fairer world* <<http://www.globaltaxjustice.org/>>.

<sup>114</sup> There are dissenting views on the level of government borrowing and debt among different schools of economic thought. For example, while neoclassical economic view supports and advocates the balanced budget and maintaining a low debt/GDP ratio, Keynesian view supports deficit budgeting and borrowing, particularly in relation to the economic condition and public policy goals.

<sup>115</sup> Michalowski, above n 57.

ESC rights expenditure prioritise debt repayment at the expense of rights protection, this can be regarded as a human rights violation.<sup>116</sup> This problem could be particularly acute during economic downturns. It is argued that the obligation to creditors in such situations overwhelms States trying to protect the ESC rights of their populations.<sup>117</sup> Such debt repayment obligations put enormous pressure on the already overstretched public accounts of developing countries, which negatively affects the amount of resources available for ESC rights.

Positive or negative effects of borrowing can be examined by looking at how much of these funds are invested in asset building and the capacity of these assets to generate future income to repay the debt. Using bonds and other debt financing instruments to finance investment projects is justified by States as a means to ensure that future taxpayers bear their 'fair share' of the cost.<sup>118</sup> If borrowed funds are spent on current consumption that provides little or no future earning potential, the debt is likely to weaken the future fiscal capacity of the State and often leads to increased debt burden.

Economic discussion of shifting debt burden across generations<sup>119</sup> raises questions of what is done with debt and who bears the cost. The State's ability to make use of debt instruments to provide the necessary funds for investment in social services and infrastructure depends on many factors, such as the level of access to these sources and the level of expected future capacity to meet the debt obligations.<sup>120</sup> If money is utilised for investments and to increase public assets, this will accrue benefits to future generations. Thus

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<sup>116</sup> Ibid., 48.

<sup>117</sup> Balakrishnan et al, above n 53, 19.

<sup>118</sup> Dwight V Denison and Merl Hackbart, 'State Debt Capacity and Debt Limits: Theory and Practice' in Howard A Frank (ed), *Public Financial Management* (Taylor & Francis, London, 2006) 315.

<sup>119</sup> For example, Werner Z Hirsch and Anthony M Rufolo, *Public finance and expenditure in a federal system* (Harcourt Brace Jovanovich, San Diego, 1990).

<sup>120</sup> Denison and Hackbart, above n 118.

these investments in human and physical assets must be seen as positive contributions to the realisation of human rights.<sup>121</sup>

Another key factor which influences the ability of States to protect human rights, particularly ESC rights such as an adequate standard of living, is the amount of liquidity in global financial markets,<sup>122</sup> which impacts the ability of the State to borrow. Given these challenges in debt management, States must look to developing a more diverse borrowing and bond portfolio, including GDP-indexed bonds, as well as establishing macro markets to help manage bonds-based debt more effectively. Such arrangements enable bonds to be indexed to key macroeconomic aggregates and allow bond-holders to hedge against risks of market volatility.<sup>123</sup> For such hedging to be effective, States need to extend their bond instruments to the global financial market. For many developing States, however, these policy options are extremely difficult to implement due to limited capacity and associated risks.

Multinational mechanisms, such as the *Joint World Bank–IMF Debt Sustainability Framework for Low-Income Countries* (DSF), help guide donors and recipients to manage debt transactions without creating excess burden on borrowers. For example, the DSF pays attention to the way lending and borrowing decisions are made, including matching financial needs with the current and future ability of the borrower to pay, based on economic circumstances and projected debt burden.<sup>124</sup> The recently revised DSF also includes further indicators of the ability of the borrowers to repay their external debt obligations, including the level of capital flow and remittances from

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<sup>121</sup> Balakrishnan et al, above n 53, 17. Discussions on debt forgiveness (HIPC, Paris Club), AID for Debt programmes and similar aspects of debt management in partnership with international community are presented in Chapter 5, in the context of international assistance and cooperation.

<sup>122</sup> Dowell-Jones and Kinley, above n 69, 186.

<sup>123</sup> See, Inge Kaul and Pedro Conceição, 'The Changes Under Way: Financing Global Challenges Through International Cooperation Behind and Beyond Borders' in Inge Kaul and Pedro Conceição (eds), *The New Public Finance: Responding to Global Challenges* (The United Nations Development Programme, New York, 2006) 26.

<sup>124</sup> International Monetary Fund, *The Joint World Bank–IMF Debt Sustainability Framework for Low-Income Countries* (15 April 2015) <<https://www.imf.org/external/np/exr/facts/jdsf.htm>>.

migrants.<sup>125</sup> Such frameworks are vital in creating more favourable conditions for developing States to regulate and manage their level of external debt.

### **4.3.3 Outcome challenges: Equity and revenue maximisation**

In addition to the institutional and process challenges identified above, maximising resources for ESC rights faces a number of outcome challenges. These include adequacy of revenue generation, fairness, equity and progressiveness.

#### ***4.3.3.1 Adequacy of revenue generation***

The effective tax rate is an important measure of mobilisation of adequate tax revenue. The effective tax rate is a measure of the overall level of tax in the country in relation to aggregate GDP. In relation to rationalising tax structures to increase revenue, the World Bank suggested that an optimal tax structure must: minimise exemptions and tax incentives; have no minor and costly taxes; include corporate taxes that are broad-based and reasonable; have simple personal income taxes; and adopt a broad application of VAT/GST and lower trade tax rates.<sup>126</sup> These policy orientations are essential for broadening and deepening adequacy and effectiveness of tax structures.

Tax reform policies in developing countries should also be guided by the fact that indirect taxes create deadweight losses and lower revenues<sup>127</sup> and the share of direct taxes overall should rise, especially that of corporations.<sup>128</sup> The number of income tax brackets should be small, the degree of progression moderate and the top marginal tax rate low.<sup>129</sup> If the tax rate is too low, the ability of the tax regime to generate sufficient revenue for development and social services can be severely limited. If the tax rate is too high, there is a

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<sup>125</sup> Ibid.

<sup>126</sup> The World Bank, above n 73, 18.

<sup>127</sup> Jha, above n 73.

<sup>128</sup> Ibid., 25.

<sup>129</sup> Ibid.

danger that the overall economy will suffer due to reduced savings and lower investment and employment levels, which could increase the risk of greater tax evasion and avoidance. Such outcomes can negatively impact the immediate and future capacity of the State to allocate resources for ESC rights programmes.

#### **4.3.3.2 Fairness, equity and progressiveness of taxation system**

Revenue measures are not human rights neutral. Apart from revenue impact, the nature, type and level of taxation can have both direct and indirect effects on human rights realisation. Therefore, in addition to revenue generation objectives, fiscal policies must also be sensitive to equity and fairness, especially in relation to the impact on individuals' ability to enjoy their human rights.

A key aspect of this requirement is to ensure that taxes are progressive; that is, the rich pay a higher percentage of their income as tax than the poor. It is argued that progressive taxes based on income and wealth are more equitable and are also more effective in mobilising resources.<sup>130</sup> Progressive taxes can 'lead to gentle and gradual forms of income redistribution within States without threatening economic stability or patterns of growth',<sup>131</sup> which is essential for the proper enjoyment of ESC rights. The need to remove regressive effects of taxation goes hand in hand with the objective of enhancing resources available to the State.<sup>132</sup> Therefore, addressing questions of adequacy and equity in the tax system is essential from the perspective of ESC rights, not only for the direct impact on the amount of revenue governments would be able to raise, but also because of the positive human rights impact of such policy approaches. A more equitable tax system helps address a number of social and economic factors that lead to ESC rights violations.

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<sup>130</sup> Balakrishnan et al, above n 53, 12.

<sup>131</sup> Danilo Türk, *The Realization of Economic, Social and Cultural Rights*, 44<sup>th</sup> sess, Agenda Item 8 of the provisional agenda, UN Doc E/CN.4/Sub.2/1992/16 (3 July 1992), [83].

<sup>132</sup> See for example, Olivier De Schutter, *Report of the Special Rapporteur on the right to food*, A/HRC/13/33/Add.6, 13<sup>th</sup> sess, Agenda Item 3, (19 February 2009).

Many challenges associated with fair and equitable tax systems remain. These include deficits in corporate taxation regimes, which allow businesses to exploit the system through transfer pricing, tax havens and shadowy financial centres.<sup>133</sup> Current deficits in effective communication on taxation and lack of international fiscal co-operation are also identified as reasons for tax regimes' failure to raise sufficient funds for social development and human rights realisation.<sup>134</sup> Both the campaign for greater tax justice at the local level and efforts to combat international tax evasion and avoidance practices can be regarded as part of the struggle for the realisation of human rights.<sup>135</sup> The fairness and equity of taxation systems can be ensured by identifying the link between human rights obligations and taxation and the role of taxation policies using the principles of maximum available resources, non-discrimination and equality, and transparency, accountability and participation.<sup>136</sup>

Addressing these questions of adequacy and equity in the tax system is essential from the perspective of ESC rights, not only because of their direct impact on the amount of revenue the government would be able to raise, but also because of the positive human rights implications. From this perspective, a more equitable tax system helps address a number of social and economic factors that lead to ESC rights violations.

#### 4.3.4 Indicators of policy effort

Having identified several challenges associated with increasing and maximising domestic revenue of the government, a key question that needs to be answered is, how do we determine if States are serious about domestic

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<sup>133</sup> Wolfgang Obenland, 'Taxes and human rights' (Policy brief of the Tax Justice Network Germany, Tax Justice Network Germany, 81.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Radhika Balakrishnan and Diane Elson, 'Economic Policies and Human Rights Obligations' in Radhika Balakrishnan; Diane Elson (ed), *Economic Policy and Human Rights* (Zed Books, London, 2011) 257, 20; International Council on Human Rights Policy, *Human Rights in the global economy: Report from a colloquium* (International Council on Human Rights Policy, 2010), 8.

revenue mobilisation, in light of these structural, process and outcome challenges? Policy challenges can be translated into policy indicators that represent the efforts of the State in these areas. These can be categorised as structural, process and outcome indicators, as described below.

In relation to structural challenges, governments should take the following policy actions: design tax laws and regulations to maximise revenue; explore and strengthen the avenues for non-tax revenue; strengthen legal and institutional structures necessary to borrow adequate funds; and strengthen institutional capacity to effectively manage debt. These policy elements reinforce each other and strengthen the capacity of the State to overcome structural challenges in maximising revenue.

In relation to process challenges, the State should focus on strengthening the power and authority of tax authorities in order to enhance their effectiveness; develop appropriate policies to address revenue loss; direct policies to enhance tax collection; strengthen the role of monetary reserves and debt to complement State budgetary resources when required. Strengthening the capacity of the State to optimise the process of revenue generation at the domestic level, thus, requires attention to policy elements with the highest impact in these areas.

Policy options in addressing the outcome challenges identified here should incorporate assurances that resources raised through taxation, non-tax, and debt and deficit financial tools are adequate for investment in social services; that revenue is sustainable and does not endanger future revenue capacity; and that debt and deficit financing is sustainable and manageable without sacrificing the State's capacity to repay.

These structural, process and outcome challenges and their associated policy indicators illustrate the complex interplay of macroeconomic factors that impact on the State's ability to raise adequate revenue and can be used as tools to strengthen State commitment to mobilising adequate domestic resources for ESC rights realisation. Developing and customising specific qualitative indicators on these policy areas would involve taking into

consideration policy variables within each State, availability of data and policy information and the application of innovative evaluation methodologies.

## **4.4 DOMESTIC REVENUE MOBILISATION: STATE PRACTICE AND POLICY IMPLICATIONS**

This section examines domestic revenue policies in State practice through a qualitative analysis of State reports under the ICESCR and a case study and identifies implications for ESC rights policy.

### **4.4.1 Domestic revenue mobilisation efforts: Evidence from State reports**

The guidelines on State reporting under the ICESCR requires States parties to address the resource dimension in their treaty-specific reporting. They call for the States to include in the treaty-specific document details about ‘national framework law, policies and strategies for the implementation of each Covenant right, identifying the resources available for that purpose and the most cost-effective ways of using such resources’.<sup>137</sup> The review of States Reports evaluates these elements against the broad indicators described in the previous section.<sup>138</sup>

#### **4.4.1.1 State practice: Structural issues**

State reports provide useful insights into institutional aspects relevant to taxation and domestic revenue collection. Some States, such as Cambodia, provided details of the government’s policy efforts in raising revenue<sup>139</sup> while

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<sup>137</sup> Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2008/2 (24 March 2009), [3(a)].

<sup>138</sup> As explained in Chapter 1, the analysis of State reports was conducted using NVivo software and employed the techniques of key word searching and coding.

<sup>139</sup> CESCR, *State Report: Cambodia*, E/C.12/KHM/1 (7 January 2009), [410].

others, such as Malta, provided details of reforms in taxation laws that address macroeconomic and resource maximisation concerns.<sup>140</sup> Some States also emphasised their taxation policy, highlighting key areas of State revenue, and identified their efforts to increase the efficiency of the customs service in order to increase import duty collection, which resulted in an increase in total revenue.<sup>141</sup> Increased revenue collection associated with the introduction of Sales Tax, Service Tax, VAT and excise tax, profit tax and corporate taxes was also highlighted.<sup>142</sup>

Tax reforms and developments in tax policies are referred to in some States reports. A number of States identified these changes in tax regimes as a measure for achieving development, employment and other socio-economic policy goals. For example, Guyana identified the changes it had made to income tax policy through an increase in the income tax threshold for low income earners, which resulted in increased disposable income for a large population and a reduction in overall government revenue.<sup>143</sup> A number of States also used tax policies, such as tax breaks, to promote social goals including participation of disabled people in the workforce,<sup>144</sup> tax relief for purchase of houses,<sup>145</sup> and job creation and training.<sup>146</sup> The Solomon Islands highlighted changes in the Income Tax Act which provided additional incentives to the private sector as a means of increasing investment and employment.<sup>147</sup> In response to the ESCR Committee's previous recommendation, Mexico identified its commitment to re-orient the macroeconomic environment and strengthen policy discipline in the

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<sup>140</sup> CESCR, *State Report: Malta*, E/1990/5/Add.58 (26 May 2003), [515].

<sup>141</sup> CESCR, *State Report: Kosovo*, E/C.12/UNK/1 (15 January 2008), [18].

<sup>142</sup> *Ibid.*, [19].

<sup>143</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), 36-37.

<sup>144</sup> CESCR, *State Report: Spain*, E/C.12/4/Add.11 (14 January 2003), [145].

<sup>145</sup> *Ibid.*, [390].

<sup>146</sup> CESCR, *State Report: Malta*, E/1990/5/Add.58 (26 May 2003), [89].

<sup>147</sup> CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [50].

management of public finances.<sup>148</sup> The policy goal of gradually reducing public deficits to arrive at a budget balance was also identified.<sup>149</sup>

Overall, in relation to structural issues associated with domestic revenue generation, the majority of reports provide some insights into taxation policy, revenue challenges, debt management and fiscal policy.<sup>150</sup> This shows the importance attached to these policy areas by reporting States as part of their ESC rights implementation strategies.

#### **4.4.1.2 State practice: Process issues**

Enhancing tax collection is another indispensable aspect of tax administration. Most States, however, did not make direct reference to their tax revenue efforts. Costa Rica described the government's efforts to improve tax collection and to control public spending and internal debt, as well as monetary policy stances targeted at controlling inflation and liquidity problems.<sup>151</sup> Ireland identified the important role of its new taxation policy in modernising the institutional and legal framework of taxation, which had positive impacts on economic and social development and equity in redistribution of national income.<sup>152</sup>

A common strategy used by developing countries to attract investment, especially direct foreign investment, is to offer various forms of tax incentives and tax holidays. However, analysis of the role of incentives in attracting foreign investment shows mixed results, with 'spectacular successes as well as notable failures in their role as facilitators of FDI'.<sup>153</sup> Evidence shows that incentives are secondary in attracting investments, and factors such as market

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<sup>148</sup> CESCR, *State Report: Mexico*, E/C.12/4/Add.16 (25 February 2005), [1135].

<sup>149</sup> *Ibid.*, [1136].

<sup>150</sup> Out of 136 reports analysed, taxation is addressed in 107 reports, revenue in 53, fiscal policy 135 and debt in 62 reports.

<sup>151</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [367].

<sup>152</sup> CESCR, *State Report: Ireland*, E/C.12/IRL/3 (8 November 2013), [66].

<sup>153</sup> United Nations Conference on Trade and Development, 'Tax Incentives and Foreign Direct Investment: A Global Survey' (ASIT Advisory Studies No. 16 UNCTAD, 11) <[http://unctad.org/en/Docs/iteipcmisc3\\_en.pdf](http://unctad.org/en/Docs/iteipcmisc3_en.pdf)>.

size, access to raw materials and availability of skilled labour play a more significant role.<sup>154</sup> Therefore, while reduced taxes and tax incentives can help attract foreign investment, many other factors are equally necessary.<sup>155</sup> It is argued that the main reason companies invest in any given country almost never involves tax incentives; rather, the decision is driven by other considerations such as the size of the market, resources, strategic export platforms and labour.<sup>156</sup> Therefore, it can be argued that the tax incentives most often used by developing countries to promote investment—tax holidays and ‘special development’ or free trade zones—are actually damaging to their economies.<sup>157</sup> Estonia’s policy of lowering income tax and raising tax-exempt minimum income as a measure to increase real income of employees and promote investment and jobs is an example of fiscal policy application for social objectives.<sup>158</sup> Tajikistan reported its plans to analyse taxation mechanisms in order to boost entrepreneurial and investment activities.<sup>159</sup>

State reports, however, made very little mention of policies in non-tax revenue areas. Among the few to do so, Cambodia identified the government’s management of State-owned enterprises and enterprises co-owned by the State and private companies as a means to enhance their value.<sup>160</sup> The taxation of unused land<sup>161</sup> was also mentioned in that report. Similarly, Tanzania provided detailed tables on tax and non-tax revenue.<sup>162</sup>

The increasing problem of fiscal deficit and public debt was identified by Costa Rica as a limitation on the government’s flexibility in the implementation of

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<sup>154</sup> Ibid.

<sup>155</sup> International Monetary Fund, above n 14.

<sup>156</sup> Balakrishnan et al, above n 53, 12.

<sup>157</sup> Itriago, above n 18, 14. In most cases, tax holidays provide an opportunity for companies to dodge their responsibilities and is susceptible to abuse.

<sup>158</sup> CESCR, *State Report: Estonia*, E/C.12/EST/2 (12 July 2010), [274].

<sup>159</sup> CESCR, *State Report: Tajikistan*, E/C.12/TJK/2-3 (4 April 2013), [194].

<sup>160</sup> CESCR, *State Report: Cambodia*, E/C.12/KHM/1 (7 January 2009), [410].

<sup>161</sup> Ibid., [542].

<sup>162</sup> CESCR, *State Report: United Republic of Tanzania*, E/C.12/TZA/1-3 (28 March 2011), 12.

social policies.<sup>163</sup> The report described how the increasing burden of debt repayment had hampered effective public spending on other areas of the economy.<sup>164</sup> The issues associated with fiscal deficit were identified by the Philippines as a major macroeconomic problem.<sup>165</sup>

In general, the State reports referred to efforts by States to enhance the process of revenue collection and policy augmentation but would have been enriched by more detail about current reform processes and their impact.

#### **4.4.1.3 State practice: Outcome issues**

Few States provided detailed breakdowns of revenue. A small number of States, such as Cambodia, provided tabulated data on tax collection from various sources.<sup>166</sup> Angola reported that, in 2011, Total Fiscal Revenue corresponded to approximately 50.4 percent of Gross Domestic Product (GDP) at market prices, while in 2012, 80 percent of taxes came from oil revenue.<sup>167</sup> Indonesia also provided details of the domestic revenue component of government financing.<sup>168</sup> Costa Rica identified some of the challenges faced by the government due to reductions in central government revenue and increased deficit.<sup>169</sup>

Overall, these reports demonstrated the results of many States' efforts in relation to resource mobilisation in different areas. More detail about the policy challenges in generating and broadening the resource base would have enhanced their value as indicators of State effort in the area of resource mobilisation.

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<sup>163</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [78].

<sup>164</sup> *Ibid.*, [79].

<sup>165</sup> CESCR, *State Report: The Philippines*, E/C.12/PHL/4 (7 September 2007), [25].

<sup>166</sup> CESCR, *State Report: Cambodia*, E/C.12/KHM/1 (7 January 2009), 165.

<sup>167</sup> CESCR, *State Report: Angola*, E/C.12/AGO/4-5 (3 July 2014), [43].

<sup>168</sup> CESCR, *State Report: Indonesia*, E/C.12/IDN/1 (29 October 2012), [28].

<sup>169</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [81].

#### 4.4.2 Pushing policy boundaries on resource mobilisation: A case study on Maldives

The previous section outlined the range of challenges States face in fiscal policy design and implementation, particularly in relation to maximising domestic public sector resources. The following case study analyses some of these key challenges in more depth. It shows that proper design and implementation of a robust fiscal policy can be particularly challenging for small developing countries.<sup>170</sup> While the issues and challenges may not be applicable to other countries, they illustrate the complexity of revenue policies and their implementation.<sup>171</sup>

##### 4.4.2.1 Economic background and fiscal position

The Indian Ocean tsunami of 2004 and the global financial and economic crises of 2007-2008 affected Maldives particularly badly, especially given its small size and inherent vulnerability to external shock.<sup>172</sup> According to the World Bank, macroeconomic imbalances threaten to derail the government's development agenda, especially since the policy response to the 2007-2008 global financial crisis was partial and has left the country vulnerable to further shocks.<sup>173</sup> These macroeconomic imbalances, especially fiscal deficit, and the general level of policy uncertainty continues to threaten the already narrow economic base.

For public revenue, the Government of Maldives relies heavily on tourism-related taxes and rents. Tourism revenue has been traditionally based on a

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<sup>170</sup> As described in chapter 1, Maldives is selected for case studies throughout this thesis based on the relevance of the country's experience to small developing states, easy availability of relevant data, and the author's personal familiarity with the country.

<sup>171</sup> A detailed background on the socio-economic condition and human rights situation in Maldives is covered in Chapter 1 (Section 1.4.3.1).

<sup>172</sup> See for example, Ministry of Planning and National Development, *Tsunami Impact Assessment 2005: A socio-economic countrywide assessment at household level, six months after the tsunami* (Ministry of Planning and National Development, Male', Maldives, 2005), <[http://www.planning.gov.mv/publications/TIA/TIA\\_SUMMARY\\_report.pdf](http://www.planning.gov.mv/publications/TIA/TIA_SUMMARY_report.pdf)>; The World Bank, *Maldives: Country Snapshot* (The World Bank, Washington, D.C., 2014).

<sup>173</sup> The World Bank, *Maldives Overview* <<http://www.worldbank.org/en/country/maldives/overview>>.

fixed tourist-night tax (bed tax) and land lease payments from the resort islands. In 2010, the government introduced major tax reforms with the aim of strengthening the tax base. As part of the tax reform agenda, a goods and services tax (GST) and tourism goods and services tax (TGST) were introduced. The TGST introduced in January 2011 is applied only to tourism-related consumption of goods and services, while the GST, which came into effect in October 2011, covered all non-tourism goods and services consumed within the country. A broad Business Profit Tax (BPT) was also introduced in July 2011.<sup>174</sup> Despite these initiatives, as of 2015, personal income tax and corporate profit tax were yet to be introduced,<sup>175</sup> which could have provided important additional government revenue channels. The former government's efforts to introduce these taxes were mainly derailed by elite capture, as the result of objections from the political and economic elites.

Before the introduction of TGST/GST and business profit tax in 2010-2011, the government relied heavily on import duties for much of its tax revenue. The lowering (or elimination) of import duties on a number of items has resulted in an overall decline in import duty receipts. Deficit financing has become increasingly problematic in the face of limited financing options.<sup>176</sup> The overall composition of revenue from various sources for 2011-2013 is shown in Table 2 below.

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<sup>174</sup> The information about taxation regime is derived from Maldives Inland Revenue Authority, *Maldives Inland Revenue Authority MIRA* (2015) <[https://www.mira.gov.mv/Default\\_Eng.aspx](https://www.mira.gov.mv/Default_Eng.aspx)>.

<sup>175</sup> A draft regulation on green tax, mainly targeted to the tourism sector is currently under review.

<sup>176</sup> Maldives Monetary Authority, *Annual Report 2013* (MMA, Male', 2014).

Table 2: Government Revenue and Grants, 2010-2014 (Maldives)

(Millions of MVR : US\$ 1= MVR 15.40)

Year	Total Revenue and Grants															
	TOTAL	Tax Revenue									Non-Tax Revenue			Capital Revenue	Grants	
		Total Tax	Tourism tax	TGST	Import duty	GST	Airport SC	Bank profit tax	business profit tax	Others	Total non-tax	Net sales to public enterprises	Resort lease rent			Others
2011	<b>9,904.6</b>	4,893.0	750.8	665.3	2,586.5	243.0	337.5	229.9	34.9	45.1	3,744.7	973.7	1,152.2	1,618.8	534.5	732.4
2012	<b>10,138.1</b>	6,880.1	804.7	1,553.6	1,369.0	1,005.7	299.9	313.2	1,401.3	132.7	2,843.3	633.3	1,031.2	1,178.8	48.1	366.7
2013	<b>11,900.7</b>	8,872.8	861.6	2,154.7	1,575.9	1,538.4	350.3	355.0	1,881.0	156.0	2,642.1	475.9	1,106.3	1,059.9	268.1	117.7
2014	<b>14,907.2</b>	10,436.3	812.3	2,977.9	1,717.0	1,478.0	436.5	482.4	2,376.4	155.9	3,930.4	757.2	1,271.1	1,902.1	152.9	414.6

Source: Ministry of Finance and Treasury/ MMA (2015)

As can be seen from Table 2, the largest component of tax revenue in 2014 was the TGST followed by business profit tax and import duties. Of the total tax revenue, TGST revenue made up 28.5 percent, a significant increase over previous years that largely reflects the increase in the rate of TGST from 6 percent in 2012 to 8 percent in 2013.<sup>177</sup> Revenue from GST also increased, driven by increased consumption, increased tax rates (from the initial 3.5 percent to 6 percent) and the inclusion of more goods and services in the list of taxable items. The government has recently added key sectors such as telecommunications and transport to the GST,<sup>178</sup> which will significantly increase GST revenue in future. The government has already put forward proposals to increase the TGST rate to 15 percent.

According to the World Bank, non-tax revenue accounted for 26 percent of total government revenue. This includes rent from resort lease and profit transfers from State-owned enterprises<sup>179</sup> and puts the non-tax revenue in Maldives among the highest in the South Asia region.<sup>180</sup> This over-reliance on non-tax revenue may be a source of structural vulnerability in the economy and the revenue base.

<sup>177</sup> Ibid., 21.

<sup>178</sup> Maldives Inland Revenue Authority, *GST (Goods and Services Tax)* <<http://www.mira.gov.mv/Gst.aspx>>.

<sup>179</sup> The World Bank, above n 73, 40-41.

<sup>180</sup> Ibid.

Despite increasing revenue generation over time, Maldives is currently spending beyond its means and financing the budget risks affecting the real economy.<sup>181</sup> The gap between revenue and expenditure has been widening substantially over recent years.<sup>182</sup> This has created an enormous debt burden that could negatively impact the ability of the government to sustain future spending in key areas of ESC rights.

#### **4.4.2.2 Deficit financing and debt sustainability**

The Government of Maldives follows an expansionary fiscal policy with total expenditure increasing by 20.6 percent in 2014 from 3.5 percent growth in 2013. The overall budget deficit has widened to 11.6 percent of GDP in 2014.<sup>183</sup> The Maldives Monetary Authority (MMA)<sup>184</sup> reported that, although total tax revenue collection in 2013 exceeded the expected value, non-tax revenue was lower than anticipated, thereby offsetting the increased tax revenue.<sup>185</sup> The debt-to-GDP ratio is projected to deteriorate further to about 96 percent by 2015 unless strong measures are taken to bring the fiscal and debt situation, which has created problems with regard to future borrowing, back to sustainable levels.<sup>186</sup> The World Bank notes that government spending is unsustainably high relative to available fiscal resources and that the country is already at high risk of debt distress.<sup>187</sup>

In the face of inadequate revenue generation, the Maldives government adopted three main approaches to deficit financing: short-term commercial borrowing from banks and the private sector; monetisation of the deficit; and

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<sup>181</sup> The World Bank, *Maldives Development Update 2013* (The World Bank, Washington, D.C., 2013), <[http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2013/12/06/000356161\\_20131206154350/Rendered/PDF/829560REVISED00rief020130Dec0final.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2013/12/06/000356161_20131206154350/Rendered/PDF/829560REVISED00rief020130Dec0final.pdf)>.

<sup>182</sup> For example, in 2013, the total expenditures of the government were above 42 percent of the GDP, while the total revenue collection stayed at just 32.8 percent.

<sup>183</sup> Asian Development Bank, *Asian Development Outlook 2015: Financing Asia's Future Growth* (ADB, Manila, 2015), <<http://www.adb.org/sites/default/files/publication/154508/ado-2015.pdf>>.

<sup>184</sup> The MMA is the Central Bank of Maldives.

<sup>185</sup> Maldives Monetary Authority, above n 176, 20.

<sup>186</sup> The World Bank, above n 181, 4.

<sup>187</sup> The World Bank, above n 73, 2.

build-up of payment arrears which poses a real threat to long-term sustainability of the debt.<sup>188</sup> In relation to financing for the budget deficit, the government had significant difficulty in obtaining funds from external sources so it resorted to financing these requirements through domestic borrowing, mainly through issuance of Treasury-bills (T-bills) and monetisation.

Because of the high reliance on T-bills and the narrow market base, the weighted average interest rates for T-bills remained very high, making this form of borrowing extremely expensive for the government and has increased the total outstanding stock.<sup>189</sup> The overall public debt, including publicly guaranteed debts, has remained at 78 percent of GDP,<sup>190</sup> while T-bill rates of all maturities were over 10 percent by December 2013.<sup>191</sup> The government's approach to deficit financing exacerbated the situation, particularly because of increased monetisation and ad hoc borrowing from the central bank and private sector.

Currently, there is overreliance on borrowing from the banking sector to meet domestic financial requirements, mainly because of the absence of any non-banking finance facilities.<sup>192</sup> This has increased stress on the banking sector and it is feared that the private sector is being crowded out of the available credit. At the moment, there is very little by way of a fiscal buffer to absorb the impact of increasing debt and depleting reserves. As a result of weak macroeconomic management, the balance of payment and external reserves remain under considerable pressure.

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<sup>188</sup> The World Bank, above n 181, 2; Maldives Monetary Authority, above n 176, 20.

<sup>189</sup> Maldives Monetary Authority, above n 176, 24.

<sup>190</sup> Ibid.

<sup>191</sup> Asian Development Bank, *Asian Development Outlook 2014- Fiscal Policy for Inclusive Growth: Maldives* (ADB, Manila, 2014), <<http://www.adb.org/sites/default/files/ado2014-maldives.pdf>>, 175.

<sup>192</sup> Asian Development Bank, above n 183.

#### ***4.4.2.3 Challenges in strengthening resource base from an ESC rights perspective***

Institutional weakness in public financial management is one of the factors that have undermined the Maldivian government's capacity to undertake necessary fiscal adjustments in an efficient manner. Although there have been some developments in public finance management in recent years,<sup>193</sup> a lot more needs to be done to improve budget credibility and governance, especially in relation to transparency and accountability.

Containing and controlling fiscal and external imbalance needs to be a high priority for the government of Maldives,<sup>194</sup> especially since high fiscal deficits create an elevated risk to the overall health of the economy and the ability of the government to sustainably provide public services that are essential for basic ESC rights. Fiscal consolidation, reduction in current account spending and reining in transfers and subsidies are among the most important and urgent challenges for the government. The evidence on the ground suggests that deficit financing will become more challenging in the future unless there is a reversal in the reliance on short-term commercial borrowing, monetisation of deficit, and build-up of payment arrears.

In summary, this case study analysis has identified the political and economic dimensions of the challenges of managing government revenue and fiscal policy sustainability and how these policy elements could impact the overall level of resources available to the State to address ESC rights policy priorities.

#### **4.4.3 Policy implications in maximising domestic revenue for ESC rights**

The foregoing analyses of the State reports and the case study have shown the practical complexities of fiscal policy tools relevant to domestic revenue

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<sup>193</sup> Strengthening the institutional capacity of MIRA and introduction of broad-based taxation are among key developments in recent years.

<sup>194</sup> Asian Development Bank, above n 191, 176.

collection. At the same time, they provide a good basis on which to develop some core themes and constructs that can inform policy options within individual countries to enhance the State's capacity to maximise domestic revenue, which is essential for implementing ESC rights policies. These core constructs can help to guide the process of strengthening policymaking in these interrelated areas.

First among the most urgent policy initiatives is the need to strengthen aspects of good governance, including responsiveness and accountability of the State to citizens and their needs, which can enhance the State's legitimacy as it seeks to address the many challenges associated with revenue generation. The 'new fiscal sociology' approach focuses on the importance of taxation to good governance and the process of 'building State institutions that are responsive, accountable and competent.'<sup>195</sup> There is historical evidence of the relationship between the ways in which States raise revenue and how they are governed.<sup>196</sup> This approach provides a fiscal management blueprint that States can use to maximise resource generation.

An effective taxation system requires, among other things, appropriately structured institutions and tax policies that minimise the effects of corruption. Tax policies and institutional design should be, in Joseph Stiglitz's words, *corruption resistant tax structures*.<sup>197</sup> He argues that a fundamental aspect of designing a corruption-resistant tax structure is the observability and verifiability of the tax design.<sup>198</sup> For these characteristics to be effective, information management and understanding information limitations related to taxation are crucial.<sup>199</sup> Resource governance and anti-corruption measures are discussed in more detail in Chapter 8.

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<sup>195</sup> Keen, above n 13.

<sup>196</sup> Moore, above n 89.

<sup>197</sup> Stiglitz, above n 29.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

As discussed above, existing levels of taxation in many developing countries are lower than the optimal tax rates identified by economic simulations.<sup>200</sup> Reasons include the regressive taxation system, excessive tax incentives, weak tax authorities, the practice of tax evasion and tax avoidance, and the size of the informal sector.<sup>201</sup> Therefore, any examination of taxation policy should address these issues with regard to the appropriate level of taxation, distribution of the tax burden among taxpayers, potential effects of taxation on the overall economy, and the questions of sustainability.

A robust system of taxation also provides incentives for government to be more productive in the overall economy, leading to better human rights outcomes, through what economists call the endogenous feedback loop from taxation to development.<sup>202</sup> By broadening the tax base, rationalising tax rates, and improving tax administration,<sup>203</sup> the government increases its stakes in the economy, which in turn creates strong complementarities between taxation, infrastructure development and human rights. Therefore, addressing these areas of tax administration can enhance resource capacity and have a direct effect on the level of realisation of ESC rights.

As explained in this chapter, the imbalance of tax policy can have adverse consequences for the ability of government to address important human rights priorities in the short term as well as the overall conditions for human rights in the future. While economic policy is driven by the desire to create wealth and improve economic conditions, these are not far removed from the normative values of human rights. Given the close interaction and complementarity between economic variables and human rights objectives, it is crucial for governments to employ economic policy tools to achieve human rights targets. The normative framework of the human rights regime (particularly that of ESC

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<sup>200</sup> Louis Kaplow, *The Theory of Taxation and Public Economics* (Princeton University Press, Princeton, 2008), 78.

<sup>201</sup> Obenland, above n 133.

<sup>202</sup> Besley and Persson, above n 91, 6.

<sup>203</sup> The World Bank, above n 73, 17.

rights) can be effectively employed to guide State policy interventions and participation in the market.

## 4.5 CONCLUSIONS

The macroeconomic analysis of the concept of ‘maximum available resources’ for ESC rights presented in this chapter opens up new methods of appreciating not only State obligations in relation to taking steps within its resource envelope, but also new ways of looking at the potential to improve resource mobilisation and allocation.

This chapter presented a qualitative analysis of the policy options available to States with regard to domestic resource mobilisation within an ESC rights framework. It has shown that, in order to achieve the objectives of human rights realisation, most developing countries require significant changes in domestic resource mobilisation strategies, particularly enhancement of their tax regime. There is a substantial gap between developed and developing countries in terms of their ability to raise public revenue. In addition to the low tax-to-GDP ratio in many developing countries, as illustrated in the State reports and case study, these countries also face significant challenges in the form of weak revenue administration, poor governance, low taxpayer morale and compliance. Therefore, the identification of legal and institutional constraints on raising revenue and managing and allocating adequate resources for various policy objectives must be considered in the resource policy agenda.

The most important conclusion to be drawn from this chapter is that the design of a domestic revenue regime should target high tax yields by broadening the tax base, reducing tax exemption and tax holidays, and strengthening overall tax administration and fiscal management capacity. The analysis of core elements of fiscal and monetary policy through the lens of ESC rights validates the view that a good fiscal policy should be driven and guided by the principles of efficiency, equity and fairness, and that these policies must be targeted

towards creating stronger institutional capacity and orientation towards human rights needs.

Maximising domestic revenue is one of the most crucial elements of the resource model presented in this thesis. In addition to policy efforts to maximise domestic revenue, the obligation on the State to use 'maximum available resources' for ESC rights realisation necessitates active effort on the part of the State to supplement these resources through international assistance and co-operation. This is the topic of discussion in the next chapter.

## 5

**Maximising Resources for ESC Rights through International Assistance and Co-operation****5.1 INTRODUCTION**

The sweeping effects of globalisation and of the international economic and political order dictate that human rights objectives be incorporated into international assistance and co-operation activities. In the context of ESC rights, the realities of globalisation and structural disadvantages for the poor call for a new paradigm of international assistance and co-operation in which 'needy' States have a stronger voice in determining how these efforts are managed.

For many poor States, existing national resources and efforts are inadequate to break the vicious cycle of powerlessness, stigmatisation, discrimination, exclusion and material deprivation that characterise situations in which the basic rights of individuals are not always realised.<sup>1</sup> It is important to emphasise, however, that this call for international assistance and co-operation, including the transfer of human rights-related resources from wealthy to poorer States, should not be seen as a claim for handouts or charity. Rather, it is an *entitlement* within an international social and economic order that is sensitive to basic human needs and rights.<sup>2</sup> The international assistance and co-operation regime needs to be transformed into a more practical system

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<sup>1</sup> For example, Magdalena Sepúlveda, *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, 21<sup>st</sup> sess, Agenda Item 3, UN Doc A/HRC/21/39 (18 July 2012), 4.

<sup>2</sup> Sakiko Fukuda-Parr, 'International Obligations for Economic and Social Rights: The Case of the Millennium Development Goal Eight' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007), 293.

in which the flow and utilisation of resources reflect the needs, aspirations and human rights demands of the population.

Considering the necessity for augmenting international assistance and co-operation from the perspective of resources required for the realisation of ESC rights as presented in Chapter 3, this chapter examines the structures, institutional arrangements, inadequacies and limitations of the international assistance regime from an ESC rights perspective and identifies policy options for developing States to maximise the flow of international aid and resources for ESC rights purposes. Building on the model of 'maximum available resources' in the context of ESC rights, it provides an in-depth analysis of current practices in international assistance and co-operation and suggests how such co-operation can be expanded. The argument is that assistance and co-operation are an important component of 'maximum available resources' in the realisation of ESC rights and that, with more concerted policy efforts, States can enhance the quantity and quality of these resources.

The first section surveys current practices, including bilateral, multilateral and regional aid and assistance mechanisms, to identify their key characteristics and how they relate to the concept of resources within an ESC rights frameworks. This is followed by an examination of existing processes of aid delivery and allocation and how they impact human rights realisation in developing countries. This analysis is not intended to be a general critique of international assistance and co-operation; rather, its purpose is to establish its relevance as a form of 'resource' that needy States can tap into in their efforts to realise ESC rights obligations. The chapter then identifies gaps in international assistance practice that need to be addressed in order to better meet human rights obligations. Some findings from a qualitative analysis of State reports under the ICESCR are included to provide empirical support to the discussion.

The last part of the chapter explores new approaches to maximising resources through international assistance and co-operation and allowing States more policy space in which to perform their human rights obligations more effectively and efficiently.

## 5.2 INTERNATIONAL ASSISTANCE AND CO-OPERATION: CURRENT TRENDS AND FUTURE DIRECTIONS

International assistance and co-operation activities are instrumental in filling domestic gaps in resources and skills that are essential for sustaining public expenditure and investment in developing countries. From an economic point of view, such assistance is useful in filling the foreign exchange gap associated with the shortage of foreign exchange flow, especially in the case of poor trade balances, and the fiscal gaps that arise from reduced or inadequate revenue from taxation and other primary revenue sources. From a human rights perspective, such aid and assistance are crucial for creating the necessary conditions for many in poor countries to enjoy their basic rights.

The dynamics of international assistance and co-operation indicate that such activities are strongly interrelated and their positive effects are transmitted to economic and social policy areas. It is recognised that development co-operation serves the purpose of 'assisting countries in their efforts to make social and economic progress.'<sup>3</sup> Numerous references to international assistance and co-operation in soft law instruments suggests a recognition of such co-operation as an important principle with the character of a general principles of international law.<sup>4</sup> Therefore, the capacity of the State to deliver social and economic progress is directly related to its ability to protect and promote human rights, particularly ESC rights.

The need for the international community to support social development and the realisation of human rights has been recognised in a number of international instruments.<sup>5</sup> These argue that mechanisms to increase the net flow of resources to developing States and strengthen economic co-operation

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<sup>3</sup> Stephan Klingebiel, *Development Cooperation: Challenges of the New Aid Architecture* (Palgrave Macmillan, London, 2014), 2.

<sup>4</sup> Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2009), 324.

<sup>5</sup> For example, United Nations World Summit on Social Development, *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development*, A/CONF.166/9, (6-12 March 1995). Many other international provisions related to international assistance and cooperation were covered in Chapter 2 and 3 of this thesis.

and mutual trade<sup>6</sup> need to be based on dialogue and transparency,<sup>7</sup> a duty to co-operate,<sup>8</sup> and the principles of 'sovereign equality, interdependence, mutual interest and cooperation'.<sup>9</sup> These instruments reflect recognition that social development cannot be achieved without the collective commitment and effort of the international community and therefore constitute acknowledgement that international assistance and co-operation are a vital element in the achievement of these global goals.<sup>10</sup> These principles also emphasise that such a 'duty' on the States to provide international assistance and co-operation ought to be commensurate with their capacities, resources and influence,<sup>11</sup> and that such co-operation and assistance must address the requirements for harmonisation, transparency and coordination of the activities and shared accountability.<sup>12</sup> These characteristics will not only make international assistance and co-operation more human rights-friendly, but also more effective in bringing about the desired developmental outcomes.

From an economic perspective, the rationale for aid as a source of development finance has its foundations in the two-gap model of Chenery and Strout,<sup>13</sup> which holds that low-income countries have low domestic savings for investment in growth and insufficient foreign exchange earnings for capital

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<sup>6</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993), [4].

<sup>7</sup> *Ibid.*

<sup>8</sup> United Nations General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/8082, 2625 (XXV), UN Doc A/RES/25/2625 (24 October 1970).

<sup>9</sup> United Nations General Assembly, *Declaration on the Right to Development*, 41/128, 41<sup>st</sup> sess, 97th plenary mtg, UN Doc A/RES/41/128 (4 December 1986).

<sup>10</sup> *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development*, above n 5, [25].

<sup>11</sup> *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, A/HRC/21/39, above n 1.

<sup>12</sup> *Ibid.*, [93].

<sup>13</sup> H B Chenery and A M Strout, 'Foreign Assistance and Economic Development' (1966) 56 *American Economic Review* 679-733.

imports.<sup>14</sup> Later models add a third element, the fiscal gap.<sup>15</sup> It is taken as axiomatic that foreign resources help fill these gaps and provide much needed resources with which a government can carry out its programmes and activities.

Positive outcomes from international assistance and co-operation are contingent not only on the amount of resources made available, but also on the commitment of recipient States to ensure the effectiveness of such programmes. Therefore, the duties of developing States to seek appropriate levels of assistance from other States are an important consideration. This section examines international assistance and co-operation practices and appraises the recent aid landscape. This analysis provides the background for subsequent discussion of resource mobilisation for ESC rights through international co-operation.

### **5.2.1 International assistance and co-operation: Actors and structures**

International assistance and co-operation takes many different forms, including Official Development Assistance (ODA), technical co-operation, preferential terms of trade, loans and debt cancellation. According to the World Bank, Official Development Assistance (ODA) includes all disbursements of concessional loans and grants by the Development Assistance Committee (DAC) and non-DAC bilateral and multilateral institutions whose work is targeted at enhancing economic development and welfare in recipient States.<sup>16</sup>

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<sup>14</sup> Susana Franco-Rodriguez, Oliver Morrissey and Mark McGillivray, 'Aid and the Public Sector in Pakistan: Evidence with Endogenous Aid' (1998) 26(7) *World Development* 1241-1250, 1241.

<sup>15</sup> Isabel Ortiz, 'Financing for Development: International Redistribution' in Katja Hujo and Shea McClanahan (eds), *Financing Social Policy: Mobilizing Resources for Social Development* (Palgrave Macmillan, 2009) 53, 71.

<sup>16</sup> The World Bank, *Net ODA received per capita (current US\$)* (2015) <<http://data.worldbank.org/indicator/DT.ODA.ODAT.PC.ZS>>.

Currently, international assistance and aid programmes comprise a large number of actors. Some estimate that there are at least 126 bilateral agencies from the OECD DAC countries and another 23 non-DAC bilateral donors.<sup>17</sup> In addition, there are 263 multilateral aid agencies, not counting the huge number of private philanthropic organisations.<sup>18</sup> It is estimated that bilateral agencies contribute about 70 percent of all aid, while multilateral and other systems account for the rest.<sup>19</sup> There is also a large number of bilateral and regional co-operation and assistance arrangements.

Despite renewed commitments from developed States on many occasions to allocate 0.7 percent of Gross National Product (GNP) to international aid,<sup>20</sup> total aid remains at 0.3 per cent of their combined GNP.<sup>21</sup> As of 2014, only Norway, Sweden, Luxemburg, Denmark, and the United Kingdom had met the 0.7 per cent commitment.<sup>22</sup> According to OECD statistics, the net ODA from DAC countries was US\$135.1 billion in 2013 and US\$135.2 billion in 2014, which represents a 0.5 percent decline in real terms if price rises and exchange rate moves are factored in.<sup>23</sup> Overall, the GNP share of ODA for DAC countries remains at 29 percent.<sup>24</sup> These statistics show that there has

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<sup>17</sup> Homi Kharas, 'Development Assistance in the 21st Century' (Paper presented at the The VIII Salamanca Forum- The Fight Against Hunger and Poverty, Wolfensohn Center for Development, Brookings Institute, Washington, D.C., 2-4 July 2009) <[http://www.brookings.edu/~media/research/files/papers/2009/11/development-aid-kharas/11\\_development\\_aid\\_kharas.pdf](http://www.brookings.edu/~media/research/files/papers/2009/11/development-aid-kharas/11_development_aid_kharas.pdf)>.

<sup>18</sup> Alison Evans, *Aid effectiveness post-2010- a think piece on ways forward* (Overseas Development Institute, 2010), <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7263.pdf>>, 2.

<sup>19</sup> Simon Burall, Simon Maxwell and Alina Rocha Menocal, 'Reforming the international aid architecture: Options and ways forward' (Working Paper 278, Overseas Development Institute), 4; Inge Kaul and Pedro Conceição, 'Why Revisit Public Finance Today?' in Inge Kaul and Pedro Conceição (eds), *The New Public Finance: Responding to Global Challenges* (The United Nations Development Programme, New York, 2006) 1.

<sup>20</sup> A Commission led by the Canadian Prime Minister Pierre Trudeau called for the allocation of 0.7 per cent of GNP of the rich states to aid the developing states, which was later adopted by the UN General Assembly in 1970.

<sup>21</sup> Ortiz, above n 15, 55.

<sup>22</sup> Ibid.

<sup>23</sup> Organisation for Economic Co-operation and Development, *Development aid stable in 2014 but flows to poorest countries still falling* OECD <<http://www.oecd.org/development/development-aid-stable-in-2014-but-flows-to-poorest-countries-still-falling.htm>>.

<sup>24</sup> Ibid.

been a decline in the total amount of aid from DAC countries and it remains far from the 0.7 percent commitment. Figure 3 displays the most recent statistics.

### Gross bilateral ODA (2012-2013 average, unless otherwise shown)

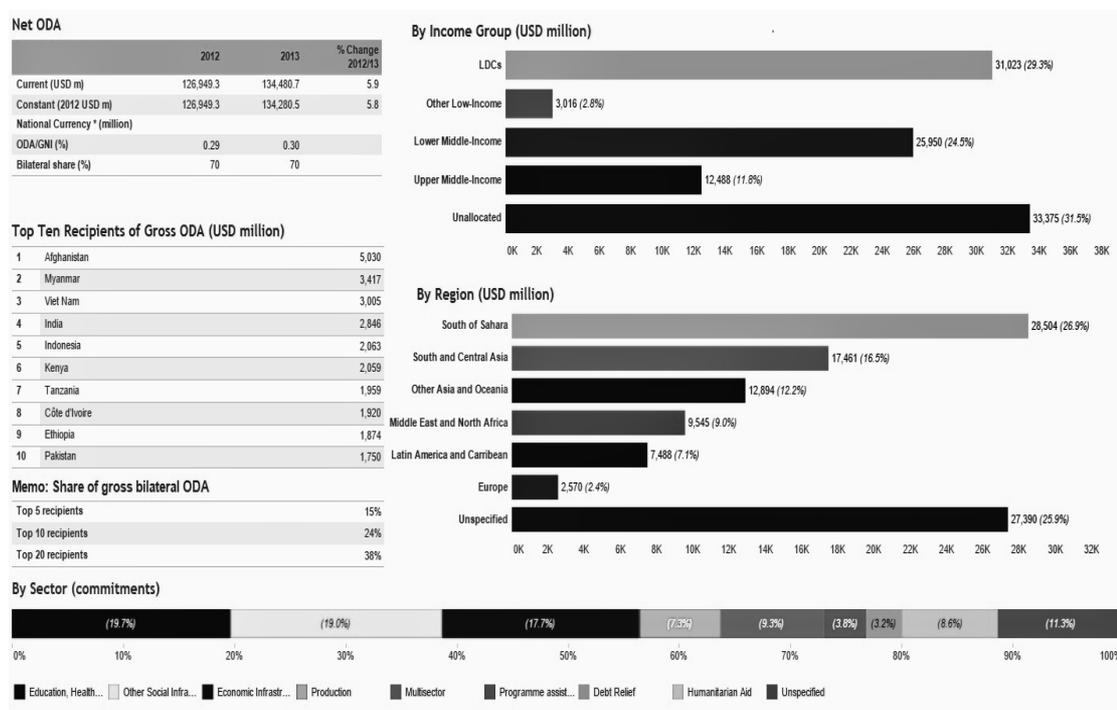


Figure 3: Official Development Aid from DAC countries

Source: OECD (2015) / <https://public.tableau.com>

In 2013, more than 20 percent of all aid went towards a combined category that includes education, health and population and which has a direct bearing on ESC rights fulfilment. If the allocation for other social infrastructure projects with direct impact on the enjoyment of all ESC rights is included, the total amounts to just over 40 percent.

Despite the urgency of development needs in recipient countries, international assistance and co-operation activities remain largely voluntary and loosely organised. Moreover, the amount of bilateral and multilateral aid that States receive is often not directly related to their level of development, income or need. Factors such as geo-political importance, colonial history, regional

groupings and level of engagement with the international community in seeking aid play a more significant role than the actual resource needs of these States (see Figure 4 below).

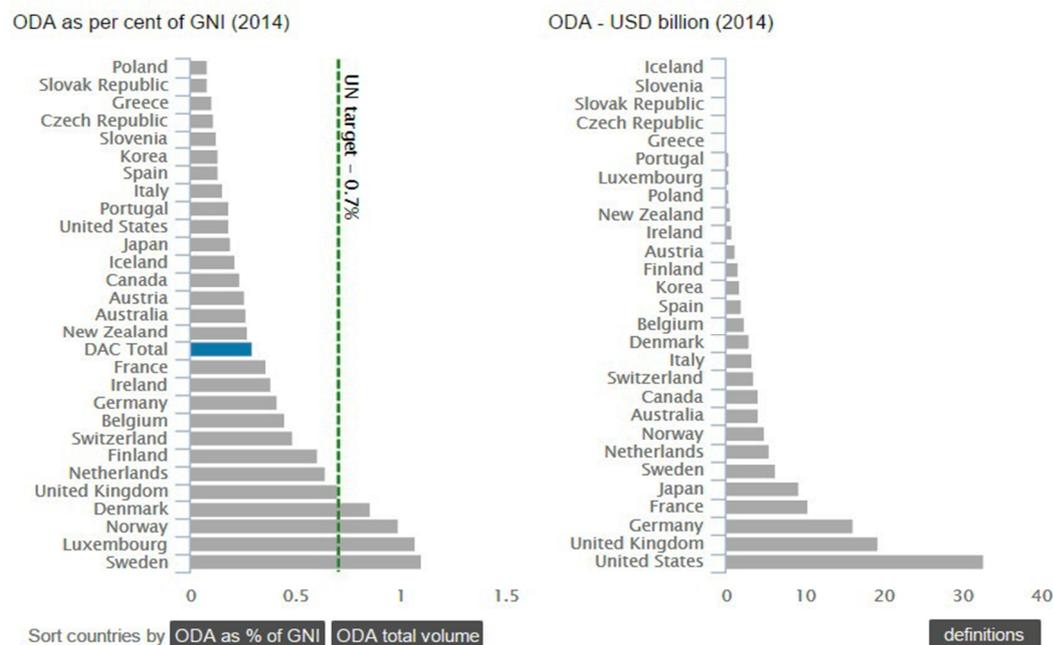


Figure 4: DAC ODA as a percentage of GNI and in Total Volume (2014)

Source: OECD- [www.oecd.org](http://www.oecd.org); <http://www.aidflows.org/>

All forms of international assistance and co-operation, including grants, loans, debt relief, and technical and economic co-operation, have their advantages and disadvantages, especially from the perspective of the recipient State. For example, grants financing involves less cost to governments, while debt (including loans and securities) are often the least preferred,<sup>25</sup> because higher *concessional* and a lower debt burden are good for poor countries.<sup>26</sup> Some scholars claim that loans are not effective sources of finance for social sector programmes, such as education and health, because their returns are long-

<sup>25</sup> Ortiz, above n 15, 73.

<sup>26</sup> Oliver Morrissey, Olaf Islei and Daniel M'Amanja, 'Aid Loans Versus Aid Grants: Are The Effects Different?' (CREDIT Research Paper No. 06/07, Centre for Research in Economic Development and International Trade, University of Nottingham).

term and they have very little financial return in the short-run.<sup>27</sup> Others contend that loans with future obligations encourage more positive fiscal management as compared to grants.<sup>28</sup> Despite these differences of opinion, it is argued that economic analysis and empirical tests show that loans are better than grants in promoting budgetary discipline in recipient governments because, grants are less-efficiently utilised by recipient governments especially when measured against efficiency indicators based on 'government investment spending in relation to consumption spending, higher tax effort and reduced domestic financing of fiscal deficits'.<sup>29</sup>

The fiscal behaviour of the government is also shaped by the understanding that they will have to repay the loan. Governments take a much more relaxed approach to management of domestic revenue efforts if the aid is in the form of a grant.<sup>30</sup> It has also been shown that loans are positively correlated with increased tax revenue while grants have the opposite effect.<sup>31</sup> Hence one approach for loans is to incorporate long concessional and pay-up periods, although this could also mean that fewer funds for loans will be available due to the longer recovery period.

All forms of debt, such as loans and securities, are cumulative and can present enormous long-term challenges for poor countries. It is often argued that grants financing is a better option from the perspective of poor States<sup>32</sup> because it does not incur additional debt and can be justified by the existing unequal distribution of global resources.<sup>33</sup> Whether grant aid or loans are preferable depends on the policy environment and economic conditions.

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<sup>27</sup> See *ibid.*, 1.

<sup>28</sup> Ashna Rahman, 'Fiscal Effects of Aid' (Paper presented at the APEA Conference, University of Washington, Seattle, July 29-30, 2006) <<http://www.apeaweb.org/confer/sea06/papers/rahman.pdf>>.

<sup>29</sup> Matthew Odedokun, 'Economics and Politics of Official Loans versus Grants: Panoramic Issues and Empirical Evidence' (WIDER Discussion Paper No. 2003/04, World Institute for Development Economics Research, January 2003), <[http://archive.unu.edu/hq/library/Collection/PDF\\_files/WIDER/WIDERdp2003.04.pdf](http://archive.unu.edu/hq/library/Collection/PDF_files/WIDER/WIDERdp2003.04.pdf)>.

<sup>30</sup> Morrissey, Islei and M'Amanja, above n 26.

<sup>31</sup> *Ibid.*, 2.

<sup>32</sup> Ortiz, above n 15, 73.

<sup>33</sup> *Ibid.*

Countries with a better policy environment have no difficulty absorbing and repaying loans, but those with higher poverty and poor governance are likely to benefit more from fewer but more concessional resources.<sup>34</sup> Those with strong institutions benefit from a high level of aid, whereas for those with poor institutions, aid has the reverse effect.<sup>35</sup> Despite the apparent 'aid-institutions paradox', which shows that countries that receive more foreign aid have less incentive to strengthen public institutions,<sup>36</sup> the role of effective, accountable and inclusive institutions in attracting and effectively managing aid has been strongly acknowledged by scholars based on empirical evidence.<sup>37</sup> Therefore, it can be argued that one of the objectives of aid should be the provision of better incentives for good institutions and good governance.

Apart from direct provision of financial assistance, cancelling or forgiving the debt of the poorest countries is another valuable instrument, if managed well. Although debt cancellation performs better than either loans or grants alone,<sup>38</sup> it is argued that countries seeking debt relief under the Heavily Indebted Poor Countries (HIPC) initiative need to establish and demonstrate good policy reforms to tackle poverty.<sup>39</sup> These conditions are likely to have a positive policy impacts on overall human rights performance.

The objective of financial co-operation is 'to make resources available to enable partner countries to undertake the necessary investment and

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<sup>34</sup> Tito Cordella and Hulya Ulku, 'Grants vs. Loans' (IMF Staff Papers, Vol. 54, No. 1, International Monetary Fund), <<https://www.imf.org/external/pubs/ft/staffp/2007/01/pdf/cordella.pdf>>, 152.

<sup>35</sup> Deborah Bräutigam, *Aid Dependence and Governance* (Expert Group on Development Issues, 2000), <[http://www.swisstph.ch/fileadmin/user\\_upload/Pdfs/swap/swap404.pdf](http://www.swisstph.ch/fileadmin/user_upload/Pdfs/swap/swap404.pdf)>.

<sup>36</sup> Todd Moss, Gunilla Pettersson and Nicolas van de Walle, 'An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa' (Working Paper 74 Centre for Global Development, 1/10/2006) <<http://www.cgdev.org/publication/aid-institutions-paradox-review-essay-aid-dependency-and-state-building-sub-saharan>>.

<sup>37</sup> See for example, Matthew S Winters, 'Accountability, Participation and Foreign Aid Effectiveness' (2010) 12(2) *International Studies Review* 218.

<sup>38</sup> Daniel Cohen, Pierre Jacquet and Helmut Reisen, 'Loans or Grants?' (2007) 143(4) *Review of World Economics* 764-782.

<sup>39</sup> Oliver Morrissey, 'Aid and the Financing of Public Social Sector Spending' in Katja Hujó and Shea McClanahan (eds), *Financing Social Policy: Mobilizing Resources for Social Development* (Palgrave Macmillan, 2009) 141, 154.

expenditure that is important for development processes'.<sup>40</sup> Technical co-operation provides partners with 'advice and know-how, thus helping to develop sustainable capacities for managing the development processes.'<sup>41</sup> In the OECD definition, technical co-operation includes free-standing technical co-operation aimed at transferring technical and managerial skills and technology for capacity building at the national level as well as investment-related technical co-operation in services related to specific projects.<sup>42</sup> While the benefits of such activities are significant, a common criticism is that they lack sustainability, particularly when technical advice is provided by experts from the donor countries.<sup>43</sup> This 'supply orientation' of technical co-operation does not help to create local capacity or make use of locally available knowledge and solutions. Exclusive procurement of expertise from donor countries can reduce the overall flow of benefits to the recipient State.

### **5.2.2 Comparing modes of delivery: Bilateral, multilateral and regional co-operation mechanisms**

Given the diversity of actors and structures, international assistance and co-operation programmes are delivered through multiple modes, including multilateral, bilateral and regional arrangements. All these modes of delivery have advantages and disadvantages.

From an ESC rights perspective, the multilateral system has a number of advantages, particularly in relation to incorporating human rights objectives into aid programmes and pooling best practices from around the world. The potential efficiency gains in management and delivery are also likely to improve the utilisation of these resources.<sup>44</sup> This view is supported by research

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<sup>40</sup> Klingebiel, above n 3, 56.

<sup>41</sup> Ibid.

<sup>42</sup> Organisation for Economic Co-operation and Development, *Glossary of Statistical Terms: Technical Co-operation Grants* <<http://stats.oecd.org/glossary/detail.asp?ID=6022>>.

<sup>43</sup> Klingebiel, above n 3.

<sup>44</sup> Ibid., 28.

findings which confirm that multilateral co-operation generally works well in maximising efficiency, fostering institutions, reducing the burden on recipients, and providing transparency and learning quality.<sup>45</sup> In this approach, resources for development aid from multiple sources can be pooled and, thus, better managed.<sup>46</sup> Broader participation also gives more legitimacy.<sup>47</sup> The process is usually more transparent and less politicised,<sup>48</sup> which helps to create positive developmental outcomes.

Another positive aspect of the multilateral mode is the ability of multilateral agencies to better coordinate and share norms and knowledge of aid management.<sup>49</sup> Given the challenges to multilateral effectiveness, including fragmentation, economies of scale, coordination, and norms knowledge, increased competition among multilaterals should become the focus of future work to strengthen their effectiveness and innovation.<sup>50</sup> Multilateral institutions, with their larger capital and knowledge-bases, can be more effective than bilateral donors in making strategic decisions at the global level for maximum impact.<sup>51</sup> Domestic political and institutional factors are also relevant to the State's engagement with multilateral donors.

It can be argued that the large number of actors in the multilateral system makes it susceptible to the creation of excessive bureaucracy and delays. The fact that donors have less control over the process could make it less attractive, and the power relations between donors and recipients may also be more complicated. Nonetheless, the multilateral system is more likely to

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<sup>45</sup> For example see, Nancy Birdsall and Homi Kharas, *Quality of Official Development Assistance Assessment* (Center for Global Development, Washington, D.C., 2010), <<http://www.ifad.org/governance/replenishment/external/QuODA.pdf>>.

<sup>46</sup> Klingebiel, above n 3.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., 28.

<sup>49</sup> Homi Kharas and Michael Blomfield, 'Rethinking the Role of Multilateral Institutions in an Ever-Changing Aid Architecture' in Hany Besada and Shannon Kindornay (eds), *Multilateral Development Cooperation in a Changing Global Order* (Palgrave Macmillan, 2013) 63, 64.

<sup>50</sup> Ibid., 64.

<sup>51</sup> Ibid.

address the issue of fragmentation of aid, provide better economies of scale, and help to allocate resources for the most urgent needs.

By contrast, the advantage of bilateral co-operation is that it allows donors to be more selective in allocating aid resources. Politicians and the public in both donor and recipient States can access more information about allocation decisions.<sup>52</sup> Because only two governments are involved in decision-making, the processes of approval and implementation can be carried out more quickly.<sup>53</sup> Bilateral aid and co-operation affords donors the capacity to assess the performance of their aid contribution more closely compared to what is possible through multilateral mechanisms, which in turn allows the donor countries to better inform their own tax payers on how the aid money is used.<sup>54</sup>

However, the current form of bilateralism based on national preferences permits and often encourages donors to finance particular countries and projects based on their political preference.<sup>55</sup> In such situations, donors not only target assistance towards preferred areas, but also pick their favourite or 'darling' countries for aid assistance, thus creating a very unfair system of international assistance and aid distribution.<sup>56</sup> This form of voluntarism and preference-based aid does not take into consideration the areas that are most in need in developing countries, thus creating shortfalls in the most urgent areas.

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<sup>52</sup> Klingebiel, above n 3, 27-28.

<sup>53</sup> Ibid.

<sup>54</sup> Kharas and Blomfield, above n 49, 78.

<sup>55</sup> Ortiz, above n 15, 65.

<sup>56</sup> Ibid.

### 5.2.3 Human rights focus and the changing landscape of international assistance and co-operation

Increasingly, internationally recognised standards and norms of assistance, including the Monterrey Consensus, the DAC Principles,<sup>57</sup> and the Paris Declaration, have given due recognition to human rights principles. For example, the Monterrey Consensus recognises the need to mobilise more resources and increase their effective use in international assistance programmes<sup>58</sup> and for sound policies and good governance measures to accompany increased financial and technical co-operation, in addition to policies on sustainable debt financing and external debt relief.<sup>59</sup> Although the Monterrey Consensus does not make any explicit reference to the realisation of human rights as a fundamental goal of international assistance, a number of relevant objectives of social and public infrastructure and the provision of services such as education, health, nutrition, shelter and were specified.<sup>60</sup> The Consensus further reiterates the need for good governance and strong and accountable institutions for effective mobilisation and allocation of resources and fighting corruption as essential priority areas, for which further collective effort at the international level is essential.<sup>61</sup>

Similarly, the *DAC Action-Oriented Policy Paper on Human Rights* elaborated principles to engage donors more effectively in human rights goals, including those concerned with strengthening the connections between human rights and aid effectiveness.<sup>62</sup> The *Paris Declaration on Aid Effectiveness* (2005) and

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<sup>57</sup> Development Assistance Committee, *DAC Principles for Evaluation of Development Assistance* (Development Assistance Committee, Organisation for Economic Co-operation and Development, Paris, 1991), <<http://www.oecd.org/dac/evaluation/2755284.pdf>>.

<sup>58</sup> United Nations Department of Economic and Social Affairs, *Monterrey Consensus of the International Conference on Financing for Development*, (The final text of agreements and commitments adopted at the International Conference on Financing for Development - Monterrey, Mexico), (18-22 March 2002).

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Organisation for Economic Co-operation and Development and The World Bank, *Integrating Human Rights into Development: Donor Approaches, Experiences, and*

the *Accra Agenda for Action* (2008) set out key commitments for ensuring that aid more effectively addresses the needs of the recipient State.<sup>63</sup>

Aid and development programmes have also begun to incorporate general human rights principles through human rights mainstreaming and Human Rights Based Approaches (HRBA). The HRBA requires that human rights principles of universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, accountability and rule of law, are fully incorporated into all aspects of development programming.<sup>64</sup> While this gives due recognition to these important human rights values, direct targeting of ESC rights is yet to become the norm in many international aid and assistance programmes.

Human rights principles also feature prominently in most bilateral and multilateral donor programmes, and many bilateral donors and multilateral agencies have begun to incorporate human rights standards into their practice and programmes. Examples include the ‘enhancing human rights’ objective of the Australian aid program<sup>65</sup> and Germany’s *Development Policy Action Plan on Human Rights*.<sup>66</sup>

Against this background, there is necessity for a clearly identified and targeted ESC rights approach in development aid to strengthen opportunities for States to manage their resources through international assistance and co-operation more effectively. Better understanding of the tensions and contradictions in

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*Challenges* (OECD and International Bank for Reconstruction and Development / The World Bank, 2nd ed, 2013).

<sup>63</sup> Organisation for Economic Co-operation and Development, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (Organization for Economic Co-operation and Development, 2008), <<http://www.oecd.org/dac/effectiveness/34428351.pdf>>.

<sup>64</sup> United Nations Development Programme, *Indicators for Human Rights Based Approaches to Development in UNDP Programming : A Users’ Guide* (UNDP, 2006), <<http://gaportal.org/sites/default/files/HRBA%20indicators%20guide.pdf>>.

<sup>65</sup> Commonwealth of Australia, *An Effective Aid Program for Australia: Making a real difference—Delivering real results* (Commonwealth of Australia, Canberra, 2012), <<http://aid.dfat.gov.au/Publications/Documents/AidReview-Response/effective-aid-program-for-australia.pdf>>.

<sup>66</sup> Federal Ministry for Economic Cooperation and Development - Germany, ‘Human Rights in German Development Policy’ (BMZ Strategy Paper 4), <[http://www.bmz.de/en/publications/type\\_of\\_publication/strategies/Strategiepapier305\\_04\\_2011.pdf](http://www.bmz.de/en/publications/type_of_publication/strategies/Strategiepapier305_04_2011.pdf)>.

human rights approaches in the context of national and international public policy will contribute to turning the objectives of human rights realisation into reality. Overturning the politico-economic *status quo* and drastically transforming the aid and co-operation landscape will require much greater ownership of the human rights agenda by all the actors. For this to occur, a new set of institutional principles needs to be developed.

#### 5.2.4 Shifting dynamics of international assistance programmes

International assistance and co-operation arrangements are experiencing a number of changes. The emergence in recent years of new donors such as China, India and Republic of Korea, among many others, has introduced new ideas and approaches into international aid practice. The attitudes of these donors towards recipient States and aid programmes differ from the traditional approach and reflect their own areas of strength. For example, there is an increased focus on infrastructure development projects under aid programmes which has the potential to cause a paradigm shift in development aid thinking. This form of co-operation, often referred to as South-South co-operation, has already begun to play a significant role in advancing the objectives of the recipient States.<sup>67</sup>

Given the rising income levels in many middle-income countries, a critical debate has also emerged whether international development aid should be redirected to the poorest countries only, or if there still exists a need to provide aid to those middle-income countries to address their developmental needs.<sup>68</sup>

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<sup>67</sup> An important milestone of South-South co-operation is the new Asian Infrastructure Investment Bank (AIIB) which holds promise as an alternative, or at least a complement, to the existing multilateral finance system, although many basic management principles are still to be finalised. See, Asian Infrastructure Investment Bank, The Asian Infrastructure Investment Bank: About Us <[http://aiibank.org/yatouhang\\_04.html](http://aiibank.org/yatouhang_04.html)>; Injoo Sohn, *AIIB: A plank in China's hedging strategy* <<http://www.brookings.edu/research/opinions/2015/05/11-china-asian-infrastructure-investment-bank-sohn>>.

<sup>68</sup> Gilles Carbonnier and Andy Sumner, 'Reframing Aid in a World Where the Poor Live in Emerging Economies' in Gilles Carbonnier (ed), *International Development Policy: Aid, Emerging Economies and Global Policies* (Palgrave Macmillan, 2012) 3; Andy Sumner, 'Global Poverty and the New Bottom Billion: What if Three-Quarters of the World's Poor Live in Middle-Income Countries?' (Working Paper

With this changing 'geography of poverty', which has increased the relative (in many cases, absolute) wealth of many middle-income countries, there still remains the problem of persistent poverty in these countries.<sup>69</sup> From an ESC rights perspective, inefficient allocation of State resources in addressing poverty and fulfilment of basic rights cannot be tackled by withdrawing international assistance and cooperation from such States. Instead, international assistance and cooperation can be invaluable in strengthening institutional mechanisms of resource maximisation and allocation for ESC rights related areas. Another important area for the future of multilateral assistance is the development of innovative approaches to resourcing and funding international development programmes.<sup>70</sup> Specialised global partnership funds and market-based approaches have the advantage of unbundling fundraising from design and implementation.<sup>71</sup> Raising funds in the international capital market through securities beyond the traditional government obligation bonds is another source of development finance that has been recently explored.<sup>72</sup> In addition, the Third International Conference on Financing for Development held in Addis Ababa in July 2015 agreed to develop a new global framework for financing sustainable development which takes into consideration the economic, social and environmental priorities in developing policies related to all financial flows.<sup>73</sup>

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Institute of Development Studies, 12 September 2010)  
<<https://www.ids.ac.uk/files/dmfile/GlobalPovertyDataPaper1.pdf>>.

<sup>69</sup> Gilles Carbonnier and Andy Sumner, 'Reframing Aid in a World Where the Poor Live in Emerging Economies' in Gilles Carbonnier (ed), *International Development Policy: Aid, Emerging Economies and Global Policies* (Palgrave Macmillan, 2012) 3.

<sup>70</sup> Some examples of such innovations include the Global Financial Transfer Tax (GFTT), Global Trust Fund (GTF) and the proposed Global Welfare Agency. For details see, Ortiz, above n 17, 73.

<sup>71</sup> Sam Jones, 'Innovating foreign aid - progress and problems' (2010) 24(1) *Journal of International Development* 1-16.

<sup>72</sup> Ortiz, above n 15, 77.

<sup>73</sup> The Addis Ababa Action Agenda proposed a comprehensive set of policy actions and more than 100 concrete measures that take into consideration all sources of finance, technology, innovation, trade and data relevant to the process of mobilising various means of global transformation needed to achieve sustainable development goals, which specifically includes goals of promoting human rights, including the right to development. See for example, Third International Conference on Financing for Development, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*

The emergence of these new ideas and institutions introduces a new dimension to the aid landscape. When they are put into practice, aid recipients will have more resources potentially available to them and a broader platform on which to seek and manage these resources. These reforms are expected to create a more conducive environment for aid negotiation and management.

In summary, this section has mapped out the structures and development trends of international assistance and co-operation and has compared various modes of delivery and types of assistance and co-operation. It has argued that recipient country ownership and leadership of international assistance and co-operation activities are crucial for effective realisation of their objectives. In this way, human rights values can be embedded in the international assistance agenda. It will be necessary to recognise challenges in the design and implementation of international assistance programmes and to identify policy options and indicators for State efforts in addressing these challenges.

### **5.3 CHALLENGES IN MOBILISING RESOURCES THROUGH INTERNATIONAL ASSISTANCE AND CO-OPERATION**

This section explores the structural, process and outcome challenges facing recipient States in mobilising resources through international assistance and co-operation for ESC rights purposes and proposes indicators of State policy effort.

#### **5.3.1 Structural challenges**

Recipients of international assistance and co-operation face a number of challenges within the existing aid architecture, including the attitudes and approaches of donors and institutional weakness in negotiating and managing

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(*Addis Ababa Action Agenda*) (United Nations, 2015), <[http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA\\_Outcome.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf)>.

aid and assistance programmes. These challenges, and policy options for addressing them, are discussed below.

### **5.3.1.1 Weakness in the design and architecture of aid and co-operation regime**

The architecture of international assistance and co-operation is loosely structured and is often driven by the interests of donors without adequate attention to the integration of human rights and the needs of recipients. This situation may be exacerbated by a lack of interest on the part of some recipient States, especially authoritarian and less democratic States, which are often hostile towards the inclusion of a human rights focus in ODA programmes.<sup>74</sup> If current development assistance programmes are to be consistent with the needs and objectives of human rights, they may need to be made subject to human rights impact assessments and their personnel may need to receive training in project planning, implementation and evaluation.<sup>75</sup> Success in achieving these goals will depend on how effectively the experience of donors can be transferred and combined with knowledge of local conditions.<sup>76</sup>

The proliferation of new bilateral donors and aid agencies has resulted in increasing fragmentation of the international aid system. New forms of multilateralism, including vertical funds and earmarked trust funds, are emerging while funding from traditional agencies has been on the decline.<sup>77</sup> The fragmentation of donors within a loose architecture of aid and co-operation increases the amount of time and resources required for negotiation and

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<sup>74</sup> See for example, Freedom House, *Undermining Democracy: 21st Century Authoritarians* (Freedom House, Washington, D.C., 2009), <[https://freedomhouse.org/sites/default/files/UnderminingDemocracy\\_Full.pdf](https://freedomhouse.org/sites/default/files/UnderminingDemocracy_Full.pdf)>; The Reality of Aid, *Reality of Aid Report 2010: Aid and Development Effectiveness - Towards Human Rights, Social Justice and Democracy* (The Reality of Aid Management Committee, Manila, 2010), <<http://www.realityofaid.org/wp-content/uploads/2013/02/Web-English-ROA-Report-2010.pdf>>.

<sup>75</sup> Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 *Human Rights Law Review* 393-420, 417.

<sup>76</sup> Øyvind Eggen and Kjell Roland, *Western Aid at a Crossroads: The End of Paternalism* (Palgrave Pivot, Hampshire, 2013), 23.

<sup>77</sup> Kharas and Blomfield, above n 49, 63.

implementation, especially for recipient States.<sup>78</sup> This also diverts scarce State resources or some of the aid away from more urgent developmental purposes.

### **5.3.1.2 Conditionality and tied aid**

Conditionality and tied aid pose additional challenges and reduce the overall benefits to recipient States. While conditionalities related to human rights and democracy are undoubtedly positive, not all conditionality seeks to address such concerns. Donors are often accused of ‘foul play’ when conditionality is driven by political expediency, economic factors or security interests rather than human rights, democratic and governance objectives.<sup>79</sup> Such political conditionalities are often characterised by paternalism, bribery, restraints and false signalling about the sincerity of aid<sup>80</sup> and may be imposed on the recipient by the donor through a coercive relationship rather than one of mutual engagement and negotiation.

Tied aid is the term used to describe aid that retains most of the value in the donor country by imposing the condition that certain goods and services must be procured from the donor country rather than the recipient country, which may in fact produce cheaper and better options. It is argued that tied aid is a *de facto* subsidy to companies in the donor country, thus raising the question of who actually benefits from aid.<sup>81</sup> The main concern is that this form of aid represents home country subsidies in disguise.<sup>82</sup> From a human rights perspective, such conditionalities create a significant challenge for States, especially poorer ones, in maximising resources for policy areas that are in

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<sup>78</sup> Ibid.

<sup>79</sup> Olav Stokke (ed), *Aid and Political Conditionality* (Routledge, 2013).

<sup>80</sup> Paul Collier et al, 'Redesigning Conditionality' (1997) 25(9) *World Development* 1399-1407; Machiko Nissanke, 'Shifting Grounds in Aid Relationships and Effectiveness Debate: Implications for Economic Development in Sub-Saharan Africa' in Machiko Nissanke and Yasutami Shimomura (eds), *Aid as Handmaiden for the Development of Institutions: A New Comparative Perspective* (Palgrave Macmillan, 2013) 48, 57.

<sup>81</sup> Ortiz, above n 15, 70; Klingebiel, above n 3.

<sup>82</sup> Ortiz, above n 15, 6. Although there has been a recent drive to untie aid, only a few donor countries such as Finland, France, Germany, Ireland, Japan, the Netherlands, Norway, Portugal, Sweden, Switzerland and the United Kingdom have fully untied their aid contributions.

most demand. It also effectively reduces policy space of the State in determining how aid money could be used most effectively and efficiently.

The OECD recognises that tied aid not only increases the cost of a project by as much as 15-30 percent, but also requires larger bureaucracies in both donor and recipient countries, thereby reducing the overall effectiveness of funds utilisation.<sup>83</sup> In recent years, the proportion of untied bilateral aid rose progressively from 46 percent to 82 percent.<sup>84</sup> An alternative approach to tied aid can be seen in the emphasis by emerging donors on mutual benefit, which contrasts with traditional donors' emphasis on untied aid.<sup>85</sup>

### **5.3.1.3 Institutional capacity in recipient States**

Institutional capacity in recipient States is critical to the effectiveness of aid. Most developing States have inadequate institutional capacity in many aid-related areas, particularly in negotiating aid with donors, managing aid resources and implementing aid programmes. From an ESC rights perspective, the ability and willingness of recipient States to recognise their international assistance needs in terms of specific ESC rights strengthens their position in aid and co-operation activities. In this context, the capacity of recipient States to conduct comprehensive needs assessments and develop effective negotiation strategies are fundamental to effective engagement with donors.

Institutional and professional capacity to plan and conduct aid negotiations with donors can make a significant difference in securing adequate and relevant aid and assistance projects. In addition to low institutional capacity in many recipient States in this regard, the current level of donor fragmentation

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<sup>83</sup> Organisation for Economic Co-operation and Development, *Untied aid* OECD <<http://www.oecd.org/development/untied-aid/>>.

<sup>84</sup> Edward J Clay, Matthew Geddes and Luisa Natali, *Aid untying: is it working?* (Overseas Development Institute, 2009), <<http://www.oecd.org/dac/evaluation/dcdndep/44375975.pdf>>.

<sup>85</sup> Arjan de Haan and Ward Warmerdam, 'New Donors and Old Practices: The Role of China in the Multilateral System' in Hany Besada and Shannon Kindornay (eds), *Multilateral Development Cooperation in a Changing Global Order* (Palgrave Macmillan, 2013) 215, 228.

poses challenges to recipient States in terms of the amount of time and resources required to negotiate and implement aid programmes.<sup>86</sup> While donors often come with their own plans and programmes, recipient governments lack the professional capacity to properly handle the intricacies of these negotiations,<sup>87</sup> putting them at a disadvantage.

Thus an important element of capacity building in recipient countries is to train local personnel in process of aid negotiation and management. Professional capacity to plan and negotiate development co-operation programmes with bilateral or multilateral donors needs to be strengthened in developing States. Linked to this professional capacity is the transfer of technology and technical know-how of aid management. This includes technical and technological means of implementing needs evaluations in specific human rights areas.

### **5.3.2 Process challenges**

There are a variety of challenges to maximising international assistance and co-operation which impact the practice and programmes of such co-operation. These include harmonising aid activities with domestic macroeconomic policy, maintaining a strong donor-recipient relationship, developing the ability to absorb and utilise aid resources, and corruption and rent-seeking in aid and assistance practices.

#### ***5.3.2.1 Challenges of harmonising aid with macroeconomic policy***

By definition, aid contributes to growth, directly benefits the poor, and leads to increased social sector spending.<sup>88</sup> For these benefits to be realised, governments must be more disciplined in handling aid programmes and their

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<sup>86</sup> Homi Kharas and Michael Blomfield, 'Rethinking the Role of Multilateral Institutions in an Ever-Changing Aid Architecture' *ibid.* 63, 63.

<sup>87</sup> Romilly Greenhill, Annalisa Prizzon and Andrew Rogerson, *The age of choice: How are developing countries managing the new aid landscape?* (Overseas Development Institute, London, 2013), <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8296.pdf>>, 14.

<sup>88</sup> Morrissey, above n 39, 146.

impact. While economic studies point to positive growth outcomes from aid programmes, particularly in poor countries, aid has also been shown to impact on public sector fiscal behaviour in relation to taxation, borrowing, and expenditure decisions, which are affected by the flow of aid money.<sup>89</sup> Such impacts are often unpredictable given that aid flow itself often fluctuates with economic cycles.<sup>90</sup>

Aid and trade policies must also be coordinated at a high level in order to achieve their full benefits.<sup>91</sup> Although many countries have liberalised their trade regimes during the last few decades, very few have reaped the growth dividend associated with this policy, mainly due to structural and institutional challenges, such as the inherently ‘unfair’ global trade structure, or the weakness of the trading private sector in these countries.<sup>92</sup> Therefore, for many poor countries, the choice involves much more than aid or trade; rather it is about the composition and effectiveness of trade in relation to overall growth.<sup>93</sup> Therefore, addressing the challenges faced by poor countries within the international economic and trade regime and harmonising international assistance and co-operation activities with the domestic macroeconomic policy are essential to maximise benefits for these countries.

### **5.3.2.2 Donor-recipient relationship and aid effectiveness**

How effective is development aid in achieving the desired outcomes? Key issues in the current aid architecture include ownership challenges and the need to establish shared principles between and among new and emerging donors.<sup>94</sup> The effectiveness of aid is often considered in terms of whether it

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<sup>89</sup> Franco-Rodriguez, Morrissey and McGillivray, above n 14.

<sup>90</sup> Ortiz, above n 15, 69.

<sup>91</sup> Oliver Morrissey, 'Aid or Trade, or Aid and Trade?' (2006) 39(1) *The Australian Economic Review* 78–88, 78.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., 86.

<sup>94</sup> Franke Toornstra and Frédéric Martin, 'Building Country Capacity for Development Results: How Does the International Aid Effectiveness Agenda Address the Capacity Gaps?' in Hany Besada and Shannon Kindornay (eds), *Multilateral Development Cooperation in a Changing Global Order* (Palgrave Macmillan, 2013) 89, 89.

achieves anything at all,<sup>95</sup> and what needs to be done to make it more effective.<sup>96</sup> It is argued that effectiveness will be improved by simplifying aid programmes with clearer and more realistic goals, better definition of development in the local context of the recipient State, targeting aid towards activities that can have a real, tangible impact, and allowing local players to take full ownership.<sup>97</sup>

The need to establish and nurture a productive relationship between donors and recipients is essential for achieving the objectives of development aid programmes. Such relationships 'encourage and stimulate the process of policy learning and experimentation as well as institutional experimentation and innovation'<sup>98</sup> between donor and recipient States. Despite these benefits, the experience of many Sub-Saharan African States indicates that the relationship between donors and recipients has not been conducive to achieving development objectives and is often rooted in the restrictive policy conditionalities attached to aid.<sup>99</sup>

Aid is also seen through a hierarchy of objectives which are linked to long term outcomes and achieved through a series of activities.<sup>100</sup> From this perspective, development aid, particularly technical assistance, has produced very little long-term effect, given that the capacity of institutions in many poor countries seems not to have improved to the level where they can effectively function after the aid money and experts have left the country.<sup>101</sup> Overall, the huge heterogeneity of the aid system and assessment methods makes it difficult to reach firm conclusions about aid effectiveness.

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<sup>95</sup> For example, Roger C Riddell, *Does Foreign Aid Really Work?* (Oxford University Press, Oxford, 2007).

<sup>96</sup> Klingebiel, above n 3.

<sup>97</sup> Eggen and Roland, above n 76.

<sup>98</sup> Nissanke, above n 80, 74.

<sup>99</sup> *Ibid.*, 71.

<sup>100</sup> Eggen and Roland, above n 76.

<sup>101</sup> *Ibid.*, 74.

### 5.3.2.3 Absorption and fungibility of aid flow

Absorption and spending are central in aid flow, which requires coordination of fiscal policy, exchange rate and monetary policy.<sup>102</sup> Aid absorption is defined 'as the fall in the non-aid current account balance that is attributable to aid'<sup>103</sup>. If aid comes in kind or the money is spent on imports, spending and absorption remain equivalent and do not translate into macroeconomic problems such as exchange rates and price levels.<sup>104</sup> Berg et al showed that, in their sample countries (Mozambique, Tanzania and Uganda), spending exceeded absorption, which resulted in domestic liquidity and often led to inflation (in Mozambique) or a rise in interest rates and debt burden (Uganda and Tanzania).<sup>105</sup>

The ability to absorb and spend aid would be the most desirable and appropriate response. This can be achieved by a corresponding increase in imports and public spending.<sup>106</sup> On the other hand, to absorb but not spend might be the best option for States experiencing high levels of inflation, low private investment and lower rate of returns on public expenditure.<sup>107</sup> For these reasons, aid effectiveness is also related to the ability of the government not only to utilise the aid funds for the proposed purposes, but also to maintain adequate resources within these areas from the State budget.

The fungibility effect is associated with financial aid when governments use aid money to substitute their own resources in a given area.<sup>108</sup> Some argue that, while economists assume that aid is fungible and that fungibility is evident on the ground in terms of aid impact on development outcomes, most donors

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<sup>102</sup> Andrew Berg et al, 'The Macroeconomics of Managing Increased Aid Inflows: Experiences of Low-Income Countries and Policy Implications' (Paper presented at the WIDER Conference on Aid, Helsinki, 16-17 June 2006) [1].

<sup>103</sup> Shekhar Aiyar and Ummul Ruthbah, 'Where Did All the Aid Go?: An Empirical Analysis of Absorption and Spending' (IMF Working Paper WP/08/34, International Monetary Fund), 4.

<sup>104</sup> Berg et al, above n 102, 13.

<sup>105</sup> Ibid., 3.

<sup>106</sup> Ibid., 13.

<sup>107</sup> Ibid.

<sup>108</sup> Ortiz, above n 15, 70-71.

behave as if the effect is absent.<sup>109</sup> While fungibility does not necessarily negatively affect the overall benefit of the additional funds flow to the economy,<sup>110</sup> it may contribute to a weakening in the State's allocative efficiency in relation to available resources.

#### **5.3.2.4 International aid flow, corruption and rent-seeking behaviour**

The 'side-effects' of the flow of international aid include associated corruption and rent-seeking behaviour. Rent-seeking behaviour is related to aid windfalls and an associated increase in corruption, particularly in countries with competing social groups<sup>111</sup> and fewer institutional safeguards. There is also the perception that the expectation of aid increases rent-seeking behaviour and decreases public spending.

Aid flow influences the political process in the recipient country, which can have significant impact on the overall promotion and protection of human rights. As such, political stability has a positive impact on the effectiveness of aid.<sup>112</sup> The ability of international assistance to improve quality of life is often associated with other factors such as democracy and good governance.<sup>113</sup> Rent-seeking behaviour can be reduced through binding policy commitments between donors and recipients.<sup>114</sup>

The literature on aid effectiveness presents contrasting views on the connection between aid and corruption in recipient States. Simplice Asongu presents evidence from 52 African countries which shows the existence of a

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<sup>109</sup> Dominique Van de Walle and Ren Mu, 'Fungibility and the Flypaper Effect of Project Aid: Micro-Evidence for Vietnam' (World Bank Policy Research Working Paper 4133, The World Bank).

<sup>110</sup> Rahman, above n 28; Stefan Leiderer, 'Fungibility and the Choice of Aid Modalities: The Red Herring Revisited' (Working Paper No. 2012/68, United Nations University), <<http://www.oecd.org/dac/peer-reviews/Fungibility%20and%20the%20Choice%20of%20Aid%20Modalities.pdf>>.

<sup>111</sup> Jakob Svensson, 'Foreign aid and rent-seeking' (2000) 51 *Journal of International Economics* 437–461, 455.

<sup>112</sup> *Ibid.*, 456-457.

<sup>113</sup> Stephen Kosack, 'Effective Aid: How Democracy Allows Development Aid to Improve the Quality of Life' (2003) 31(1) *World Development* 1–22.

<sup>114</sup> Svensson, above n 111.

'positive aid-corruption nexus' and argues that development assistance fuels and exacerbates corruption.<sup>115</sup> On the other hand, José Tavares argues that, while the effect of aid corruption is causally linked to the geographical and cultural distance between donor and recipient, aid generally results in decreased corruption.<sup>116</sup> Other authors have proposed that the corruption effect of aid is often contingent on the type of aid and assistance.<sup>117</sup> While corruption and related challenges of governance are politically sensitive and complex, addressing issues of corruption in the context of international assistance programmes can significantly enhance their effectiveness, especially in achieving targeted ESC rights objectives.

### **5.3.3 Outcome challenges**

Recipient States also face a number of challenges related to the overall outcome of international assistance and co-operation activities. Key issues include aid dependency and sustainability and debt management. In order to make aid and assistance meaningful, recipient States should overcome these challenges through appropriate policy action.

#### ***5.3.3.1 Aid dependency and sustainability***

With regard to the sustainability of aid, issues such as disbursement difficulties, effects on prices and effects on competitiveness need to be better understood.<sup>118</sup> While development co-operation helps countries in terms of increased resources, the issue of fiscal sustainability is important in designing and implementing development co-operation policies. The true impact of aid projects may not be easy to assess because concessional assistance

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<sup>115</sup> Simplice A Asongu, 'On the Effect of Foreign Aid on Corruption' (2012) 32(3) *Economics Bulletin* 2174-2180.

<sup>116</sup> José Tavares, 'Does foreign aid corrupt?' (2003) 79(1) *Economics Letters* 99-106.

<sup>117</sup> Uchenna Efobi, Ibukun Beecroft and Simplice A Asongu, 'Foreign Aid and Corruption: Clarifying Murky Empirical Conclusions' (African Governance and Development Institute WP/25/14, African Governance and Development Institute.

<sup>118</sup> Morrissey, above n 91.

influences resource allocation decisions.<sup>119</sup> The politics of resource allocation is complex, with multiple actors and diverse objectives. Allocation decisions are often influenced by contextual needs and priorities (time, place and nature of the aid) as well as the political equilibrium of the recipient State.

Failure to harmonise aid flow with the macroeconomic policies of recipient States often leads to the phenomenon known as *Dutch disease*,<sup>120</sup> in which 'windfall' resources (in this case, development aid) reduce the drive for domestic productivity and create dependency on aid.<sup>121</sup> However, evidence of the effect of aid receipt on the real exchange rate and overall economic performance remains mixed.<sup>122</sup>

The impact of international assistance on the overall progress of welfare and quality of life in the recipient State is extremely relevant from an ESC rights perspective. Drawing on Human Development Index (HDI) data for 104 countries over 20 years, Gomanee et al show that aid contributes to improved welfare indicators, through both growth and expenditure, particularly in low income countries.<sup>123</sup> They argue that aid can impact welfare in a number of ways through growth or increased public sector spending.<sup>124</sup> Social spending related to increased aid funds is likely to have a positive impact on the poor, mainly because they are more likely to be positively affected by increased

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<sup>119</sup> Svensson, above n 111, 439.

<sup>120</sup> Dutch disease refers to a situation in which revenue from natural resources – or aid flow – strengthens the local currency, thereby reducing the competitiveness of other industries leading to reduced exports and eventual weakening of other industries. The Economist coined the term "Dutch disease" in 1977 in relation to the impact of the discovery of large reserves of gas in Netherlands. Since then, the term has also been applied in other situations of high windfall, such as aid flow, which could have similar impacts on the national productivity and local currency. See for example, The Economist, *What Dutch disease is, and why it's bad* The Economist <<http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-2>>.

<sup>121</sup> See for example, David Fielding and Fred Gibson, 'Aid and Dutch Disease in Sub-Saharan Africa' (2012) *Journal of African Economies*.

<sup>122</sup> See for example, Berg et al, above n 102, 77.

<sup>123</sup> Karuna Gomanee et al, 'Aid, Government Expenditure, and Aggregate Welfare' (2005) 33(3) *World Development* 355–370.

<sup>124</sup> *Ibid.*, 364.

public spending.<sup>125</sup> Some argue that aid is positively correlated with quality of life in democracies while the reverse is true in autocracies, and that this shows a clear link between aid, quality of life and the political context.<sup>126</sup> Others argue that, despite decades of international aid, some regions such as Sub-Saharan Africa have not seen much economic growth or social development, which has prompted many to conclude that aid has failed to achieve its objectives.<sup>127</sup>

Weaknesses in the design and architecture of international assistance mechanisms, along with institutional challenges in developing recipient States, present significant challenges to the ability of States to increase the quantity and quality of international resources for ESC rights. Policies need to be better oriented towards maximisation of resource mobilisation efforts and outcomes.

### **5.3.3.2 Debt management and debt-forgiving**

Debt relief is another important form of aid. For the State whose debt is relieved, this is often the equivalent of a cash transfer (i.e. the amount of funds that would otherwise be drawn from the government budget for debt payment). Donors also normally treat debt relief as part of the aid budget.<sup>128</sup>

Debt burden and debt management have been identified as crucial elements of the ESC rights debate. In a number of cases, the ESCR Committee identified the relationship between a State's foreign debt burden and its ability to realise ESC rights.<sup>129</sup> For example, in its recent Concluding Observation on Cameroon, the Committee praised the State for its 'efforts to reach completion point under the Heavily Indebted Poor Countries (HIPC) initiative, which enabled it to ease debt and thereby release additional resources to priority

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<sup>125</sup> Morrissey, above n 39, 142; Peter Lanjouw and Martin Ravallion, 'Benefit Incidence and the Timing of Program Capture' (1999) 13(2) *World Bank Economic Review* 257-274.

<sup>126</sup> Kosack, above n 113, 11.

<sup>127</sup> Morrissey, above n 91.

<sup>128</sup> Morrissey, above n 39, 154.

<sup>129</sup> CESCR, *Concluding observations: Sudan*, E/C.12/1/Add.48 (1 September 2000); CESCR, *Concluding observations: Kyrgyzstan*, E/C.12/1/Add.49 (1 September 2000).

areas in the health sector'.<sup>130</sup> Similarly, the Independent Expert on the effects of foreign debt and other related international financial obligations, Cephias Lumina, highlighted the crucial role of responsible borrowing, prudent loans, proper debt management and debt financing for creating the right conditions for the realisation of ESC rights and emphasised the harmful effects of debt burden and unfavourable loan conditions.<sup>131</sup>

The *Guiding Principles on Foreign Debt and Human Rights* highlight the need to ensure the primacy of human rights in all lending and borrowing activities and to ensure that these activities do not constrain the conditions for enjoyment of human rights.<sup>132</sup> The requirements of non-discrimination, progressive realisation, minimum core obligations and non-retrogression are also essential elements of such activities.<sup>133</sup> The importance of shared responsibility between creditors and debtors and the need for transparency, participation and accountability must be fully recognised in all debt arrangements.<sup>134</sup> These Principles also address loan negotiations, use of loan funding, debt servicing and repayment as well as various aspects of debt relief,<sup>135</sup> all of which can have significant impact on the overall resources of the State and its ability to fund ESC rights programmes.

### 5.3.4 Key indicators of State effort

Based on the discussion above of the challenges and policy options related to maximising international assistance and co-operation from the perspective of

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<sup>130</sup> CESCR, *Concluding observations: Cameroon*, E/C.12/CMR/CO/2-3 (23 January 2012), [15(a)].

<sup>131</sup> Human Rights Council, *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, Cephias Lumina*, 20<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/20/23 (10 April 2011), ('The Guiding Principles on Foreign Debt and Human Rights'), [3].

<sup>132</sup> *Ibid.*, [6-9].

<sup>133</sup> *Ibid.*, [10-20].

<sup>134</sup> *Ibid.*, [23-32].

<sup>135</sup> *Ibid.*, [42-57].

ESC rights, the following indicators and policy options can provide guidelines for assessing the level of State efforts in overcoming these challenges and enhancing relevant policy space.

In order to address the structural challenges identified above, government policy should emphasise the following: make international assistance and aid architecture more ESC rights-friendly; minimise conditionality; use tied aid to bring aid programmes into line with the recipient State's development and human rights demands; and develop capacity in relevant institutions to handle aid negotiations and implementation activities more effectively.

To address the process challenges, donor States should work to harmonise aid flow with macroeconomic policy and economic cycles of the recipient State and put in place a strong coordination arrangement between donors and recipients. Recipient States should focus on building institutional capacity to fully absorb and utilise aid resources and put in place safeguards and institutional mechanisms to tackle corruption and rent-seeking behaviour related to aid flow.

To address outcome challenges, State policy could focus on ensuring that aid programmes are implemented in a sustainable manner and ensure that debt management activities are designed and implemented according to long-term debt-sustainability objectives.

The policy efforts of the State in these key areas can be used by ESC rights advocates to measure the commitment of the State to addressing these challenges and identify policy areas that require attention. These indicators of policy effort are essential for linking State action to the programmes and activities of international assistance and co-operation.

## 5.4 OPTIMISING INTERNATIONAL ASSISTANCE AND CO-OPERATION: STATE PRACTICE

The preceding discussion has highlighted the need for concerted effort by the State to optimise policy outcomes. This section presents relevant findings from a qualitative analysis of State reports and a case study.

As explained in Chapter 1, States' periodic reports were analysed using NVivo software. The key search terms were 'international assistance', 'international co-operation', 'international aid', 'technical co-operation' and 'technical assistance'. Most reports identified some aspects of international assistance and co-operation, although a number of reports from both developed and developing countries were silent on these aspects.<sup>136</sup>

### 5.4.1 State efforts and challenges in mobilising international assistance and co-operation: Evidence from State reports

Periodic reports of contracting States under the ICESCR provide useful insights into how States perceive the role of international assistance and co-operation in the implementation of ESC rights policy. This section provides a qualitative discussion of key issues that emerge from this analysis.

A number of States clearly identified themselves as beneficiaries of international assistance and co-operation<sup>137</sup> and expressed their appreciation of such co-operation<sup>138</sup> in many different areas related to ESC rights. Some reports provided insight into the efforts of States to seek and maximise international assistance and co-operation. For example, Guyana,<sup>139</sup>

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<sup>136</sup> A total of 136 State Reports under the ICESCR (the latest report for each State) were analysed for relevant discussion.

<sup>137</sup> For example, CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [264].

<sup>138</sup> For example, CESCR, *State Report: Brazil*, E/C.12/BRA/2 (28 January 2008), [78].

<sup>139</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), [16].

Zambia,<sup>140</sup> and Cambodia<sup>141</sup> indicated that international financial and technical co-operation and assistance had been sought in the advancement of ESC rights. International multilateral and bilateral assistance was actively sought for various programmes<sup>142</sup> and were targeted at the development of capacity in various fields.<sup>143</sup> Some States identified proactive policies designed to attract and establish bilateral and multilateral assistance, through the signing of agreements in various sectors,<sup>144</sup> and partnerships and initiatives with international and regional development partners.<sup>145</sup>

A number of States recognised that significant progress had been achieved in areas related to ESC rights with the help of international assistance,<sup>146</sup> international co-operation agreements,<sup>147</sup> bilateral and regional arrangements,<sup>148</sup> technical co-operation and coordination with international organisations.<sup>149</sup> States also identified their efforts to attract as much bilateral and multilateral co-operation and assistance as possible, through partnerships and agreements in which their needs with regard to ESC rights were identified.<sup>150</sup> Some States reported that national efforts to achieve ESC rights realisation was fully supported through international assistance and co-operation,<sup>151</sup> particularly financial and technical assistance.<sup>152</sup> Also mentioned were the role of bilateral and multilateral assistance in achieving ESC rights

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<sup>140</sup> CESCR, *State Report: Zambia*, E/1990/5/Add.60 (1 September 2003), [185].

<sup>141</sup> CESCR, *State Report: Cambodia*, E/C.12/KHM/1 (7 January 2009).

<sup>142</sup> CESCR, *State Report: Sri Lanka*, E/C.12/LKA/2-4 (27 January 2010).

<sup>143</sup> CESCR, *State Report: El Salvador*, E/C.12/SLV/3-5 (30 October 2012), [485].

<sup>144</sup> CESCR, *State Report: Moldova*, E/C.12/MDA/2 (27 January 2009), [964]; CESCR, *State Report: Kyrgyzstan*, E/C.12/KGZ/2-3 (8 November 2013), [422].

<sup>145</sup> CESCR, *State Report: Uganda*, E/C.12/UGA/1 (5 December 2013), [18].

<sup>146</sup> CESCR, *State Report: Gambia*, E/C.12/GMB/1 (6 November 2013), [49].

<sup>147</sup> CESCR, *State Report: Venezuela*, E/C.12/VEN/3 (20 November 2013), [271].

<sup>148</sup> CESCR, *State Report: Djibouti*, E/C.12/DJI/1-2 (2 November 2012), [23]; CESCR, *State Report: Vietnam*, E/C.12/VNM/2-4 (14 March 2013), [42][58].

<sup>149</sup> CESCR, *State Report: Iraq*, E/C.12/IRQ/4 (20 November 2013), [41].

<sup>150</sup> CESCR, *State Report: Brazil*, E/C.12/BRA/2 (28 January 2008), [78].

<sup>151</sup> CESCR, *State Report: Madagascar*, E/C.12/MDG/2 (22 August 2008), [178].

<sup>152</sup> *Ibid.*, [185].

policy objectives,<sup>153</sup> in the form of financial and material support as well as technical expertise,<sup>154</sup> consultancy,<sup>155</sup> and running sustainable projects in harmony with the national development plans.<sup>156</sup>

A number of States also identified various steps taken to enhance the realisation of individual rights through international co-operation projects<sup>157</sup> and indicated that increased, well-coordinated and harmonised inflow of financial and technical assistance from bilateral and multilateral donors had helped realise many ESC rights.<sup>158</sup> Several States highlighted individual ESC rights, such as the right to education,<sup>159</sup> science and culture and research,<sup>160</sup> right to health and welfare,<sup>161</sup> housing and human settlement,<sup>162</sup> right to food,<sup>163</sup> for which international assistance and co-operation had been indispensable. They also expressed the value of bilateral and multilateral assistance received in relation to the right to work,<sup>164</sup> the rights of women and

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<sup>153</sup> CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [20].

<sup>154</sup> CESCR, *State Report: Mexico*, E/C.12/4/Add.16 (25 February 2005), [614-615].

<sup>155</sup> CESCR, *State Report: Libyan Arab Jamahiriya*, E/1990/6/Add.38 (15 February 2005), [118].

<sup>156</sup> CESCR, *State Report: Colombia*, E/C.12/COL/5 (9 January 2009), [653].

<sup>157</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012).

<sup>158</sup> CESCR, *State Report: Ethiopia*, E/C.12/ETH/1-3 (28 March 2011), [26]; CESCR, *State Report: Nepal*, E/C.12/NPL/3 (29 October 2012), [35].

<sup>159</sup> CESCR, *State Report: Senegal*, E/1990/6/Add.25 (31 August 2000), [124].

<sup>160</sup> CESCR, *State Report: Latvia*, E/1990/5/Add.70 (21 September 2005); CESCR, *State Report: DPR Korea*, E/1990/6/Add.35 (15 May 2002); CESCR, *State Report: Panama*, E/1990/6/Add.24 (31 March 2000), [361].

<sup>161</sup> CESCR, *State Report: Zambia*, E/1990/5/Add.60 (1 September 2003); CESCR, *State Report: Democratic Republic of the Congo*, E/C.12/COD/5 (21 January 2009), [282].

<sup>162</sup> CESCR, *State Report: The Philippines*, E/C.12/PHL/4 (7 September 2007); CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006); CESCR, *State Report: Peru*, E/C.12/PER/2-4 (20 January 2011).

<sup>163</sup> CESCR, *State Report: Bolivia*, E/C.12/BOL/2 (20 August 2007); CESCR, *State Report: Senegal*, E/1990/6/Add.25 (31 August 2000), [71].

<sup>164</sup> CESCR, *State Report: Chad*, E/C.12/TCD/3 (13 January 2009), [107]; CESCR, *State Report: Dominican Republic*, E/C.12/DOM/3 (30 June 2009), [112].

children,<sup>165</sup> a fair distribution of food supply,<sup>166</sup> providing primary education facilities,<sup>167</sup> right to education,<sup>168</sup> social security,<sup>169</sup> formulation and implementation of health programmes,<sup>170</sup> and promotion and preservation of cultural heritage.<sup>171</sup> Reformation and modernisation of educational structures and facilities,<sup>172</sup> labour force skill development,<sup>173</sup> and combatting the worst forms of child labour,<sup>174</sup> were also identified.

Some States provided detail of bilateral and multilateral projects<sup>175</sup> implemented in close association with international co-operation agencies,<sup>176</sup> as well as planning, social policy development and advocacy in relation to various rights.<sup>177</sup> Thus, the importance of international assistance in filling resource gaps and providing requisite infrastructure and resources, particularly in under-resourced developing countries,<sup>178</sup> was acknowledged.

Many States identified challenges they faced in seeking adequate international assistance and co-operation. For example, Moldova expressed concern that financial limitations and language barriers hampered coordination and

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<sup>165</sup> CESCR, *State Report: Turkmenistan*, E/C.12/TKM/1 (20 October 2010), [333]; CESCR, *State Report: Democratic Republic of the Congo*, E/C.12/COD/5 (21 January 2009), [187]; CESCR, *State Report: Gabon*, E/C.12/GAB/1 (29 June 2012), [31].

<sup>166</sup> CESCR, *State Report: Turkmenistan*, E/C.12/TKM/1 (20 October 2010), [217]; CESCR, *State Report: Slovakia*, E/C.12/SVK/2 (14 January 2011), [255].

<sup>167</sup> CESCR, *State Report: Madagascar*, E/C.12/MDG/2 (22 August 2008), [522].

<sup>168</sup> CESCR, *State Report: Mauritania*, E/C.12/MRT/1 (20 May 2011), [530].

<sup>169</sup> CESCR, *State Report: Panama*, E/1990/6/Add.24 (31 March 2000), [142].

<sup>170</sup> CESCR, *State Report: Senegal*, E/1990/6/Add.25 (31 August 2000), [104]; CESCR, *State Report: Georgia*, E/1990/6/Add.31 (10 August 2001); CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001).

<sup>171</sup> CESCR, *State Report: Turkmenistan*, E/C.12/TKM/1 (20 October 2010), [376]; CESCR, *State Report: Montenegro*, E/C.12/MNE/1 (2 September 2013), [414].

<sup>172</sup> CESCR, *State Report: Iran*, E/C.12/IRN/2 (16 May 2011), [53].

<sup>173</sup> *Ibid.*, [58].

<sup>174</sup> CESCR, *State Report: Burundi*, E/C.12/BDI/1 (20 January 2014), [212].

<sup>175</sup> CESCR, *State Report: Estonia*, E/C.12/EST/2 (12 July 2010); CESCR, *State Report: Cameroon*, E/C.12/CMR/2-3 (19 July 2010), [574].

<sup>176</sup> CESCR, *State Report: Nicaragua*, E/C.12/NIC/4 (22 October 2007), [584].

<sup>177</sup> CESCR, *State Report: Romania*, E/C.12/ROU/3-5 (9 April 2013), [381].

<sup>178</sup> CESCR, *State Report: Ethiopia*, E/C.12/ETH/1-3 (28 March 2011), [333]; CESCR, *State Report: Mauritania*, E/C.12/MRT/1 (20 May 2011), [566].

partnership in the areas of educational and cultural co-operation.<sup>179</sup> Other factors impeding success included the lack of institutional capacity and international co-operation skills and management knowledge, as well as the requisite financial capacity to manage international assistance programmes.<sup>180</sup>

#### **5.4.1.1 Structure of assistance and co-operation**

The reports did not provide much detail as to the nature of specific activities and projects through international co-operation, although a few States described some projects and partnerships. For example, Costa Rica,<sup>181</sup> Trinidad and Tobago,<sup>182</sup> Kosovo,<sup>183</sup> and Nepal<sup>184</sup> provided detailed information about past and ongoing projects with international assistance and co-operation, including infrastructure and capacity development projects. Technical and economic co-operation received from bilateral and multilateral donors was specifically identified as having had a positive impact on the overall enjoyment of ESC rights.<sup>185</sup> Some reports also described the benefits of debt relief. For example, Guyana reported that the respite from its huge debt under the Heavily Indebted Poor Countries (HIPC) initiative had enabled the country to focus on strengthening fiscal management.<sup>186</sup> These indications of focal areas for international assistance and unmet needs help the State to design and negotiate future aid.

The reports also provided evidence of the importance of both bilateral and multilateral co-operation and assistance to the realisation of ESC rights. In relation to the former, a number of States listed their specific programmes and activities aimed at enhancing ESC rights realisation. For example, Guyana had

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<sup>179</sup> CESCR, *State Report: Moldova*, E/C.12/MDA/2 (27 January 2009), [961].

<sup>180</sup> CESCR, *State Report: Lithuania*, E/C.12/LTU/2 (22 December 2011), [1171].

<sup>181</sup> CESCR, *State Report: Costa Rica*, E/C.12/CR/4 (22 June 2006).

<sup>182</sup> CESCR, *State Report: Trinidad and Tobago*, E/1990/6/Add.30 (2 October 2000), [25].

<sup>183</sup> CESCR, *State Report: Kosovo*, E/C.12/UNK/1 (15 January 2008), [4].

<sup>184</sup> CESCR, *State Report: Nepal*, E/C.12/NPL/3 (29 October 2012), [142].

<sup>185</sup> CESCR, *State Report: Uruguay*, E/C.12/URY/3-4 (22 July 2009), [16].

<sup>186</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012).

made significant attempts to work with the donor community, particularly with other developing countries such as India and China.<sup>187</sup> Benin identified projects on social security assisted by Belgium and literacy programmes in co-operation with the Swiss government.<sup>188</sup> In relation to the latter, States acknowledged their work with many international organisations, such as UNICEF, UNDP, WHO and ILO in programmes of assistance in their fields of expertise.<sup>189</sup>

The nature of multilateral assistance covered a wide range, including specific funded projects,<sup>190</sup> empowerment of individuals,<sup>191</sup> training and capacity-building,<sup>192</sup> strengthening capacity of the government and its social partners,<sup>193</sup> expertise and advice,<sup>194</sup> and helping establish appropriate policy guidelines and mechanisms.<sup>195</sup> Enforcement of international standards in local projects, such as those relating to child labour<sup>196</sup> and the right to work,<sup>197</sup> was shown to have benefited local practices. Some States reported that national policies related to ESC rights had been implemented in close coordination with multilateral partners in order to achieve the required quality standards,<sup>198</sup> and that such collaborations had enabled States to access a pool of expertise and resources.<sup>199</sup> Despite these positive outcomes, the reports did not indicate any

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<sup>187</sup> Ibid., [17].

<sup>188</sup> CESCR, *State Report: Benin*, E/C.12/BEN/2 (30 March 2007), [168].

<sup>189</sup> CESCR, *State Report: Panama*, E/1990/6/Add.24 (31 March 2000), [217]; CESCR, *State Report: Malta*, E/1990/5/Add.58 (26 May 2003), [679]; CESCR, *State Report: Libyan Arab Jamahiriya*, E/1990/6/Add.38 (15 February 2005), [84].

<sup>190</sup> CESCR, *State Report: Georgia*, E/1990/6/Add.31 (10 August 2001), [177].

<sup>191</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), [16].

<sup>192</sup> CESCR, *State Report: The Philippines*, E/C.12/PHL/4 (7 September 2007), [187]; CESCR, *State Report: Madagascar*, E/C.12/MDG/2 (22 August 2008), [276].

<sup>193</sup> CESCR, *State Report: Mongolia*, E/C.12/MNG/4 (2 December 2013), [87].

<sup>194</sup> CESCR, *State Report: Cyprus*, E/C.12/CYP/5 (21 October 2008), [590].

<sup>195</sup> Ibid., [137].

<sup>196</sup> CESCR, *State Report: Mongolia*, E/C.12/MNG/4 (2 December 2013), [43].

<sup>197</sup> CESCR, *State Report: Democratic Republic of the Congo*, E/C.12/COD/5 (21 January 2009), [103].

<sup>198</sup> CESCR, *State Report: Bulgaria*, E/C.12/BGR/4-5 (9 May 2011), [173].

<sup>199</sup> CESCR, *State Report: Jamaica*, E/C.12/JAM/3-4 (14 June 2011), [314]; CESCR, *State Report: Togo*, E/C.12/TGO/1 (4 October 2011), [613].

clear preference among recipients for one approach over the other and they were generally ambivalent about the effectiveness and efficacy of multilateral and bilateral approaches to international assistance and co-operation.

Regional co-operation was identified in State reports as another key area for mobilising resources and expertise for the realisation of ESC rights. Many States identified their close co-operation with regional partners, such as the Amazon Cooperation Treaty Organization (ACTO) and the Caribbean Community (CARICOM),<sup>200</sup> the East African Community,<sup>201</sup> the European Union,<sup>202</sup> and the Mercado Comum do Sul (MERCOSUR/MERCOSUL).<sup>203</sup> These co-operation efforts have helped States realise success in their policy programmes and activities.

The reports identified technical co-operation with bilateral partners in areas such as health and education. These included technical co-operation projects in health,<sup>204</sup> cultural co-operation,<sup>205</sup> poverty reduction,<sup>206</sup> technological and educational partnerships,<sup>207</sup> and labour rights.<sup>208</sup> Technical assistance and co-operation in the field of fiscal and monetary policy management from the World Bank and IMF were also been specifically mentioned as having had positive impacts.<sup>209</sup> Technical assistance was also reported in the design and implementation of various rights-related projects and activities,<sup>210</sup> support in

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<sup>200</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), [17]; CESCR, *State Report: Jamaica*, E/C.12/JAM/3-4 (14 June 2011), [116].

<sup>201</sup> CESCR, *State Report: United Republic of Tanzania*, E/C.12/TZA/1-3 (28 March 2011), [22].

<sup>202</sup> CESCR, *State Report: The former Yugoslav Republic of Macedonia*, E/C.12/MKD/2-4 (1 February 2014), [26].

<sup>203</sup> CESCR, *State Report: Venezuela*, E/C.12/VEN/3 (20 November 2013), [273]; CESCR, *State Report: Brazil*, E/C.12/BRA/2 (28 January 2008), [289].

<sup>204</sup> CESCR, *State Report: Mexico*, E/C.12/4/Add.16 (25 February 2005).

<sup>205</sup> CESCR, *State Report: Georgia*, E/1990/6/Add.31 (10 August 2001), [284].

<sup>206</sup> CESCR, *State Report: Panama*, E/1990/6/Add.24 (31 March 2000), [222].

<sup>207</sup> CESCR, *State Report: DPR Korea*, E/1990/6/Add.35 (15 May 2002), [99].

<sup>208</sup> CESCR, *State Report: Bolivia*, E/C.12/BOL/2 (20 August 2007).

<sup>209</sup> CESCR, *State Report: Uruguay*, E/C.12/URY/3-4 (22 July 2009), [112].

<sup>210</sup> *Ibid.*, [113]; CESCR, *State Report: Moldova*, E/C.12/MDA/2 (27 January 2009), [275]; CESCR, *State Report: Cambodia*, E/C.12/KHM/1 (7 January 2009); CESCR, *State Report:*

crisis management<sup>211</sup> and other reciprocal international arrangements. Technical and capacity-building assistance from various donors in areas including education, economy, as well as health and disaster management enhanced the fulfilment of ESC rights.<sup>212</sup>

#### **5.4.1.2 Process capacity and accountability**

The reports showed evidence of the key role of international assistance and co-operation in many States. Most, however, did not clearly express the policy approaches of governments in mobilising and managing future resources. Some States expressed their commitment to work towards enhancing efficient and effective use of international assistance<sup>213</sup> and stated that external assistance in the form of loans and grants was utilised within national priorities and used as support to the budget allocation.<sup>214</sup> A few States stated that the aid received through international assistance and co-operation was channelled towards realisation of ESC rights.<sup>215</sup> Apart from these few vague commitments, States did not make explicit the institutional and process commitments they were incorporating into international assistance and co-operation policies.

Some States provided detail of existing institutional frameworks for making aid management more effective. For example, Costa Rica has set up a Department of International Co-operation, with responsibility for negotiating, coordinating and following up on all international assistance activities.<sup>216</sup> In Nicaragua, all aspects of international assistance and co-operation are managed through a separate Directorate in the Ministry of Foreign Affairs,<sup>217</sup>

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*Egypt*, E/C.12/EGY/2-4 (22 December 2011), [202]; CESCR, *State Report: Mauritius*, E/C.12/MUS/4 (6 January 2009), [521].

<sup>211</sup> CESCR, *State Report: Argentina*, E/C.12/ARG/3 (26 January 2011), [106].

<sup>212</sup> CESCR, *State Report: Indonesia*, E/C.12/IDN/1 (29 October 2012), [30].

<sup>213</sup> CESCR, *State Report: Ethiopia*, E/C.12/ETH/1-3 (28 March 2011), [269].

<sup>214</sup> CESCR, *State Report: Indonesia*, E/C.12/IDN/1 (29 October 2012), [24].

<sup>215</sup> CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [40].

<sup>216</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [259].

<sup>217</sup> CESCR, *State Report: Nicaragua*, E/C.12/NIC/4 (22 October 2007), [146].

while in Cameroon, a Human Rights and International Co-operation Directorate was set up to oversee all aspect of international assistance.<sup>218</sup> Ecuador described the role of the Ecuadorian International Cooperation Agency (AGECI) in negotiating with donors and international organisations to obtain the required resources for its policy objectives.<sup>219</sup> Indonesia stated that international assistance is directed towards supporting the national development agenda and acknowledged the need to maintain flexibility and accountability in managing these resources while simultaneously striving to reduce dependence on international financial assistance.<sup>220</sup> Some States, however, indicated that the terms and conditions of aid laid down by donors restricted their flexibility.<sup>221</sup>

Some States identified that aid effectiveness is a major concern, and a substantial part of assistance comes outside the purview of the government finances,<sup>222</sup> and the gap between aid committed and realised is often wide,<sup>223</sup> which increases unpredictability of aid and assistance programmes and their overall benefits. The inadequacy of resources for some specific areas such as education, despite the international support,<sup>224</sup> indicates the need to channel aid through a more harmonised manner through the budgetary system, and the need to put in place safeguards and accountability measures in the utilisation of resources and implementation of projects.<sup>225</sup>

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<sup>218</sup> CESCR, *State Report: Cameroon*, E/C.12/CMR/2-3 (19 July 2010), [146].

<sup>219</sup> CESCR, *State Report: Ecuador*, E/C.12/ECU/3 (20 May 2011).

<sup>220</sup> CESCR, *State Report: Indonesia*, E/C.12/IDN/1 (29 October 2012), [26-27].

<sup>221</sup> CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [40].

<sup>222</sup> CESCR, *State Report: Nepal*, E/C.12/NPL/3 (29 October 2012), [144].

<sup>223</sup> *Ibid.*, [143].

<sup>224</sup> CESCR, *State Report: Madagascar*, E/C.12/MDG/2 (22 August 2008), [549].

<sup>225</sup> CESCR, *State Report: Nepal*, E/C.12/NPL/3 (29 October 2012), [145].

### **5.4.1.3 Enhancing outcomes of international assistance and co-operation programmes**

Some State reports identified active measures for international assistance and co-operation to be provided in areas such as cultural co-operation,<sup>226</sup> combating hunger and food aid,<sup>227</sup> health and education,<sup>228</sup> as well as child welfare.<sup>229</sup> The ‘help to help oneself’ programmes were used as sustainable development assistance standards by States such as Liechtenstein and San Marino.<sup>230</sup> A number of donors also identified their regular commitments to the multilateral system,<sup>231</sup> ‘annual solidarity provisions’<sup>232</sup> and annual contributions.<sup>233</sup> These contributions and co-operation efforts were identified as important in transferring international expertise to developing States.<sup>234</sup>

A number of major donors itemised their programmes of international assistance and co-operation, both within the bilateral and multilateral engagement channels.<sup>235</sup> Some States noted the increasing allocation of resources for international co-operation,<sup>236</sup> and identified resource allocation priority areas,<sup>237</sup> geographic priorities in international assistance efforts,<sup>238</sup> and policies for collaboration with partners in recipient States on public sector institutions such as universities.<sup>239</sup> Some donor States also identified the total

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<sup>226</sup> CESCR, *State Report: Luxembourg*, E/1994/104/Add.24 (28 September 2001), [184].

<sup>227</sup> *Ibid.*, [127-128].

<sup>228</sup> CESCR, *State Report: Liechtenstein*, E/1990/5/Add.66 (27 October 2004).

<sup>229</sup> CESCR, *State Report: Monaco*, E/1990/5/Add.64 (1 July 2004), [207].

<sup>230</sup> CESCR, *State Report: Liechtenstein*, E/1990/5/Add.66 (27 October 2004), [10]; CESCR, *State Report: San Marino*, E/C.12/SMR/4 (5 March 2007), [62].

<sup>231</sup> CESCR, *State Report: Liechtenstein*, E/1990/5/Add.66 (27 October 2004), [173].

<sup>232</sup> CESCR, *State Report: San Marino*, E/C.12/SMR/4 (5 March 2007), [63].

<sup>233</sup> CESCR, *State Report: United Kingdom of Great Britain and Northern Ireland*, E/C.12/GBR/5 (31 January 2008), [55].

<sup>234</sup> CESCR, *State Report: Germany*, E/C.12/DEU/5 (27 July 2010), [303].

<sup>235</sup> CESCR, *State Report: Sweden*, E/C.12/SWE/6 (24 June 2013), [27].

<sup>236</sup> CESCR, *State Report: Spain*, E/C.12/4/Add.11 (14 January 2003), [49].

<sup>237</sup> *Ibid.*, [61]; CESCR, *State Report: Sweden*, E/C.12/SWE/6 (24 June 2013), [28].

<sup>238</sup> CESCR, *State Report: Spain*, E/C.12/4/Add.11 (14 January 2003), [61].

<sup>239</sup> CESCR, *State Report: Sweden*, E/C.12/SWE/6 (24 June 2013), [618].

amount of resources allocated for bilateral and multilateral contributions as a percentage of GDP.<sup>240</sup> Some made clear commitments to increase total resources allocated for international co-operation with special attention to ESC rights.<sup>241</sup>

A number of donor States also commented that co-operation with developing countries helps to diffuse development know-how<sup>242</sup> and assists States to achieve their social and economic developmental goals.<sup>243</sup> Specific approaches and programmes were identified, their effectiveness was regularly measured<sup>244</sup> and their impact on ESC rights was described.<sup>245</sup> The need to align the policies of international organisations with human rights goals and to enhance trade and economic co-operation was also noted.<sup>246</sup>

Donor States generally expressed their keenness to reach out to other States through regional mechanisms.<sup>247</sup> Many states identified their intentions to increase resource allocation for international assistance.<sup>248</sup> While promotion of human rights was identified as a key priority of development assistance,<sup>249</sup> other States reported international studies, advocacy and standard-setting as areas of support.<sup>250</sup> A number of States also identified themselves as both recipients and donors of international assistance,<sup>251</sup> with many playing key roles in technical co-operation,<sup>252</sup> especially at the regional level, and in

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<sup>240</sup> CESCR, *State Report: Greece*, E/C.12/GRC/2 (16 December 2013), [31].

<sup>241</sup> CESCR, *State Report: Belgium*, E/C.12/BEL/4 (18 June 2012), [27].

<sup>242</sup> CESCR, *State Report: Switzerland*, E/C.12/CHE/2-3 (17 July 2009), [602].

<sup>243</sup> CESCR, *State Report: Japan*, E/C.12/JPN/3 (16 May 2011), [163].

<sup>244</sup> CESCR, *State Report: United Kingdom of Great Britain and Northern Ireland*, E/C.12/GBR/5 (31 January 2008), [60].

<sup>245</sup> *Ibid.*, [66-70]; CESCR, *State Report: Japan*, E/C.12/JPN/3 (16 May 2011), [287][349][373].

<sup>246</sup> CESCR, *State Report: Ireland*, E/C.12/IRL/3 (8 November 2013), [645-646].

<sup>247</sup> CESCR, *State Report: Kuwait*, E/C.12/KWT/2 (22 December 2011), [127].

<sup>248</sup> CESCR, *State Report: Monaco*, E/1990/5/Add.64 (1 July 2004); CESCR, *State Report: Slovenia*, E/C.12/SVN/2 (26 June 2013).

<sup>249</sup> CESCR, *State Report: Norway*, E/C.12/NOR/5 (29 October 2012), [14].

<sup>250</sup> CESCR, *State Report: Belgium*, E/C.12/BEL/4 (18 June 2012), [30].

<sup>251</sup> CESCR, *State Report: India*, E/C.12/IND/5 (1 March 2007).

<sup>252</sup> CESCR, *State Report: Turkey*, E/C.12/TUR/1 (28 January 2009), [45].

collaboration with multilateral agencies.<sup>253</sup> Some States compared the level of aid received and given,<sup>254</sup> while others had set up international assistance and co-operation funds,<sup>255</sup> and programmes with clear budget allocations.<sup>256</sup>

In summary, qualitative textual analysis of the State reports indicates the enthusiasm of many developing countries to making best use of international assistance and co-operation. At the same time, most States did not provide details about any international co-operation activities in their reports. This may reflect insufficient awareness of international assistance in the context of ESC rights realisation efforts.

#### **5.4.2 Case study: Challenges of maximising international assistance to address ESC rights needs in Maldives**

The following case study on Maldives illustrates the key challenges faced by a small developing State in maximising international and assistance and co-operation. While the experience of Maldives in these areas may be unique to its economic, political and social milieu, this case study provides insight into the nature of challenges that may be applicable in similar situations.

##### ***5.4.2.1 Background, nature and types of international assistance and co-operation***

In 2004, the United Nations promoted Maldives from least developed country (LDC) to developing country status with a grace period ending in 2010.<sup>257</sup> The

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<sup>253</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006).

<sup>254</sup> CESCR, *State Report: China*, E/C.12/CHN/2 (6 July 2012).

<sup>255</sup> CESCR, *State Report: Egypt*, E/C.12/EGY/2-4 (22 December 2011).

<sup>256</sup> CESCR, *State Report: Indonesia*, E/C.12/IDN/1 (29 October 2012), [32].

<sup>257</sup> The UN Committee for Development Policy (CDP) recommended the ECOSOC in 2004 on the graduation of Maldives from the list of LDCs on the basis of GNI per capita and human asset index (HAI) and the recommendation was endorsed by the ECOSOC (resolution E/2004/67) and taken note of by General Assembly (A/RES/59/2010). The graduation was scheduled to take place by December 2007. However, following the tsunami of 2004, the Council decided to delay the graduation until 1 January 2011. Committee for Development Policy, *Monitoring of Graduated Countries from the Category*

promotion affected the country both in relation to loss of preferential market access to the EU and USA and reduction of international assistance.

Given the large fiscal gap in recent years, Maldives does not receive sufficient donor assistance to make up the revenue shortfall. This resonates with changes in government policy on international assistance. In 2006, when the Asian Development Bank (ADB) proposed a Public Resource Management Reform Programme (PRMRP) and the Strengthening Economic and Financial Management Programme (SEFMP), the government did not take this advice seriously and subsequently withdrew from the negotiations, indicating the government's reluctance to reform the public sector and fiscal policies.<sup>258</sup> After democratic elections in 2008, with ADB's support, the government initiated remedial action

to address the large fiscal deficit, current account imbalance, and rising public debt through improvements in the efficiency and accountability of government institutions, reductions in public expenditures, the privatisation of State-owned enterprises, and the creation of an enabling environment for private sector development.<sup>259</sup>

Over the last few decades, the education sector has received considerable foreign aid, particularly in relation to the development of educational infrastructure. Japanese and UNICEF grant aid provided a number of school buildings in the atolls and in Malé. Bilateral and multilateral aid played a crucial role in the area of health infrastructure<sup>260</sup> and bilateral donors such as Australia have made an important contribution to human resources development.<sup>261</sup> Key statistics on recent ODA received by Maldives are presented in Table 3.

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*of Least Developed Countries: Maldives*, UN Doc CDP2012/PLEN/12 (16-17 January 2012).

<sup>258</sup> Asian Development Bank, *Country Assistance Program Evaluation: The Maldives* (ADB, Reference Number: CAP:MLD 2011-21 ed, Manila, 2011), <<http://www.oecd.org/countries/maldives/49049206.pdf>>, (i).

<sup>259</sup> Ibid.

<sup>260</sup> For example, the largest hospital in the country, IGM Hospital was donated by the Government of India, while some regional hospitals were funded by UNICEF and other donors.

<sup>261</sup> Australian Government, *Maldives country brief* Department of Foreign Affairs and Trade, Australian Government <<http://dfat.gov.au/geo/maldives/Pages/maldives-country->

Table 3: *International Assistance and Aid to Maldives (2011-2013)*

Receipts	2010	2011	2012	2013
Net ODA (US\$ million)	111	45	58	22.9
Bilateral share (gross ODA)	53%	53%	41%	52.8%
Net ODA / GNI	6.1%	2.4%	3.1%	1.2%
Net Private flows (US\$ million)	29	- 80	- 36	-25.9
For reference	2010	2011	2012	2013
Population (million)	0.3	0.3	0.3	0.3
GNI per capita (Atlas US\$)	5 490	5 800	5750	5600

Sources: Compiled from data available at OECD - DAC, World Bank; [www.oecd.org/dac/stats](http://www.oecd.org/dac/stats)

The Asian Development Bank (ADB) was the most important multilateral donor over the period 2012-2013, while Australia accounted for the most bilateral ODA, as shown in Figure 5.

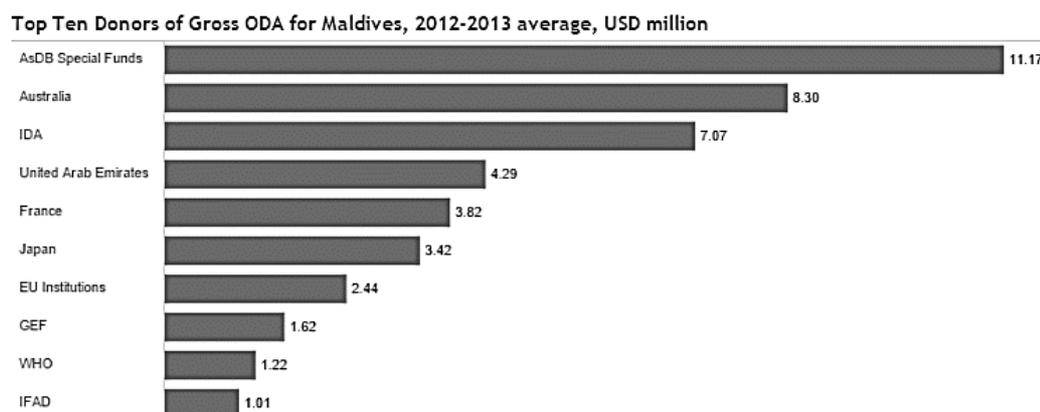


Figure 5: ODA inflow to Maldives (2012-2013)

Sources: OECD - DAC, World Bank; [www.oecd.org/dac/stats](http://www.oecd.org/dac/stats)

These data show that the bulk of international assistance to Maldives is in the form of multilateral loans, followed by bilateral loans and grants.<sup>262</sup> While a

brief.aspx>. Australian programme of development assistance to Maldives is mainly focused on providing higher education scholarships.

<sup>262</sup> Saman Kelegama, 'Foreign Aid and South Asia' in Saman Kelegama (ed), *Foreign Aid in South Asia: The Emerging Scenario* (Sage Publications India, New Delhi, 2012) 1, 15.

substantial level of aid flowed in immediately after the tsunami of 2004, aid and grant receipts have declined in recent years following the country's promotion from LDC status.<sup>263</sup> This has created a significant resource gap.

#### **5.4.2.2 Some key challenges in making aid more effective in Maldives**

Three of the policy indicators discussed above—institutional capacity to handle aid negotiations and implementation, institutional capacity to absorb and utilise resources, and sustainability—are considered in this context.

- **Institutional capacity to manage aid negotiations and implementation activities effectively:** Maldives' recent success in making significant improvements in human development and other indicators resulted in the country's promoted from LDC status, despite the enormous economic and developmental challenges it continues to face. Because of this change of status, donors' perceptions of Maldives as an aid recipient have changed dramatically, making it harder for the country to negotiate international assistance and concessional treatment. For example, the Maldives government has been unable to extend duty-free market access to the EU for its fish exports. Under the WTO's Generalised System of Preferences (GSP) programme, Maldives exported 40 percent of its fishing industry produce to the EU, which was its single largest export partner by export value until January 2014, when these preferences were discontinued. At the end of this concession arrangement, Maldives applied for an extension under the 'GSP+' programme, which is a unilateral trade concession of the EU given to a limited number of countries on the basis of good implementation of human rights and labour conventions. This preference was not extended due to the country's failure to comply with international human rights standards.<sup>264</sup> The government of Maldives was unsuccessful in pursuing its case for preferential market

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<sup>263</sup> Ibid.

<sup>264</sup> J J Robinson, *EU refuses to extend duty-free status of Maldivian fish imports on human rights grounds* (Minivan News, 9 November 2013) <<http://minivannews.com/environment/eu-refuses-to-extend-duty-free-status-of-maldivian-fish-imports-on-human-rights-grounds-71200>>.

access with its EU partners. The weak capacity of the government to negotiate and coordinate bilateral and multilateral aid also results from lack of a strong foreign policy and sustained bilateral and multilateral relations via mutually beneficial policy approaches.

- Institutional capacity in absorbing and utilising aid resources:** Donors generally regard aid programmes in Maldives positively. Maldives is recognised as a successful example of aid utilisation.<sup>265</sup> The ADB assessed its aid and development programme from 1978 to 2010 as ‘partially successful’.<sup>266</sup> While ADB support was assessed as satisfactory in terms of strategic positioning, the programmes themselves were described as ‘relevant, less efficient, effective, less likely sustainable, and partly satisfactory in terms of development impact.’<sup>267</sup> As the biggest multilateral donor to Maldives in recent years, the ADB rated 75 percent of completed sovereign operations and 67 percent of completed technical assistance projects as successful.<sup>268</sup> Often, however, the efficiency of operations was described as below par, a situation that resulted in ‘substantial project implementation delays seen across the portfolio’.<sup>269</sup> The ADB identified a number of factors that contributed to these delays and inefficiencies, including: ‘government capacity constraints, design changes, transfer of project management responsibility among government ministries, staff reassignments, state agency re-organisations, and problems in finding suitable consultants and contractors.’<sup>270</sup>

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<sup>265</sup> Kelegama, above n 262, 14.

<sup>266</sup> Asian Development Bank, above n 258, (ii).

<sup>267</sup> Ibid.

<sup>268</sup> Asian Development Bank, *Development Effectiveness Brief: Maldives* (ADB, Manila, 2013), <<http://www.adb.org/sites/default/files/publication/30161/development-effectiveness-brief-maldives.pdf>>, 15.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

- **Sustainable implementation of aid programmes:** In general, the engagement of multilateral donors with the government produces better results in terms of policy dialogue and development outcomes if it has a long-term focus. Lack of transparency in the use of national funds and international assistance makes it harder to determine if these resources are being misused. It can be argued that, given the fungibility of international aid, the government of Maldives may be able to re-allocate its revenue resources into less beneficial areas. According to the ADB, Maldives' dependence on consultants has resulted in capacity substitution and less than optimum results.<sup>271</sup> Increased focus on developing local capacity is expected to produce better results in the long run.

This case study demonstrates that as the Maldivian government attempts to maximise international assistance and co-operation in various areas of development and provision of basic services essential for the realisation of ESC rights, these key challenges will need to be addressed more rigorously through the aid management structure.

## **5.5 INTERNATIONAL ASSISTANCE AND CO-OPERATION POLICY IMPLICATIONS AND FUTURE DIRECTIONS**

The analysis of State reports and the case study on Maldives demonstrate the complexity of challenges States face in maximising the impact of international assistance and co-operation. While relevant policy options and indicators of State efforts are identified above, it is important to recognise their implications for ESC rights and State obligations to use 'maximum available resources' for ESC rights realisation.

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<sup>271</sup> Asian Development Bank, above n 258, (iv).

### 5.5.1 The need for strengthening institutional principles guiding international assistance and co-operation activities

The current philosophy and methodology of international aid has been undergoing significant transformation, particularly in relation to how aid programmes can be implemented more effectively and efficiently and how transparency and accountability of the aid process can be improved.<sup>272</sup> The philosophy of international assistance must be guided by human rights and dignity consideration for recipients. The incorporation of human rights into development programmes has been undertaken using different approaches, including the Human Rights Based Approach (HRBA), with some agencies adopting explicit human rights approaches while others treat these objectives as aspirational.<sup>273</sup> The rights-based approach to development, which is based on aligning aid programmes with human rights objectives, is one of the most commonly referenced guiding principles of international aid. As part of HRBA and human rights mainstreaming, donors engage in dialogue that addresses sensitive subjects and review compliance through the planning, implementation and evaluation stages of the development process.<sup>274</sup>

Another emerging idea is to identify and align these activities within the framework of the global public goods approach, which covers key ESC rights such as education, health, standard of living and employment. This concept refers to goods that have 'become global and require international co-operation to be adequately provided'.<sup>275</sup> The rationale for focusing on the provision of global public goods is the need to regulate and compensate for the 'public bads' that arise out of global externalities.<sup>276</sup> In this approach, the

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<sup>272</sup> Gilles Carbonnier and Andy Sumner, 'Reframing Aid in a World Where the Poor Live in Emerging Economies' in Gilles Carbonnier (ed), *International Development Policy: Aid, Emerging Economies and Global Policies* (Palgrave Macmillan, Hampshire, 2012) 3, 3.

<sup>273</sup> Organisation for Economic Co-operation and Development and The World Bank, above n 62.

<sup>274</sup> Ibid.

<sup>275</sup> Inge Kaul and Ronald U Mendoza, 'Advancing the Concept of Public Goods' in Inge Kaul et al (eds), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, Oxford, 2003) 78; Klingebiel, above n 3.

<sup>276</sup> Carbonnier and Sumner, above n 272, 9.

implementation of global public policies is considered to have been weak in most areas, despite the ever-increasing commitments from various agencies.

One source of criticism of current global public policy is the low level of success in aid delivery.<sup>277</sup> Institutional and organisational reforms are needed to increase the credibility of these activities. If provision of global public goods is to be improved, there must be changes in the mechanisms of multilateral development institutions and a greater focus on their resources and competence.<sup>278</sup> The position here is that better results will be achieved if a global public policy approach and a human rights-based approach to development can combine their core values.

The increasing number of regional mechanisms of aid delivery and management has enriched the opportunities for engagement between donors and recipients. Recent research shows that recipient countries are positive about the changing aid landscape, particularly the increased number of donors and aid channels.<sup>279</sup> Governments are more comfortable negotiating aid with multiple donors, often in different fora, as a means of enhancing their negotiating power.<sup>280</sup> The capacity of the State to take full ownership of development programmes depends to a great extent on the capacity, legitimacy and leadership of all institutions,<sup>281</sup> which collectively define institutional and State capacity.

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<sup>277</sup> Michel Mordasini, 'Implementing Global Public Policies: Are the Aid Agencies Walking the Talk?' Ibid. 19.

<sup>278</sup> Ibid., 29.

<sup>279</sup> Greenhill, Prizzon and Rogerson, above n 87, 33-34.

<sup>280</sup> Ibid.

<sup>281</sup> Marta Foresti, David Booth and Tammie O'Neil, *Aid effectiveness and human rights: strengthening the implementation of the Paris Declaration* (Overseas Development Institute, London, 2006).

## 5.5.2 Future directions of international assistance and co-operation activities

The current aid debate highlights the need for reform in aid architecture and policies to reflect existing global challenges.<sup>282</sup> With the increasing fragmentation in multilateral aid architecture, there is an urgent need to address the problem of overlapping mandates and objectives. New approaches, such as vertical funds and earmarked trust funds, are becoming more prevalent at a time when funding for multilateral donor institutions is declining.<sup>283</sup>

Better institutional mechanisms need to be put in place to ensure that the decisions of multilateral donor agencies are in line with the human rights priorities of the recipient States. Fons Coomans argues that the developed nations who participate in the decisions of the World Bank have an obligation to ensure that the projects funded by this entity do not interfere with the enjoyment of rights in the recipient country.<sup>284</sup> Other developments, such as institutionalising a new system of global governance, reforming all Bretton Woods Institutions, creating a new International Development Aid Fund (IDAF) through compulsory contributions from wealthy countries, or patching up and harmonising existing aid mechanisms,<sup>285</sup> can also significantly enhance the success of international assistance projects.

The number of countries classified as low- or middle-income is changing, and this will affect the 'poverty case load.' At the same time, the number of aid providers is set to rise.<sup>286</sup> All of this is likely to have a significant impact on the overall structure and delivery of aid. With changing patterns of economic growth and demography, the focus of aid has also been changing. For

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<sup>282</sup> Klingebiel, above n 3, 93; Nissanke, above n 80.

<sup>283</sup> Kharas and Blomfield, above n 86, 63.

<sup>284</sup> Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11(1) *Human Rights Law Review* 1-35, 3.

<sup>285</sup> Ortiz, above n 15, 72.

<sup>286</sup> Evans, above n 18, 1-2.

example, with more than 72 percent of the world's poor now living in middle-income States that not only receive aid but are also forming their own aid agencies, the role of international development assistance has become increasingly complex.<sup>287</sup> For these reasons, there is a need to move towards a more collective action model, particularly with the proliferation of development aid partners and diverse objectives.<sup>288</sup> This situation has increased the challenges of proper coordination, transparency and accountability of the aid process.<sup>289</sup>

Aid delivery and management will require major transformation. The 'cash on delivery' approach advocated by Birdsall and Savedoff departs from traditional 'results-based approaches' to aid by targeting the behaviour of both donor and the recipient and considering ways to enhance the accountability of the recipient State to its citizens.<sup>290</sup> This approach requires the recipient State to take full ownership of the aid programme, develop a better working relationship with the donor and pay attention to jointly desired outcomes.<sup>291</sup>

Further reforms in the international economic system are needed to address the challenges faced by the most vulnerable populations in realising their basic needs and human rights. Enhancing the real 'gains from trade' for the poor through better trade regulation and improved capacity will substantially benefit the overall welfare of developing States, particularly the most vulnerable populations in those States. These gains are also essential to realise the mutual synergies between trade and human rights.<sup>292</sup> Such an approach

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<sup>287</sup> Malcolm Langford et al, 'Introduction: An Emerging Field' in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, Cambridge, 2012), 31.

<sup>288</sup> Mordasini, above n 277, 29.

<sup>289</sup> Ibid.

<sup>290</sup> Nancy Birdsall and William D Savedoff, *Cash on Delivery: A new approach to foreign aid* (Centre for Global Development, Washington, D.C., 2011). The core of 'cash on delivery' approach is to work through a contract between the donor and recipient which agrees and outlines the desired outcomes and fixed payments for confirmed progress.

<sup>291</sup> Ibid.

<sup>292</sup> See for example, Ernst-Ulrich Petersmann, 'Human Rights and International Economic Law in the 21st Century: The need to clarify their interrelationships' (2001) *Journal of International Economic Law* 3-39, 4; Ernst-Ulrich Petersmann, 'Economic Law and

would require moving beyond the preoccupation with traditional market rules to prioritising ESC rights goals in trade-related decisions. Prioritising ESC rights in agricultural trade,<sup>293</sup> subsidies and in negotiation and implementation of trade agreements is an essential feature of these synergy-building approaches. While the ongoing Doha round of trade negotiations under the WTO has achieved some success in addressing a number of issues around agricultural and cotton subsidies, they do not go far enough.<sup>294</sup> The rules of international trade should be better aligned with human rights principles to ensure fair treatment of all players.

In summary, this chapter has argued that international assistance and co-operation must be seen within a broad framework that addresses the structural, process and outcome challenges faced by beneficiary States and must incorporate global economic arrangements, including trade and investment rules, to enhance the resources and capacity of these States to effectively implement their ESC rights obligations. New approaches to aid, including trade and investment opportunities, are needed to empower States to become more self-sufficient in addressing these challenges within a domestic policy framework.

## 5.6 CONCLUSIONS

This chapter has examined aspects of international assistance and co-operation with the aim of identifying areas of concern and opportunities in relation to the 'resources through international co-operation and assistance' element of the ICESCR. States are confronted with many challenges in adopting the most effective and outcome-oriented policies for maximising the quality and quantity of international assistance and co-operation, particularly

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'Constitutional Justice" (2008) 19(4) *The European Journal of International Law* 769-798, 796.

<sup>293</sup> Sarah Joseph, *Blame it on the WTO?: A Human Rights Critique* (Oxford University Press, New York, 2011), 141.

<sup>294</sup> Christophe Bellmann, 'The Bali Agreement: Implications for Development and the WTO' (2014) 5.2 *International Development Policy*, Joseph, above n 293, 277.

those appropriate for the realisation of ESC rights. While the level of overall international aid and assistance has remained far below the expected level, an equally relevant concern is how to ensure that available resources are put to proper use.

The politics of international assistance still plays a major role in resources allocation for international aid programmes, which creates competition for international resources among developing States. Weaknesses in the existing architecture of international assistance and co-operation disadvantages weaker States that lack local capacity to negotiate and manage aid. As a result, they are unable to mobilise adequate resources and fully utilise and absorb the resources that are made available. Such weaknesses are often exacerbated by institutional weakness in aid governance and mechanisms for tackling corruption.

Current practices and the scope of provision of international aid and assistance are insufficient and unsatisfactory for effective realisation of ESC rights for a number of reasons. Although the number of bilateral, regional and multilateral players in the international assistance and co-operation arena has increased significantly in recent years, there is still an urgent need for the system to be more closely aligned with ESC rights. Recipient States also need to be more proactive in seeking resources through international assistance channels to complement domestic resources and maximise the amount of 'available resources' for the progressive realisation of ESC rights. There is also good reason to argue that donors need to ensure that recipient States better appreciate aid as useful and attractive and focus more on facilitating and extending resources than on guidance. This can be achieved through enhanced coordination of aid programmes, with more direct inputs from recipient States, and by empowering recipient States to implement the programmes within stronger aid sustainability frameworks.

Through analysis of State reports and a case study, this chapter has confirmed the key role of resources and support received through international assistance and co-operation in implementing State obligations in relation to

ESC rights. These resources supplement the State's domestic revenue, especially in situations where domestic resources are inadequate.

The next chapter examines resources that can be raised and mobilised through private sector participation (investments and public private partnerships) and non-financial resources (State and community) which can significantly enhance the State's ability to implement ESC rights programmes.

# **6 Mobilising Private Sector and Societal Resources for ESC Rights through a 'Synergistic Partnership' Approach**

## **6.1 INTRODUCTION**

Chapter 3 advanced the argument that the role of the State as a promoter and protector of human rights within the 'maximum available resources' model can be enhanced by expanding policy paradigms to include facilitation and mobilisation of private sector and non-financial resources for realisation of these rights. This involves direct engagement and policy action by the State to ensure that Economic, Social and Cultural Rights (ESC rights) are given priority in market and societal interactions. Such an approach also requires the State to adopt a proactive policy stance towards ESC rights and resources-related matters, especially in guiding private sector investment and societal resources into areas that can complement and support State expenditure and provide better opportunities for individuals to realise their rights.

This chapter builds on discussions in the previous chapters by applying macroeconomic and public policy perspectives to private sector participation, investment and non-financial societal resources. The main proposition is that a macroeconomic policy environment directly targeted at attracting private investment and involvement in essential social services such as employment, education, health and housing are essential to the concept of using 'maximum available resources' for the realisation of ESC rights. The focus of this chapter is on identifying how States can maximise their overall resources and capacity to address ESC rights by engaging with the private sector and attracting private sector investments.

Unlike the previous two chapters, which addressed policy approaches targeting the maximisation of State revenue and resources for ESC rights, the focus here is on policies to maximise the engagement of the private sector and mobilise private sector resources for the same objectives through participatory arrangements. This involves using the State's policy tools to shape the economic environment in a way that encourages more private sector engagement in the provision of social services essential for the realisation of ESC rights. Such engagement can complement the State's own expenditure in relevant policy areas by creating opportunities for public-private partnership and co-operation, especially Foreign Direct Investment (FDI).

The chapter begins by examining the human rights case and economic arguments for active promotion of private sector engagement and investment in areas relevant to ESC rights. Public policy approaches, particularly those related to macroeconomic management and incentives for attracting private sector investment and non-financial societal resources into ESC rights-related goods and services are identified. This is followed by a discussion of relevant policy areas, key challenges and policy indicators that can be used to measure State efforts in attracting and engaging societal and private sector resources. Next, a systematic analysis of State reports on relevant aspects of State policy is presented to identify the State's practices in relation to private sector involvement, particularly private sector investment, in ESC rights-related areas and the main policy approaches that are adopted. The analysis focuses on identifying methods that can be used to maximise mobilisation of private sector resources for fulfilment of ESC rights and policy challenges involved in effective regulation of private sector involvement. The chapter concludes by discussing the implications of such engagements and presenting policy options and recommendations.

## 6.2 MOBILISING PRIVATE SECTOR AND SOCIETAL RESOURCES

The relevance of ‘societal resources’ and the private sector to the realisation of ESC rights is evident from a number of perspectives. In its General Comment No. 12 on the right to adequate food, the ESCR Committee asserted that:

While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society individuals, families, local communities, nongovernmental organizations, civil society organizations, as well as the private business sector have responsibilities in the realization of the right to adequate food.<sup>1</sup>

This idea of ‘horizontal obligation’ among all members of the society is only meaningful if such responsibilities are an expected component of civic participation. ‘Societal’ resources include natural resources, individual skills and knowledge, and technological, management and organisational resources under the control and ownership of individuals and business entities. All of these can make significant contributions to realisation of the economic, social and cultural rights of the population. Hence, it can be argued that effective mobilisation of these resources constitutes an essential element of using ‘maximum available resources’ for ESC rights policy implementation.

The key to making these resources work for ESC rights objectives is to create an environment in which the use of these resources is aligned with the ESC rights needs of the society. The role of the State is to provide a legal, economic and social environment that is conducive to this purpose. In many cases, the role of the State in facilitating maximum utilisation of these resources involves relaxation or removal of constraints on individuals to use societal resources, such as land, to realise these rights through their own effort. In this context, Asbjørn Eide argues that

states must, at the primary level, respect the resources owned by the individual, her or his freedom to find a job of preference and the freedom to

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (art. 11)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/5 (12 May 1999), [20].

take the necessary actions and use the necessary resources - alone or in association with others - to satisfy his or her own needs...<sup>2</sup>

Such a policy orientation must be primarily targeted at enhancing an individual's drive and desire to fulfil basic needs. These are often crushed by undue restrictions on access to societal resources that can help people move out of poverty. Poverty and unemployment are not only undesirable for individuals but also represent a huge drain on the overall resources of society. The human skills, energy and entrepreneurship that remain idle because of poverty, unemployment and underemployment can be harnessed through proper economic policies and incentives. As Amartya Sen affirms, 'poverty must be seen as the deprivation of basic capabilities rather than merely a lowness of incomes, which is the standard criterion of identification of poverty'.<sup>3</sup> In line with the capability arguments of Sen and Martha Nussbaum,<sup>4</sup> others argue that extreme poverty represents a clear violation of human rights.<sup>5</sup>

Since the realisation of ESC rights entails efforts from individuals as well as the State, quality investment in education, skill building and employment is essential for mobilising the practical and financial contributions of individuals to their society and the fulfilment of their own human rights and those of other members of their society. Such investments are also essential for optimum utilisation of non-financial resources within a country, such as human resources, technology and management skills, as highlighted in the resource model presented in Chapter 3.

Appropriate allocation and efficient management of the State's natural resources, such as land, water and biodiversity, can have significant positive

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<sup>2</sup> Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Leiden, 2001) 9-28, 23.

<sup>3</sup> Amartya Sen, *Development as Freedom* (Anchor Books, New York, 1999), 87.

<sup>4</sup> See for example, Martha Nussbaum, 'Capabilities and human rights' (1997) 66(2) *Fordham Law Review* 273-300; Martha Nussbaum, 'Capabilities As Fundamental Entitlements: Sen and Social Justice' (2003) 9(2) *Feminist Economics* 33-59.

<sup>5</sup> See for example, Sigrun Skogly, 'Is there a right not to be poor?' (2002) 2(1) *Human Rights Law Review* 59-80.

effects on the overall realisation of ESC rights such as the right to food, housing and adequate standard of living. Effective management of these resources has significant legal and political requirements.

### 6.2.1 Private sector resources and market solutions

The State represents the preferences and demands of citizens and is best placed to identify the needs of the society as a whole. At the micro level, however, the market is better positioned to understand and meet individual and group preferences.<sup>6</sup> Although there are potential areas of friction and conflict, the State and the market can complement each other to achieve the goals of social development and human rights, rather than either attempting to do so alone. Instead of taking a back seat in market processes, government must be proactive in creating the right conditions in which the market can flourish. This requires ‘policy nudging’ from the government to direct the market to address socially optimal policies and is particularly relevant in the case of poor States.

By definition, the market is a setting, enforced by government, which operates on the basis of perfect duty where ‘participants make, accept, and reject offers of trade in a setting of mutual respect, without deception or coercion.’<sup>7</sup> There are contrasting perspectives on the role of the market in the economy and the general welfare of society. Conservative (right-leaning) economists seek market-based solutions, while those of liberal (left-leaning) persuasion prefer State intervention in the event of market failure.<sup>8</sup> *Structuralists*, on the other hand, want social goods to be taken out of the market altogether and provided

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<sup>6</sup> See for example, John Meadowcroft, ‘Markets, Discovery, and Social Problems’ in Mark D White (ed), *Accepting the Invisible Hand: Market-based Approaches to Social-Economic Problems* (Palgrave Macmillan, New York, 2010) 23-41(197), 23.

<sup>7</sup> Mark D White, ‘Markets and Dignity: The Essential Link (with and application to health care)’ *ibid.* 1-21 (197), 11.

<sup>8</sup> William Felice, ‘Linking Law and Economics: Translating Economic and Social Human Rights Norms into Public Policy’ (Paper presented at the Rights and Their Translation into Practice Conference, Rogers College of Law, University of Arizona, 22-24 April 2011) 3.

by government.<sup>9</sup> Although the profit motive of the market prioritises stakeholder interests, this driving force need not supersede the needs of individuals and society. From a human rights point of view, a complementary approach is both practical and beneficial.

It is important to identify the human rights duties that can be conferred on the market without compromising the primacy of human rights values and the integrity of rights-holders. A common question about market-based social solutions is whether the nature of the market is compatible with human rights.<sup>10</sup> Some human rights scholars argue that market solutions and human rights objectives are incompatible because they perceive an incompatibility between market objectives and human rights goals.<sup>11</sup> In this perspective, the inability of the market to fulfil human rights is linked to its failure to express social preference and an over-reliance on the price mechanism.<sup>12</sup> Anonymity, unaccountability and lack of market interest in the provision of basic services also results in socially inefficient allocation of resources based only on the price mechanism.<sup>13</sup>

To address this perceived imbalance and achieve welfare efficiency and equity, State intervention is required at appropriate levels to address these concerns.<sup>14</sup> It is essential to recognise that, whenever services essential to the realisation of human rights are privatised, the State must ensure that the private sector operator respects the human rights obligations arising out of the particular activity.<sup>15</sup> The form taken by such interventions must be based on

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<sup>9</sup> Ibid.

<sup>10</sup> For example see, Koen Feyter, *Human Rights: Social Justice in the Age of the Market* (Zed Books, London, 2005).

<sup>11</sup> See for example, Rhoda E Howard-Hassmann, 'Reply to Paul O'Connell's Article on Neo-liberal Globalisation and Human Rights' (2009) 9(1) *Human Rights Law Review* 127-133, 131.

<sup>12</sup> Manuel Couret Branco, *Economics versus Human Rights* (Routledge, London, 2009), 55-59.

<sup>13</sup> Ibid.

<sup>14</sup> Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity' (2008) 26(4) *Development Policy Review* 387-405.1, 396.

<sup>15</sup> Adam Mcbeth, 'Privatising Human Rights: What Happens to The State's Human Rights Duties when Services are Privatised?' (2004) 5 *Melbourne Journal of International Law*.

human rights and welfare impact and efficiency. Hence the debate around the efficiency and effectiveness of the public sector in providing and facilitating social goods and services must also be informed by discussion of similar challenges in the private sector.

When harnessed responsibly and effectively, economic freedom results in better economic outcomes, which attracts more investment, encourages innovation and discovery, inspires productive activities and allows for better social and developmental outcomes.<sup>16</sup> This power of the market to address human rights objectives has been acknowledged by many human rights scholars. The UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, highlighted in his report to the General Assembly that the considerable global power of business, when harnessed responsibly, can support and enhance human rights.<sup>17</sup> The relevance of private sector engagement in providing for and facilitating ESC rights has been recognised within the ESC rights community. With respect to the right to adequate housing, for instance, the ESCR Committee in its General Comment No. 4 recommended that States include 'whatever mix of public and private sector measures considered appropriate'<sup>18</sup> in the design of the State's policies. Thus there is a strong case for involvement of the market in promoting human rights fulfilment.

Although the market has enormous potential as an enabler in the realisation of human rights, legitimate concerns may be raised about the negative impact of the market on many aspects of society, including the enjoyment of human rights. The ESCR Committee's view on the role of the government in regulating

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<sup>16</sup> James D Gwartney and Joseph S Connors, 'Economic Freedom and Global Poverty' in Mark D White (ed), *Accepting the Invisible Hand: Market-based Approaches to Social-Economic Problems* (Palgrave Macmillan, New York, 2010) 43-68, 48.

<sup>17</sup> *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Protect, Respect and Remedy: a Framework for Business and Human Rights*, 8<sup>th</sup> sess, UN Doc A/HRC/8/5 (7 April 2008).

<sup>18</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11 (1)) of the Covenant*, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991), [14].

and directing private sector in the provision of goods and services relevant to ESC rights is evident in its General Comment No. 5, which states that:

In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces.<sup>19</sup>

Privatisation and deregulation, introduced to promote market solutions and private sector involvement, have created many dramatic examples of failure and disappointment where State resources have been abused by a few individuals to the detriment of the society.<sup>20</sup> Some argue that many actions of the market lead to direct and indirect violations of human rights, especially since transnational corporations (TNCs) have the capacity to influence State policies that affect the realisation of human rights.<sup>21</sup> Similar sentiments have been expressed by many other human rights and development scholars.<sup>22</sup> It is therefore argued that the home-States of TNCs have an international legal obligation to regulate the activities of these entities,<sup>23</sup> to ensure that these activities do not lead to violation of human rights.

At the same time, a number of studies on the impact of market liberalisation attest to the fact that such reforms and the involvement of the market generate not only better economic conditions but also higher levels of social harmony

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<sup>19</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 5: Persons with Disabilities*, 11<sup>th</sup> sess, UN Doc E/1995/22 (9 December 1994), [12].

<sup>20</sup> See for example, Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press, 2013).

<sup>21</sup> Feyter, above n 10, 20.

<sup>22</sup> For example, Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483-509; Cathy Albisa, Brittany Scott and Kate Tissington, 'Demolishing Housing Rights in the Name of Market Fundamentalism: The Dynamics of Displacement in the United States, India, and South Africa' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press, Cambridge, 2013) 86; M Rodwan Abouharb and David L Cingranelli, *Human rights and structural adjustment* (Cambridge University Press, Cambridge, 2007).

<sup>23</sup> Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *The Modern Law Review* 598-625.

and enhance the government's respect for human rights.<sup>24</sup> The key point is that markets are sensitive and responsive to incentives. This creates a necessary condition for the market to respect human rights values such as individual choice and dignity and can be achieved by introducing appropriate incentives for the private sector. In order to harness this potential responsiveness to human rights concerns, government interventions should be shaped by the desire to create the requisite positive conditions in the market rather than weaken its inherent energy and ability to innovate and flourish.

The role of the State in the market is a subject of extensive inquiry in economics and public policy. This is particularly relevant in relation to changing dynamics of international trade and global and regional economic cooperation, in addition to forces of multinational corporations. While a detailed analysis of legal and policy dimensions of State intervention and participation in the market would provide further insight into this relationship, this thesis will maintain a narrower focus on the elements necessary for creating the relevant conditions in relation to maximising resources for ESC rights.

### **6.2.1.1 The significance of mobilising private sector resources**

Public-private partnerships (PPPs) are 'cooperative relationships between government, profit-making firms, and non-profit private organisations to fulfil a policy function'.<sup>25</sup> The term refers to a range of relationships between the State and market actors that are also referred to as 'private-sector participation' or 'privatisation'.<sup>26</sup> The focus is on joint working arrangements between the public and private sectors which can include all forms of co-operation and collaboration as well as risk-sharing arrangements.

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<sup>24</sup> For example, Indra de Soysa and Krishna Chaitanya Vadlammanati, 'Do pro-market economic reforms drive human rights violations? An empirical assessment, 1981–2006' (2013) 155 *Public Choice* 163-187.

<sup>25</sup> Stephen Linder and Pauline Rosenau, 'Mapping the Terrain of the Public-Private Policy Partnership' in Pauline Vaillancourt Rosenau (ed), *Public-Private Policy Partnerships* (MIT Press, Cambridge, 2000) 1, 5.

<sup>26</sup> Asian Development Bank, *Public-Private Partnership Handbook* (Asian Development Bank, Manila, 2008), 1.

Private-sector investment, particularly Foreign Direct Investment (FDI), is an important driver of business activities and also contributes significantly to basic services such as education, health and employment. Companies invest in a given country mainly to capture the benefits from market access, an educated workforce, natural resources or strategic export platforms.<sup>27</sup> Government policies directed to advancing these features help to attract investment.

Although the role of the State and that of the market are distinct in many areas of economic activity, they are not mutually exclusive: one cannot thrive without the other. The 'resource stress' associated with demographic, climate and economic growth will have a significant impact on environmental resources in the future. This requires governments to pay more attention to the sustainable management of these resources and to collaborate with private sector and international partners.<sup>28</sup> While investment in economic infrastructure is clearly linked with positive growth outcomes and sustainability, social investment in health and education also generate significant short- and long-term benefits.<sup>29</sup>

Investment in social infrastructure and services relevant to ESC rights can be incorporated into government policies that target domestic and international investors. The State must adopt appropriate planning and forecasting measures to harmonise ESC rights and investment obligations, since such investment can have a positive impact on the dignity and rights of individuals.<sup>30</sup>

In addition to the private sector resources mobilised through FDI and other private sector engagement activities, State policy can also be positively targeted at enhancing the impact of private remittances (especially migrant remittance) in creating social development infrastructure with positive ESC

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<sup>27</sup> Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women's Global Leadership, New Jersey, 2011), 12.

<sup>28</sup> KPMG International, *Future State 2030: The Global Megtrends Shaping Governments* (2013), 44.

<sup>29</sup> Rathin Roy, Antoine Heuty and Emmanuel Letouzé, 'Fiscal Space for What?: Analytical Issues from a Human Development Perspective' (Paper presented at the G-20 Workshop on Fiscal Policy, Istanbul, 30 June 30-2 July 2007) 4.

<sup>30</sup> Bruno Simma and Diane A Desierto, 'Bridging the Public Interest Divide: Committee assistance for investor-host State compliance with the ICESCR' (2013) 10(1) *Transnational Dispute Management*, 5,12.

rights implications. According to the World Bank, recorded remittances to the developing States are expected to reach US\$440 billion in 2015, which represents not only a significant source of national revenue for these States, but also a potential to create enhanced opportunities for addressing ESC rights related infrastructure needs.<sup>31</sup> While private remittances are accounted as a private capital flow, State policy can be effective in enhancing its quantity and channelling them to productive investments, especially those with maximum impact on ESC rights.<sup>32</sup>

With proper implementation, private sector investment has the potential to generate technology spill-overs, capital formation, trade integration and improvement in the overall business environment.<sup>33</sup> Such benefits have the potential to help reduce poverty and improve social and environmental conditions that are vital for the realisation of ESC rights.

### **6.2.1.2 Financial and non-financial societal resources**

In addition to financial resources and FDI, societal and private sector engagement can also target the mobilisation of non-financial resources. As discussed in Chapter 3, non-financial resources that can be mobilised for ESC rights include natural, human, informational, organisational and scientific and cultural resources.

The endowment of natural resources varies widely across States. States have differential access to natural resources that can be exploited for the realisation of ESC rights. Natural resources can be used directly to ensure the realisation and enjoyment of ESC rights by individuals and communities and can also be

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<sup>31</sup> The World Bank, *Remittances growth to slow sharply in 2015, as Europe and Russia stay weak; pick up expected next year* (13 April 2015) <<http://www.worldbank.org/en/news/press-release/2015/04/13/remittances-growth-to-slow-sharply-in-2015-as-europe-and-russia-stay-weak-pick-up-expected-next-year>>.

<sup>32</sup> While private remittances can be addressed as a separate source of private financial resources, in order to maintain the focus of State policy in addressing all forms of private resources from an ESC rights perspective, this chapter will treat remittances as a constitute component of private sector resources in general, rather than treating it separately.

<sup>33</sup> *Ibid.*, 13.

a means of generating additional revenue for the State.<sup>34</sup> For many individuals, particularly in rural communities, access to natural resources such as land and water are of great significance because it allows them to fulfil their basic rights without direct government intervention.<sup>35</sup> At the same time, appropriate political and social arrangements are necessary to optimise such benefits.<sup>36</sup> Thus the system of ownership of natural resources, particularly in relation to land tenure or land reform, is directly relevant to the realisation of ESC rights. Ownership of natural resources allows individuals and communities to empower themselves to realise their rights, including ESC rights, especially by removing or diminishing the need for direct intervention of the government for their realisation.

The issue of natural resources has been addressed by the ESCR Committee on many occasions in relation to the exploitation of a country's natural resources and the impact on indigenous peoples and the environment.<sup>37</sup> The need for land and water reforms to address inequality and inefficient use has been identified in a number of cases.<sup>38</sup> Another issue in need of attention is the process of exploration for natural resources, particularly with regard to its impact on the rights of indigenous people. For example, in the case of Ecuador, the Committee expressed concern that the State granted natural resource extraction concessions to international companies without full consent of the communities concerned and without proper assessment of their impact on the exercise of land and cultural rights as well as on the

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<sup>34</sup> Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 *Human Rights Law Review* 393-420, 406.

<sup>35</sup> Robert E Robertson, 'Nutrition , human rights and resources' (1996) 21 *Food Policy* 57-71, 59.

<sup>36</sup> For example, countries with abundant arable land or water resources can use these resources to ensure the realisation of rights to food and water, if properly managed and equitably distributed, without having to commit additional financial resources through the state budget.

<sup>37</sup> For example, CESCR, *Concluding observations: Venezuela*, E/C.12/1/Add.56 (21 May 2001), [12].

<sup>38</sup> CESCR, *Concluding observations: Bolivia*, E/C.12/1/Add.60 (21 May 2001), [40]; CESCR, *Concluding observations: Yemen*, E/C.12/1/Add.92 (12 December 2003), [38].

environmental and health.<sup>39</sup> Some Concluding Observations identified as essential the utilisation of natural resources wealth for the purpose of building social infrastructure.<sup>40</sup> Clearly, natural resources are a key component of the overall resources envelope for ESC rights.

Human resources or human capital is defined as 'people's innate abilities and talents plus their knowledge, skills and experience that make them economically productive'.<sup>41</sup> This can be enhanced by increased investment in health care, education and training. Individual abilities, knowledge, skills and experience are among the most valuable resources in any society.<sup>42</sup> Therefore, the overall human rights enjoyment of the society can be greatly enhanced if the issues of 'poverty, lack of educational facilities, job opportunities and other capacity obstacles'<sup>43</sup> to untapped potential of the population can be fully addressed. Given the opportunity to develop and utilise their capacity, individuals can not only realise their own human rights, but also provide societal resources for the realisation of rights for others.<sup>44</sup> Appropriate use of human resources enhances the condition of individuals as well as overall productivity.

Increasing the educational standard directly contributes to increased resources for the realisation of human rights, particularly ESC rights.<sup>45</sup> According to Skogly, enhancement of human resource capacity through education, healthcare and job training not only results in fulfilment of these individual rights but also empowers individuals to advance their human rights in general.<sup>46</sup> An important aspect of enhanced human capacity, Eide suggests,

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<sup>39</sup> CESCR, *Concluding observations: Ecuador*, E/C.12/1/Add.100 (7 June 2004), [12].

<sup>40</sup> For example, CESCR, *Concluding observations: Chad*, E/C.12/TCD/CO/3 (16 December 2009), [23].

<sup>41</sup> Tatyana P Soubbotina and Katherine A Sheram, *Beyond Economic Growth: Meeting the Challenges of Global Development* (The World Bank, Washington, D.C., 2000), <[http://www.worldbank.org/depweb/beyond/beyondco/beg\\_all.pdf](http://www.worldbank.org/depweb/beyond/beyondco/beg_all.pdf)>, 100.

<sup>42</sup> Skogly, above n 34, 407.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, 408.

<sup>46</sup> *Ibid.*, 407.

is that it allows individuals to use their own resources to satisfy their needs, either individually or collectively.<sup>47</sup> Since people living in poverty represent an unrealised national resource of human skill and energy, targeted actions by States to bring people out of poverty and empower them through investment in the development of human capacity add significantly to the overall resources of the State.

States have access to information that is vital for the promotion and protection of human rights. Hence the State information infrastructure is an available resource that can be used to realise ESC rights.<sup>48</sup> If appropriately used, this infrastructure can help address a number of key ESC rights, such as rights to education and health, and promote enjoyment of cultural rights. Although the creation and dissemination of information itself often involves financial costs, it is clear that information itself has its own inherent value and can be utilised as a separate resource available to the State.

Some scholars also suggest that organisational resources can be used by the State for the realisation of ESC rights of children.<sup>49</sup> These resources include governmental and public sector organisations, household and family structures, community and civil society organisations, political and trade movements and media and private corporate enterprises.<sup>50</sup> It is important to explore how these organisational resources can be utilised for ESC rights realisation.

Scientific and cultural resources can also be put to this purpose. Traditional knowledge and other core elements of culture, including scientific knowledge and intellectual property, are an important resource at national, individual and

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<sup>47</sup> Eide, above n 2, 23.

<sup>48</sup> 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* 693-714, 697.

<sup>49</sup> For example, James Himes, 'Implementing the United Nations Convention on the Rights of the Child: Resource Mobilization and the Obligations of the States Parties' (Innocenti Occasional Papers, No CRS 2, UNICEF International Child Development Centre, November 1992).

<sup>50</sup> Robertson, above n 35, 59.

community levels.<sup>51</sup> Scientific and cultural resources are crucial both as resources in themselves and also as a means of protecting and preserving other resources.<sup>52</sup>

The discussion of societal resources in this chapter has referred to both financial and non-financial elements. Specific attention is now paid to the role of private sector financial and organisational resources in areas of relevance to ESC rights fulfilment. In many cases, this leads to more effective utilisation of non-financial resources for this purpose.

### **6.2.2 The case for an ESC rights-oriented ‘synergistic partnership’ with the private sector**

Investment in infrastructure and public goods essential for the realisation of ESC rights is often beyond the financial capacity of governments, especially in poorer States. In such situations, governments need to take an active policy stance by engaging with the private sector at the highest possible level to achieve relevant public sector objectives.<sup>53</sup> This has the potential to relieve the resource burden on government without neglecting ESC rights.

Private sector resources can be oriented towards ESC rights through public policy approaches that involve ‘expansion of opportunities for private gain’ or through systems of equitable distribution of private wealth.<sup>54</sup> This is not an argument for government to relinquish its human rights obligations but to implement its responsibilities in the most effective manner. Government retains the key role of facilitating individual enjoyment of ESC rights, but this

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<sup>51</sup> Skogly, above n 34, 409.

<sup>52</sup> Ibid.

<sup>53</sup> See for example, Inge Kaul and Pedro Conceição, ‘Why Revisit Public Finance Today?’ in Inge Kaul and Pedro Conceição (eds), *The New Public Finance: Responding to Global Challenges* (The United Nations Development Programme, New York, 2006) 1.

<sup>54</sup> See for example, Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2014), 143.

can be achieved more effectively through stronger partnerships with private sector market players.

This argument rests on the premise that government can use its institutional authority and policy tools to engage more closely with private sector activities, such as investment, service provision and philanthropic activities, to guide these efforts towards ESC rights goals. Joseph Stiglitz advanced the concept of an 'interactive partnership'<sup>55</sup> as a new paradigm for the relationship between the market and the State.<sup>56</sup> Drawing on this seminal work, the present thesis proposes a 'synergistic partnership' approach to the realisation of ESC rights policy objectives. This approach recognises that the success of many emerging economies in improving the living conditions of their citizens results from strong engagement of market actors and government, often through a variety of intervention measures.

A 'synergistic partnership' approach seeks a balance between the role of the market in generating wealth and creating solutions, and the role of the State in properly regulating the market. It addresses concerns about the negative effects of market engagement and the lack of attention to the ethical dimensions of market-based outcomes.<sup>57</sup> At the same time, it recognises that governments can influence the 'game' of the market and the manner in which market participants behave in order to maximise welfare and promote ESC rights. The focus is on optimising synergy between the roles of the State and the market to create solutions for ESC rights without compromising the market's ability to harness creative power or depriving the State of its regulatory authority.

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<sup>55</sup> Joseph Stiglitz, 'Redefining the Role of the State: What should it do? How should it do it? And how should these decisions be made?' (Paper presented at the Tenth Anniversary of MITI Research Institute, MITI Research Institute, March 1998), <[https://www0.gsb.columbia.edu/faculty/jstiglitz/download/1998\\_3\\_Redefining\\_the\\_Role\\_of\\_the\\_State.pdf](https://www0.gsb.columbia.edu/faculty/jstiglitz/download/1998_3_Redefining_the_Role_of_the_State.pdf)>.

<sup>56</sup> Ibid.

<sup>57</sup> This issue is derived from discussions by Radhika Balakrishnan, Diane Elson and Raj Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53(1) *Development* 27-36, 27.

### **6.2.2.1 Approaches to a 'synergistic partnership'**

The traditional view of productive development policies is based on distinct roles for the government and private sector. It does not emphasise the need to work together, thus the roles are defined independently of each other.<sup>58</sup> Such an approach fails to place due emphasis on the complementarity of the roles of government and the private sector. The new thinking is that the public sector can benefit immensely from collaboration with the private sector in many policy areas, particularly in relation to technological and managerial skills and knowledge held by the private sector, in ways that benefit both parties. To achieve this, government must involve the private sector as partners in policy-making and implementation. The depth of this engagement will depend on the nature of policy projects and the capacity and preparedness of the private sector. The relationship could vary from consultation and joint policy design to autonomy in implementation.

The role of government in creating an ESC rights investment-friendly environment is based on the premise that its fiscal and monetary policies, as well as its overall administrative and bureaucratic arrangements, can be significant forces in attracting and expanding private sector investment in key ESC rights areas. Through such an arrangement, the efficiency-focused approach of the private sector can bring new resources for ESC rights programmes and add societal values to these programmes more effectively.

### **6.2.2.2 Public-private partnership models**

PPP design reflects the environment in which the partnership will operate. These partnerships take many different forms, including management contracts, joint-ventures, leasing, Build-Operate-Transfer, Build-Own-Operate, Design-Build-Operate, co-operative arrangements, joint-ventures and concession arrangements.<sup>59</sup> All these approaches have their advantages

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<sup>58</sup> Inter-American Development Bank, 'Two to Tango' in Gustavo Crespi, Eduardo Fernández-Arias and Ernesto Stein (eds), *Rethinking Productive Development: Sound Policies and Institutions for Economic Transformation* (Palgrave Macmillan, Basingstoke, 2014) 32, 359.

<sup>59</sup> See for example, Asian Development Bank, above n 26, 27.

and can be adopted for particular sectors according to project type and policy objectives. Management contracts have become more common since the recent financial crisis, along with lease contracts, divestures, concessions and privatisation. While PPPs take a variety of forms, there are some common elements. These include: a contractual agreement defining roles and responsibilities; risk-sharing arrangements; and appropriate financial rewards for the private party.<sup>60</sup>

A key feature of PPP is that it acknowledges the role of government in working alongside the private sector to achieve social goals and objectives. The PPP allocates tasks, obligations and risks between the public and private partners (including government departments, private business entities and non-government and society-based organisations) in an optimal way.<sup>61</sup> The government provides capital, transfers assets and other policy level support, while the private partners also provide investment capital, as well as management and operational expertise and business innovation, in a way that allocates risks to the partners, minimises costs and improves performance.<sup>62</sup>

Governments enter into public-private partnerships with clear objectives such as to attract private capital investment, increase efficiency and effectiveness of available resources, and reform sectors through reallocation of roles, incentives and accountability.<sup>63</sup> PPP programmes have been successfully implemented in many countries in infrastructure and services areas such as water and sanitation, hospitals, schools, roads and housing.<sup>64</sup> The benefits of PPPs that involve private sector finance, expertise and efficiencies must be weighed against any realistic transaction costs from the government side.<sup>65</sup>

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<sup>60</sup> Ibid., 11.

<sup>61</sup> Ibid., 1.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid., 3.

<sup>64</sup> For example, in Latin America, PPPs have emerged as efficient models of providing public services and social entitlements. See, World Economic Forum, *Creating New Models Innovative Public-Private Partnerships for Inclusive Development in Latin America* (World Economic Forum, Geneva, 2014), 4.

<sup>65</sup> Sock-Yong Phang, *Housing Finance Systems: Market Failures and Government Failures* (Palgrave Macmillan, Hampshire, 2013), 98.

These investments are essential for job creation and to achieve the right to an adequate standard of living, and for enjoyment of the benefits of social sector investments.

### **6.2.2.3 Private philanthropy and corporate social responsibility**

In addition to private investments and public-private partnership programmes, resources for ESC rights can be maximised by tapping into and coordinating the activities of private philanthropic organisations and individuals, as well as the corporate social responsibility activities of business organisations.

There is a growing trend towards ‘giving’ and the philanthropic activities of private individuals have expanded dramatically over the years.<sup>66</sup> The need for private philanthropy to be targeted towards benefits for the recipients has been emphasised of late, often by philanthropists themselves.<sup>67</sup> It can be argued that philanthropy is seen by the wealthiest individuals as a responsibility and sometimes even as an obligation.<sup>68</sup> The increasing engagement of corporate and private philanthropy in social sectors, such as poverty reduction, education, health and other social infrastructure development, is already making a significant contribution towards alleviating these problems. Some global private foundations, such as the Bill and Melinda Gates Foundation, the Ford Foundation, and the Kellogg Foundation, have become global players, addressing key social challenges, particularly with regard to health and education.<sup>69</sup> In order to maximise the benefits of these activities, however, the

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<sup>66</sup> Some high net-worth individuals such as Bill Gates, and Warren Buffett have signed the Giving Pledge – which commits to donating more than half of their fortunes to good causes over the course of their lifetime. See for example, Howard Husock, *Philanthropy Under Fire* (Encounter Books, 2013).

<sup>67</sup> For example, George Soros, for example, argues that his engagement in philanthropy is out of a strong sense of moral duty, not out of a desire for praise or to impose his vision on the world. George Soros, *My Philanthropy* (PublicAffairs, New York, 2012).

<sup>68</sup> Husock, above n 66, 10.

<sup>69</sup> Details about the work of these foundations are available: Bill & Melinda Gates Foundation, *Bill & Melinda Gates Foundation: What we do* <<http://www.gatesfoundation.org/What-We-Do>>; Ford Foundation, *Ford Foundation: About us* <<http://www.fordfoundation.org/about-us>>; W K Kellogg Foundation, *W K Kellogg Foundation: What we do* <<http://www.wkcf.org/what-we-do/overview>>.

focus must move from traditional ‘feel good’ areas to those with the greatest human rights impact.

In addition to individual philanthropists, an increasing number of companies are also focusing on community development and social innovation projects.<sup>70</sup> The private sector has, over the years, become more engaged in the social sphere. The preparedness of private sector businesses to play a key role in the social sector is evidenced by their increasing involvement in corporate social responsibility activities, which often go beyond their Corporate Social Responsibility (CSR) activities to position their business objectives within socially-optimal goals and values. The recent development of business models based on the ‘bottom of the pyramid’ (BOP) approach, which looks to the needs of the most vulnerable in society as a target for marketing strategy, indicates the recognition that social needs of the poorest can also be fulfilled effectively through market solutions.<sup>71</sup> The ethical dimensions of such an approach must, however, be informed by human rights of these individuals, and should be fully incorporated into both the business strategies and CSR activities.<sup>72</sup>

The literature on CSR and Business Responsibilities for Human Rights (BRHR) examines both positive and negative aspects of the role of corporations and their impact on human rights and welfare.<sup>73</sup> Some argue that, notwithstanding the emancipatory rhetoric, CSR activities are ‘defined by narrow business interests and serve to curtail interests of external stakeholders’.<sup>74</sup> A key issue in the debate is that businesses and the society need to recognise that all business activities have human rights dimensions,

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<sup>70</sup> World Economic Forum, above n 64, 12.

<sup>71</sup> See for example, C K Prahalad, *The Fortune at the Bottom of the Pyramid* (Pearson Prentice Hall, New Jersey, 2006).

<sup>72</sup> The ethical and CSR dimensions of BOP approach are discussed by Kirk Davidson, ‘Ethical Concerns at the Bottom of the Pyramid: Where CSR Meets BOP’ (2009) 2(1) *Journal of International Business Ethics* 22-32.

<sup>73</sup> See for example, Karin Buhmann, Lynn Roseberry and Mette Morsing (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan, 2011).

<sup>74</sup> Subhabrata Bobby Banerjee, ‘Corporate Social Responsibility: The Good, the Bad and the Ugly’ (2008) 34(1) *Critical Sociology* 51-79, 52.

and therefore must be subject to law and regulation.<sup>75</sup> From this perspective, it is imperative that business corporations extend their commitment to corporate citizenship to include a focus on creating positive human rights impacts through their activities.

The literature on CSR and its impact on human rights also discusses the key role that corporations and CSR policies can play in promoting human rights.<sup>76</sup> An exciting aspect of this debate is the 'respect (plus)' scenario, which takes the human rights responsibilities of corporations beyond simply respecting human rights, especially in situations where the company is exercising some form of governmental or quasi-governmental authority.<sup>77</sup> The wider debate about the role of CSR in many areas of development is beyond the scope of the present study. Here the focus is on the relevance of CSR as a mechanism through which governments can tap into and direct corporate sector resources into areas that can have maximum ESC rights impact.

#### **6.2.2.4 Emerging trends in public-private and civil society partnerships**

In addition to these traditional models of public and private sector engagement in socially significant areas of work, innovations in government, private sector and civil society partnerships have led to greater convergence of objectives. These can be harnessed to produce better collaboration outcomes.

The concept of *innovative public-private partnerships* (iPPPs) has been suggested by the World Economic Forum (WEF) as a way to maximise private

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<sup>75</sup> Chris Sidoti, 'It's Our Business: Ensuring Inclusiveness in the Process of Regulating and Enforcing Corporate Social Responsibility' in Karin Buhmann, Lynn Roseberry and Mette Morsing (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan, Eastbourne, 2011).

<sup>76</sup> For example see, Joseph Lozano and María Prandi, 'Corporate Social Responsibility and Human Rights' in Ramon Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (International Bar Association, London, 2005) 183-203; Justine Nolan and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' (2009) 87 *Journal of Business Ethics* 433-451; David Kinley and Justine Nolan, 'Trading and Aiding in Human Rights: Corporations in the Global Economy' (2008) 4 *Nordic Journal of Human Rights Law* 353-377; Florian Wettstein, 'Beyond Voluntariness, Beyond CSR: Making a Case for Human Rights and Justice' (2009) 114(1) *Business and Society Review* 125-152.

<sup>77</sup> Nolan and Taylor, above n 76, 444.

sector engagement in the provision of socially beneficial services.<sup>78</sup> Some of the most pressing public policy issues can be addressed through better collaboration between government, the private sector and civil society organisations using complementary approaches.<sup>79</sup> Both the government and private sector can benefit from such collaboration, not only by pooling scarce resources, but also by addressing unfavourable perceptions about the inefficiency and bureaucracy of government and the profit motives of private business. The proliferation of social entrepreneurs who focus on social innovation and social development also presents a new opportunity for governments to widen the scope of co-operation and collaboration to achieve their own social policy objectives.

Innovative social initiatives such as the Social Impact Investment (SII), which encourages investors to be more conscious of the need to improve society and the environment and which 'intentionally target specific social objectives along with a financial return and measure the achievement of both'<sup>80</sup> have the potential to attract a significant amount of private sector resources for ESC rights objectives, which naturally have a high level of social impact. SII caters for the growing number of investors who are interested in addressing society's problems through innovative business approaches. The SII initiative has huge potential to fulfil social needs, such as ESC rights, by attracting finance for innovative approaches and enhancing the efficiency of delivery of these services. To achieve such outcomes, governments and investors must work together to create better models to facilitate and promote social entrepreneurship.<sup>81</sup>

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<sup>78</sup> World Economic Forum, above n 64, 11.

<sup>79</sup> Ibid.

<sup>80</sup> The UK Government, *Impact Investment: The Invisible Heart of Markets - Report of the Social Impact Investment Taskforce* (The UK Government, London, 2014), <[http://www.socialimpactinvestment.org/reports/Impact%20Investment%20Report%20FINAL\[3\].pdf](http://www.socialimpactinvestment.org/reports/Impact%20Investment%20Report%20FINAL[3].pdf)>, 1.

<sup>81</sup> See for example, Nadina Helen Bakos, 'Social Impact Investment: How to Grow Interest among Capital Providers?' (Paper presented at 30th Summit International Social Entrepreneurship Conference, Alytaus Kolegija University of applied sciences, October 2013), <[http://sbk.vdu.lt/wp-content/uploads/2014/05/Aukstuju-mokyklu-vaidmuo-issukiai-tendencijos-ir-perspektyvos-Nr3\\_2014.pdf#page=15](http://sbk.vdu.lt/wp-content/uploads/2014/05/Aukstuju-mokyklu-vaidmuo-issukiai-tendencijos-ir-perspektyvos-Nr3_2014.pdf#page=15)>.

The role of the government in addressing social needs, particularly given the increasing attention to democracy and demand-driven governance, necessitates a more proactive approach in engaging with the private sector in order to maximise the resources potentially available for ESC rights-related programmes and activities. Apart from the objective of mobilising private sector resources, another key reason for attracting private sector participation in development and infrastructure projects is to harness the elements of efficiency which can substantially improve the outcome of government programmes.

In summary, markets are powerful and essential mechanisms for achieving many objectives of ESC rights realisation. As the primary duty-bearer in human rights fulfilment, States must see participation of the private sector as an opportunity to optimise the realisation of these rights. To this end, governments have an important role to play in attracting private sector investment in key areas of ESC rights to supplement and support the government's own investment in these areas.

State policy can help create a more vibrant market that is able and willing to be part of the State's public policy programmes. This requires identifying and resolving many structural, process and outcome challenges that may constrain such a partnership. These are addressed in the next section.

### **6.3 CHALLENGES IN ATTRACTING SOCIETAL AND PRIVATE SECTOR RESOURCES FOR ESC RIGHTS**

This section builds on the preceding discussion to focus on specific challenges in promoting private investment and societal resources in areas relevant to ESC rights realisation. It explores the need to engage with the private sector, incentives and models of partnership, policy options and indicators of State efforts to address these policy requirements.

### 6.3.1 Reconciling the roles of the government and the market

The market process is key to generating wealth and enhancing welfare in society. The market contributes to job creation, supply of goods and services, and the elimination of poverty. These market activities improve overall welfare, particularly in relation to ESC rights such as adequate standards of living. Government intervention, therefore, must be driven by the desire to support and enhance these conditions.

At the same time, concerns about the potentially negative effects of the profit motive on public policy projects cannot be overlooked. The risk of capture and rent-seeking by the private party at the expense of the public sector is often associated with policy weaknesses. This is particularly evident in vertical policy designs that benefit firms but increase the risk of rent-seeking behaviour.<sup>82</sup>

Given this intricate balance, in order to maximise participation of the private sector in social sector investment and service provision, the State must move away from the minimalist view of State engagement in the market and become more proactive in its work with the private sector and business partners. The State's role as the leading investor and market catalyst helps mobilise co-operation from the private sector to invest in key areas of social development, thereby engaging with ESC rights objectives.<sup>83</sup> To achieve these goals, the institutional design of State policy must be clearly delineated and implemented.

Public sector provision of goods and services has a number of potential weaknesses, such as poor planning and budgeting, poor expenditure control, inadequate management of public sector resources, and poor management of human and material resources.<sup>84</sup> Hence, there are sound economic arguments for strengthening participation of the private sector in activities that promote human rights. At the same time, if private sector services are

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<sup>82</sup> Inter-American Development Bank, above n 58, 365.

<sup>83</sup> See for example, Mariana Mazzucato, *The Entrepreneurial State: Debunking Public Vs. Private Sector Myths* (Anthem Press, London, 2013), 20.

<sup>84</sup> The World Bank, *Public Expenditure Management Handbook* (The International Bank for Reconstruction and Development/ The World Bank, Washington, D.C., 1998), 5 [Box 1].

preferred by the wealthy, there is a risk that political and economic support for public sector provision for the poor will be lost.<sup>85</sup> It is incorrect to assume, however, that private sector provisions benefit only the most affluent in society. With the right policy orientation, public sector services will benefit from increased private provision because of the reduced load on government, which can be translated into better outcomes for the most disadvantaged in the society.

### **6.3.2 Incentives for effective implementation of public-private partnerships**

Changes in the global economic environment present many challenges to States in terms of their ability to mobilise resources for social programmes, including ESC rights. States need to pay greater attention to sustainable resource management, because of various resource stresses resulting from population and economic growth and climate change.<sup>86</sup> States will be constrained by public debt and its impact on fiscal policy, and will be required to find new ways to manage public resources and provide public services.<sup>87</sup> These observations have significant resonance for moving government policy towards private sector participation.

As explained in Section 6.2.2, if PPPs are well structured and implemented, they can mobilise previously untapped resources from the private sector, particularly for areas of investment that require significant resources and managerial expertise. PPPs also provide opportunity for government to pass on the operational roles of public sector infrastructure and management projects and focus attention on other core public sector responsibilities such as regulation and supervision.<sup>88</sup> On the other hand, Private Sector

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<sup>85</sup> Audrey Chapman, 'The Impact of Reliance on Private Sector Health Services on the Right to Health' (2014) 16(1) *Health and Human Rights*.

<sup>86</sup> KPMG International, above n 28.

<sup>87</sup> *Ibid.*

<sup>88</sup> Asian Development Bank, above n 59, 4.

Participation (PSP) programmes essentially transfer obligations to the private sector without adequate emphasis on partnership, which often results in the social agenda being overlooked.<sup>89</sup> Such arrangements, if not properly implemented, reduce the capacity of government to regulate private sector service provision, thereby reneging on the obligation to protect.<sup>90</sup> Similarly, with fragmented private sector providers, it is harder for government to regulate standards of service and ensure that rights are respected.<sup>91</sup>

Government policies are key to attracting private sector activities in the area of social investment. Important elements of ‘good process management’<sup>92</sup> and ‘co-governance’<sup>93</sup> can be incorporated into public-private partnership policies to address the diverse interests involved in such programmes. The extent of engagement with private sector partners is also influenced by the governance cultures of the country, as illustrated in case studies of such policy partnerships in Costa Rica and Chile.<sup>94</sup> Kaul and Conceição argue that public finance policy must go beyond taxation and spending to include active ‘fiscal, regulatory and monitoring tools to encourage and complement private activities and private spending on these goals.’<sup>95</sup> Such a policy also requires governments to be more accepting of competition from the private sector and other providers with the objective of enhancing the efficiency and effectiveness of State-based services.<sup>96</sup>

Another crucial consideration is the need to create domestic and international conditions that are conducive to investment flows. According to the Monterrey Consensus, countries need ‘a transparent, stable and predictable investment

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<sup>89</sup> Ibid., 2.

<sup>90</sup> Chapman, above n 85.

<sup>91</sup> Ibid.

<sup>92</sup> Marianne Beisheim, Andrea Liese and Jasmin Lorch, 'Introduction: Transnational Partnerships for Sustainable Development' in Marianne Beisheim and Andrea Liese (eds), *Transnational Partnerships: Effectively Providing for Sustainable Development?* (Palgrave Macmillan, London, 2014) 3, 4.

<sup>93</sup> Ibid., 3.

<sup>94</sup> Inter-American Development Bank, above n 58, 376.

<sup>95</sup> Kaul and Conceição, above n 53, 5-6.

<sup>96</sup> Ibid.

climate' which is characterised by 'contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact.'<sup>97</sup> Such policies also require focus on promotion and protection of investments, human resources development, double taxation, corporate governance and accounting standards, public/private partnerships and investment agreements.<sup>98</sup>

### 6.3.3 Effective governance of private sector partnership

In order to attract private investment in focal areas and to effectively govern the relationship between private sector parties and State regulatory authorities, a system of interaction and coordination is essential. In this, government needs to play a leadership role in creating and sustaining a more socially empowered, private sector that can collaborate with government and civil society to address social demands. Such a relationship also requires better governance structures to fully engage with the private sector.

Although skills, know-how and other technological resources are brought in through private investment, their rate of capture by the intended beneficiaries is sometimes below expectation.<sup>99</sup> Some also argue that using public finance to 'leverage' private sector investment distorts incentives and generates moral hazards.<sup>100</sup> It is argued that this approach can result in the erosion of the private sector's capacity to take risks in their undertakings, which also reduces efficiency gains.<sup>101</sup>

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<sup>97</sup> United Nations Department of Economic and Social Affairs, *Monterrey Consensus of the International Conference on Financing for Development*, (The final text of agreements and commitments adopted at the International Conference on Financing for Development - Monterrey, Mexico), (18-22 March 2002), [21].

<sup>98</sup> Ibid.

<sup>99</sup> CIDSE Resources for Development Working Group, *Financing Sustainable Development: Are we up to the challenge?* (CIDSE, 2014).

<sup>100</sup> Ibid., 14.

<sup>101</sup> Ibid.

This concern can be addressed by appropriately targeting and strategising private sector involvement in the social sector. Here Joseph Stiglitz's five general propositions on improving governance are relevant.<sup>102</sup> These propositions are: (1) restricting government interventions in areas in which there is evidence of systematic and significant influence of special interests; (2) building a strong presumption against government actions restricting competition, and a strong presumption in favour of government actions which promote competition; (3) a strong presumption in favour of openness in government and against secrecy; (4) encouraging the private provision of public goods, including through non-governmental organisations, not only as a mechanism for the creation of effective internal competition (which encourages self-discipline) but also as an effective way of conveying voice; and (5) the need to achieve a balance between expertise and democratic representativeness and accountability.<sup>103</sup> At the heart of these approaches is the proactive position of government in facilitating and guiding private sector actions towards those which can produce optimal social outcomes.

Effective governance of private sector engagement requires additional focus on creating and promoting competition, transparency and accountability. These propositions can be integrated into government policy frameworks to define the interaction between the government and the private sector in all investment and corporate relationships.

#### **6.3.4 Identifying key policy indicators**

Policy action is necessary to create an environment that will attract societal and private sector resources which can complement the efforts of the government in the realisation of ESC rights. These policy actions must take account of challenges in the core areas of this engagement.

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<sup>102</sup> Stiglitz, above n 55.

<sup>103</sup> Ibid.

To address the structural challenges identified above, State policy should strive to create a broad-based economic environment in which the role of the private sector is significant and encouraged and which puts in place effective legal and institutional protection for private sector engagement with government in the provision of social goods and services. To address the process challenges, State policy should focus on introducing attractive incentives and policy frameworks for private sector investment in ESC rights-related areas. This includes putting in place a strong mechanism of coordination between the government and private sector in their economic engagements and establishing mechanisms to ensure competition, transparency and accountability in the transactions between government and the private sector in the provision of social goods and services.

In relation to outcome challenges, State policy should focus on creating a synergistic partnership with the private sector that is capable of attracting and directing private investments in areas that facilitate the enjoyment of ESC rights and on ensuring that societal and private sector resources are fully engaged and adequately supplement public sector investments.

The policy efforts of the State against these indicators can be used by ESC rights advocates to measure the seriousness of the State in addressing these challenges and to identify policy areas that require attention. These indicators reflect key policy efforts of the State in the area of societal and private sector resources. The next section provides further insight into State practice in relation to engaging private sector resources, particularly investments, in areas relevant to realisation of ESC rights.

## **6.4 THE ROLE OF PRIVATE SECTOR IN ESC RIGHTS AREAS: EVIDENCE FROM STATE REPORTS**

Public-private partnerships and private sector investment programmes are key components of State policies in relation to ESC rights, particularly in addressing the resources requirement. As shown above, it is vital for government to actively seek private sector investment and participation in

supply-side issues relevant to the enjoyment of ESC rights to complement government efforts. In the context of the ‘synergistic partnership’ model, such a policy approach can ensure essential public goods and services are made available to a broader population.

This section examines State practices in various aspects of private sector engagement in areas relevant to ESC rights enjoyment. A qualitative analysis of States reports under the ICESCR and a case study are used to identify State practice and policy challenges in these areas.<sup>104</sup>

#### **6.4.1 State reports: The role of the private sector**

Private sector participation represents an opportunity for private sector partners in the form of investment and profit. For government, it represents an opportunity to provide public infrastructure, goods and services at a lower cost by attracting private capital. Successful examples of gains from private sector participation are included in State reports in relation to many areas of social development including health, education, housing and other infrastructure programmes.

##### ***6.4.1.1 Institutional structures advancing private sector participation***

The analysis of State reports showed that a number of States identified the need to encourage private investments necessary for economic development through a coherent policy framework<sup>105</sup> and had directed State policy to create an economic environment that encourages and promotes private investments.<sup>106</sup> Some States made specific reference to private investments

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<sup>104</sup> As explained in Chapter 1, the documentary analysis of States’ periodic reports was conducted using NVivo. Key search and coding terms were ‘private sector’, ‘public-private-participation’ and ‘private investments’. These established the reporting parameters and were used to generative qualitative comparisons of State practice in these areas.

<sup>105</sup> For example see, CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [20].

<sup>106</sup> For example see, CESCR, *State Report: Zambia*, E/1990/5/Add.60 (1 September 2003), [8].

related to employment,<sup>107</sup> keeping the skill level and employability in line with the global demands,<sup>108</sup> and promotion of private investment in the areas of research and technology.<sup>109</sup> The reports identified key driving forces in such partnerships, including the increasing importance and impact of private investment in job creation and development,<sup>110</sup> increased private investments in the overall economy,<sup>111</sup> and the positive impact of private sector investments on the socio-economic development of the country.<sup>112</sup>

#### **6.4.1.2 Process elements advancing private sector participation**

Many State reports provided examples of successful private sector participation in health services. Cyprus indicated that the introduction of competition between the public and private sectors in health services was expected to result in upgrading of health services infrastructure and quality.<sup>113</sup> In Romania, private sector health service providers have a contractual relationship with a social insurance company or provide the service as a private entity, with positive results.<sup>114</sup> Hong Kong (SAR) indicated its enthusiasm to explore the scope of greater PPP involvement in healthcare.<sup>115</sup>

Private sector participation in the provision of educational services was also highlighted by a number of States. India noted that the government attached great importance to building synergy with the private sector to achieve the goals of the universal elementary education initiative.<sup>116</sup> The collaboration included expansion of the role of the private sector, further support for private sector initiatives, encouragement for the opening of more private sector

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<sup>107</sup> CESCR, *State Report: Nicaragua*, E/C.12/NIC/4 (22 October 2007), [191].

<sup>108</sup> CESCR, *State Report: Mexico*, E/C.12/4/Add.16 (25 February 2005), [133].

<sup>109</sup> *Ibid.*, [852].

<sup>110</sup> CESCR, *State Report: Tunisia*, E/1990/6/Add.14 (8 October 1996), [73]; CESCR, *State Report: Ethiopia*, E/C.12/ETH/1-3 (28 March 2011), [50].

<sup>111</sup> CESCR, *State Report: Colombia*, E/C.12/COL/5 (9 January 2009), [50].

<sup>112</sup> CESCR, *State Report: Djibouti*, E/C.12/DJI/1-2 (2 November 2012), [26].

<sup>113</sup> CESCR, *State Report: Cyprus*, E/C.12/CYP/5 (21 October 2008), [351].

<sup>114</sup> CESCR, *State Report: Romania*, E/C.12/ROU/3-5 (9 April 2013), [146].

<sup>115</sup> CESCR, *State Report: Hong Kong (SAR)*, E/C.12/CHN-HKG/3 (6 July 2012), [12.51].

<sup>116</sup> CESCR, *State Report: India*, E/C.12/IND/5 (1 March 2007), [656].

schools and the use of private sector expertise in computer education.<sup>117</sup> Vietnam identified mobilisation of societal resources, including through promotion of PPPs, as a key aspect of its education and training policy.<sup>118</sup> Increased attention to the step-by-step application of PPP for public services and public service delivery was also highlighted.<sup>119</sup>

Many States referred to public and private sector participation in education.<sup>120</sup> Iran identified ‘utilization of the potentials and capacities of the public and private sectors for the development of technical, vocational, professional and applied training’ as a key policy objective.<sup>121</sup> Vietnam recognised the promotion of public-private partnership in education and training as a key orientation of government policy.<sup>122</sup> Costa Rica reported that the retention rate of young people retained in education is better in private sector institutions than in their public sector counterparts.<sup>123</sup> Peru described the introduction of a Legislative Decree to allow for private sector investment in education.<sup>124</sup>

Complementary arrangements between public and private sectors were also used to manage the construction, refurbishing and equipping of public and private sector health facilities.<sup>125</sup> Such arrangements not only complement each party’s investments and service delivery, but also create the necessary conditions for expansion of facilities and services to new areas. Guyana identified the ‘One Stop Shop’ initiative—a public/private partnership arrangement in the area of housing—which provides advisory services, loans and access to construction materials and furniture. The programme is targeting the allocation of 17,000 housing units by September 2011, with the

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<sup>117</sup> Ibid.

<sup>118</sup> CESCR, *State Report: Vietnam*, E/C.12/VNM/2-4 (14 March 2013), [134(d)].

<sup>119</sup> Ibid., [159].

<sup>120</sup> For example, CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), 97; CESCR, *State Report: Trinidad and Tobago*, E/1990/6/Add.30 (2 October 2000).

<sup>121</sup> CESCR, *State Report: Iran*, E/C.12/IRN/2 (16 May 2011), [53].

<sup>122</sup> CESCR, *State Report: Vietnam*, E/C.12/VNM/2-4 (14 March 2013), [134].

<sup>123</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [999].

<sup>124</sup> CESCR, *State Report: Peru*, E/C.12/PER/2-4 (20 January 2011), [275].

<sup>125</sup> CESCR, *State Report: Mauritania*, E/C.12/MRT/1 (20 May 2011), [319].

aim of improving the nation's housing stock.<sup>126</sup> Zambia also identified PPP as a key component of its adequate housing programme and noted the need to strengthen PPP arrangements in the area of housing.<sup>127</sup> Construction and maintenance of housing units (especially for older citizens) benefitted from PPP initiatives in Slovenia.<sup>128</sup> Estonia also identified programmes to increase municipal leased housing stock, for which public-private partnerships are encouraged.<sup>129</sup> The positive contribution of the private sector in creating adequate housing was identified by a number of States.<sup>130</sup>

#### **6.4.1.3 Outcomes of private sector participation**

A number of positive experiences were identified by States such as India, which noted the importance of public-private partnerships for shelter development under its housing and habitat policy.<sup>131</sup> Here the government's role is that of 'enabler and provider of fiscal concessions' and it assumes the responsibility to create an enabling legislative and economic environment. The private sector is expected to undertake actual construction and to invest in and operate infrastructure services.<sup>132</sup> The Republic of Korea reported the success of partnership with the private sector in addressing its housing shortage.<sup>133</sup> The use of housing funds from the private sector was identified by Uruguay.<sup>134</sup> Armenia reported success in integrating the private sector in its housing policy, noting that the platforms of co-operation with the private sector had attracted large-scale capital investment into private housing.<sup>135</sup> The national housing

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<sup>126</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), 56.

<sup>127</sup> CESCR, *State Report: Zambia*, E/1990/5/Add.60 (1 September 2003), [201(b)].

<sup>128</sup> CESCR, *State Report: Slovenia*, E/C.12/SVN/2 (26 June 2013), [164].

<sup>129</sup> CESCR, *State Report: Estonia*, E/C.12/EST/2 (12 July 2010), [732-733].

<sup>130</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), 27; CESCR, *State Report: Panama*, E/1990/6/Add.24 (31 March 2000), [273]; CESCR, *State Report: Estonia*, E/C.12/EST/2 (12 July 2010), [733].

<sup>131</sup> CESCR, *State Report: India*, E/C.12/IND/5 (1 March 2007), [416].

<sup>132</sup> *Ibid.*

<sup>133</sup> CESCR, *State Report: Republic of Korea*, E/C.12/KOR/3 (4 February 2008), [288].

<sup>134</sup> CESCR, *State Report: Uruguay*, E/C.12/URY/3-4 (22 July 2009), [218].

<sup>135</sup> CESCR, *State Report: Armenia*, E/C.12/ARM/2-3 (26 February 2013), [293].

policy of Mexico includes specific focus on strengthening and consolidating public and private housing finance.<sup>136</sup>

The success of PPP projects in developing low cost accommodation for minority groups<sup>137</sup> and other vulnerable persons<sup>138</sup> was identified in some State reports. Overall, the reports demonstrated the important role played by the private sector in creating adequate housing supply through finance and capital investment,<sup>139</sup> increased housing market participation,<sup>140</sup> and supply of construction materials and equipment.<sup>141</sup>

States reports also provided insights into the private sector's role in water and sanitation. Indonesia identified increased regional investment spending and the need to further stimulate participation of the private sector in PPP and CSR arrangements.<sup>142</sup> The use of public-private partnership projects to address sanitation issues was reported by Nepal<sup>143</sup> and Montenegro.<sup>144</sup> Kenya documented the work it is carrying out to enhance access to water, particularly by separating water resource management and water supply functions.<sup>145</sup> It is argued that enhanced public-private partnerships have resulted in greater and more affordable access to water, especially in informal settlements and rural areas.<sup>146</sup>

Although little represented in State reports, the private sector has a role to play in job creation. The strength of the private sector is directly related to individual enjoyment of the right to work. The government's role in fostering a more dynamic private sector will invariably help to create more and better

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<sup>136</sup> CESCR, *State Report: Mexico*, E/C.12/4/Add.16 (25 February 2005), [1161].

<sup>137</sup> CESCR, *State Report: Italy*, E/C.12/ITA/5 (10 October 2013), [457(c)].

<sup>138</sup> CESCR, *State Report: Nepal*, E/C.12/NPL/3 (29 October 2012), [101].

<sup>139</sup> CESCR, *State Report: Georgia*, E/1990/6/Add.31 (10 August 2001), [176].

<sup>140</sup> CESCR, *State Report: Armenia*, E/C.12/ARM/2-3 (26 February 2013), [293].

<sup>141</sup> CESCR, *State Report: Ethiopia*, E/C.12/ETH/1-3 (28 March 2011), [268].

<sup>142</sup> CESCR, *State Report: Indonesia*, E/C.12/IDN/1 (29 October 2012), [181].

<sup>143</sup> CESCR, *State Report: Nepal*, E/C.12/NPL/3 (29 October 2012), [275].

<sup>144</sup> CESCR, *State Report: Montenegro*, E/C.12/MNE/1 (2 September 2013), [277].

<sup>145</sup> G. Cesaroni, *State Report: Kenya*, E/C.12/KEN/2-5 (26 February 2014), [146].

<sup>146</sup> *Ibid.*

opportunities for employment. It can, for instance, provide incentives and remove policy barriers to private sector activities that can impact on work and employment opportunities. Such 'job creation' by the private sector based on economic demand not only helps to increase the number of jobs but also generates higher incomes and improves work conditions. It can be argued that the development of an enabling environment for job creation often involves deregulation of the labour market, which encourages firms to create jobs, improve training and change their workload and work arrangement policies.<sup>147</sup>

In summary, the analysis of State reports shows that private sector resources are essential for supplementing public sector resources in many areas of ESC rights realisation. The reports also indicated that States in general are taking this scenario seriously. Although the reports contained a number of examples of successful partnerships, the issue does not seem to have received sufficient attention from the majority of States.

#### **6.4.2 Case study: Private sector participation in alleviating housing shortage in Maldives**

Clearly, the private sector has an important role to play in ensuring broader enjoyment of basic rights such as education, health, housing, water and sanitation. In this context, the analysis identified a number of common elements across a large number of States. The following case study on Maldives provides a more detailed account of one sector in one State in which private sector involvement has made a significant impact.

##### ***6.4.2.1 Background to housing situation in Maldives***

Because of severely limited land resources, housing has always been a serious problem in Maldives. This is particularly acute in the capital, Malé. This is a 1.5 square-kilometre island (two adjacent islands, Hulhumalé and Villimalé, are considered part of the Greater Malé area) with more than

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<sup>147</sup> Branco, above n 12, 41.

133,000 inhabitants or about one-third of the total population of the country.<sup>148</sup> According to the *Rapid Assessment of Housing Situation in Maldives* conducted by the Human Rights Commission of Maldives (HRCM) in 2008, almost 85 per cent of families living in Malé are 'non-homeowners' and around 12,000 families across the nation are forced to share accommodation with other families or make do with temporary living arrangements.<sup>149</sup> The report also noted that housing has become so scarce that almost 70 per cent live in accommodation that fails to meet 'adequate housing' criteria in relation to overcrowding. Poor ventilation, sanitation, degree of privacy and quality of cooking facilities make these dwellings akin to 'slums', according to the report.<sup>150</sup> The housing situation was aggravated after the Indian Ocean tsunami of 2004, due to population displacement and migration.

Maldives is a signatory to the International Covenant on Economic, Social and Cultural Rights and other human rights instruments which recognise housing as a human right and the Constitution recognises the right to housing, which must be progressively realised 'by reasonable measures within its ability and resources'.<sup>151</sup> The absence of an adequate housing policy for many years has worsened the situation and has led to social problems including drug abuse and gang warfare. While the housing situation in the atolls is not as serious as that in Malé, in many islands, there is inadequate space and housing for the population, which results in overcrowding and other social problems. Although the government initiated some public sector housing programmes in the 1990s, the supply was insufficient to meet demand and the housing market did not improve. In addition, there were few if any systems of housing finance.

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<sup>148</sup> National Bureau of Statistics - Ministry of Finance & Treasury, *Population and Housing Census 2014 - Preliminary Results* (National Bureau of Statistics, Male', Maldives, 2014), <<http://www.planning.gov.mv/census/census%202014/CensusPreliminary/PreliminaryResults.pdf>>. With the inclusion of Hulhumalé and Villimalé to the Greater Malé area more than doubles the total land, however the population density still remains extremely high.

<sup>149</sup> Human Rights Commission of Maldives, *Rapid Assessment of the Housing Situation in the Maldives* (HRCM, Male', Maldives, 2008), <<http://hrcm.org.mv/publications/otherreports/HousingAssesmentDhiv.pdf>>.

<sup>150</sup> Ibid.

<sup>151</sup> "Dhivehi Raajjeyge Jumhooriyyage Qaanoonu Asaasee" (*Constitution of the Republic of Maldives*) 2008 article 23.

On her visit to the Maldives in 2009, the former Special Rapporteur on adequate housing, Raquel Rolnik, identified a number of other issues affecting the right to adequate housing in the country. These included: ‘affordability, the lack of housing legislation (including on tenancy and a building code) and the limited implementation of the existing laws, the absence of data on income distribution and a taxation system, the lack of efficient waste management and sewage systems and the housing and living conditions of migrant workers’.<sup>152</sup> The Special Rapporteur recommended that government increase housing availability by expanding its engagement with the private sector.<sup>153</sup> She noted that private mortgage and ownership-based housing systems have the potential to increase the supply of housing. At the same time, she cautioned against privatising the housing market entirely, arguing that a strong system of public housing and subsidies for the poor must be incorporated in order to ensure affordability, especially for those who cannot access market-rated housing.<sup>154</sup>

#### **6.4.2.2 Housing development: Successful public-private partnership projects**

Following the first democratic elections in 2008, the government committed to addressing the housing problem as a priority area and created a National Committee on the Right to Adequate Housing, made up of representatives from the public and private sectors. The government initiated a comprehensive programme of affordable housing, with particular focus on public-private partnership and participation in housing projects, to increase supply and affordability.<sup>155</sup> The government’s policy documents focused on creating additional avenues for the population to acquire land and new housing,

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<sup>152</sup> Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Raquel Rolnik, 13 sess, UN Doc A/HRC/13/20/Add.3 (11 January 2010), 2.

<sup>153</sup> *Ibid.*, [53].

<sup>154</sup> *Ibid.*

<sup>155</sup> Human Rights Council, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Maldives*, Working Group on the Universal Periodic Review Comm, UN Doc A/HRC/WG.6/9/MDV/1/Rev.1 (30 August 2010), [114].

through multiple programmes of social housing and finance, within a more decentralised institutional structure.<sup>156</sup>

According to statistics from the Ministry of Housing, government-initiated housing projects included more than 4,600 housing units constructed in 2009-2011 (out of a total 10,000 such units built since the project was launched by the government in 2008).<sup>157</sup> Although most of these projects enjoyed a high level of government funding and support, many were designed with private sector participation through public private partnerships and design-build and operate schemes. Both local and international companies participated in these projects.<sup>158</sup> In addition, the 'building completion financial loan scheme' targeted individual home owners who require financial assistance to complete existing housing projects and, was expected to cover at least 300 houses.<sup>159</sup> Despite political turmoil in 2012,<sup>160</sup> most of these projects continued through 2012-2013, although some were amended and a few projects were cancelled due to changes in government policy.<sup>161</sup>

The political upheavals and the abrupt change of government in February 2012 had the effect of diverting the new government's attention away from social provisions, and engagement with the private sector become extremely difficult due to the hostile stance of the government. This resulted in a number

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<sup>156</sup> Maldivian Democratic Party, "*Aneh Dhivehi Raajje*" - *The Other Maldives: Manifesto of the Maldivian Democratic Party Alliance 2008-2013* MDP <<http://mdp.org.mv/wp-content/uploads/2009/01/mdp.manifesto-en.pdf>>.

<sup>157</sup> Ministry of Housing and Environment, *Annual Report ('Aharee Report') 2011* (Ministry of Housing and Environment, Male'- Maldives, 2012), <<http://www.housing.gov.mv/v1/publication/>>, 20-24.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Backgrounds and key elements of these political changes are discussed in detail in Ahmed Shahid and Hilary Yerbury, 'A Case Study of the Socialization of Human Rights Language and Norms in Maldives: Process, Impact and Challenges' (2014) 6(2) *Journal of Human Rights Practice* 281-305.

<sup>161</sup> Ministry of Housing and Infrastructure, *Annual Report ('Aharee Report') 2012* (Ministry of Housing and Infrastructure, Male'- Maldives, 2013), <<http://www.housing.gov.mv/v1/publication/>>.

of existing housing projects being suspended, downsized or rescheduled.<sup>162</sup> Despite these drawbacks, a total of 2,630 housing units have been newly built, providing affordable housing to 17,500 people.<sup>163</sup> A key area of focus for the future should be to ensure that the marketised housing projects address any concerns about affordability, especially for the most disadvantaged in the society.<sup>164</sup>

### **6.4.2.3 Lessons and policy implications**

Overall, the experience of engaging the private sector in increasing the supply of adequate and affordable housing in the Maldives has been positive, despite some political setbacks. This attests to the potential for private sector contribution to the realisation of ESC rights in general. While the positive outcomes of this endeavour have been affected by political instability, overall progress holds promise for continued private sector engagement.

The case study illustrates the role of the private sector in complementing the efforts of the State by facilitating broader enjoyment of ESC rights, which ultimately depends on many aspects of the market and the social environment. While individual purchasing power is the most important indicator of wants fulfilment, realisation of ESC rights cannot be measured using the same yardstick. A more fitting measure is the entitlement that individuals can claim and legally protect vis-à-vis the State and the market for the enjoyment of these rights.

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<sup>162</sup> For example see, Neil Merrett, *Tata reaffirms commitment to stalled Maldives housing projects* <<http://minivannews.com/society/tata-reaffirms-commitment-to-stalled-maldives-housing-projects-60459>>.

<sup>163</sup> Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Maldives*, UN Doc A/HRC/WG.6/22/MDV/1 (17 April 2015), [35].

<sup>164</sup> This issue of affordability for the most disadvantaged has been identified by the Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik*, 10<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/10/7 (4 February 2009), [35].

## **6.5 POLICY IMPLICATIONS AND APPROACHES TO MAXIMISE PRIVATE SECTOR RESOURCES FOR ESC RIGHTS**

As the key driver of the economy, the State has the responsibility for shaping the economic policy environment in a way that attracts private sector investment and participation to maximise the enjoyment of ESC rights of the population. Striking the right balance in attracting private sector engagement in ESC rights and addressing any potential trade-offs arising out of such engagements, especially any negative human rights implications, must be a key concern of State policy. Such an approach must, therefore, be based on a strong vision of partnership and co-operation with the private sector and driven by appropriate and adequate incentives. Policy approaches, indicators and their validation in State practice identified above support the argument that private sector and societal resources are a key element of 'maximum available resources' in relation to the realisation of ESC rights.

Notwithstanding the positive expectations of private sector involvement in augmenting government provision, a number of important concerns remain. Two of these are addressed below: promotion of equity and protection of the most vulnerable from exploitation; and ensuring proper governance of private sector involvement.

### **6.5.1 Promotion of equity and protection of the most vulnerable**

The success or failure of private sector-based service delivery may hinge on the dynamism of the public sector's engagement in the process. This is a key strength of the 'synergistic partnership' model, since the government will have to play a decisive role in ensuring the equity of service delivery while the private sector can provide these services more efficiently. Greater emphasis on addressing barriers to action and incentives to shape the behaviour of privatised or private-sector driven services is essential to maximise benefits.

Calls for greater participation of the private sector are accompanied by expressions of concern and caution. In a number of privatisation programmes involving basic services in developing countries, the private sector's impact has received negative reports. The former Special Rapporteur on the right to health, Anand Grover, calls for an appropriate balance between public and private financing as well as administration of health facilities, goods and services.<sup>165</sup> He cautions that privatisation in health systems 'poses significant risks to the availability, equitability and accessibility of health facilities, good and services, especially for the poor and other vulnerable or marginalised groups.'<sup>166</sup> The argument here is that privatisation of health services often leads to increased 'out-of-pocket' payments for consumers, which has a greater effect on the poorest in the society.<sup>167</sup> It is argued that a parallel private health system with a single payer may result in 'infringements of the right to health' due to under-funding in the public health sector.<sup>168</sup> Such concerns must be fully addressed in all public-private partnership endeavours through proper governance and regulatory mechanisms.

Therefore, an integral part of social services delivery through the private sector is the creation of adequate safety nets for the most vulnerable. This is necessary to provide guarantees that market-based services can be reasonably accessed by the poor and disadvantaged, especially in times of financial distress. Such protection is essential, especially for basic rights such as water, health and education, where exclusion will result in violation of the ESC rights of individuals.

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<sup>165</sup> United Nations General Assembly, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 67<sup>th</sup> sess, UN Doc A/67/302 (13 August 2012).

<sup>166</sup> *Ibid.*, [3].

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*, [37].

## 6.5.2 Governance and regulatory capacity

There is clear acknowledgement by critics of privatisation that weakness in government's regulatory capacity is a central consideration when it comes to ensuring quality, level of service, price and citizen's entitlements.<sup>169</sup> It makes better sense to focus government attention on strengthening exactly these capacities to regulate, rather than on providing the service on its own.

Hence, a number of concerns about the PPP process must be addressed. These include reform objectives, policy environment, legal, regulatory and institutional frameworks, financing requirements, political constraints and other stakeholder concerns.<sup>170</sup> PPP design incorporates sector diagnostics that address technical issues, policy frameworks, capacity issues, and commercial, financial and economic issues.<sup>171</sup> The diagnostic is important to identify the strengths and weaknesses of the sector and the most promising areas for efficiency increases, regularly gauge and report on the progress of reform, and tweak the reform programme as needed.<sup>172</sup> As such, successful PPPs require strong private partners. Choosing the right private sector partner is a challenge, especially since the private sector is extremely heterogeneous and potential partners vary greatly in their structures, capabilities and preferences.<sup>173</sup> There is need to create an environment in which firms with the required capabilities are motivated to engage with the public sector. For public-private partnerships to be successful, public sector agencies also need to be imbued with elements of private sector culture,<sup>174</sup> particularly those related to better communication and engagement.

Advances in technology, connectivity and collation techniques have provided a new set of tools for governments to undertake PPPs more effectively.<sup>175</sup>

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<sup>169</sup> Chapman, above n 85.

<sup>170</sup> For example see, Asian Development Bank, above n 26, 11.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid., 12.

<sup>173</sup> Inter-American Development Bank, above n 58, 371.

<sup>174</sup> Ibid., 376.

<sup>175</sup> World Economic Forum, above n 64, 15.

Results-based management techniques and budgeting techniques are essential to enhance project life cycle and sustainability.<sup>176</sup> Effective institutionalisation and process management are crucial to the effectiveness of PPP strategies,<sup>177</sup> and are particularly relevant in standard-setting and service-provision partnerships.

Building a strong public-private partnership programme requires ‘overcoming prejudices and fostering a culture of dialogue and consensus-building that necessitates identifying a set of common goals.’<sup>178</sup> Building trust and consensus depends on establishing a dynamic process in which political, institutional and leadership elements work together for a common vision.<sup>179</sup> Institutional design, particularly precise articulation of obligations and rules, is essential.<sup>180</sup> Such co-operation also requires a good understanding of the comparative advantages of the partners and mechanisms for dealing with different perceptions of the core features of the project.

Finally, the analysis of State practice shows the need to upgrade public infrastructure, improve the delivery of public services, and explore new options for partnering with the private sector to create new business opportunities for the private sector while helping achieve the government’s social goals. For this approach to be effective, building sufficient ‘fiscal space’ for key public expenditure programmes that support economic development (including public investment) is essential, even in the context of tight government budgets. Public investment, like other spending, has to be carried out within a sustainable macroeconomic framework and accompanied by efforts to strengthen the efficiency of such spending and to manage the significant fiscal risks that accompany new options for delivering infrastructure services, including via greater private-sector participation.

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<sup>176</sup> Ibid.

<sup>177</sup> Marco Schäferhoff, ‘Partnerships for Health – Special Focus: Service Provision’ in Marianne Beisheim and Andrea Liese (eds), *Transnational Partnerships: Effectively Providing for Sustainable Development?* (Palgrave Macmillan, London, 2014) 45, 59.

<sup>178</sup> World Economic Forum, above n 64, 68.

<sup>179</sup> Ibid.

<sup>180</sup> Beisheim, Liese and Lorch, above n 92, 4.

## 6.6 CONCLUSIONS

This chapter has argued that the realities of globalisation and the changing role of governments and markets in the overall economy requires serious rethinking with regard to the role of the private sector and non-financial resources for the realisation of ESC rights. The State's capacity to ensure realisation of ESC rights can be significantly enhanced by actively pursuing market-based solutions for ESC rights realisation in a number of areas. The capacity of government to engage private sector resources in the most effective manner to promote ESC rights in areas such as education, health, housing, food, water, sanitation and work will be reflected in a more cost-effective and sustainable environment for the fulfilment of ESC rights.

A 'synergistic partnership' approach calls for private sector participation in enhancing the total resources dedicated to the provision of goods and services that improve the overall enjoyment of economic, social and cultural rights. In this chapter, such an approach has been located in the human rights context to demonstrate its relevance to the academic application of the concept of 'maximum available resources'.

The main proposition advanced in this chapter is that the ability of the State to channel and share public policy goals with the private sector and to encourage private sector resources to be effectively targeted towards achieving human rights-related goals should provide the foundation for a new public policy orientation. The goal is to maximise the positive contribution of the market to the realisation of ESC rights while addressing any negative impacts of market-oriented solutions.

# **PART III**

## **Qualitative Dimensions of Resource Allocation, Utilisation and Governance**

**Chapter 7 Policy Options and Challenges in Resource Allocation  
for ESC Rights: A Case for Enhanced Public  
Participation**

**Chapter 8 Quality of Resource Governance for ESC Rights:  
Augmenting Transparency and Accountability**

This part builds upon the discussions in Part II and moves to policy and related aspects of resource allocation and governance. Thus, using arguments from human rights, economics, public policy and public finance, Chapter 7 addresses policy challenges and options related to resource allocation, with special emphasis on allocative efficiency and public policy approach to public-sector budgeting. Chapter 8 provides a detailed treatment of issues related to resource governance aspects, with emphasis on transparency and accountability aspects of resource mobilisation and allocation practices.

# **7 Policy Options and Challenges in Resource Allocation for ESC Rights: A Case for Enhanced Public Participation**

## **7.1 INTRODUCTION**

Public sector resource allocation is a multifaceted process that is influenced by demands from competing policy objectives and different sections of government and society. It is also subject to many forms of scrutiny, both from within government and from the public. Resource allocation decisions must be sensitive to these institutional and societal forces while maintaining a proper balance between competing demands. The resource model discussed in Chapter 3 recognises the economic, political and administrative nature of public sector resource and budget allocation. This chapter considers how the human rights perspective can be incorporated as a key driving force behind these decisions.

The chapter focuses on public sector resource allocation for policy areas relevant to the realisation of economic, social and cultural rights (ESC rights). Since resource allocation to these areas is subject to the same level of competition as other sectors of public policy, it must be understood within the dynamic process of resource allocation in general. This complexity is revealed by examining the politics and policy dynamics at play throughout the resource allocation and management processes, especially in budgeting and public finance management practices. This analysis demonstrates the impact of competing players (such as politicians, bureaucrats, citizens and societal groups), competing interests (such as housing and defence expenditure) and competing objectives (such as social welfare or promotion of political benefits) that are the driving forces behind these decisions. This understanding must

then be applied to the human rights debate to strengthen the argument more favourable prioritising of resource allocation for ESC rights.

Allocation of resources for various purposes within government structures is best explained through a combination of economic and public policy perspectives. Public policy processes, institutions and actors are crucial in shaping the State's policies and priorities with regard to ESC rights and the allocation of resources to these objectives. The nature of human rights obligations necessitates the recognition of political decisions as relevant to the fulfilment of these rights.<sup>1</sup> Hence due attention must be paid to the processes of public sector decision-making and policy prioritisation in relation to resource allocation for ESC rights and their practical implementation.

Theoretical work on the government budgeting process has generated a number of insights into the mechanisms and models of budgeting and their economic, social and political implications.<sup>2</sup> This chapter focuses on key points of contact between the budgeting process and ESC rights policies to identify ways of strengthening and entrenching State practice in relation to ESC rights and placing rights arguments at the forefront of public policy. The chapter describes a 'priority-setting mechanism in budget allocation' from the perspective of ESC rights which aims to influence the resource allocation formula and bring ESC rights objectives into the centre of political debate.

The chapter explores the policy options available to a State for prioritising and allocating resources for upholding its ESC rights obligations, with particular focus on non-discrimination, progressive realisation and non-retrogression from minimum core content. It begins by analysing relevant aspects of resource allocation decisions from public policy and public finance perspectives. These policy options are then discussed in the context of State resource allocation decisions applicable to ESC rights, with special focus on

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<sup>1</sup> Peter R Baehr, *Human Rights: Universality in Practice* (Palgrave, London, 2001), 1.

<sup>2</sup> For example see, Lawrence L Martin, 'Budgeting for Outcomes' in Aman Khan and W Bartley Hildreth (eds), *Budget Theory in the Public Sector* (Quorum Books, Westport, Connecticut, 2002) 246; Robert D Lee, Ronald W Johnson and Philip G Joyce, *Public Budgeting Systems* (Jones & Bartlett Publishers, London, 2012).

the participatory approach. Various elements of participatory budgeting, budget analysis and efficiency and effectiveness of budgetary outcomes are then addressed.

## **7.2 PUBLIC POLICY PROCESS OF RESOURCE ALLOCATION AND BUDGETING**

Resource allocation is one of the main ways in which government policy influences the realisation and enjoyment of ESC rights. The concept of 'maximum available resources' for ESC rights must therefore take into consideration the process of public sector resource allocation. Resource allocation also has political dimensions and is at times controversial, as the supporters and detractors of competing priorities push to maximise resources for their respective areas.<sup>3</sup> These policy tensions and resulting compromises can often lead to inefficient resource allocation decisions.

Scarcity is a fact of economic life. This in turn creates opportunity costs associated with allocation and expenditure of scarce resources for any particular activity. Expenditures on defence, for example, creates opportunity costs in the form of foregone expenditures on education, health or other social services. Similarly, expenditure in one particular geographic area or on a specific target group of beneficiaries also results in limiting the amount of available resources for other areas or groups of people. Moreover, expenditure on social infrastructure and services today also creates a serious opportunity cost in the form of foregone economic investments, which could provide additional resources in the future. These considerations are, therefore, part and parcel of policy decisions on resource allocation, which must be integrated into the debate of resource allocation for ESC rights. From the perspective of public sector budgeting, it is important to examine how resource allocation interacts with ESC rights objectives and policies. The following

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<sup>3</sup> See for example, Irene S Rubin, *The Politics of Public Budgeting: Getting and Spending, Borrowing and Balancing* (CQ Press, Washington, D.C., 2009).

section addresses issues of public sector budgeting and identifies the policy dynamics of the budgeting process, with emphasis on institutions, actors, processes and outcomes.

### 7.2.1 Public sector budgeting and public policy

The public sector budget is one of the fundamental tools of public policy. Budgets have been conceptualised, variously, as descriptions, explanations or causal assertions, and Statements of preference or values.<sup>4</sup> From the perspective of the State, the budget is ‘the most solid and articulate expression of its priorities, performances, decisions and intentions.’<sup>5</sup> The budget reflects what the State is doing or intends to do, and is ‘a translation in financial terms of the action program of the state, coordinating planned expenditures with expected revenue collections and proposed borrowing operations’.<sup>6</sup>

A budget plan provides clear indication of the priorities and preferences in resource allocation among competing objectives and activities,<sup>7</sup> and acts as a device for ‘limiting the powers of government’ and ensuring accountability.<sup>8</sup> The idea behind budgets as descriptions is that the budget provides a discrete picture of the State’s resources and activities. The idea of budgets as explanations is that they document the causal links between resources, activities and results. Hence the budget is an important gauge of government programmes, activities and planning for policy objectives.

Decision-making in relation to public sector resource allocation is influenced by a number of elements. From an incrementalist point of view, decision-

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<sup>4</sup> Lee, Johnson and Joyce, above n 2, 15.

<sup>5</sup> Enakshi Ganguly Thukral, 'Budget for Children' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 139, 139.

<sup>6</sup> Maria Socorro I Diokno, 'A Rights-Based Approach towards Budget Analysis' (International Human Rights Internship Program Working Paper, IHRI), <<https://www.crin.org/docs/resources/publications/hrbap/RBABudgetAnalysis.pdf>>, 2.

<sup>7</sup> Lee, Johnson and Joyce, above n 2, 16.

<sup>8</sup> *Ibid.*, 7.

makers make the first acceptable and available choice, due to constraints of time, resources, intelligence and other factors.<sup>9</sup> This approach allows for incremental deviations from last year's *base budget*, guided by the need to allot fair shares to all.<sup>10</sup> By contrast, rational choice theory (or public choice theory) explains political behaviour in terms of self-interest, whereby actors pursue their preferences.<sup>11</sup> Both these theoretical approaches provide valuable insight into budget processes, institutions and actors, which can be taken up by human rights advocates to influence policy decisions in the context of resource allocation for ESC rights.

Budgeting processes, institutional arrangements, actors and stakeholders vary greatly across States according to the type of government and political regime. Given this diversity, this chapter adopts a technocratic approach to understanding the politics of the budget process, by focussing on key points of contact with ESC rights policy objectives. Various models of public policy and decision-making within budgetary dynamics are explored in detail below.

### **7.2.2 Public policy dimensions of resource allocation and budgetary decisions**

The term 'policy' is used to describe many fields of activity, expressions of general purpose or intention. It can refer to a specific proposal, a decision of the government, formal authorisation, a programme of activity, outputs of government activity, outcomes or achievements, and theoretical models of action.<sup>12</sup> Public policy refers to choices 'made by a government to undertake some course of action.'<sup>13</sup> Public policy incorporates elements of what

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<sup>9</sup> Carol W Lewis and W Bartley Hildreth, *Budgeting: Politics and Power* (Oxford University Press, New York, 2011), 8.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 9.

<sup>12</sup> Brian W Hogwood and Lewis A Gunn, *Policy Analysis for the Real World* (Oxford University Press, Oxford, 1984), 11–19.

<sup>13</sup> Michael Howlett and M Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems* (Oxford University Press, Oxford, 2003), 3.

governments choose to do, relationships within and outside the units of government, and actions and pronouncements indicating the intention of the government.<sup>14</sup> Clearly, the dynamics of the public policy process are complex and multiple actors and stakeholders are involved.

Policy decisions are influenced by the political, economic and social environment in which these decisions are grounded. Policies comprise a series of interrelated decisions involving many people at different levels of government, who are also influenced by earlier policy decisions and other factors.<sup>15</sup> Therefore, public policy processes interact with political and social environments and often evolve and adapt their stance on major issues to reflect public concern and demands.

Government decisions in relation to public sector resources and their allocation for various objectives and programmes are most directly influenced by the institutional and process elements of public policy. These processes are driven by political as well as production considerations. They are informed by economic and public policy dynamics that depend on human decisions and which are invariably influenced by the legacy of the past and the uncertainty of the future.<sup>16</sup> It can therefore be argued that policies are about choices: of objectives; of rationales for a particular action; of policy tools and instruments to achieve a particular result; and of actions available to address the consequences of these choices.<sup>17</sup> Hence, the achievement of public policy goals is closely related to a number of factors, including productivity of the public sector; the degree of openness and participation of stakeholders in decision-making; transparency; and the ability of the policy process to accept feedback and consistently improve. The processes involved are complex and dynamic, constantly evolving to reflect public expectations.

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<sup>14</sup> For details on the definitions of 'public policy', see Kevin B Smith and Christopher W Larimer, *The public policy theory primer* (Westview Press, New York, 2013), 4.

<sup>15</sup> Adrian Kay, *The Dynamics of Public Policy: Theory and Evidence* (Edward Elgar, Cheltenham, 2006), 8.

<sup>16</sup> *Ibid.*, 2.

<sup>17</sup> *Ibid.*

A number of theoretical approaches advanced in the public policy literature are relevant to resource allocation within an ESC rights framework. The *process model* of public policy, which identifies stages of problem identification, agenda setting, policy proposals formulation, policies approvals, implementation and evaluation, can help to determine the impact of resource allocation decisions within the government structure.<sup>18</sup> In this approach, relevant decisions are not only driven by the institutional structure and actors involved in the process but can also be significantly influenced by external advocacy.

Another relevant theoretical model is *systems theory*, which explains how individuals, groups and nations provide inputs into the political system and produce outputs and feedback while transforming public demands into authoritative decisions.<sup>19</sup> This model is sensitive to public demands and requires the support of society. Internal elements of the system interact with environmental factors to preserve the system and address policy inputs. *Public choice* theory provides additional insight into how rational and self-interested individuals and groups can co-operate to achieve mutual goals and how governments generally address issues associated with market failure.<sup>20</sup>

Other theoretical models such as *institutionalism*, *group theory*, *elite theory*, *rationalism*, *incrementalism* and *game theory* shed further light on how public policy decisions are developed, shaped and implemented.<sup>21</sup>

The *policy cycle framework* provides useful insight into the public policy process through its ability to 'compare the diverse debates, approaches, and

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<sup>18</sup> These descriptions of the models are derived from William N Dunn, *Public policy analysis : An introduction* (Prentice Hall, Harlow, 4th ed, 2007); Smith and Larimer, above n 14.

<sup>19</sup> For example see, Jenny Stewart and Russell Ayres, 'Systems theory and policy practice: An exploration' (2001) 34(1) *Policy Sciences* 79-94.

<sup>20</sup> These model descriptions are derive from Kay, above n 15; Paul Cairney, *Understanding Public Policy: Theories and Issues* (PalgraveMacmillan, Hampshire, 2012); James E Anderson, *Public policymaking : An introduction* (Cengage, Boston, 7th ed, 2011).

<sup>21</sup> The relevant elements of these theories are discussed in detail in later sections. Detailed explanations of these theories are discussed in Cairney, above n 20; Christoph Knill and Jale Tosun, *Public policy: A new introduction* (Palgrave Macmillan, New York, 2012); Michael Moran, Martin Rein and Robert E Goodin, *The Oxford handbook of public policy* (Oxford University Press, Oxford, 2006).

models in the field'.<sup>22</sup> Howlett and Ramesh identify the following steps in the policy cycle: agenda-setting (problem recognition); policy formulation (proposal of a solution); decision-making (choice of a solution); policy implementation (putting the solution into effect); and policy evaluation (monitoring results).<sup>23</sup> Others expand this list to include: issue search or agenda setting; issue filtration; issue definition; forecasting; setting objectives and priorities; options analysis; policy implementation; evaluation and review; and policy maintenance, succession or termination.<sup>24</sup> Of these elements, agenda-setting, policy formulation and institutional settings of policy implementation and evaluation are most relevant in the present context.

The identification of a public policy problem and the direction of policy alternatives on the government agenda are influenced by these multiple structures, processes and actors. Since prioritising ESC rights in the public policy process is an important focus of the present inquiry, it is important to identify models through which ESC rights requirements, particularly resource allocation, can be brought to the forefront of the policy process.

### 7.2.3 ESC rights priority-setting mechanism in budget allocation

The budget process is influenced by a number of fiscal constraints and rules that emanate from institutional characteristics and policy pronouncements.<sup>25</sup> Many States today follow the *executive budgeting* process, in which a single, comprehensive budget is put forward by the executive (or the government) and is then reviewed, debated and passed in the legislature.<sup>26</sup> The legislative review and appropriation then leaves the executive to implement the budget, which will in turn be audited and evaluated by the oversight bodies.

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<sup>22</sup> Werner Jann and Kai Wegrich, 'Theories of the Policy Cycle' in Frank Fischer, Gerald J Miller and Mara S Sidney (eds), *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (CRC Press, Boca Raton, 2007) 43, 43.

<sup>23</sup> Howlett and Ramesh, above n 13.

<sup>24</sup> Hogwood and Gunn, above n 12.

<sup>25</sup> Lewis and Hildreth, above n 9, 119.

<sup>26</sup> *Ibid.*, 86-87.

As noted above, the budget process involves a number of key stakeholders with various capacities and roles and passes through a number of complex iterations. This process is often divided into four key stages: executive planning; legislative approval; executive implementation; and *ex post* accountability.<sup>27</sup> ESC rights priorities must be incorporated into all these stages.

The cross-disciplinary model of 'maximum available resources' proposed in Chapter 3 advocates the combined action of government and community through the language of empowerment, as well as mechanisms for shaping policy through public opinion throughout the budget allocation and implementation processes. ESC rights advocates can communicate ESC rights priorities and influence decision-making through involvement with key institutional processes, actors and decisions throughout these stages.

The four key stages of budgeting identified above provide the basis for the advocacy model of ESC rights priority-setting in budget allocation proposed in Figure 6.

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<sup>27</sup> Jürgen Von Hagen, 'Budgeting Institutions for Better Fiscal Performance' in Anwar Shah (ed), *Public Sector Governance and Accountability Series: Budgeting and Budgetary Institutions* (The World Bank, Washington, D.C., 2007) 27, 29.

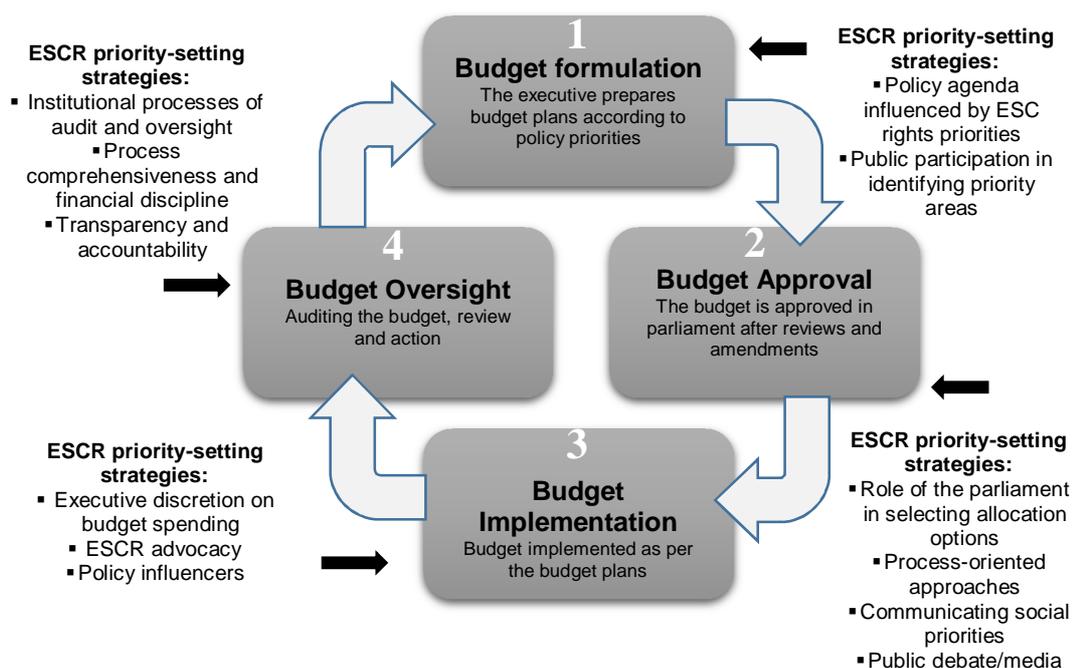


Figure 6: ESC rights priority-setting mechanism in budget allocation

The elements of this model are discussed in detail below.

### 7.2.3.1 Budget formulation stage

In any sound budgeting process, political inputs are indispensable at the first stage when key policy decisions on technically prepared budget proposals are made. From an economic point of view, the key objectives of an effective budget should be targeted at achieving efficiency in the allocation of resources in accordance with policy priorities and in the delivery of services and should provide 'value for money'.<sup>28</sup> To achieve these objectives, the budget should be realistic and must be prepared and presented in a way that guarantees its comprehensiveness and transparency.<sup>29</sup> Strong institutional arrangements must also be in place to ensure that budgetary decisions are based on thoughtful and deliberate processes.

<sup>28</sup> Rebecca Simson, Natasha Sharma and Imran Aziz, *A guide to public financial management literature: For practitioners in developing countries* (Overseas Development Institute, London, 2011), 4.

<sup>29</sup> Ibid.

The role of political influence in resource allocation is complex and often can be driven by political opportunism and self-interest of players which determine and shape key elements in the process of agenda-setting. Political influence should, therefore, be minimised in the preparation of budget proposals, which should be left to the technical bureaucracy,<sup>30</sup> to allow for ESC rights objectives to be incorporated into the proposal and given proper consideration.<sup>31</sup> It is also important to emphasise that, while politics is the use of power and authority to tackle the problems of scarcity and competing demands,<sup>32</sup> the politics of budgeting uses both power and authority to decide who gets what, who pays and who wins or loses. The budget process is the platform on which these key interactions determine the value, urgency and priority of competing demands on State resources.<sup>33</sup>

Policy formulation is a pre-decision stage in which a smaller number of participants craft policy directions and alternative decision routes for consideration. This is the stage in which evidence is used to identify possible policy options. The clarity with which the perceived problems and solutions are identified and addressed in the policy process can make a considerable difference to the successful outcome of the policy activity. At this stage, the budget agenda can be influenced by technical, political and social information. The *agenda* is defined as a 'collection of problems, understandings of causes, symbols, solutions, and other elements of public problems that come to the

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<sup>30</sup> Salvatore Schiavo-Campo, 'Budget Preparation and Approval' in Anwar Shah (ed), *Public Sector Governance and Accountability Series: Budgeting and Budgetary Institutions* (The World Bank, Washington, D.C., 2007) 235, 236.

<sup>31</sup> It is important to note that in countries with Westminster Parliamentary processes, the political process is absolutely dominant, including at the budget preparatory stage. This may be differently applied in presidential/executive systems.

<sup>32</sup> Lewis and Hildreth, above n 9, 1.

<sup>33</sup> The nature of an institutional platform in which these priorities effectively interact may vary in different political setups. A structure of either internal or external source of advice may be used to feed public priorities into the budget plans at relevant stages.

attention of members of the public and their governmental officials.<sup>34</sup> The policy agenda can address institutional, systemic or decision-related issues.<sup>35</sup>

Throughout the budgeting process, information plays a key role. Information technology provides opportunity for the budgeting process to be more aligned with societal needs, including human rights objectives, through use of broader information sources and wider participation. This would also require more decentralised decision-making in the budgeting process. Therefore, ESC rights advocates can influence the budgeting process by collecting and channelling relevant information to decision-makers in an effort to influence the process at the budget approval stage.

### **7.2.3.2 Budget approval stage**

At the budget approval stage, public policy decisions on budget allocation for various purposes and programmes are influenced by the way things have been done in the past. This ‘path dependency’, as argued by Douglas North,<sup>36</sup> constrains the set of choices for future policy direction. Economic, political and social choices are often shaped by the path that was taken earlier, although they do not clearly determine the future or make any future choices inevitable.<sup>37</sup> Path dependency implies that the order in which things happen affects how they happen, and captures ‘the insight that policy decisions accumulate over time; a process of accretion can occur in a policy area that restricts options for future policymakers.’<sup>38</sup> Such past policy decisions are identified as ‘institutions’ in terms of current policy decisions and these can determine and often limit the direction of current and future decisions.

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<sup>34</sup> Thomas A Birkland, 'Agenda Setting in Public Policy' in Frank Fischer, Gerald J Miller and Mara S Sidney (eds), *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (CRC Press, Boca Raton, 2007) 63, 63.

<sup>35</sup> *Ibid.*, 64.

<sup>36</sup> Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990), 98–99.

<sup>37</sup> *Ibid.*

<sup>38</sup> Kay, above n 15, 29, 31.

The legislature is the main institutional player in the budget approval stage in almost all democratic political settings, although there is also influence from the executive branch and from public opinion.<sup>39</sup> In many States, these interactions between the legislature and the executive around budgetary decisions can be highly competitive.<sup>40</sup> Democratic influence and accountability in budget-related decision-making,<sup>41</sup> are crucial for creating institutional and political processes necessary for ESC rights sensitivity at this stage.

Budgetary decisions and policies guided purely by economic priorities may not be as sensitive to immediate social priorities, while policies which do not fully consider the economic dimensions may not be sustainable in the long run. The process-oriented approach to budget decision-making helps to combine these priorities more effectively and to address multiple concerns while maintaining the overall focus of deliberations by employing elements of the nature of judgement within a process environment so that individuals use their analytic and intuitive cognitive capacities in different ways across different circumstances.<sup>42</sup> Therefore, the dimensions of efficiency, adaptability, flexibility and representativeness of the budget process are key to good budget processes,<sup>43</sup> and help achieve better decision outcomes.

### **7.2.3.3 Budget execution stage**

At the budget execution stage, the executive branch plays a key role in determining how effectively the expenditures are made and the level of compliance with the budgetary plan and public accounting standards.<sup>44</sup> This

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<sup>39</sup> In States with Westminster parliamentary settings, this distinction between the parliament and executive may not be as distinguishable as in presidential systems.

<sup>40</sup> Schiavo-Campo, above n 30, 273.

<sup>41</sup> Stefan Sjölander et al, *Public Finance Management in Development Co-operation – A Handbook for Sida Staff* (SIDA, Stockholm, 2007).

<sup>42</sup> Carlos Scartascini and Ernesto Stein, 'A New Framework' in Mark Hallerberg, Carlos Scartascini and Ernesto Stein (eds), *Who Decides the Budget?: A Political Economy Analysis of the Budget Process in Latin America* (Inter-American Development Bank, Cambridge, MA, 2009) 1, 13.

<sup>43</sup> Ibid.

<sup>44</sup> See for example, Lee Alston et al, 'Presidential Power, Fiscal Responsibility Laws, and the Allocation of Spending: The Case of Brazil' *ibid.* 58, 87-88.

stage involves authorising and controlling expenditures (and revenues) in accordance with the budget plans, public sector expenditure rules, systems of accountability and standards. At this stage, key stakeholders derive their legitimacy from following public finance management rules and implementing the budgeting process in a transparent manner.

Budgets 'encapsulate the trade-offs political actors must make on different policy priorities and, by extension, on different groups in society'.<sup>45</sup> Therefore, it is conducted through intense negotiation, bargaining, accommodation, 'horse-trading' and collaboration which help to produce a 'consensus' on the allocative proportions and priorities. Because of this, it is imperative to identify the interactions of these competing priorities and how power players in the budget process use their influence to achieve their defined objectives.<sup>46</sup> This makes it necessary for ESC rights advocates to identify points of interaction and connectivity in order to effectively influence budgetary decisions.

These institutional arrangements provide the setting in which policy actors exercise most of their influence and other stakeholders provide feedback, especially at the budget execution stage. Technical bureaucrats in the executive branch and politicians in the executive and legislature must play a key role to ensure that ESC rights needs are fully incorporated and spending priorities are sensitive to these needs. Civil society actors and the general public are also considered key actors in the process.

#### **7.2.3.4 Budget oversight stage**

Institutional arrangements for transparency and accountability ensure that the allocated resources are spent well and efficiently, without wastage and corruption. This requires institutional processes to incorporate key principles of fiscal management and sound budgeting, such as comprehensiveness and discipline; legitimacy of decision makers; flexibility; predictability;

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<sup>45</sup> Mark Hallerberg, Carlos Scartascini and Ernesto Stein, 'The Budget Process as a Political Arena' *ibid.* 295.

<sup>46</sup> This is particularly essential given that a large number of self-interested actors take part in the budget game, and their level of interaction and cooperation is often lower than optimum.

contestability; honesty; information; transparency and accountability.<sup>47</sup> Thus principles of information, honesty, transparency and accountability are essential aspects of the interaction between policymakers and the public, especially at the execution and oversight stages.

Resource allocation decisions are influenced by a number of public policy factors, including institutional structures, actors and processes, which collectively shape the way in which ESC rights priorities are ultimately set in the budget process. These policy factors, therefore, also determine the quantum of resources allocated for policy areas, including ESC rights. Principles of transparency and accountability are also fundamental to the whole budgeting process and can significantly affect the interactions between actors and institutional processes. These issues will be discussed in detail in Chapter 8.

Institutional rigidities, interests of actors, process complexities, negotiations and compromises determine the outcomes of these procedures, especially budget priorities. This creates a number of challenges for maximising budgetary allocations that affect the realisation and enjoyment of ESC rights.

### **7.3 CHALLENGES IN MAXIMISING RESOURCE ALLOCATION FOR ESC RIGHTS**

The importance of effective resource allocation for ESC rights has been identified by the ESCR Committee,<sup>48</sup> Special Rapporteurs<sup>49</sup> and human rights scholars.<sup>50</sup> Human rights law does not, however, specify that a particular sum

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<sup>47</sup> The World Bank, *Public Expenditure Management Handbook* (The International Bank for Reconstruction and Development/ The World Bank, Washington, D.C., 1998), 1-2.

<sup>48</sup> For example, CESCR, *Concluding observations: Albania*, E/C.12/ALB/CO/2-3 (18 December 2013), [11].

<sup>49</sup> For example, *Report of the United Nations Special Rapporteur on the right to education : financing education and update on education in emergencies*, A/66/269, 66<sup>th</sup> sess, Agenda Item 69 (b), (5 August 2011).

<sup>50</sup> For example, Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women's Global Leadership, New Jersey, 2011); Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations

or portion of public spending should be devoted to economic, social and cultural rights.<sup>51</sup> The expectation is that, where funding is required, ‘targeting public funds wisely and efficiently to areas of most need can achieve a great deal’.<sup>52</sup> Such expenditures ‘need not bankrupt delicate economies’.<sup>53</sup> Allocation of any public resource for a particular purpose has inherent distributive consequences, which is the ‘incidence’ of the spending.<sup>54</sup> Thus, the ‘supply side of entitlements’—which describes the direct provision of goods and services by the government or other agencies to rights-holders with less access to resources<sup>55</sup>—should be incorporated into the core of the public policy matrix.

The objective of this section is to identify challenges in maximising resource allocation for ESC rights realisation in the public sector budgeting processes discussed in the previous section. First, the section identifies the institutional arrangements, processes and actors involved in public sector budgeting which influence the amount of resource allocated for ESC rights-related activities. This is followed by discussion of ESC rights arguments around progressive realisation obligations and the importance of minimum core contents and non-discrimination.

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under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229; Victor Steenberg, *A Guide to Costing Human Rights* (equalinrights, The Hague, 2011), <[http://www.equalinrights.org/uploads/tx\\_wizzresources/EIR\\_VS\\_2011\\_Costing\\_Guide.pdf](http://www.equalinrights.org/uploads/tx_wizzresources/EIR_VS_2011_Costing_Guide.pdf)>.

<sup>51</sup> Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (Office of the High Commissioner for Human Rights, Geneva, 2005), 24 (Online) < <http://www.ohchr.org/Documents/Publications/training12en.pdf> >.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Balakrishnan et al, above n 50, 7.

<sup>55</sup> Shyama Kuruvilla et al, 'The Millennium Development Goals and Human Rights: Realizing Shared Commitments' (2012) 34 *Human Rights Quarterly* 141-177, 152.

### 7.3.1 Incorporating ESC rights into public policy resources agenda

Policy decisions about how much should be allocated to ESC rights are relevant at all stages of the budgeting process. Although the policy review stage will have little direct impact on such decisions in the current budget cycle, incorporation of human rights priorities at this stage will give the next cycle a better chance of benefitting from these considerations. The participants in the budget planning and execution process, including government departments, the parliament and non-State actors, are influential in the proper incorporation of ESC objectives. The challenge is to ensure that resource allocation and utilisation decisions are in line with the State's ESC rights obligations,<sup>56</sup> which is the most crucial aspect of any human-rights based budget framework.

Government policy on allocation of resources for specific areas of ESC rights such as health, education or housing may be driven by many factors other than concerns about human rights fulfilment. Motives such as winning elections may often influence decisions to divert government budget resources to a particular geographic area or to target a particular ethnic group. This may result in imbalances in resource allocation, which often end up over-serving one geographic area or group of people at the expense of more deserving segments of the population, thereby depriving them of their rights. Correcting such imbalances requires the incorporation of human rights principles into resource allocation decisions. This position is evident in State practice, as discussed below.

The analysis of State reports show that resource allocation in the context of individual rights is recognised by the States as a key element of policy. Guyana attributed growth of the housing industry to government resource allocation, which supplemented private investment,<sup>57</sup> while Brazil and Kazakhstan

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<sup>56</sup> QUB Budget Analysis Project, *Budgeting for Economic and Social Rights: A Human Rights Framework* (QUB School of Law, Belfast, 2010), <<http://www.qub.ie/schools/SchoolofLaw/Research/HumanRightsCentre/ResearchProjects/BudgetAnalysis/Documents/filestore/Filetoupload,210767,en.pdf>>.

<sup>57</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), 27.

provided details of government allocation of resources for housing.<sup>58</sup> Many reports gave detailed breakdowns of budget allocation to various policy areas and sectors.<sup>59</sup> For example, India documented the allocation of public sector resources for various programmes and activities, including the provision of sanitation services to rural communities,<sup>60</sup> elimination of child labour<sup>61</sup> and food management.<sup>62</sup> The Philippines provided some information about budgetary allocation for areas such as health<sup>63</sup> and public education. The latter attracted the largest allocation,<sup>64</sup> although total expenditure on education was relatively low.

Education was identified as a priority area for public sector resource allocation by many States, such as the Solomon Islands.<sup>65</sup> Trinidad and Tobago described the government decision to allocate funds for textbooks for needy children as a measure to address the concerns of parents who could not afford to buy them.<sup>66</sup>

Some countries reported annual increases in resource allocation for health as a percentage of GDP.<sup>67</sup> The Solomon Islands provided details of the government budget allocation for the health sector as an overall percentage and in a breakdown of different areas in the health sector.<sup>68</sup> Guyana reported that resource allocation for the health sector was in line with the priorities of the poverty reduction strategy paper (PRSP) and the overall pro-poor approach of the national development agenda.<sup>69</sup> Benin noted that budget

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<sup>58</sup> CESCR, *State Report: Brazil*, E/C.12/BRA/2 (28 January 2008), [375]; CESCR, *Concluding observations: Kazakhstan*, E/C.12/KAZ/CO/1 (7 June 2010), [322].

<sup>59</sup> For example, CESCR, *State Report: Iran*, E/C.12/IRN/2 (16 May 2011).

<sup>60</sup> CESCR, *State Report: India*, E/C.12/IND/5 (1 March 2007), [56].

<sup>61</sup> *Ibid.*, [312].

<sup>62</sup> *Ibid.*, [360].

<sup>63</sup> CESCR, *State Report: The Philippines*, E/C.12/PHL/4 (7 September 2007), [744].

<sup>64</sup> *Ibid.*, [874] [911].

<sup>65</sup> CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [260].

<sup>66</sup> CESCR, *State Report: Trinidad and Tobago*, E/1990/6/Add.30 (2 October 2000), [303].

<sup>67</sup> CESCR, *State Report: Panama*, E/1990/6/Add.24 (31 March 2000), [293].

<sup>68</sup> CESCR, *State Report: Solomon Islands*, E/1990/5/Add.50 (30 July 2001), [208-209].

<sup>69</sup> CESCR, *State Report: Guyana*, E/C.12/GUY/2-4 (03 September 2012), 53.

reforms had 'shifted the focus to better allocation of resources according to criteria of equity and objectivity, as well as to their efficient use, which requires ongoing evaluation and physical and financial monitoring of the implementation of domestic health policy.'<sup>70</sup>

While these efforts are significant, it is especially important to view resource allocation from the perspective of non-discrimination, progressive realisation and ensuring minimum core content. Given that promoting equality and inclusion in the economic and social allocation of resources must be seen as one of the primary functions of the State from a human rights perspective, ensuring that available resources are designated and capitalised in a fair and equitable manner should be a primary concern in budgeting decisions.

As explained in Chapter 2, non-discrimination is a core principle of the ICESCR which must be applied to the allocation of resources for ESC rights. This requires budgeting decisions to fully take into consideration the requirements for addressing existing disparities in ESC rights fulfilment among different groups and the means of uplifting the most disadvantaged members of the society. Therefore, resource allocation decisions must also factor in geographic disparities with regard to service access. For example, if rural communities have lower quality public sector goods and less access to whatever facilities are available, there is a clear need to allocate more resources for facilities and infrastructure to allow better access for these communities.

General discussions of non-discrimination and special protection for vulnerable groups are presented in a number of State reports. Zambia made specific reference to the national resource allocation criteria applied to the national budget, which gives priority to gender-responsive activities and the participation of people with disabilities in socio-economic activities.<sup>71</sup> While the specific details of such projects and their outcomes are not provided,

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<sup>70</sup> CESCR, *State Report: Benin*, E/C.12/BEN/2 (30 March 2007), [250].

<sup>71</sup> CESCR, *State Report: Zambia*, E/1990/5/Add.60 (1 September 2003), [72].

recognition of this criterion in national budget allocation indicates a positive policy direction.

General discussions of resource allocation cover a wide range of topics related to ESC rights. Libya expressed its commitment to allocating funds and resources to improve citizens' cultural life.<sup>72</sup> Some States identified resource allocation for specific areas such as combatting HIV, especially for high-risk and vulnerable populations.<sup>73</sup> Increased attention and resource allocation was also given to programmes to address poverty and to assist families living with poverty.<sup>74</sup> Mexico stated in its report that the government seeks to devote social expenditure to the most important areas and to orient the budget towards human rights and social development goals.<sup>75</sup> Some reports are clear about the obligation of the State to allocate resources for ESC rights policy areas.<sup>76</sup>

A number of reports identified the challenges and difficulties associated with resource allocation for various ESC rights areas. Costa Rica emphasised that the government allocation of resources for education was inadequate and that families are required to pay for expenses outside of enrolment.<sup>77</sup> Scarcity of economic resources in the cultural sector was directly linked to low levels of budget allocation.<sup>78</sup> India identified the low level of resource allocation for health as a percentage of GDP.<sup>79</sup> Tanzania recognised the commitment of the government to maintain at least 20 per cent of the budget allocation for education.<sup>80</sup> Some reports identified the quantum of support in specific

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<sup>72</sup> CESCR, *State Report: Libyan Arab Jamahiriya*, E/1990/6/Add.38 (15 February 2005), [136].

<sup>73</sup> CESCR, *State Report: Mexico*, E/C.12/4/Add.16 (25 February 2005), [577].

<sup>74</sup> *Ibid.*, [1095].

<sup>75</sup> *Ibid.*, [1032-1033].

<sup>76</sup> For example, CESCR, *State Report: Ethiopia*, E/C.12/ETH/1-3 (28 March 2011), [24].

<sup>77</sup> CESCR, *State Report: Costa Rica*, E/C.12/CRI/4 (22 June 2006), [992].

<sup>78</sup> *Ibid.*, [1168].

<sup>79</sup> CESCR, *State Report: India*, E/C.12/IND/5 (1 March 2007), [483].

<sup>80</sup> CESCR, *State Report: United Republic of Tanzania*, E/C.12/TZA/1-3 (28 March 2011), [152].

projects targeted at the realisation of ESC rights, as well as the overall allocation and disbursement of funds.<sup>81</sup>

As is evident from many reports, access to goods and services required for the effective realisation of ESC rights may be difficult to realise for some sections of the society, including women, children, the disabled, the elderly and minorities. These groups need not only more services but also support to break down barriers to the full enjoyment of their rights.

The allocation of a given amount of resources to individual programmes and activities has both immediate and long-term effects. Investments and expenditures may not always provide immediate benefits in terms of ESC rights realisation, but may have significant benefits over a longer period. Resource allocation decisions need to achieve a balance between these priorities. The State has an obligation to ensure that minimum core content of the rights is guaranteed regardless of resource constraints. To this end, first priority in available resources is given to minimum core content and non-retrogression of these rights.

### **7.3.2 Ensuring allocative efficiency of resources in the budgeting process**

Promoting equity and inclusion in the allocation of resources are key dimensions of the State's human rights obligations.<sup>82</sup> The incorporation of normative values of international human rights into the principles of welfare economics shows that the human rights framework provides 'a measure against which policy options and resource allocation outcomes can be assessed, including those of equity and equality, in achieving re-distributional

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<sup>81</sup> CESCR, *State Report: Tajikistan*, E/C.12/TJK/2-3 (4 April 2013); CESCR, *State Report: Yemen*, E/C.12/YEM/3 (14 March 2014), [151].

<sup>82</sup> Margot E Salomon and Colin Arnot, 'Better Development Decision-making: Applying International Human Rights Law to Neoclassical Economics' (2014) 32(1) *Nordic Journal of Human Right* 44–74, 67.

objectives.<sup>83</sup> These approaches are essential in informing State resource allocation decisions about human rights needs and goals. From this perspective, normative demands and expectations of international human rights law, especially those relating to ESC rights, can be valuable in shaping economic policy objectives.

The principles of allocative efficiency hold that some allocation decisions are objectively better than others and are therefore likely to produce better results. The Paretian welfare efficiency position requires that policy decisions to allocate goods and services are based on achieving the greatest utility; that is, goods and services are allocated to those who derive the greatest utility without anyone else being made worse off.<sup>84</sup> On the face of it, this approach requires improvement of the condition of the worst-off in the society in order to improve aggregate welfare.

The main criticism of Pareto efficiency is that it is based on the requirement that no one is made worse off by the allocation decision, even if that decision makes many others relatively better off. For example, since Pareto efficiency does not allow the worsening of anyone's condition, any policy or programme targeted at improving the condition of the worst-off through redistribution can be seen to negatively affect the welfare of the richest, which is not optimal.<sup>85</sup> Therefore, it may be difficult to achieve the right 'balance' of welfare through redistributive policies based on attempts to reconcile Pareto optimality and human rights norms.

Resource allocation decisions with regard to ESC rights must have a mechanism to ensure that public sector resources are put to purposes that create the largest gains in welfare and human rights for the population. This

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<sup>83</sup> Ibid., 45. On the contrary, Eric Posner argues that a focus on welfare could provide better outcomes. See, Eric A Posner, 'Human Welfare, Not Human Rights' (2008) 108 *Columbia Law Review* 1758-1801.

<sup>84</sup> Pareto optimality refers to an economic concept of resource allocation in which an equilibrium can be achieved where it is impossible to make any one individual better off without making another worse off.

<sup>85</sup> See for example, Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity' (2008) 26(4) *Development Policy Review* 387-405.

perspective is supported by progressive, heterodox economists, who argue that government budgets and the levels of expenditure should reflect the need for essential services and economic stimulation to increase employment.<sup>86</sup> This positive economic approach takes a more holistic view of the impact of public policy decisions, including their effect on the private actions of economic agents.

It can be argued that the achievement of allocative efficiency in public sector resources depends on the extent to which the complexities of competing distributional rules can be incorporated into multi-dimensional human welfare, especially those related to challenges in realising ESC rights. To this end, a balance needs to be struck between the arguments from two mutually exclusive camps: free-market views in which individuals choose what the market offers and those of the statist who argue that government is best placed to make choices on behalf of the people. The reality of economic and social life is that neither of these extreme positions can produce optimum results.

### 7.3.3 Optimising the budgeting process for ESC rights

Despite the existence of sophisticated institutional and regulatory processes, the budgeting process often fails to follow optimal planning steps and, in many cases, the national budget reflects a highly disjointed process, with competing priorities cobbled together by political arrangements.<sup>87</sup> Such budgets do not take into account the many facets of State revenue, including overseas development aid cycles.<sup>88</sup>

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<sup>86</sup> Radhika Balakrishnan, Diane Elson and Raj Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53(1) *Development* 27-36, 33.

<sup>87</sup> Radhika Balakrishnan, *Why MES with Human Rights?: Integrating Macro Economic Strategies with Human Rights* (US Human Rights Network), <<http://www.rightingfinance.org/wp-content/uploads/2012/10/whymes2005.pdf>>, 28.

<sup>88</sup> Ibid.

The increasing emphasis on human rights in recent years has directed attention to how the budgeting process can become more output-oriented and, in response to democratic demands, more accountable.<sup>89</sup> Typically, programme budgeting focuses on developing proposals for activities which have measurable outcomes and are directly linked to their objectives through quantitative performance indicators.<sup>90</sup> The process of outcome budgeting, which targets resources to a specific policy outcome,<sup>91</sup> can ensure that resource allocation decisions are driven by the desired outcomes.

The public finance literature suggests that, for budgeting to be effective, six key factors must be in place: accountability, transparency, responsiveness, stewardship, public participation, and public scrutiny.<sup>92</sup> The first four must be fulfilled by the State's political leadership, while the last two involve the public.<sup>93</sup> The effectiveness of these factors largely depends on the level of democratic governance and public participation, which lies at the heart of ESC rights advocacy.

From this perspective, a number of policy tools and methodologies can be employed to strengthen the allocation decision-making process. An example is the orthodox method of ranking alternative expenditure options for maximising overall well-being using a cost-benefit analysis.<sup>94</sup> In contrast to incremental budgeting, zero-based budgeting requires each department to develop budget plans afresh every year and to provide specific justifications for programmes and their implementation.<sup>95</sup> The success of this approach

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<sup>89</sup> Alta Fölscher, 'Budget Methods and Practices' in Anwar Shah (ed), *Public Sector Governance and Accountability Series: Budgeting and Budgetary Institutions* (The World Bank, Washington, D.C., 2007) 109.

<sup>90</sup> Ibid.

<sup>91</sup> Martin, above n 2, 250; David Osborne and Ted Gaebler, *Reinventing Government* (Addison-Wesley, Reading, 1992).

<sup>92</sup> Lewis and Hildreth, above n 9, 17-18.

<sup>93</sup> Ibid.

<sup>94</sup> A cost-benefit analysis is a decision-making tool which helps making choices between a given proposal and the status quo; or between the competing proposals, based on quantifying all costs and benefits in monetary terms. New Zealand Treasury, *Cost Benefit Analysis Premier* (New Zealand Treasury, Wellington, 2005), <<http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/primer/cba-primer-v12.pdf>>.

<sup>95</sup> Fölscher, above n 89, 123.

depends largely on a strong system for incorporating and measuring many alternative options.

A budgeting process that is more transparent and open to participation promotes better allocative outcomes. Fukuda-Parr et al argue that open and participatory budgeting processes ensure that the allocation priorities of public funding are better secured and targeted towards development, with fewer possibilities for 'leakage'.<sup>96</sup> Such an open budgeting process impacts positively on human rights in two key ways: it enhances government accountability in terms of spending priorities and ensures that resources are allocated to priority sectors for fulfilment of ESC rights.<sup>97</sup> For these reasons, countries with better budget transparency realise better ESC rights outcomes.<sup>98</sup>

In order to influence budget decisions, it is important to recognise the principal-agent problem of the 'incomplete contract',<sup>99</sup> which gives more authority for politicians to act according to their own preferences.<sup>100</sup> Another difficulty, known as the common pool problem, relates to the fact that government budget allocation does not reflect broader taxpayer interests, hence, more net benefits accrue to the target group than to the society as a whole.<sup>101</sup> Institutional designs to address these problems involve better systems of delegation, contracts and accountability.

The incorporation of ESC rights into public policy agendas and increased public participation can help to ensure that the budget process gives sufficient consideration to these rights and is aligned with the objective of achieving an

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<sup>96</sup> Sakiko Fukuda-Parr, Patrick Guyer and Terra Lawson-Remer, 'Does Budget Transparency Lead to Stronger Human Development Outcomes and Commitments to Economic and Social Rights?' (Working Paper Number 4, International Budget Partnership), <<http://ssrn.com/abstract=2211584>>, 6.

<sup>97</sup> Ibid., 4.

<sup>98</sup> Ibid., 17-18.

<sup>99</sup> Torsten Persson, Gerard Roland and Guido Tabellini, 'Separation of Powers and Political Accountability' (1997) 112(4) *Quarterly Journal of Economics* 1163-1202.

<sup>100</sup> Von Hagen, above n 27, 27.

<sup>101</sup> Ibid., 28.

ESC rights-efficient allocation decision. As the following case study illustrates, however, this is often very challenging.

### **7.3.4 'Budgeting behind closed doors': A case study of budget allocation dynamics in Maldives**

The government budget accounts for a significant component of total GDP in the Maldives. Political and social changes have placed significant stress on public sector expenditure over recent years. Public sector budgets have been substantially inflated since 2005, resulting in a very high and unsustainable level of public sector debt over the decade.

#### **7.3.4.1 Government budget allocation and resource management**

On the expenditure side, non-investment current expenditure accounted for 84 percent of overall government budget expenses in 2013, of which 48 percent went towards paying salaries, wages and allowances for public sector employees.<sup>102</sup> This has been particularly problematic as a result of unprecedented pay increases and promotions for civil servants between 2004 and 2009, which dramatically increased the wages bill.<sup>103</sup> In 2013, salary expenditure increased by 55 percent, while capital expenditure declined by 20 percent.<sup>104</sup> The main contributing factor was salary increases for the Maldives Police Service and Maldives National Defence Force.<sup>105</sup> The public sector employee wage bill was 15.8 percent of GDP while overall transfers, including subsidies and welfare payments, remained extremely high.<sup>106</sup> The

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<sup>102</sup> The World Bank, *Maldives Development Update 2013* (The World Bank, Washington, D.C., 2013), <<http://www-wds.worldbank.org>>, 7.

<sup>103</sup> The World Bank, *South Asia Economic Focus: Creating Fiscal Space through Revenue Mobilization* (The World Bank, Washington, D.C., 2012), <<http://www-wds.worldbank.org>>, 72.

<sup>104</sup> The World Bank, above n 102, 7.

<sup>105</sup> Ibid.

<sup>106</sup> Maldives Monetary Authority, *Annual Report 2013* (MMA, Male', 2014).

government's contribution to social welfare and universal health insurance accounted for another 18 percent of current expenditure in 2013.<sup>107</sup>

According to the World Bank, the most serious underlying imbalance in public finance in the Maldives is that it is spending beyond its means, financed by unsustainable levels of public debt.<sup>108</sup> This imbalance is on the expenditure side rather than on the revenue side.<sup>109</sup> The level of public spending stood at 42 percent of GDP in 2012, which is high compared to international standards of sustainability.<sup>110</sup>

Over the years, there has been a modest increase in allocations to social services in the form of health, education, welfare and community programmes. There has been a reduction in economic services (agriculture, fisheries, transportation, telecommunication, tourism, trade and electricity).<sup>111</sup> These changes are often driven by political demands, highly tuned to election cycles. Political promises made at the time of presidential and parliamentary elections created demands for the allocation of additional resources to specific areas such as defence, police and the judiciary.<sup>112</sup>

#### **7.3.4.2 Budgeting process: With little public scrutiny**

The budgeting process in the Maldives is highly centralised and does not involve much public debate and participation. The Ministry of Finance and Treasury (MOFT) requires all government ministries and State agencies to prepare annual budget estimates, without a set ceiling. Once the budget estimates are sent to the Ministry, technical meetings are held between the ministry and the individual State agencies to address some elements of the

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<sup>107</sup> Ibid., 22.

<sup>108</sup> The World Bank, *Public Financial Management Systems Strengthening Project: Maldives* (The World Bank, Washington, D.C., 2014), <<http://www-wds.worldbank.org>>.

<sup>109</sup> Ibid., [5].

<sup>110</sup> Ibid., [6].

<sup>111</sup> International Monetary Fund, *Maldives: Public Financial Management-Performance Report* (IMF, Washington, DC, 2010), <<http://www.imf.org/external/pubs/ft/scr/2010/cr10137.pdf>>, 13.

<sup>112</sup> This is evident in the budget allocation documents reviewed by the author.

budget proposal. The process, however, is often not driven by concerns of allocative efficiency. The MOFT then adjusts the figures according to government policy priorities and limits. The particular agency has very little leeway in terms of adjusting the line items. The consolidated budget is prepared and sent to the parliament by the MOFT about one month before the end of the financial year.<sup>113</sup>

The parliament's budget committee debates the budget proposal and often invites individual State agencies to discuss the details. However, these meetings are generally for information and clarification and do not provide much opportunity for agencies to defend their proposals. The committee often decides on the allocations and makes adjustments without direct consultation with the affected agencies.

Throughout the process, there is very little public debate in the media or in civil society on budget allocation to different areas and few concerns are voiced. There are no formalised mechanisms for public participation or scrutiny of budget decisions at any level. While aggregated budget figures are often reported in the media before they are finalised, there is usually little or no analysis or discussion of these figures and how they are expected to achieve policy goals.<sup>114</sup> There is little or no open consultative process involving civil society and the media.

One serious problem in current practice is that budget documents do not provide clear linkages between budget figures and underlying policies.<sup>115</sup> Moreover, the fiscal planning process lacks a comprehensive multi-year perspective, which reduces the overall credibility of the budget.<sup>116</sup> Yet the government has shown little interest in creating greater transparency and

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<sup>113</sup> Financial year in Maldives runs from 1 January to 31 December.

<sup>114</sup> See for example, Haveeru Daily, *State Budget 2015 approved, opposition revisions rejected* (2014) <<http://www.haveeru.com.mv/news/57919>>; Haveeru Daily, *State Budget for 2015 passes unammended* (2014) <<http://www.haveeru.com.mv/news/57729>>.

<sup>115</sup> The World Bank, above n 108, [15].

<sup>116</sup> Ibid.

participation in the overall budget process. The weakness of civil society organisations helps to sustain the *status quo*.

This case study demonstrates that, without a high level of human rights sensitivity among the policy actors and strong institutional arrangements for public participation, resource allocation decisions cannot be optimal from an ESC rights perspective. Given the significance of public sector participation as a tool to influence the budget process, the next section examines different elements of participatory budgeting and how participation helps to produce better allocative decisions.

## **7.4 STRENGTHENING PUBLIC PARTICIPATION IN BUDGETING: AN ESC RIGHTS PERSPECTIVE**

The process of public sector decision-making can be influenced by increased participation, especially by those who are affected by these decisions. While the traditional public finance approach is concerned only with managing State resources according to narrowly defined policy goals, a more participatory approach broadens these goals and gives these decisions more legitimacy. The process of decision-making can, thus, be significantly enriched by increased public participation. From an ESC rights perspective, the ability of individuals to exercise their ESC rights to food, housing, health and education can be enhanced through increased participation and expression of the needs of the poor and other stakeholders.

Participation is recognised as a key aspect of human rights policy. For example, the PANTHER principles,<sup>117</sup> which were developed in 2006 by the Food and Agricultural Organisation (FAO) in relation to the right to food, identify participation (P) as a key policy component,<sup>118</sup> along with accountability, non-discrimination, transparency, human dignity,

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<sup>117</sup> PANTHER is an acronym for Participation, Accountability, Non-discrimination, Transparency, Human dignity, Empowerment, and Rule of law.

<sup>118</sup> Food and Agricultural Organisation, *Human Right Principles: PANTHER* FAO <<http://www.fao.org/righttofood/about-right-to-food/human-right-principles-panther/en/>>.

empowerment and rule of law. Participation at all levels of government by those who are affected by policy decisions not only provides the opportunity for individuals to make a contribution but also strengthens relevant public institutions and mechanisms.<sup>119</sup> While participation within the PANTHER principles addresses a specific case in relation to the right to food, the same principles can have significant human rights outcomes in other policy areas, especially in resource allocation decisions at national and local levels.

The importance of public participation in policy-related areas is highlighted by the ESCR Committee in a number of General Comments. In relation to action on education, the Committee argued that: ‘Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential.’<sup>120</sup> The Committee also referred to the principle of participation in relation to the right to education<sup>121</sup> and in relation to the formulation of national water and food strategies.<sup>122</sup> In the same vein, the importance of people’s participation in the formulation and implementation of national health strategies was emphasised: ‘Effective provision of health services can only be assured if people’s participation is secured by States’<sup>123</sup> and ‘the participation of the population in all health-related decision-making at the community, national and international levels’<sup>124</sup> is required. In relation to the right to benefit from protection of moral and material interests resulting from one’s scientific, literary or artistic

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<sup>119</sup> Ibid.

<sup>120</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 11: Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/4 (10 May 1999), [8].

<sup>121</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (article 13 of the Covenant)*, 21<sup>st</sup> sess, UN Doc E/C.12/1999/10 (8 December 1999), [30].

<sup>122</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29<sup>th</sup> sess, UN Doc E/C.12/2002/11 (20 January 2003), [24],[48]; Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (art. 11)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/5 (12 May 1999), [23].

<sup>123</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000), [54].

<sup>124</sup> Ibid., [11].

productions, the Committee asserted that authors and groups of authors should have the opportunity to participate in relevant policy decision-making.<sup>125</sup>

The ESCR Committee also emphasised broad-based participation in national employment strategy development<sup>126</sup> in relation to the right to social security, especially by groups that were affected by any retrogressive measures,<sup>127</sup> and in the formulation and implementation of national social security strategies.<sup>128</sup> In relation to cultural rights, the Committee stated that it was crucial for minority groups, indigenous peoples and other communities to participate in the design and implementation of laws and policies that affect them.<sup>129</sup> Extensive and genuine consultation with and participation by all those affected by government policies on housing is required in the adoption of a national housing strategy.<sup>130</sup>

Although these recommendations do not directly refer to participation in public sector budgeting practices, it is clear from their scope that participation will be more meaningful if these processes are included.

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<sup>125</sup> Committee on Economic, Social and Cultural Rights, *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 (article 15, paragraph 1 (c), of the Covenant)* 35<sup>th</sup> sess, UN Doc E/C.12/GC/17 (12 January 2006), [46].

<sup>126</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, 35<sup>th</sup> sess, UN Doc E/C.12/GC/18 (6 February 2006), [42].

<sup>127</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art. 9)*, 39<sup>th</sup> sess, UN Doc E/C.12/GC/19 (4 February 2008), [42].

<sup>128</sup> *Ibid.*, [69].

<sup>129</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 43<sup>rd</sup> sess, UN Doc E/C.12/GC/21 (21 December 2009), [55].

<sup>130</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11 (1)) of the Covenant*, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991), [12].

### 7.4.1 Budget analysis advocacy and participatory budgeting

Civil society actors and other interest groups can exercise substantial influence on the process of budgeting, which is the government decision that has the most significant impact on ESC rights realisation. Although applied budget work by civil society groups has the potential to influence budget priorities and improve transparency, these positive outcomes may not be obvious and their impact may not be easy to measure.<sup>131</sup> Such work, however, is expected to provide an important platform for enhancing government accountability, reducing corruption, and improving the pro-poor orientation of the budget allocation.<sup>132</sup>

Several trends towards greater openness in the public budgeting process have been identified. These include: increased focus on democracy and governance with accountability, transparency and participation in national level activities; increasing number of independent budget groups; political acceptance of the concept of participatory budgeting in some parts of the world; and growing recognition of the centrality of the budget in development.<sup>133</sup> These elements are equally applicable to the human rights framework and could be pivotal in creating the momentum needed to make the budget process more human rights-oriented.

The four models of citizen's participation in the budgetary process proposed by Andy Norton and Diane Elson are relevant in the context of resource allocation for ESC rights.<sup>134</sup> Under the traditional model of political accountability, elected government representatives must be directly approached by civil society actors who wish to influence budgetary decisions. In this model, in the absence of a formal political structure for public

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<sup>131</sup> Mark Robinson, 'Improving Transparency and Promoting Accountability: Civil Society Budget Work in Perspective' in Mark Robinson (ed), *Budgeting for the Poor* (Palgrave MacMillan, New York, 2008) 1, 1.

<sup>132</sup> *Ibid.*, 2.

<sup>133</sup> *Ibid.*, 2-4.

<sup>134</sup> Andy Norton and Diane Elson, 'What's behind the budget?: Politics, rights and accountability in the budget process' (Overseas Development Institute Policy Paper, ODI), <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2422.pdf>>, 47-48.

participation, bureaucratic discretion is the determining factor in the level of participation. The second model envisions a more structured approach to formal consultation with the public on policy issues, including budget allocation. The technocrats consult the public on key issues, but this does not necessarily translate into shared decision-making. A more direct-democracy oriented model involves shared decision-making on budgetary issues, albeit at the local level. This form of decentralised and citizen-empowered participatory budgeting has significant potential to incorporate public demands into the budget. The fourth model envisions a system in which citizens are empowered through statutory entitlements and can seek redress through effective and accessible processes.<sup>135</sup> A fifth model, which can be adapted to suit specific political and institutional circumstances, combines key elements of non-structured political engagement, structured consultations, decentralised participation and entitlements backed by redress.

There is also growing recognition that citizen participation in macro-economic policy deliberations, such as the budget process, greatly enhances the allocative efficiency of government resources. Applied budget work contributes to the process of democracy-building and has far-reaching positive impacts on the process of governance.<sup>136</sup> Budget work also supports horizontal and vertical government accountability to citizens.<sup>137</sup> It has been argued that budget work provides both *ex-ante* and *ex-post* accountability.<sup>138</sup> *Ex-ante* accountability refers to scrutiny of executive action before they take place. This includes the scrutiny of the budget process before decisions are made. In *ex-post* accountability, relevant authorities are held to account through State bodies for their budget allocation and expenditure decisions. Jim Shultz maintains that:

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<sup>135</sup> Ibid.

<sup>136</sup> Robinson, above n 131, 4.

<sup>137</sup> While horizontal accountability incorporates the process of checks-and-balances between and among the state institutions and departments, vertical accountability strengthens the incorporation of citizen's concerns in the budget process.

<sup>138</sup> Robinson, above n 131, 7.

Combining the financial analytic rigor of budget analysis with the moral and legal weight of human rights work could, among other things, lead to the development of more concrete measures of whether governments are meeting their obligations toward the realization of ESC rights.<sup>139</sup>

Direct participation of the public in the budget process may be expensive and even impractical at many levels, especially in resource-constrained developing countries. A number of approaches can be adopted to enhance such participation. Among others, these include strengthening the capacity of civil society, enhancing the capacity of elected representatives, deepening indirect participation in the budget process and identifying avenues through which influence can be exerted on policymakers.<sup>140</sup>

The success of such programmes is evident in several examples of good practice in budget analysis by civil society-based budget groups. These include the work of DISHA<sup>141</sup> in Gujarat, India; Fundar budget analysis projects in Mexico; budget work and democracy building exercises of IBASE<sup>142</sup> in Brazil; and the budget work of IDASA<sup>143</sup> in South Africa.<sup>144</sup> Such exercises provide a high level of legitimacy to social movements and help create increased awareness and transparency around budgeting. They also have the potential to make the government budgeting process more efficient and effective in directing resources to the most urgent areas of human rights.

Budget consultation and participation practices vary across countries. In some, budget hearings are held before the budget debates to inform the budget process. In others, open public hearings are held both before and

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<sup>139</sup> Jim Shultz, 'Promises to Keep: Using Public Budgets as a Tool to Advance Economic, Social and Cultural Rights' (Conference Report, Fundar, May 2002).

<sup>140</sup> Robinson, above n 131, 10-11.

<sup>141</sup> Developing Initiatives for Human and Social Interaction.

<sup>142</sup> The Brazilian Institute for Social and Economic Analysis.

<sup>143</sup> Institute for Democracy in South Africa.

<sup>144</sup> Laura Malajovich and Mark Robinson, 'Budget Analysis and Social Activism: DISHA and the Budget Process in Gujarat, India' in Mark Robinson (ed), *Budgeting for the Poor* (Palgrave MacMillan, New York, 2008) 21; Mark Robinson and Vinod Vyasulu, 'Democratising the Budget: Fundar's Budget Analysis and Advocacy Initiative in Mexico' *ibid.* 47; Paolo de Renzio and Jim Shultz, 'Budget Work and Democracy-Building' *ibid.* 73; Helena Hofbauer, 'Sustained Work and Dedicated Capacity: IDASA's Experience in Applied Budget Work in South Africa' *ibid.* 96.

during the formal budget debates in the parliament with full participation and coverage by the media.<sup>145</sup> Such consultation and participation enriches the whole budget process and helps to identify priority areas for the community.

In recent years, there has been a growing interest in participatory budgeting, especially following the experience of Porto Alegre (Brazil) model, which allowed citizens to closely interact with their elected representatives and participate in the state budgeting process at various levels.<sup>146</sup> Such participatory approaches can be customised to reflect institutional and political structures of the States and carried out with human rights goals as the end-objectives. Citizens can participate in budgeting through public meetings, advisory committees, surveys, focus groups, lobbying and voting.<sup>147</sup> All these forms of participation bring the views and expectations of the public to bear on the budget documents and associated resource decisions. Encouraging the public's understanding of budgetary technicalities can demystify the process and enhance its participation in the process.

#### **7.4.2 Influencing policy agenda: Front-loading ESC rights through a participatory approach**

Budgetary decision-making, which involves analytical, objective, intuitive and emotive processes,<sup>148</sup> can become more sensitive to ESC rights goals through more systematic interaction with relevant stakeholder groups. The challenge of effective budgeting is to bring that information to bear on budgetary and

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<sup>145</sup> See for example, The World Bank, *Transparency in Public Finance* <<http://www.worldbank.org/en/topic/governance/brief/transparency-in-public-finance>>.

<sup>146</sup> See for example, Ernesto Ganuza and Gianpaolo Baiocchi, 'The Power of Ambiguity: How Participatory Budgeting Travels the Globe' (2012) 8(2) *Journal of Public Deliberation*.

<sup>147</sup> For example see, Lewis and Hildreth, above n 9, 25.

<sup>148</sup> Katherine G. Willoughby, 'A Multiple Rationality Model of Budgeting: Budget Office Orientations and Analysts' Roles' in Aman Khan and W Bartley Hildreth (eds), *Budget Theory in the Public Sector* (Quorum Books, Westport, Connecticut, 2002) 104, 109.

resource allocation decisions.<sup>149</sup> This is particularly relevant given that public budgeting systems are about ‘making choices of ends and means’.<sup>150</sup>

The willingness of the State to incorporate ESC rights priorities into policy goals, in particular resource allocation priorities, can result in the front-loading of human rights priorities.<sup>151</sup> According to Steenbergen, front-loading includes human rights-based situation analysis, formulation of policies in relation to the budget, formulation of recommendations, costing and financing human rights policies.<sup>152</sup> The concept of front-loading is useful in the context of resources related to ESC rights, particularly in relation to efficiency of redistribution.

The level of attention received by any particular problem or policy goal depends on the complex interaction between and among policy agents and the power relations around various policy options. Politicians create an impression of importance and urgency for policies that are dear to them and exercise all their power to put the issue at the forefront of the policy agenda. This kind of power play can also be used to incorporate ESC rights into the policy agenda. Such an approach, however, must ensure that the ESC rights agenda is properly institutionalised in order to sustainably address the progressive realisation outcomes.

Institutional processes interact with individuals and their agendas to shape public policy priorities and determine policy outcomes, including resource allocation decisions. There are at least four categories of relations between participants in the budgeting process: agency dominance, legislative dominance, as well as executive dominance and issue networks. All reflect the level of information exchange and hierarchical relationships among participants.<sup>153</sup> In order to clarify the role of the State in efficient allocation of

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<sup>149</sup> Lee, Johnson and Joyce, above n 2, 1.

<sup>150</sup> Ibid.

<sup>151</sup> Steenbergen, above n 50.

<sup>152</sup> Ibid., 15.

<sup>153</sup> John Forrester, 'The Principal-Agent Model and Budget Theory' in Aman Khan and W Bartley Hildreth (eds), *Budget Theory in the Public Sector* (Quorum Books, Westport, Connecticut, 2002) 123, 135.

resources for ESC rights goals, the following section examines some relevant theoretical frameworks of public resource management, mainly derived from public policy and public finance management literature.

### 7.4.3 Efficiency and effectiveness of outcomes in resource allocation

The concept of efficiency in resource allocation needs to be considered differently when applied to human rights policy. A number of factors may impact the level of the realisation of ESC rights, in addition to the budget allocation decisions. These include the impact of economic growth on per person expenditure in a given social sector; impact of extra-sectoral spending on the realisation of ESC rights; regressive patterns of social spending; and inefficiency in the use of resources.<sup>154</sup>

During times of economic hardship, cuts in public spending and other austerity measures generally hit the poorest and most disadvantaged the hardest, because they are likely to be most reliant on public welfare and other public services.<sup>155</sup> For example, studies on the fiscal austerity measures adopted by the governments of Spain and Ireland in recent years identify the significant retrogressive impact on the enjoyment of ESC rights by these policies.<sup>156</sup>

In contrast to the fiscal stimulus plans developed and implemented during the economic downturns of 2008-2009, recent economic difficulties have prompted many governments to move from stimulus to austerity.

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<sup>154</sup> 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* 402-435, 413.45, 413.

<sup>155</sup> James Harrison and Mary-Ann Stephenson, 'Assessing the Impact of the Public Spending Cuts: Taking Human Rights and Equality Seriously' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 221.

<sup>156</sup> Center for Economic and Social Rights, 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (Briefing Paper, CESR), <<http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf>>; Ignacio Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 77.

Governments have been increasingly cutting back on spending, including social spending, often driven by the desire to reduce budget deficits.<sup>157</sup> It has been argued, however, that governments had many alternatives for increasing revenue and reducing expenditure, without cutting down on essential public expenditure. Austerity measures and tax reforms did not address issues of equitable distribution and, in many countries, the tax reforms introduced or increased reliance on indirect consumption taxes, which have more negative impact on the poorest of society.<sup>158</sup>

Resource allocation for ESC rights is not always direct. Various ESC rights require different levels of resources, depending on the existing infrastructure and capacity as well as the gap between current and future required capacity. Areas in which current achievement is inadequate for minimum core rights will require higher priority in resource allocation. While direct investment in ESC rights areas is the best approach, investment in many other areas can have indirect benefits. Hence it is imperative for human rights experts to learn the skills and tools of the budgetary process, and for economists and policymakers to familiarise themselves with human rights language.<sup>159</sup>

The conceptual model presented in this chapter synthesises elements of economics, law and public policy and provides a more coherent understanding of State accountability and policy alternatives in the area of ESC rights realisation. The argument gives priority to ESC rights over many other areas of resource allocation within government programmes. The position is not only that many areas of ESC rights such as education, health and housing require more resources but also that State resource allocation and utilisation in these areas can generate better welfare results for the whole economy.

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<sup>157</sup> Saiz, above n 156.

<sup>158</sup> Ibid.

<sup>159</sup> Rory O'Connell et al, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

## 7.5 CONCLUSIONS

Allocation of public sector resources is a multifaceted practice that involves several State institutions and actors. The process is driven by economic, public policy and political forces, among others. The interaction of these forces through a variety of channels determines the policy environment in which public resources are allocated, managed and governed for various competing priorities.

In order to capture this complexity, this chapter has examined existing theoretical frameworks for public sector resource management and identified key elements of this process. The chapter has considered how public sector resource allocation and budgeting can be shaped to put ESC rights priorities at the core of policy. The chapter identified public policy approaches to government decision-making in relation to resource allocation and prioritisation. Various theoretical elements of public sector decision-making, especially in relation to budgetary decisions, were examined to identify their role in shaping resource allocation decisions at the political, economic and technical levels. It was shown that resource allocation outcomes are impacted by decisions that reflect policy processes and actors with their own agendas.

Maximising resource allocation for areas related to ESC rights is challenging not only because of the multiple actors and institutional arrangements at play, but also because the interactions between policymakers and citizens are often not conducive to affording ESC rights goals sufficient attention in the decision process. To overcome these challenges, ESC rights advocacy must be able to identify and understand various points of contact for influencing decisions at all levels of the budget process. What is needed is a multi-actor model of influence on the budgeting process that is driven by the objective of bringing ESC rights needs to the forefront of budgetary decisions. Such an approach is strengthened through participation by all sectors of the society, particularly those whose rights are most affected, in decisions that determine the level of public sector resource allocation in specific areas.

The core proposition of this chapter is that the budgeting process is a significant political exercise in which decisions about the allocation of society's scarce resources among competing priorities are made, and that this can be meaningfully influenced through direct engagement and advocacy. An ESC rights-driven agenda, embedded within the 'maximum available resources' model presented in this chapter, can be used to influence policymakers to give more attention to resource needs in specific rights areas, thereby enhancing resource allocation to these policy areas. Such advocacy in the political marketplace can move ESC rights closer to the forefront of public policy.

How do we determine if the resource allocation has produced the required objectives? Public participation in the budgeting process will have a significant impact on the answer to this question. Yet the full impact of such engagement will also depend on the overall governance of the resources that are targeted at the stated objectives of the budget plans. The next chapter examines relevant issues in resource governance from an ESC rights perspective.

# 8

## Quality of Resource Governance for ESC Rights: Augmenting Transparency and Accountability

### 8.1 INTRODUCTION

Effective management and governance of the resources available to the State is a key component of the obligation to use ‘maximum available resources’ for Economic, Social and Cultural Rights (ESC rights). Such measures require concrete commitments to taxation and revenue generation and processes of resource allocation and budgetary discipline that ensure robust, equitable and accountable public finance management.

This chapter identifies management and governance aspects of public sector resources that are vital for the quality of ESC rights realisation. This chapter argues that public finance management and good governance can have a significant impact on how effectively public sector resources are utilised to achieve ESC rights objectives, thereby completing the resource mobilisation–allocation–utilisation continuum. It argues that public sector resource management must be an integral component of ‘maximum available resources’ that is applicable at all stages of resource mobilisation, allocation and utilisation.

While many relevant aspects of resource governance are considered, emphasis is given to transparency and accountability, since these factors can have the greatest impact on how resources are utilised and ESC rights outcomes are achieved. Examples from public finance literature are used to demonstrate that a number of institutional arrangements must be made to ensure the quality of resource management from a human rights perspective. These are essential to ensure that resources are not only adequate and

appropriately allocated, but also that they are well-utilised through an effective mechanism and with appropriate accountability systems.

The chapter begins with an overview of key theoretical positions on resource governance from an ESC rights perspective. A theoretical framework derived from concepts in public finance management is used to identify the qualitative elements of resource governance. This is followed by an examination of budgetary implementation and issues related to equality and equity in budget spending. Information on resource governance from State reports and a case study is used to test the relevance and applicability of this approach. The chapter concludes by recommending policy options for States to enhance resource governance from the perspective of ESC rights.

## **8.2 RELEVANCE OF RESOURCE GOVERNANCE FOR EFFECTIVE ESC RIGHTS REALISATION**

The qualitative aspects of resource governance, which encompass the institutional mechanisms that are in place to ensure that public sector resources are used effectively and efficiently, have been identified as an area of relevance for ESC rights realisation by human rights scholars.<sup>1</sup> The qualitative dimension of resources is relevant in understanding how governments actually utilise available resources, particularly in relation to the efficiency and effectiveness with which these resources are used and the measures that are put in place to safeguard against wastage and corruption. Greater focus at policy level on enhancing the quality of resources and how they are administered can help achieve better policy outcomes.

This section shows that the institutional and process elements of resource governance are vital for the effective realisation of ESC rights, given its strong connection with the requirement to use ‘maximum available resources’.

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<sup>1</sup> For example, María Magdalena Sepúlveda, *The Nature Of The Obligations Under The International Covenant On Economic, Social And Cultural Rights* (Intersentia, Utrecht, 2003); Radhika Balakrishnan et al, *Maximum Available Resources & Human Rights: Analytical Report* (Center for Women’s Global Leadership, New Jersey, 2011), 8.

Resource mobilisation, allocation and utilisation are key steps in the State's efforts to use the 'maximum available resources.' Resources governance plays a key role in all these stages and is particularly significant at the stage of resource utilisation.

### 8.2.1 'Maximum available resources' and resource governance

This section examines in detail the key aspects of resource governance presented in the cross-disciplinary model of 'resources' (see Chapter 3). Before discussing these from the perspective of ESC rights, it is important to identify the key elements of governance that are applicable in this discussion.

According to the United Nations Development Programme (UNDP), governance is 'the exercise of political, economic and administrative authority in the management of a country's affairs at all levels'.<sup>2</sup> Governance is also defined as 'all processes of governing, whether undertaken by a government, market or network, whether over a family, tribe, formal or informal organization or territory and whether through laws, norms, power or language.'<sup>3</sup> The UNDP goes on to explain that governance is made up of 'complex mechanisms, processes and institutions through which citizens and groups articulate their interests, mediate their differences and exercise their legal rights and obligations'.<sup>4</sup> These definitions are directly relevant to the present discussion of resources governance in a number of ways.

First, the types of powers applicable in government, including political, economic, and administrative authority, are relevant to the mobilisation, allocation, utilisation and governance of resources. As discussed in Chapters 4 to 6, the political and economic powers of the State drive the effective mobilisation of resources from the domestic, international and private sectors.

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<sup>2</sup> United Nations Development Programme, 'Reconceptualising Governance' (Discussion paper 2, UNDP), <ftp://pogar.org/LocalUser/pogarp/other/undp/governance/reconceptualizing.pdf>, x.

<sup>3</sup> Mark Bevir, *A Theory of Governance* (University of California Press, Berkeley, 2013), 1.

<sup>4</sup> United Nations Development Programme, above n 2.

As shown in Chapter 7, political power is the primary determinant of resource allocation decisions, while administrative authority defines and determines the nature in which resources are utilised and administered.

Second, the process of governance is not confined to the activities of the government itself but includes the exercise of power by other sectors of society through various mechanisms. This view of governance is particularly important for the resource allocation and utilisation stages, where societal forces can shape policy orientation and outcomes through participation and advocacy.

Third, governance is driven by actions that can originate from civil society and other groups, who interact with complex institutional mechanisms to ensure that their voices are heard in the work of the government. As Daniel Kaufmann argues, good governance is not a 'luxury good', but must be improved through sustained interventions.<sup>5</sup> This proactive approach to governance, especially by the public, is an essential element of the 'activist State' arguments advanced in this thesis in relation to ESC rights policies within the 'maximum available resources' model.

This chapter maintains that resource governance must be understood as the legislative, institutional and procedural arrangements that are in place to optimise the mobilisation, allocation and use of public sector resources for the implementation of ESC rights programmes. Three dimensions of good governance are fundamental in this context: the responsiveness of the State to citizens; the accountability of the State to the citizens; and the capability of the State to determine and respond to citizen's needs and wants.<sup>6</sup> These elements play a role at all stages of resource mobilisation, allocation and utilisation.

Governance is applicable to resource mobilisation efforts in many different ways. On the domestic level, there is a strong correlation between

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<sup>5</sup> Daniel Kaufmann, *Human Rights, Governance, and Development: An empirical perspective* (The World Bank Institute, 2006), <<http://siteresources.worldbank.org/EXTSITETOOLS/Resources/KaufmannDevtOutreach.pdf>>, 19.

<sup>6</sup> Mick Moore, 'How Does Taxation Affect the Quality of Governance?' (IDS Working Paper No. 280, Institute of Development Studies, April 2007).

transparency and accountability and revenue collection.<sup>7</sup> A higher level of transparency and accountability in the tax and revenue processes significantly augments the revenue capacity of the government and helps to create the necessary conditions in the economic and social environment.

As discussed in Chapter 4, taxation authorities in many developing countries face a number of challenges, including: dealing with hard-to-tax sectors (for example, the informal sector, small businesses); weak revenue administration, low tax payer morale and poor governance (including corruption); heavy reliance on receipts from multinational enterprises; low level of engagement with financial institutions; weaknesses due to trade liberalisation and tax competition; and difficulty in dealing with international services.<sup>8</sup> Given these challenges, the ability of government to impose taxes and raise revenue depends on many structural characteristics of the economy as well as governance process. These include reforms and policy actions targeted at enhancing resource mobilisation, strengthening and creating a system of enabling governance, and creating a supportive institutional and economic environment.<sup>9</sup> They constitute part of the State's fiscal space that can significantly affect its resources capability.

Aspects of governance are also fundamental in mobilising resources through international assistance and co-operation. As discussed in Chapter 5, the main challenges here include weaknesses in both the current aid architecture and in domestic institutions that result in low levels of engagement with bilateral and multilateral donors and affect the ability of the State to request and negotiate aid and co-operation packages. Institutional weakness also leads to a lack of trust among donors, which significantly reduces the ability of the State to mobilise adequate levels of funding. Process-related issues such as lack of

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<sup>7</sup> The World Bank, *South Asia Economic Focus: Creating Fiscal Space through Revenue Mobilization* (The World Bank, Washington, D.C., 2012), <<http://www-wds.worldbank.org>>, xi.

<sup>8</sup> Also see, International Monetary Fund, 'Revenue Mobilization in Developing Countries' (Policy Paper, IMF, 8 March 2011), <<http://www.imf.org/external/np/pp/eng/2011/030811.pdf>>, 8.

<sup>9</sup> Rathin Roy, Antoine Heuty and Emmanuel Letouzé, 'Fiscal Space for What?: Analytical Issues from a Human Development Perspective' (Paper presented at the G-20 Workshop on Fiscal Policy, Istanbul, 30 June 30-2 July 2007) 2.

transparency and entrenched corruption can also be barriers to effective mobilisation of resources.

The need to strengthen resource governance becomes more urgent given the vulnerability of governments and their resource decisions to market dynamics. The recent global financial crisis exposed the vulnerabilities of the global economic system and the inability of most poor States to properly address the impact of such crises on the most vulnerable members of their societies, particularly in relation to the ability of governments to ensure the enjoyment of basic rights of the people.<sup>10</sup> The economic and financial crises also had devastating effects on the realisation of ESC rights, especially the ability of individuals to enjoy basic rights such as food, housing, education, health and general standard of living.<sup>11</sup> The crises also impacted on social protection welfare for many who had to struggle to meet their basic needs.<sup>12</sup>

These economic crises exposed the vulnerability of the poor, who are unable to fulfil their basic ESC rights on their own and who are often the hardest hit by economic misfortune. This underscores the essential role of government in ensuring that policies to address economic hardship must be designed with the rights of individuals and communities at their heart. In practice, this suggests that instead of resorting to retrogressive measures, governments must strengthen social safety nets in times of crisis.

Another troubling aspect of government policies during the financial crisis was the protection of private investment, often at the expense of public services and the rights of the most vulnerable. The transfer of billions of dollars of

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<sup>10</sup> Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it*, 13<sup>th</sup> sess, UN Doc A/HRC/13/38 (18 February 2010).

<sup>11</sup> The socioeconomic outcomes of the global financial crisis in all major world regions, with case studies, analytical and comparative insights at the global level are provided by Ulrike Schuerkens (ed), *Socioeconomic Outcomes of the Global Financial Crisis: Theoretical Discussion and Empirical Case Studies* (Routledge, 2012).

<sup>12</sup> A number of examples of these impacts are covered in, *Report of the Office of the United Nations High Commissioner for Human Rights on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it*, A/HRC/13/38, above n 10, [11-13].

taxpayer funds to rescue big banks and other businesses was indicative of this approach.<sup>13</sup> Macroeconomic stabilisation and adjustment programmes in developing countries tend to emphasise budget and expenditure cuts to reduce budget deficits.<sup>14</sup> These spending cuts have negative effects on the government's ability to fund and support services essential for the realisation of human rights.

The negative effects of financial crisis, particularly of austerity measures, have been identified by the human rights community. The *Report on Austerity Measures and Economic and Social Rights* prepared by the Office of the High Commissioner for Human Rights illustrates the seriousness of this crisis.<sup>15</sup> Key factors contributing to the financial crisis were identified as:

inadequacy of existing regulation and its failure to adapt to a constantly evolving and increasingly interconnected global financial system, a lack of policy coherence vis-à-vis international human rights obligations, as well as a general lack of transparency and accountability.<sup>16</sup>

The contractionary fiscal policies and austerity measures adopted by many States have further eroded human welfare and enjoyment of ESC rights and seriously undermined the State obligation to protect and fulfil economic, social and cultural rights. The measures in general also failed to contribute to economic recovery, which led to further deterioration in the conditions for ESC rights.<sup>17</sup> It has been argued that austerity measures caused retrogression in the enjoyment of ESC rights through public sector cuts to education, health and social security programmes and reduced employment opportunities

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<sup>13</sup> Among many others who address the devastating effects of the financial crisis, for insights into the enormity of the crisis, see, Nouriel Roubini and Stephen Mihm, *Crisis Economics: A Crash Course in the Future of Finance* (The Penguin Press, New York, 2010).

<sup>14</sup> Enrique Delamonica and Santosh Mehrotra, 'How Can the Financing of Social Services Be Made Pro-Poor?' in Katja Hujo and Shea McClanahan (eds), *Financing Social Policy: Mobilizing Resources for Social Development* (Palgrave Macmillan, London, 2009) 89, 89.

<sup>15</sup> Office of the High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on austerity measures and economic and social rights* (OHCHR, Geneva), <[http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)>.

<sup>16</sup> *Ibid.*, [1].

<sup>17</sup> *Ibid.*, [3].

through roll-back of public sector jobs and projects.<sup>18</sup> Clearly, a more human rights-based response to economic shocks is called for.

In order to address these multiple challenges, especially in situations of significant resource constraints, budgetary institutions and processes must be capable of effectively managing the financial planning, allocation and control mechanisms. These should be guided by rules of fiscal prudence and accountability and must be sensitive to ESC rights requirements. These elements of resource governance are addressed in detail later in this chapter.

### **8.2.2 Role of governance in resource mobilisation, allocation and utilisation**

Public sector governance comprises a set of principles that must be firmly incorporated into the functioning of public institutions in order to maximise their expected service delivery and impact. The key principles of good governance include accountability, transparency and openness, integrity, stewardship, efficiency and leadership.<sup>19</sup> The Organization for Economic Co-operation and Development (OECD) identifies the elements of accountability, transparency, efficiency and effectiveness, responsiveness, forward vision and rule of law as key elements of good governance.<sup>20</sup> The resolution of the United Nations Commission on Human Rights entitled *The role of good governance in the promotion of human rights* also emphasises 'the strengthening of good governance at the national level, including through the building of effective and accountable institutions for promoting growth and sustainable human development'<sup>21</sup> and identifies practices of 'transparency and accountability,

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<sup>18</sup> Ibid., [13].

<sup>19</sup> See for example, Australian Public Service Commission, *Building Better Governance* (2007), <[http://www.apsc.gov.au/\\_\\_data/assets/pdf\\_file/0010/7597/bettergovernance.pdf](http://www.apsc.gov.au/__data/assets/pdf_file/0010/7597/bettergovernance.pdf)>.

<sup>20</sup> Cited in: Rachel M Gisselquist, 'Good governance as a concept, and why this matters for development policy' (WIDER Working Paper 2012/30, United Nations University), <<http://www.econstor.eu/handle/10419/81039>>, 8.

<sup>21</sup> Office of the High Commissioner for Human Rights, *The role of good governance in the promotion of human rights*, Commission on Human Rights resolution 2003/65, 61<sup>st</sup> mtg, UN Doc E/CN.4/2003/L.11/Add.6 (24 April 2003), Chapeau.

and creation and maintenance of an enabling environment conducive to the enjoyment of all human rights' as key components of good governance practice in the context of human rights.<sup>22</sup> The resolution further notes that

transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests and that such a foundation is a sine qua non for the promotion of human rights...<sup>23</sup>

Following these principles, good governance practices can be identified from the way in which power or authority is exercised to manage the collective affairs of a community or a country, society, or nation.<sup>24</sup> These elements are closely linked to the core objectives, principles, values or norms, and specific institutional arrangements that enable the act of governance to take place.<sup>25</sup> Identifying the best approach to improving governance must therefore involve careful exploration of all elements and how they interact with each other.

A strong system of budget execution is essential to ensure that the resources allocated for a specific ESC rights programme or targeted activity are spent appropriately. Budget execution includes authorisation and allocation of appropriations (the release of funds to spending units); commitment of funds to specific purchases; verification of deliveries; and payment.<sup>26</sup> The ability of government to develop the necessary capacity and make appropriate arrangements for areas of expenditure, such as procurement, is essential for the effective implementation of the budget and achievement of its objectives.

Problems of over-spending and under-spending are common in budget execution. Over-spending in any area of public policy must be accompanied by better planning and implementation if the full benefits of such a practice are

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid., art 1.

<sup>24</sup> Gisselquist, above n 20.

<sup>25</sup> Ibid.

<sup>26</sup> Rebecca Simson, Natasha Sharma and Imran Aziz, *A guide to public financial management literature: For practitioners in developing countries* (Overseas Development Institute, London, 2011), 10.

to be realised. These problems can be addressed by prioritising the most urgent areas through appropriate budget planning and spending policies.

Under-spending is also a major problem in many countries and is often results from the inability of the executive branch of government to properly manage funds within a given time frame.<sup>27</sup> This leads to resource wastage, since the funds are unlikely to be rolled-back to the same programmes in the next budget cycle in most States. Clearly, under-spending of allocated budgetary resources represents failure of the State to comply with its obligation to use 'maximum available resources'.<sup>28</sup> Budget under-spending and its impact on human rights was highlighted in the 2007 United Nations Economic and Social Council's report, which emphasised the need develop accountability mechanisms to assess the effectiveness of spending.<sup>29</sup>

Budgetary priorities should also be measured against human rights standards. Lilian Chenwi provides a number of key indicators that can be used to identify the effectiveness and reasonableness of government's resource allocation and utilisation.<sup>30</sup> These indicators focus on: effective and equitable allocation of resources; prioritisation of resource allocation for vulnerable and disadvantaged groups; considerations of the number of beneficiaries; patterns of spending; and the processes and frameworks used to mobilise and allocate international aid resources.<sup>31</sup> Spending priorities and results-orientation must address geographic, social and other disparities among communities. The priorities must be based on alleviating such disparities.

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<sup>27</sup> Ibid.

<sup>28</sup> Ann Blyberg and Helena Hofbauer, *Article 2 & Governments' Budgets* (International Budget Partnership, 2014), <<http://internationalbudget.org/publications/escrarticle2/>>.

<sup>29</sup> Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, Geneva, Agenda Item 14 (g) of the provisional agenda, UN Doc E/2007/82 (25 June 2007), 16.95, 16.

<sup>30</sup> Lilian Chenwi, 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' (Research Paper, Studies in Poverty and Inequality Institute), 60-61.

<sup>31</sup> Ibid.

Policies that target effective realisation of ESC rights should give due priority to allocation of resources for the most urgent programmes, especially those earmarked for the most vulnerable, and ensure that effective mechanisms are in place to prevent diversion of resources allocated for ESC rights to other purposes.<sup>32</sup> Governance mechanisms must also address the issue of effective and efficient expenditure management and ensure that resources designated for ESC rights are fully utilised.

In summary, the obligations of the State with regard to ESC rights realisation should include the responsibility to put in place appropriate systems of governance and institutional mechanisms to ensure effective usage and allocation of resources, including appropriate safeguards against corruption and wastage.

### **8.2.3 Resource governance and anti-corruption measures**

A key concern in relation to public sector resource governance is the impact of corruption on the quality of resources and their utilisation. The prevalence of corruption in resource management adversely impacts the ability of the government to address ESC rights concerns, leads to further discrimination and disadvantages the most vulnerable in the society, thus creating enormous obstacles to the realisation of human rights and development goals.<sup>33</sup> The impact of corruption on the quantity and quality of resources, their allocation, and utilisation represents one of the key challenges in advancing ESC rights policies.

The World Bank defines corruption as the 'abuse of office for private gain through such acts as bribery to circumvent public policies, through patronage

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<sup>32</sup> Sakiko Fukuda-Parr, Patrick Guyer and Terra Lawson-Remer, 'Does Budget Transparency Lead to Stronger Human Development Outcomes and Commitments to Economic and Social Rights?' (Working Paper Number 4, International Budget Partnership), <<http://ssrn.com/abstract=2211584>>, 4.

<sup>33</sup> The human rights case against corruption has been addressed by the United Nations and the Human Rights Council on many occasions. See, Office of the High Commissioner for Human Rights, *Human Rights and anti-corruption* OHCHR <<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx>>.

and nepotism, through the theft of public resources or through the diversion of State resources'.<sup>34</sup> Corruption has also been described as

a virus capable of crippling governments, discrediting public institutions and private corporations and having a devastating impact on the human rights of populations, and thus undermining society and its development, affecting in particular the poor.<sup>35</sup>

Corruption takes many forms and is present at all levels. A report by the Global Financial Integrity (GFI) estimates that, between 2003 and 2012, the developing world lost US\$6.6 trillion in illicit outflows.<sup>36</sup> The negative effect of this outflow can be fully appreciated when these figures are contrasted with the official development aid flow to the same countries during this period. The report estimates that the cumulative total of Official Development Assistance (ODA) to developing countries covered in the report during the same period was just US\$809 billion, while the ODA amount for 2012 was US\$89.7 billion.<sup>37</sup> These figures indicate that addressing corruption can free up significant resources for ESC rights programmes and address the gap in resources in many countries.

Corruption reduces the amount of resources available for ESC rights and perpetuates economic discrimination against the most vulnerable in society.<sup>38</sup> Corruption is responsible for limiting the effectiveness of government social programmes such as vaccination, housing and schooling, and negatively

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<sup>34</sup> Maina Kiai and Anthony Kuria, 'The human rights dimensions of corruption: linking the human rights paradigm to combat corruption' (2008) 4(3) *Journal of Global Ethics* 247-253, 247.

<sup>35</sup> Global Forum on Fighting Corruption and Safeguarding Integrity, 'Final Declaration' (2001), <<http://2001-2009.state.gov/p/inl/rls/rpt/gffc/2001/3380.htm>>, Preamble.

<sup>36</sup> Global Financial Integrity, *Illicit Financial Flows from Developing Countries: 2003-2012* (Global Financial Integrity, Washington, D.C., 2014), <<http://www.gfintegrity.org/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf>>, vii.

<sup>37</sup> Ibid.

<sup>38</sup> Many aspects of corruption and its impact on human rights are covered by V N Vishwanathan (ed), *Corruption and Human Rights* (Allied Publishers, 2012); Berihun Adugna Gebeye, 'Corruption and Human Rights: Exploring the Relationships' (Working paper no. 70, University of Denver), <<http://www.du.edu/korbel/hrhw/workingpapers/2012/70-gebeye-2012.pdf>>; James Thuo Gathii, 'Defining the Relationship between Human Rights and Corruption' (2009) 31(1) *University of Pennsylvania Journal of International Law* 125-202.

affects almost all government programmes. Thus it can be seen as a major contributor to the non-realisation of ESC rights in many countries.<sup>39</sup> Corruption hurts the most vulnerable 'by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid'.<sup>40</sup>

Misallocation of government resources is also mainly a result of corrupt practices by individuals involved in the planning and implementation of social development and public service projects. Realisation of rights is often hampered by the level of administrative corruption and inefficient use and allocation of resources.<sup>41</sup> Individuals with self-serving motives may direct government funds to areas from which they derive personal benefits or which will serve to boost their own position and economic interests. Pilferage and wastage of resources through corruption and misappropriation is a serious concern for the State's ability to provide basic services to the population.<sup>42</sup> It is often the case that only a small percentage of the potential benefits of any given project reaches the targeted population, which not only results in insufficient quality or quantity of services in that area but also reduces the State's ability to provide services in other areas.

Efforts to fight corruption in many parts of the world have achieved little success, which is often associated with the lack of proper understanding of various dynamics that are in play. As person et al argue, in thoroughly corrupt settings, the phenomenon is often a result of a collective action problem rather than a principal-agent problem.<sup>43</sup> The implication of this is that even if people and societies recognise negative effects of corruption, there is often a lack of interest in establishing necessary formal institutional mechanisms of control in

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<sup>39</sup> Kiai and Kuria, above n 34,34.

<sup>40</sup> Ibid., 247.

<sup>41</sup> For example, Rory O'Connell et al, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

<sup>42</sup> UN News Centre, *Corruption hurts human rights, senior UN official warns* United Nations <<http://www.un.org/apps/news/story.asp?NewsID=44357>>.

<sup>43</sup> Anna Persson, Bo Rothstein and Jan Teorell, 'Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem' (2013) 26(3) *Governance: An International Journal of Policy, Administration, and Institutions* 449.

place.<sup>44</sup> The adverse impacts of corruption on the State's ability to mobilise adequate resources for ESC rights were identified in a number of Concluding Observations of the ESCR Committee.<sup>45</sup> Loss of revenue for the State due to corruption, which could otherwise have been used to finance social programmes, was also noted by the Committee.<sup>46</sup> Observing the economic and social costs of corruption, the Committee recommended many States to allocate sufficient resources to combat corruption and increase the effectiveness of State institutions.<sup>47</sup> The negative effects of corruption on State agencies and the resultant loss of resources for the implementation of ESC rights was highlighted in a number of instances.<sup>48</sup> The need to 'enhance the effectiveness of the legal, structural and policy measures to combat corruption'<sup>49</sup> has also been highlighted by the Committee.

These comments highlight the link between corruption and the amount of resources available to a State for ESC rights programmes, especially the negative impact of corruption on the overall capacity of the State to address urgent ESC rights requirements. All these factors diminish the ability of a government to address the human rights needs of the population and directly impact on the amount of resources available for alleviating the human rights situation. Considering these impacts of corruption on human welfare, there have been suggestions for the establishment of a new, free-standing human

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<sup>44</sup> Ibid.

<sup>45</sup> For example, CESCR, *Concluding observations: Egypt*, E/C.12/EGY/CO/2-4 (13 December 2013); CESCR, *Concluding observations: Indonesia*, E/C.12/IDN/CO/1 (19 June 2014); CESCR, *Concluding observations: Yemen*, E/C.12/YEM/CO/2 (22 June 2011).

<sup>46</sup> CESCR, *Concluding observations: Azerbaijan*, E/C.12/1/Add.20 (22 December 1997).

<sup>47</sup> For example, CESCR, *Concluding observations: Congo*, E/C.12/COD/CO/4 (16 December 2009); CESCR, *Concluding observations: Algeria*, E/C.12/DZA/CO/4 (7 June 2010); CESCR, *Concluding observations: Equatorial Guinea*, E/C.12/GNQ/CO/1 (13 December 2012).

<sup>48</sup> CESCR, *Concluding observations: Mauritania*, E/C.12/MRT/CO/1 (10 December 2012), [9]; CESCR, *Concluding observations: Georgia*, E/C.12/1/Add.83 (19 December 2002), [11].

<sup>49</sup> CESCR, *Concluding observations: Armenia*, E/C.12/ARM/CO/2-3 (23 May 2014), [8].

right to freedom from corruption,<sup>50</sup> which represents a worthwhile approach to addressing these concerns.

The process of resource allocation needs transparency and participation in order to guarantee that the most important areas get priority and that resources are allocated most effectively and efficiently. The case for increased transparency and accountability in budget expenditure as a governance measure to enhance qualitative aspects of resources for ESC rights is presented in the next section.

## **8.3 TRANSPARENCY AND ACCOUNTABILITY IN RESOURCE ALLOCATION AND MANAGEMENT**

Having discussed the issues related to governance of resources and their implications on ESC rights policy in the previous section, this section focuses on the resource governance aspects of transparency and accountability within a public finance management approach. The key elements of the public finance management approach are examined, with particular attention to transparency, accountability and effective monitoring of financial procedures. A case study on the challenges to transparency and accountability in public finance management in the Maldives (in Section 8.3.5) illustrates the practical difficulties involved.

### **8.3.1 A public finance management approach to resource governance**

Management of public sector resources and international assistance programmes within and outside the central budgetary system can be examined from the disciplinary perspective of Public Finance Management (PFM). A strong PFM system which can promote effectiveness and

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<sup>50</sup> See, David Kinley, 'A New Human Right to Freedom from Corruption' (Sydney Law School Research Paper No. 14/12, University of Sydney, 2014) <<http://ssrn.com/abstract=2393205>>.

accountability of the States through better institutional arrangements is 'essential for effective and sustainable economic management and public service delivery.'<sup>51</sup>

Public Finance Management refers to 'the budgeting, accounting, internal control, funds flow, financial reporting, and auditing arrangements by which they receive funds, allocate them, and record their use'.<sup>52</sup> The PFM approach identifies the underlying economic and policy aspects of managing government revenue and expenditure, as well as the government actions that influence budgetary decisions. This encompasses many aspects of revenue mobilisation, such as: allocation of these funds for various activities, including human rights related activities; expenditures; and the process of accounting for spent funds.<sup>53</sup> Overall, PFM includes resource mobilisation, prioritisation of programmes, the budgetary process, efficient management of resources and the exercise of controls.

Increasing expenditure efficiency is a key instrument for enhancing fiscal space, especially in relation to benefit incidence (who receives benefits from government services) and expenditure incidence (how government spending affects private income).<sup>54</sup> It can be argued that expenditure switching and efficiency-enhancing reforms can create a more effective fiscal policy space, especially through the re-allocation of resources from low priority to high priority sectors.<sup>55</sup> It is, thus, essential to examine the macroeconomic strategies of States based on a conceptual framework of commitments, norms, standards, responsibilities and procedures which are tested using analytical and developmental tools of progressive economic policy.<sup>56</sup>

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<sup>51</sup> Organisation for Economic Co-operation and Development, *Public Financial Management: An overview* OECD <<http://www.oecd.org/dac/effectiveness/pfm.htm>>.

<sup>52</sup> The World Bank, *Finance Management* (2015) <<http://web.worldbank.org/>>.

<sup>53</sup> Simson, Sharma and Aziz, above n 26.

<sup>54</sup> Roy, Heuty and Letouzé, above n 9, 12.

<sup>55</sup> *Ibid.*, 13.

<sup>56</sup> Radhika Balakrishnan, Diane Elson and Raj Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53(1) *Development* 27-36, 27.

The quality and efficiency of the administration of resources is as important as the effort required to mobilise resources. For example, it is possible to enhance financial resources through appropriate financial planning, better administrative policies and procedures. Participation by affected groups in resource allocation decisions, enhanced transparency, accountability and non-discrimination, can all contribute to the qualitative aspects of resource use.<sup>57</sup> For a State to comply with the obligation of conduct, it is important to use effective administrative measures to maximise the resource allocation and implementation processes.<sup>58</sup>

Public expenditure reviews are designed to answer important questions about public finance, such as allocation decisions and consistency with policy priorities. These objectives are closely linked to the institutional and practical arrangements for transparency and accountability, which augment the overall governance of resources within the public finance management structure.

### 8.3.2 Transparency in public sector resource management

According to the World Bank, transparency is a means of strengthening governance.<sup>59</sup> In order to make transparency meaningful, the public and other stakeholders need to be provided with 'relevant and timely information about the institutional arrangements for public finance'<sup>60</sup> and 'the assessment of a government's financial position and the true cost and benefit of government activities.'<sup>61</sup> From this perspective, transparency requires information about the process and procedures to be made available, and the public to be provided with access to budgetary information.

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<sup>57</sup> Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 *Human Rights Law Review* 393-420.

<sup>58</sup> *Ibid.*, 411-412.

<sup>59</sup> The World Bank, *Transparency in Public Finance* (25 March 2015) <<http://www.worldbank.org/en/topic/governance/brief/transparency-in-public-finance>>.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

In public finance management, fiscal transparency is defined as ‘the clarity, reliability, frequency, timeliness, and relevance of public fiscal reporting and the openness to the public about the government’s fiscal policy-making process.’<sup>62</sup> According to the IMF, in order to meet fiscal transparency standards, governments must: publish fiscal reports that cover a wide range of public sector institutions and identify direct and contingent assets and liabilities; recognise a wide range of transactions and flows; be rigorous in forecasting and analysis; and ensure publication in a timely manner.<sup>63</sup>

Some policy practices of government, such as tax incentives and concessions to individuals and businesses, negatively impact fiscal transparency. Such concessions, breaks and preferences are referred to as tax expenditures and can have a significant impact on the overall revenue of the government.<sup>64</sup> Tax expenditures are an effective way to provide tax incentives and subsidies to a large number of people or firms without having to collect the tax and transfer it to the taxpayers, but this process reduces overall legislative control and institutional scrutiny.<sup>65</sup>

According to the IMF’s principles of transparency, the following four key areas of action are expected of the government.<sup>66</sup>

- Clarity on the structure and functions of government, responsibilities within government and relations between government and the rest of the economy;

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<sup>62</sup> International Monetary Fund, *Fiscal Transparency, Accountability, and Risk* (IMF, 2012), <<http://www.imf.org/external/np/pp/eng/2012/080712.pdf>>, 4. In this definition, clarity refers to the ease with which these reports can be understood by users, reliability refers to the extent to which these reports reflect the government’s true financial position, frequency (or periodicity) refers to the regularity with which reports are published, timeliness refers to the time lag involved in the dissemination of these reports, relevance refers to the extent to which these reports provide users with the information they need to make effective decisions, and openness refers to the ease with which the public can understand, influence, and hold governments to account for their fiscal policy decisions.

<sup>63</sup> *Ibid.*, 3.

<sup>64</sup> International Budget Partnership, *Guide to Transparency in Public Finances Looking Beyond the Core Budget*, <<http://internationalbudget.org/wp-content/uploads/Looking-Beyond-the-Budget.pdf>>, 11.

<sup>65</sup> *Ibid.*, 12.

<sup>66</sup> International Monetary Fund, *Manual on fiscal transparency* (International Monetary Fund, Washington, D.C., 2007), <<https://www.imf.org/external/np/pp/2007/eng/101907m.pdf>>.

- Public availability of comprehensive information on public sector financial stocks and flows, published at specified times;
- Public availability of information on how budgets are prepared and executed, and minimum content of budgets and financial reports;
- Financial data meeting accepted quality standards and subjected to independent audit scrutiny.

To meet the criterion of clarity of governmental structure and functions, the public needs to be aware of the role of the executive, legislature and other independent entities of the State in resource-related matters. In many States, the parliament and executive have significantly different roles and responsibilities in the formulation of the budget and its execution. In other States, these roles may be very similar or even overlap. The parliament has a greater say in determining resource allocations in key areas in some States than in other countries.<sup>67</sup> In most States, however, independent State institutions play a significant role in resource governance, including auditing and other oversight functions. For these systems to work effectively, it is crucial that comprehensive information on public sector financial stocks and flows is made available in a regular and timely manner so the public can understand how government agencies are managing public sector resources.

Fiscal transparency requires that budgetary information be accessible, relevant, timely, contextual, reliable and understandable.<sup>68</sup> These criteria require serious effort on the part of government to ensure that budgetary information is made available for public scrutiny. The public should also have access to information about the processes of budget preparation implementation so they can understand how public sector resources are being utilised.

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<sup>67</sup> For example, Ammanuel Abuelafia et al, 'Who Decides on Public Expenditures?: The Importance of the Informal Budget Process in Argentina' in Mark Hallerberg, Carlos Scartascini and Ernesto Stein (eds), *Who Decides the Budget?: A Political Economy Analysis of the Budget Process in Latin America* (Inter-American Development Bank, Cambridge, MA, 2009) 23, 51-52.

<sup>68</sup> The World Bank, above n 59.

These principles of transparency have also been emphasised by the ESCR Committee in relation to national policies and strategies relevant to the area of ESC rights.<sup>69</sup> Similar requirements were identified in relation to right to water,<sup>70</sup> the right to benefits from scientific work,<sup>71</sup> right to work,<sup>72</sup> and the right to social security.<sup>73</sup> National health strategies and plans of action must also be based on principles of transparency.<sup>74</sup>

Transparency in the public sector depends on the free flow of information. Institutions must open their work processes to public scrutiny and accept feedback. According to the International Budget Partnership's (IBP) Open Budget Survey, it is important for governments to ensure that budgetary information is accessible to the public and oversight institutions to enhance budgetary accountability.<sup>75</sup>

The transparency aspect of government finance requires relevant and timely publication of comprehensive finance data and information about the associated policies and expected outcomes of the expenditure. The procedural rules of public finance, such as procurement rules, conflicts-of-

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<sup>69</sup> For example, Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (art. 11)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/5 (12 May 1999), [23].

<sup>70</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29<sup>th</sup> sess, UN Doc E/C.12/2002/11 (20 January 2003), [49].

<sup>71</sup> Committee on Economic, Social and Cultural Rights, *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 (article 15, paragraph 1 (c), of the Covenant)* 35<sup>th</sup> sess, UN Doc E/C.12/GC/17 (12 January 2006), [48].

<sup>72</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, 35<sup>th</sup> sess, UN Doc E/C.12/GC/18 (6 February 2006), [42].

<sup>73</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art. 9)*, 39<sup>th</sup> sess, UN Doc E/C.12/GC/19 (4 February 2008), [70].

<sup>74</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000), [55].

<sup>75</sup> International Budget Partnership, above n 64.

interest rules and other key aspects of financial accountability, must be clearly communicated to the public.

### 8.3.3 Accountability in delivering budgetary outcomes

Accountability is the requirement for the relevant organisation to render a full account of what it has done, be transparent about its working procedures, take responsibility for its actions, and be responsive to the demands of the public and other stakeholders.<sup>76</sup> This involves a thorough assessment of the quality of goods and services produced by the organisation and a focus on improving future performance and capacity.<sup>77</sup> While the concept of public sector accountability is applicable to financial, political and administrative accountability, the focus here is on financial accountability, especially from an ESC rights perspective.

Measuring and assessing the performance of the State in the allocation of resources for ESC rights can take many forms. One of the most direct forms of such assessment is the budget analysis activities of national human rights institutions and civil society-based budget groups. Such activities are particularly relevant where State officials have been responsible for wasting scarce resources that could have been used for ESC rights realisation.

Such initiatives have been successful in bringing issues of taxation and fiscal policy to bear on human rights objectives, especially through improving government accountability. The Centre for Economic and Social Rights (CESR) has applied a rights-based framework which can be used to hold the State accountable to its human rights commitments in implementing its tax and budget policies.<sup>78</sup> Such engagements with governments are essential to

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<sup>76</sup> B Guy Peters, 'Performance-Based Accountability' in Anwar Shah (ed), *Performance Accountability and Combating Corruption* (The World Bank, Washington, D.C., 2007) 15, 16.

<sup>77</sup> Ibid., 30-31.

<sup>78</sup> Center for Economic and Social Rights, *Rights or Privileges? Fiscal Commitment to the Right to Health, Education and Food in Guatemala* (Center for Economic and Social Rights, Madrid, 2009), <<http://cesr.org/downloads/Rights%20or%20Privileges%20Executive%20Summary%20final.pdf>>; Ignacio Saiz, 'Resourcing Rights: Combating Tax

maintain a focus on fiscal accountability, which is fundamental to the most effective use of resources available to the State, especially in relation to ESC right.

Political accountability includes the expectation that the public are informed about resource-related decisions of the government. This is a key factor in the effectiveness of resource governance from an ESC rights perspective. Without a robust, transparent and accountable system of financial reporting, such assurance about government decisions may not be possible. The public must be informed not only of the immediate effects of government decisions, but also of the sustainability and future effects of these decisions and their expected outcomes. Therefore, a central concern in fiscal accountability is to identify who is responsible for accountability in budgetary management.

Horizontal and vertical accountability in relation to resource allocation and utilisation impacts the effectiveness of resource governance. Horizontal accountability between ministries and departments and across the executive to the parliament helps to ensure that the rules and procedures required of State entities are properly followed and that there is openness and transparency. One of the most important elements of vertical accountability is that between the government and the public who is the actual beneficiary of expenditure programmes.

The ESCR Committee emphasised the importance of accountability in the context of adopting a detailed plan of action on education.<sup>79</sup> The Committee also noted that the principles of accountability must be complied with in the formulation and implementation of national food strategies<sup>80</sup> and that the victims of a violation must be given access to effective judicial or other

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Injustice from a Human Rights Perspective' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013) 77.

<sup>79</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 11: Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/4 (10 May 1999), [8].

<sup>80</sup> *CESCR General Comment No 12*, E/C.12/1999/5, above n 69, [23].

remedies and guarantees of non-repetition.<sup>81</sup> Similar requirements for accountability were identified in relation to the right to health<sup>82</sup> and to State funding of autonomous educational institutions.<sup>83</sup> Principles of accountability,<sup>84</sup> and the need for an accountability mechanism were identified as key to the effective implementation of a national water strategy.<sup>85</sup> Similar requirements were recognised in relation to rights to social security<sup>86</sup> and cultural life.<sup>87</sup>

In meeting the State's responsibility to give domestic effect to the obligations of the ICESCR, the Committee noted that the State must ensure that the domestic legal order recognises the Covenant rights, that mechanisms for redress are made available and that 'appropriate means of ensuring governmental accountability must be put in place.'<sup>88</sup> None of these General Comments, however, provided much detail about the characteristics of accountability mechanisms and were generally limited to national strategy development rather than the overall obligation of the State to ensure the realisation of these rights.

The system of redistribution of the benefits of economic growth and national resources is one of the most crucial factors affecting the realisation of ESC rights. Hence the State's responsibility to generate and manage resources equitably in line with their human rights obligations is an important area of

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<sup>81</sup> *Ibid.*, [12].

<sup>82</sup> *CESCR General Comment No 14*, E/C.12/2000/4, above n 74, [59].

<sup>83</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (article 13 of the Covenant)*, 21<sup>st</sup> sess, UN Doc E/C.12/1999/10 (8 December 1999), [40].

<sup>84</sup> *CESCR General Comment No 15*, E/C.12/2002/11, above n 70, [49].

<sup>85</sup> *Ibid.*, [47].

<sup>86</sup> *CESCR General Comment No 19*, E/C.12/GC/19, above n 73, [70].

<sup>87</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 43<sup>rd</sup> sess, UN Doc E/C.12/GC/21 (21 December 2009), [61].

<sup>88</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, 19<sup>th</sup> sess, UN Doc E/C.12/1998/24 (3 December 1998), [2].

State accountability.<sup>89</sup> One of the first steps for achieving this objective is the incorporation of ESC rights obligations and goals into public policy goals and programmes.

The expectation for public finance management systems to follow transparency requirements is increasingly being incorporated into international standards and protocols. Internationally recognised public sector accounting standards, such as the International Public Sector Accounting Standards (IPSAS),<sup>90</sup> require a number of accountability principles to be incorporated into the practice of budget management. The Public Expenditure and Financial Accountability (PEFA) Programme of the World Bank incorporates the element of transparency into the system of public sector expenditure, procurement and financial accountability<sup>91</sup> in order to bring the process of public finance management in line with public expectations. The World Bank's Worldwide Governance Indicators (WGI) provide insight into the efforts of many governments to fight corruption and enhance governance and accountability, as well as many examples of failure to make fundamental improvements in governance.<sup>92</sup>

### **8.3.4 Performance measurement and monitoring of resource governance from an ESC rights perspective**

The concept of performance measurement has been in use in the private and public sectors for some time. At a basic level, performance measurement

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<sup>89</sup> Center for Economic and Social Rights, *Assessing fiscal policies from a human rights perspective: Methodological case study on the use of available resources to realize economic, social and cultural rights in Guatemala* (Center for Economic and Social Rights, New York, 2012), 4.

<sup>90</sup> International Public Sector Accounting Standards (IPSASs) were issued by the International Public Sector Accounting Standards Board (IPSASB), an independent standard-setting board supported by IFAC.

<sup>91</sup> The World Bank, above n 59.

<sup>92</sup> Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, *Governance Matters 2009: Learning From Over a Decade of the Worldwide Governance Indicators* Brookings <<http://www.brookings.edu/research/opinions/2009/06/29-governance-indicators-kaufmann>>.

requires performance indicators to be reported and disclosed to the wider public as a means of promoting greater accountability.<sup>93</sup> The practice of performance benchmarking includes the development and application of comparative league tables of financial management performance across various government departments,<sup>94</sup> which can help promote competition among government institutions and lead to more accountable and efficient practices.

The Open Budget Survey (OBS) of the International Budget Partnership (IBP) is an invaluable tool for identifying State performance practices in relation to budget transparency and oversight mechanisms. These are represented as an Open Budget Index (OBI),<sup>95</sup> which examines various aspects of public participation in the budget process and the roles played by public institutions such as the parliament and supreme audit institutions. The index and report argue for enhancing transparency and public participation to address leakages and improve efficiency in public expenditure.<sup>96</sup>

The role of public oversight institutions in ensuring a higher level of compliance and accountability in the budget process is fundamental. Political institutions such as the parliament and other arrangements are essential in influencing fiscal responsibility throughout the budget process.<sup>97</sup> While the legislative branch has a strong legal mandate of budgetary oversight, in many countries the 'executive branch undermines the legislative oversight by subsequently redistributing resources, or by arbitrarily allocating additional revenues and

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<sup>93</sup> Jeannette Taylor, 'Statutory Bodies and Performance Reporting: Hong Kong and Singapore Experience' (2006) 6(3) *Public Organization Review* 289-304.

<sup>94</sup> Nur Barizah Abu Bakar, Zakiah Saleh and Muslim Har Sani Mohamad, 'Enhancing Malaysian Public Sector Transparency and Accountability: Lessons and Issues' (2011)(31) *European Journal of Economics, Finance and Administrative Sciences* 133-145.

<sup>95</sup> International Budget Partnership, *Open Budget Survey 2012: Open Budgets Transform Lives* (IBP, 2012), <<http://internationalbudget.org/wp-content/uploads/OBI2012-Report-English.pdf>>.

<sup>96</sup> *Ibid.*, 10. Despite this need for transparency and accountability, the Open Budget Survey reveals that in many parts of the world, the 'state of budget transparency and accountability is generally dismal.'

<sup>97</sup> Carlos Santiso, *Budget Institutions and Fiscal Responsibility: Parliaments and the Political Economy of the Budget Process* (United Kingdom Department for International Development (DFID), London, 2005).

contingency funds, all without seeking legislative approval.<sup>98</sup> The main challenge, especially for poorer States, is to sustain the efficiency and independence of these institutions.

The preceding discussion has shown that institutional arrangements around transparency are closely linked to levels of accountability. The more transparent the budget process is to public and media scrutiny, the higher is the system's overall level of accountability.

In recent years, efforts to strengthen fiscal and budgetary transparency and accountability at the domestic level have been encouraged by a number of international initiatives such as the Global Initiative for Fiscal Transparency (GIFT),<sup>99</sup> Open Government Partnership<sup>100</sup> and the Johannesburg Accords, which emphasise the development of national level procedures to increase transparency and accountability in public sector financial transactions and budget management.<sup>101</sup> These initiatives are playing a pivotal role in advancing and institutionalising global norms in public sector resource management and advocating for fiscal transparency, participation and accountability.<sup>102</sup> They have the potential to become a driving force for budgetary discipline in areas where it is currently weak.

### **8.3.5 Case study: Augmenting transparency and accountability of public finance management in Maldives**

As a small, closely-connected society, the Maldives faces some unique challenges when it comes to implementing and observing transparency and accountability. The size of the community makes it harder to enforce certain

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<sup>98</sup> International Budget Partnership, above n 95, 5.

<sup>99</sup> Global Initiative for Fiscal Transparency, *Advancing Global Norms* <<http://fiscaltransparency.net/streams-of-work/advancing-global-norms/>>.

<sup>100</sup> Open Government Partnership, *What is the Open Government Partnership?* <<http://www.opengovpartnership.org/>>.

<sup>101</sup> 'The Johannesburg Accords', (2010), <<http://www.intosai.org/uploads/jhbaccordsen.pdf>>.

<sup>102</sup> Global Initiative for Fiscal Transparency, above n 99.

rules, while the social interconnectedness can make it difficult to take action in cases of mismanagement and corruption. This case study explores institutional, administrative and process challenges in public finance management faced by the Maldives over the last several years.

### **8.3.5.1 Budget management process: Institutional aspects**

Institutional capacity and public scrutiny have traditionally been weak in the Maldives. Years of autocratic rule have left behind a culture of opacity, especially in relation to government policies and resource use. The transition to democracy in 2008 kick-started a number of changes in these cultural elements but the process has not yet gone far enough. For example, according to a Transparency Maldives report in 2014,

political bias created through intermingled political thinking and practices embedded in key political institutions, including the legislature and the Executive, reduces the capacity of other institutions to function independently. Moreover, political bias embedded in the institutional framework further reduces the level of accountability, transparency and integrity functions of almost all the institutions.<sup>103</sup>

The first democratic government, elected to office in 2008, invited the International Monetary Fund (IMF) to conduct a Public Expenditure and Financial Accountability (PEFA) assessment for Maldives in 2009. One of the findings was that, while aggregate expenditures are reasonably accurate, budget credibility remains generally weak.<sup>104</sup> This reflects the lack of open participation and scrutiny around the budget preparation process and the weakness of institutional mechanisms to ensure transparency of expenditure side activities. The IMF report observed that the level of comprehensiveness and transparency were quite high in some areas,<sup>105</sup> although this was not the case across the government in general. It was noted that ‘budget documents

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<sup>103</sup> Transparency Maldives, *National Integrity System Assessment - Maldives* (Transparency Maldives, Male, Maldives, 2014), <[http://files.transparency.org/content/download/1441/10762/file/2014\\_NISMaldives\\_EN.pdf](http://files.transparency.org/content/download/1441/10762/file/2014_NISMaldives_EN.pdf)>, 11.

<sup>104</sup> International Monetary Fund, *Maldives: Public Financial Management-Performance Report* (IMF, Washington, DC, 2010), <<http://www.imf.org/external/pubs/ft/scr/2010/cr10137.pdf>>.

<sup>105</sup> Ibid.

do not provide clear linkages between budget figures and underlying policies'.<sup>106</sup> This remains a key problem in the most recent budgetary plans.

In relation to budget management, there have been persistent shortfalls in the predictability and control of budget execution.<sup>107</sup> The fiscal risk is particularly high due to discrepancies between planned and actual budget figures, indicating issues with expenditure prioritisation. The IMF identified related weaknesses in overall budget credibility, especially in the allocation of expenditure at sector and ministry levels.<sup>108</sup> While there was some level of budget transparency, the budget documents lacked comprehensiveness and provided inadequate information about the underlying public policies. In recent years, these documents have become even more inaccessible to the public than was the case a few years ago, despite the availability of technological means of dissemination. This lack of transparency can be attributed to the changes in political climate and the weakness of institutional and cultural elements that are necessary to create the demand for such transparency.

#### **8.3.5.2 Budget management process: Information flow**

The Public Finance Act of Maldives (3/2006) provides the legislative framework for the control and management of public finance in the country.<sup>109</sup> The Act stipulates the general rules and procedures of public finance management including approvals of public funding, loans, loan guarantees, and detailed guidelines on the preparation and approval of annual budgets.<sup>110</sup>

According to Article 31 of the Public Finance Act, each government office must prepare and send estimated budgets for the next financial year to the Ministry of Finance and Treasury, which are then collated and submitted to the parliament at least one month before the beginning of the next financial

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid., 8.

<sup>108</sup> Ibid., 7.

<sup>109</sup> *Public Finance Act of Maldives ('Dhaulathuge Maaliyyathuge Gaanoonu')* 2006.

<sup>110</sup> Ibid.

year.<sup>111</sup> However, the budgetary process as defined by the Act gives little consideration to the overall level of budget performance and expenditure justification. Moreover, there are no requirements for this information to be made available to the public in any form.

Article 35 of the Act requires each government office to submit a detailed financial expenditure report to the Auditor General within three months of the end of the financial year.<sup>112</sup> The Auditor General is required to complete an audit of this report and provide the assessment within two months of receiving the expenditure report.<sup>113</sup> While these reports are to be communicated to the President and the Majlis (Parliament), there is no requirement for any of them to be made publicly available. The Public Finance Regulations (2009, revised in 2015), which provide additional details about procedures for managing public finance, contain comprehensive rules of accounting, record-keeping, procurement and bidding processes, as well as overall financial accountability and auditing protocols. However, there is no requirement for making financial data publicly available for increased transparency and accountability.

The availability of reliable data is essential for public expenditure reviews conducted within the government finance system and for public monitoring. Currently, however, there are no legal requirements for public dissemination of budgetary income and expenditure details on a regular and timely basis, and there are no channels for public participation in the budget process. Nor does there seem to be a clear policy of disclosure in relation to public sector debt and borrowing practices. Without a robust, transparent and accountable system of financial management reporting, it is often impossible for the public to analyse the economic and social impacts of these actions.

### ***8.3.5.3 Efforts to address the shortfalls in budget transparency***

Between 2008 and 2012, the government demonstrated a stronger commitment to strengthening democratic accountability and decentralising

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid., art 36.

administration. A key initiative was the introduction of weekly reports on government revenue and expenditure, which were published online on the Ministry of Finance and Treasury's website.<sup>114</sup> These reports provided details of government cash flow status and expenditures on a weekly basis, aggregated for various departments and sectors. Unfortunately, with the abrupt change in government in 2012, this practice was discontinued by the new government.

The World Bank has played an active role in encouraging the implementation of the Public Finance Accountability (PFA) framework in Maldives. The system provides centralised control over financial management through a paperless transaction, processing and payment system.<sup>115</sup> However, lack of adequate transparency in procurement procedures and the absence of a procurement grievance procedure significantly weaken accountability in this area.

The IMF argues that, while the Tender Evaluation Board receives and evaluates complaints in relation to tendering processes, these processes are not transparent and suffer from apparent conflict of interest.<sup>116</sup> The IMF also notes that in Maldives, 'efficient service delivery has not been a prominent priority for public financial management'.<sup>117</sup> The crucial issue is that the budgeting process pays more attention to the input side, with very little focus on identifying and measuring outputs and outcomes of budget expenditures. The lack of a systematic performance monitoring system further weakens this process.<sup>118</sup>

The Maldives government does not publish an *ex post* accountability report such as the Final Budget Outcome documents that are issued by many countries. This could provide detailed comparisons of budget outcomes

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<sup>114</sup> The website of the Ministry of Finance and Treasury of Maldives is: <<http://www.finance.gov.mv/>>.

<sup>115</sup> The World Bank, *Public Financial Management Systems Strengthening Project: Maldives* (The World Bank, Washington, D.C., 2014), <<http://www-wds.worldbank.org/>>.

<sup>116</sup> International Monetary Fund, above n 104.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

against set targets. Such a report could also explain any variations in expenditures from the initial plans. Although the Auditor General publishes financial compliance audits for government departments and State-funded institutions, these reports are not regular (often many years late) and provide little leverage for strengthening transparency and accountability in public sector expenditure.<sup>119</sup>

#### **8.3.5.4 Potential action areas to reform fiscal management**

The weakness of transparency and accountability measures in public sector finance management in the Maldives can be addressed through a number of government initiatives. Central to these is the need to enhance public awareness, at all levels of society, of what constitutes good governance in budget implementation. The public must demand greater transparency from the government in its handling of public finance and be more vigilant in identifying areas of weakness in accountability. If citizens insist on knowing more about how the budget process is managed, government will be pressured into creating and/or strengthening these processes.

Implementing robust and effective systems of public finance management also requires legislative and institutional capacity. As previously noted, the existing legal and regulatory requirements for budgetary transparency and accountability in the Maldives are inadequate. The government must be more conscious of the need for trust between itself and the public, especially given the unstable political environment.<sup>120</sup> The regular provision of accurate and comprehensive information will help to create an environment of trust and stewardship. Action to enhance the credibility of the public finance management system and its ability to deliver on the promise of public trust must be based on a long-term view. The system must be sustainable within the country's challenging economic, political, and social dynamics.

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<sup>119</sup> The audit reports are available (in Dhivehi language) at Auditor General's Office, *Published Audit Reports* Auditor General's Office <<http://www.audit.gov.mv/en/reports/published-audit-reports/>>.

<sup>120</sup> For example see, Ahmed Shahid and Hilary Yerbury, 'A Case Study of the Socialization of Human Rights Language and Norms in Maldives: Process, Impact and Challenges' (2014) 6(2) *Journal of Human Rights Practice* 281-305.

As this case study demonstrates, it is unclear whether there has been sufficient public expression of concern about the lack of a strong public sector financial management and reporting system.<sup>121</sup> Nonetheless it is incumbent on government to take a proactive approach to strengthening the system through legislative, administrative and policy actions and to deliver on these commitments. The government needs to demonstrate that public interest is central to the policy and practice of public finance management in Maldives, especially given its narrow resource base and the huge demand for public sector services.

Increased transparency and participation in the budget process can be achieved through other means, such as public hearings on budgets and greater scrutiny by the media and civil society-based analysts. It is not only institutional bodies such as the parliament and the Auditor General's Office who have a significant role to play in enhancing transparency and accountability of the public finance system.

#### **8.4 ENHANCING RESOURCE GOVERNANCE FOR ESC RIGHTS: SOME POLICY IMPLICATIONS**

The governance of resources, especially the level of transparency and accountability of resource management, leads to better outcomes in terms of the resources at the disposition of the State. This section examines relevant policy options and their implications from an ESC rights perspective.

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<sup>121</sup> For insights into the nature of problem in financial transparency in Maldives, see Shan Anees, 'State is run in darkness' says Transparency Maldives (25 December 2014) Haveeru Daily <<http://www.haveeru.com.mv/news/58182>>; Ahmed Rilwan, *Research reveals lack of transparency in Maldives climate finance governance* (Minivannews, 26 December 2013) <<http://minivannews.com/politics/research-reveals-lack-of-transparency-in-maldives-climate-finance-governance-74080#sthash.yPVZvlfj.dpbs>>.

### 8.4.1 Policy options and recommendations: Enhancing budgetary transparency and accountability

Accountability, transparency, predictability and participation are key aspects of sound financial management and are equally applicable in evaluating State practice in the area of ESC rights policy. Although there are inherent difficulties in applying uniform human rights standards to different policymaking situations,<sup>122</sup> these basic principles can be effectively adopted in diverse political systems to ensure that the system of financial management is in line with ESC rights requirements.

In terms of accountability in relation to resource governance, the subsidiarity principle of political decision-making is fundamental. The principle of subsidiarity requires decision-making to take place at the lowest possible level in order to maximise input from those who are likely to be affected. This necessitates a strong system of decentralised decision-making, which is receptive to inputs from the wider society.

A significant role of governments and their officials is to act directly to ensure that people in their jurisdiction can enjoy their fundamental rights. If groups and individuals are empowered 'to raise contradictions between political rhetoric and structures of inequity'<sup>123</sup> in a given State, these inequalities are likely to be more effectively addressed. Human rights, especially ESC rights, language and accountability are crucial consideration here. The legal enforcement of ESC rights also limits the range of choices available to policymakers.<sup>124</sup> Therefore a strong human rights protection policy is a necessary (though not a sufficient) condition for the enjoyment of human

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<sup>122</sup> Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 *Human Rights Quarterly* 866-887, 866.

<sup>123</sup> Upendra Baxi, 'Too Many, or too Few, Human Rights?' (2001) 1 *Human Rights Law Review* 1-10, 5-6.

<sup>124</sup> Lanse Minkler, 'Economic Rights and Political Decision Making' (2009) 31(2) *Human Rights Quarterly* 368-393, 371.

rights.<sup>125</sup> The seriousness of these efforts will be evident in the policies, programmes and practices of the government and its officials.

The qualitative dimension of resources is equally important, particularly for effective and sustainable use of available resources.<sup>126</sup> The means of implementation, such as administrative, financial, educational and social measures and legislation, are central to understanding the qualitative dimension of resources for ESC rights.<sup>127</sup> It has been argued that 'by focusing on the development of the quality of the resources or the means of implementation, much can be achieved without necessarily requiring a significant increase in funding.'<sup>128</sup> Thus, the efforts of the State in providing ESC rights should be evaluated on the basis of State practice, rather than merely on policies or conditions.<sup>129</sup>

Institutional leadership plays a key role in enhancing transparency and open government in budgeting and resource governance. Leadership is needed to create an environment that is conducive to institutional adaptation in resource governance that will promote public interest and accountability. The quality of governance is related to both performance and conformance. While performance is concerned with delivering the goods and services expected of the authority in an efficient manner, conformance requires this functioning to be in accordance with legal and regulatory requirements. In order to ensure that public sector resources are governed effectively, leadership must be conscious of both these aspects.

Legislative and institutional measures addressing the right to information, disclosure, and participation must be put in place. Such regulations must enable the community to seek information from relevant authorities and

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<sup>125</sup> David L Cingranelli and David L Richards, 'Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007), 221-222, 219.

<sup>126</sup> Skogly, above n 57, 420.

<sup>127</sup> Ibid., 405.

<sup>128</sup> Ibid.

<sup>129</sup> Cingranelli and Richards, above n 125, 218.

provide the right incentives for the public to do so. The public must also be educated about the part it is expected to play in enhancing government's fiscal accountability.<sup>130</sup>

In summary, changing the direction of public policy direction is often not a matter of linear progression but of dynamic interaction and iteration of policy goals and objectives to reflect social demands and expectations. Given that State resource allocation decisions are not driven by price signals, it is important that such decisions can generate the maximum possible output, especially with regard to achieving the desired policy outcomes. This requires the application of rationality in policy decision-making.

## 8.5 CONCLUSIONS

The qualitative aspects of resources required for the realisation of ESC rights are as important as the quantity of available resources. The quality dimension of resource governance enhances outcomes at all stages of resource mobilisation, allocation and utilisation. This chapter has shown that the quality of resource governance depends on a number of political, institutional and societal factors that can significantly impact the ability of the State to address ESC rights concerns within the available resources.

The chapter has also demonstrated that enhanced transparency and accountability can significantly improve the quality of resource governance. Orienting policy mechanisms to incorporate citizens' legitimate concerns would not only make such policy outcomes more desirable, but also provide a better platform for effective implementation.

The seriousness with which a State regards its human rights obligations will be demonstrated through its active engagement with the public, through institutional arrangements for transparency of the budget process and through accountability in the delivery of budgetary outcomes. These governance

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<sup>130</sup> International Monetary Fund, above n 66, 11.

practices will maximise resources available for the realisation of economic, social and cultural rights. These concepts help clarify the complex nature of policy approaches that can be adopted for effective management of resources for human rights objectives.

The conceptual linkage between resource governance and ESC rights policy presented in this chapter provides a robust foundation on which to develop methods to further strengthen government's ESC rights commitments. Fiscal justice, which ensures the sufficiency, equality and accountability of financing targeted at ESC rights, is essential.

Policy governance is always influenced by politics, ideology and other moral dimensions. The political process provides the impetus and the direction for State efforts to maximise resources and policy space, especially through the highly intricate institutional and process arrangements for public sector resource management. Given that it is possible for politics itself to be influenced by social policy elements, including ESC rights, especially in the long term, it is important to entrench a strong culture of resource governance that will have lasting impact on the realisation and enjoyment of economic, social and cultural rights.

# 9

## Conclusions

### 9.1 INTRODUCTION

This thesis has explored the fundamental role of resources in the realisation of Economic, Social and Cultural Rights (ESC rights) and broadened the theoretical, conceptual and practical interpretations of the concept of ‘maximum available resources’ within the context of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It has enhanced understanding of the practical challenges faced by States in the effective implementation of policies necessary for the realisation of these rights through an examination of resource scarcity, competing priorities, policy dynamics and institutional capacity in relation to State resources. Given the multi-dimensional and multifaceted nature of ‘maximum available resources’ at the disposition of the State, a cross-disciplinary methodology was employed. Perspectives from law, economics, public policy and public finance were used to explore the scope, nature and dynamics of the resources that can be applied to the realisation of ESC rights. Particular attention was paid to the concepts of mobilisation, allocation and governance of State resources for the objectives of ESC rights as a powerful set of tools that can re-orient policy to this goal.

This chapter summarises the key characteristics of the multi-disciplinary model of resources presented in this thesis and its application to ESC rights policy. It discusses the key outcomes of the investigation in relation to the research questions. The scholarly contribution of the thesis is examined, and recommendations are made for further research.

## 9.2 A CROSS-DISCIPLINARY 'RESOURCES MODEL' FOR ESC RIGHTS

This thesis has focused on the proactive role of the State in mobilising and allocating adequate resources for the realisation of ESC rights and has argued for bringing these elements to the forefront of State policy. It has argued that the State has a human rights and moral obligation to do everything within its powers and abilities to ensure the fulfilment of these rights. Such a policy orientation is possible only if the obligation to use 'maximum available resources' for the realisation of ESC rights, as articulated in the ICESCR, is seen as a central component of State policy.

The main aim of this thesis was to advance a comprehensive, cross-disciplinary understanding of the concept of resources required for the effective realisation and enjoyment of ESC rights, especially within the interpretative framework of 'maximum available resources' in the ICESCR. To this end, three main objectives were addressed.

The first objective was to *develop and expand an operational understanding of the concept of 'maximum available resources' and how various propositions and arguments put forward by academics interact and enrich these definitions.* The literature review presented in Chapters 2 and 3 identified a range of perspectives on the question of resources, especially those relating to the interpretation of the concept of 'maximum available resources' within the context of Article 2(1) of the ICESCR. The State obligation to take steps for progressive realisation of ESC rights to the maximum of available resources was examined via a critical review of existing scholarship and the work of the ESCR Committee and other relevant authorities.

The second objective was to *develop a broad, cross-disciplinary framework concept of 'maximum available resources' to encompass theoretical, conceptual and practical elements of resources in relation to the human rights obligations under the ICESCR.* Chapter 3 presented a cross-disciplinary framework of resources encompassing public sector financial resources, international assistance and co-operation, private investment and non-

financial resources. The framework addressed various aspects of resource mobilisation, allocation and governance, drawing on theoretical and practical elements in human rights law, economics, public policy and public finance. The model incorporated the legal notion of a State obligation to take policy steps to the 'maximum available resources' for the progressive realisation of ESC rights with the socio-economic and political dimensions of decision-making around resource mobilisation, allocation and governance. The individual elements of the model were analysed in detail in Chapters 4-8, which demonstrated that these cross-disciplinary dimensions of 'maximum available resources' are both practical and representative of policy approaches evident in State practice.

The third objective was to *broaden the intellectual and theoretical space around ESC rights obligations and create practical connections within a cross-disciplinary interpretive framework for improved advancement of the realisation of ESC rights within public discourse and public policy practice*. The intellectual and theoretical space for ESC rights was enriched by incorporating ideas from economics and public policy. The thesis demonstrated that the concept of 'resources' gives human rights discourse legitimate entry into the intellectual apparatus of these disciplines and that this interaction can enhance State practice and advocacy work. This integrated, cross-disciplinary approach to ESC rights policy was advanced in the 'resource' model presented in Chapter 3 and in subsequent chapters. Chapters 4, 5 and 6 addressed the macroeconomic dimensions of resource mobilisation, and Chapters 7 and 8 focussed on public policy approaches to the allocation and governance of resources in relation to ESC rights. The interpretive framework synthesises multiple forms of knowledge and evidence of State practice to identify key economic, social and cultural variables and their interconnections within ESC rights practice. In this way, the thesis has not only extended the intellectual and theoretical space around the concept of 'maximum available resources' for ESC rights, but has also expanded the parameters of State obligation in relation to ESC rights and their implementation.

To achieve these objectives, the study adopted a theoretical research method based on qualitative analysis of Periodic Reports of States under the ICESCR, Concluding Observations and General Comments of the ESCR Committee, reports of Special Rapporteurs, and other institutional reports, especially those from governments and multilateral institutions such as the World Bank and the IMF. These documents were analysed within a cross-disciplinary paradigm, with theoretical and practical contributions from economics, public policy and public finance management, to develop a model of 'resources' in the context of the realisation of ESC rights.

This documentary evidence of State practice and the implementation challenges in resource-related policies was supported by analysis of case studies on Maldives. Five lines of inquiry were pursued: public sector resource mobilisation; maximisation of international assistance and co-operation; mobilisation of private sector and societal resources; resource allocation for ESC rights; and transparency and accountability dimensions of resource governance. These case studies showed that the policy experiences of a small State with a unique economic and policy environment can provide valuable insight into how the working of State institutions, actors and processes influences ESC rights, especially in relation to how the resource dimension of ESC rights implementation plays out in practice. Although these experiences not be directly applicable elsewhere, they nonetheless reveal the complexity and multidimensionality of State policy and practice in relation to resource mobilisation, allocation and governance. Thus the analysis makes a significant contribution towards a richer understanding of these policy dynamics.

### **9.3 A BRIEF REVIEW AND SUMMARY OF FINDINGS**

This thesis set out to answer three key questions related to 'maximum available resources' as a conceptual framework for the realisation of ESC rights:

1. *What are the existing scholarly interpretations of the concept of 'maximum available resources' in the context of the ICESCR and how do they reflect the nature of State obligations in practice?*
2. *How can the interpretation of the concept of 'maximum available resources' be further enriched by applying cross-disciplinary perspectives, including legal, economic, public policy and public finance dimensions, to address policy challenges and approaches to maximise the mobilisation, allocation and governance of resources for the realisation of ESC rights?*
3. *What are the policy approaches that can be employed to enhance the mobilisation, allocation and governance of resources for ESC rights, and what evidence is available in State practice on the practicability of such approaches?*

These questions were addressed through a combination of literature review, document analysis and case study methodology. A summary of key findings in relation to each question is presented below.

### **9.3.1 'Maximum available resources' and the nature of State obligations in practice**

The obligation to take steps using 'maximum available resources' reflects the State's capacity to directly affect the realisation of ESC rights. While State policies and interventions in the economy and society are always influenced by the amount of resources at its disposition, as well as the legal, institutional, human resources and organisational capacity of State institutions, there is no denying that a State's primary responsibilities cannot be abridged by constraints on these factors. Although the lack of resource capacity has the potential to impact policy performance in relation to responsibilities towards people, such constraints must never be an excuse for failure to uphold the core obligations for enhancement of the welfare of the people.

Because the obligation of the State to take steps towards the progressive realisation of ESC rights rests on the ‘maximum available resources’, the interpretation of this phrase impacts expectations for policy action and provides a frame of reference for human rights monitoring and advocacy. Chapter 2 presented the background to ESC rights obligations through a close analysis of the ICESCR text and other relevant documents. The chapter showed that, when appraised through the common terminology of *respect*, *protect* and *fulfil*, ESC rights require a high level of proactive government policy intervention to ensure that rights-holder are able to fully enjoy their rights.

The concept of ‘maximum available resources’ was then examined from the perspective of the drafters of the Covenant through analysis of its *travaux préparatoires*, which showed that the drafters adopted a very broad interpretation of this concept. The drafting history of the Covenant showed that the concept of ‘resources’ required for the realisation of ESC rights was a key point of debate among the delegates, with a high level of agreement on its importance. A similar debate took place during the drafting of the Optional Protocol to the ICESCR many decades later.

Through an extensive literature review, Chapter 2 identified the approaches taken by human rights scholars in interpreting the concept of ‘maximum available resources’ and how the concept was applied in practice. The chapter demonstrated that the concept of ‘maximum available resources’ was not given adequate attention in human rights scholarship until very recently. The emerging scholarship has begun to broaden the definition and scope of resources that can be used for the realisation of ESC rights.

The chapter also showed that the obligation to take steps to the ‘maximum of available resources’ creates a human rights duty on the State to be proactive, not only in the implementation of human rights policies and programmes, but also in the creative exploration of opportunities to capitalise on the resources available for these programmes. The chapter mapped out the existing interpretations and understandings of the concept, broadened the definition of resources and identified policy avenues that States can pursue in order to maximise the resources that can be used for ESC rights policies.

### **9.3.2 Enriching the concept of ‘maximum available resources’ within a cross-disciplinary model**

The quantity and quality of resources at the disposition of the State can be better understood through the economic precepts of resource mobilisation and public policy approaches to decision-making around resource allocation and utilisation. This highlights the need for a cross-disciplinary approach. In order for ESC rights advocacy and monitoring to be meaningful, the macroeconomic foundations of ESC rights must be considered in the conceptual development and supervision of these rights. Operational understandings of the concept in State practice were developed through a cross-disciplinary model and areas for improvement were identified.

Given the essentially economic nature of public sector resources, Chapter 3 argued that efforts of States to maximise resources can be viewed from the perspective of macroeconomic policy. The concept of resources was positioned within the concepts of ‘fiscal space’ and ‘monetary space’ to provide a meaningful connection to the work of governments and the role of policies in maximising the mobilisation of resources. In relation to resource allocation, public policy approaches provide powerful tools for better understanding the budgeting and decision-making processes that determine the amount of resources made available to ESC rights areas. Utilisation of resources can be better appreciated from a public finance approach, which also incorporates resource governance issues such as transparency and accountability.

Chapter 3 developed and justified a cross-disciplinary model of ‘maximum available resources’ which incorporates the dimensions of resource mobilisation, allocation and utilisation and derives theoretical, conceptual and practical elements from the disciplines of law, economics, public policy and public finance. The model highlights the key role of public sector policy in creating the environment necessary for the effective realisation of ESC rights. The policy dimensions of the State provided the framework for discussion of resource-related issues, which represent the willingness of the State to align its institutions and policies with the requirement of optimising resources for ESC rights.

Chapters 4-8 presented theoretical arguments and identified key policy challenges in resource mobilisation, allocation and governance. The model broadened the scope of 'maximum available resources' to include public sector resources, international assistance and co-operation and private sector resources, incorporating both quantitative and qualitative dimensions.

Chapter 4 presented a macroeconomic framework for States to maximise domestic financial resources through taxation and non-tax revenue. From a detailed examination of various forms of taxation, non-tax revenue and other fiscal and monetary tools, the chapter identified economic and policy constraints and challenges that need to be overcome in order to move beyond traditional approaches to resource mobilisation. Particular attention was paid to challenges faced by developing countries in domestic resource mobilisation, including weakness of tax administration authorities, problems of tax evasion and tax avoidance, the informal economy, and issues related to fiscal management. The case study of resource maximisation in the Maldives illustrated the challenges poor countries face in domestic resources policy, including taxation, debt financing and debt management.

Chapter 5 identified challenges faced by developing States in attracting and managing resources through international assistance and co-operation, including donor conditionality, institutional weakness, relationships with donors, corruption and problems of accountability that weaken the overall effectiveness of these programmes. The analysis demonstrated the inadequacy of current practice in, and scope of international aid and assistance for realisation of ESC rights. The chapter identified an urgent need for international assistance and co-operation programmes to be better aligned with human rights goals, particularly ESC rights.

Chapter 6 examined ways of engaging with the private sector to enhance private and societal investments in the areas of ESC rights, which is the third element of resource mobilisation in the model. The argument were based on the premise that the undeniable efficiency of the market in generating wealth and enhancing overall welfare can, with appropriate policy 'nudges', can be harnessed to address ESC rights realisation. This proposition is supported by

international experts on human rights, business and market mechanisms. Private-sector investment can play a vital role in supplementing government expenditure in human rights programmes through market mechanisms, which offer the most effective means of creating the conditions necessary to achieve ESC rights goals, especially employment.

As discussed in Chapter 6, participation by the private sector to complement government efforts in ensuring the realisation of ESC rights raises a number of concerns about the potentially negative effects of market activities on human rights and welfare. To address these concerns, the proposed model of private sector participation encourages governments to actively seek such participation in priority areas through incentives and other policy tools. The objective is to combine the strengths of both sectors to achieve socially beneficial and synergistic outcomes, through proper policy balance.

The next key components of the multidisciplinary model are allocation of adequate resources and effective utilisation of these resources for achieving ESC rights objectives. Building on the discussion of macroeconomic policy, Chapter 7 examined public policy approaches to resource allocation. It described the characteristics of the public policy-making process and the decisions involved in resource allocation from a political economy perspective. A detailed analysis of budget and resource governance processes identified issues of allocative efficiency, equity and accountability relevant to resource allocation and utilisation.

Chapter 7 demonstrated that the allocation of resources for various policy purposes within government structures is best explained through a combination of economic and public policy perspectives. The institutional processes, actors and their agendas must be included in any examination of the dynamics of resource allocation within the public sector. In this way, the chapter identified key points of contact between the budgeting process and ESC rights policies. It also addressed the policy approach to resource allocation for ESC rights using the concept of 'front-loading' ESC rights into resource allocation decisions. The discussion was guided by the key

obligations of non-discrimination, progressive realisation and non-retrogression from minimum core content.

Resource management and governance were considered in Chapter 8. It was argued that public finance management and good governance can have a significant impact on how effectively public sector resources are used to achieve ESC rights goals. In order to make resource governance effective and fair from an ESC rights perspective, issues of corruption, transparency and accountability in resource mobilisation, allocation and utilisation stages need to be addressed.

In summary, the cross-disciplinary model of 'maximum available resources' demonstrates that such an approach is not only necessary but also possible, as evidenced in the State reports and case studies. States can make their public policies more ESC rights-friendly by more effectively mobilising their domestic financial and non-financial resources, international assistance and co-operation and private sector investment and participation.

### **9.3.3 Policy approaches to enhance resource mobilisation, allocation and governance as evident in State practice**

Chapters 4 to 8 also identified policy approaches available to the States in relation to resource mobilisation, allocation and governance. The qualitative analysis of State reports and case studies on the Maldives provided useful evidence on State practice in relation to these areas.

Chapter 4 proposed that the design of a State's domestic revenue regime should target high tax yield by broadening the tax base, reducing tax exemption and tax holidays, and strengthening overall tax administration and fiscal management capacity. The analysis of core elements of fiscal and monetary policy through the lens of ESC rights demonstrated that a good fiscal policy is guided by principles of efficiency, equity and fairness. The key message is that these policies must be targeted towards creating stronger

institutional capacity and oriented towards the human rights requirements of government expenditure.

In relation to domestic resource mobilisation, State reports identified active policy approaches in many States to reform of their tax structures in a bid to enhance revenue collection. The issues of debt management and debt burden also featured in a number of reports. There was evidence that some States were adopting new approaches to the enhancement of their overall resource situation. The case study on the challenges of domestic revenue mobilisation in the Maldives identified a number of pressing issues in relation to taxation policy and unmanageable borrowing, which highlighted the lack of appropriate fiscal management policies to address the growing and unsustainable public sector debt.

Chapter 5 examined policy options for States to maximise resources available through international assistance and co-operation, with particular emphasis on the need for developing States to actively seek international assistance and co-operation in areas of greatest need and to take a stronger leadership role in managing aid resources. The chapter also argued for poorer States to be more proactive in mobilising resources through international assistance channels to complement domestic resources and maximise the amount of 'available resources' for the effective realisation of ESC rights, and for donors to ensure that the aid and assistance produced the desired results. These objectives can be achieved through better coordination of aid programmes, more direct inputs from recipient States, and empowering recipient States to implement programmes within stronger aid sustainability frameworks.

The analysis of State reports showed evidence that most developing States give serious consideration to the role of international assistance and co-operation, not only to increase financial resources, but also to upgrade and enhance the human and institutional capacity for provision of social goods and services. A number of reports identified vital contributions made by international assistance and co-operation to ESC rights-related provisions. States recognised the positive impact of a well-coordinated inflow of financial and technical assistance from bilateral and multilateral donors and the need

to make such assistance more sustainable in the long-term. Developments in ODA flow, aid architecture and emerging aid donors provide opportunity for strengthening the role of international assistance in ESC rights-related activities. The case study on the challenges of international assistance in the Maldives illustrated a number of institutional capacity issues in relation to aid negotiations and project implementation, absorption capacity and aid sustainability. It further demonstrated that international assistance and co-operation supplement and support States' efforts in public sector investment and programmes.

The third dimension of resource mobilisation—maximising resources through partnership with the private sector—was covered in Chapter 6. The 'synergistic partnership' approach involves the government creating economic conditions and incentives for private sector investors to engage in, and direct their resources to, areas where resource gaps are most acute, particularly in realising the ESC rights of the people. Core ESC rights to food, water, housing, education and health can be effectively addressed through this approach, because the realisation of these rights generally involves a significant element of private sector provision. The chapter showed that enhancing the role of the private sector can help to close the gaps in these areas. As such, the main consideration in this policy approach is to achieve the right balance between market efficiency and State intervention to optimise socially desirable outcomes.

The challenges involved in maximising private sector partnerships include choosing the right public-private partnership model and working out the best type of contractual arrangements with these partners. The chapter argued that governance of private sector participation needs to be strengthened by identifying distinct roles for the government and the market, providing the right kinds of incentives, putting in place a strong mechanism to protect the vulnerable and promote equity, and enhancing the regulatory capacity of the government, particularly in relation to engagement with the private sector. The key element in such a partnership is the willingness of government to engage

closely with the private sector to creating an environment conducive to private sector investment in areas directly relevant to ESC rights.

The analysis of State reports showed that many States perceive public-private partnerships positively in areas such as housing, education, health and water. These reports also indicate the enthusiasm of many States to strengthen these policies and to find better working models for such partnerships. Overall, the reports indicated that private sector resources are essential for supplementing public sector resources in ESC rights realisation, although more attention can be given to building and strengthening this partnership. The case study on the experience of public-private partnership in public sector housing schemes in Maldives illustrated the nature of the challenges and risks in these relationships when the political situation is unstable. Overall, the State reports and the case study shed light on the complex political, economic and social forces that are in play in resource allocation decisions, and how governments accommodate these demands. The role of government in encouraging the private sector participation in public sector efforts to enhance public infrastructure, goods and services in specific areas such as education, health, housing and employment was identified by some States as part of their ESC rights strategy.

Chapter 7 drew on insights from various models of public sector decision-making, such as *Process Models*, *Systems Theory*, and *Public Choice Theory*, to show how decisions on competing priorities for resource allocation are influenced by many forces within the institutional arrangements. The chapter proposed that the dynamics of public sector budgeting ought to take into consideration the many aspects of political power and conflict, especially between the executive and the parliament. Budgetary agenda-setting may be driven by a combination of interests in these two areas. The chapter identified a number of challenges associated with bringing ESC rights to the forefront of the budgeting agenda, especially those related to political expediency, stakeholder influence and allocative efficiency.

In order to maximise the allocative efficiency of resources from the perspective of ESC rights, the chapter proposed the idea of increased participation of civil

society actors and the public in all stages of budget planning and approval. Examples of participatory budgeting and budget analysis advocacy in many parts of the world demonstrate that public input into the budget process enhances the quality of resource allocation decisions, and thus creates better ESC rights outcomes.

State reports also provided some insight into resource allocation practices. On the whole, the reports were not very informative about the budgeting process and justifications for different levels of resource allocation. The case study of budgeting in the Maldives revealed a highly centralised process in which the key budgetary decisions are made within the executive and the parliament without much transparency or room for public participation. There is very little public debate in the media or in civil society on the budget allocation process and very little expression of concern on key issues. There is no formalised mechanism for public participation or scrutiny at any level of the budgeting process, which has resulted in weak accountability in the allocation of resources.

Chapter 8 argued that resource governance must be seen as a central component of the concept of 'maximum available resources' required for the realisation of ESC rights, and that priority must be given to ensuring quality of resources and preventing corruption in relation to resource utilisation. The chapter demonstrated that a government's engagement with citizens in the area of resource allocation and policy prioritisation can have a positive impact on bringing these policy instruments more in line with ESC rights priorities. Equally, increased engagement of citizens, transparency and accountability can significantly improve resource governance for ESC rights.

In relation to resource governance, State reports provided some direct reference to State practice. Although transparency and accountability were identified in a number of reports, these discussions did not often occur in the context of resources mobilisation, allocation or utilisation. The key challenges associated with transparency and accountability in relation to budget administration were illustrated in the case study on the Maldives, which demonstrated that institutional capacity issues and political factors contribute

to the ineffectiveness of resource governance. Lack of proper checks-and-balances, systematic performance monitoring and transparency requirements significantly weakens the resource governance mechanism. Similarly, the credibility of the public finance management system and its ability to deliver on promises were identified as key challenges for the Maldives.

In summary, the analysis of State reports and case studies provides evidence of State practice which validates the policy approaches proposed through the 'maximum available resources' model presented in this thesis. Many States take into consideration the wide range of opportunities to enhance the quantity and quality of resources that can be mobilised and allocated for ESC rights. Yet there is little uniformity of policy stances in relation to the level of sensitivity to ESC rights requirements and they are not as broadly applied in practice. This variation is particularly evident in the case of prioritising resource allocation for areas of ESC rights.

#### **9.4 CONTRIBUTION TO SCHOLARSHIP: HUMAN RIGHTS POLICY IMPLICATIONS AND WHY IT MATTERS**

What are the human rights policy implications of the findings in this thesis? The concept of 'maximum available resources' has been shown to be a significant determining factor in the realisation of ESC rights, and one that must be fully integrated into public policy so that the role of the State in ensuring the realisation of these rights is fully appreciated. The nuances of meaning attached to 'maximum available resources' or 'resources at the disposition of the State' from the broader perspectives of economics, public policy and other relevant disciplines not only enriches scholarly understanding of the issues of resources required for human rights, but also highlights the importance of concerted efforts by States to address existing opportunities for individuals to fulfil their human rights.

By disentangling the interconnections between national policy and human rights obligations, the thesis can open up new avenues for mobilising

resources required for ESC rights realisation more effectively. Such policy approaches will require increased governmental coordination of development and fiscal co-operation and active promotion of economic openness and competitiveness, with a view to addressing the State's resources and capacity to address ESC rights requirements. For ESC rights policies to be effective, the essential role of macroeconomic policies at both national and global level must be recognised and integrated into the resource policy matrix of the State.

#### **9.4.1 Originality and contribution to human rights scholarship**

The originality of this thesis lies in its incorporation of many different perspectives under the overarching concept of 'maximum available resources' for the realisation of ESC rights. The synthesis of different aspects of the concept provides greater conceptual clarity. This cross-disciplinary treatment allows for a richer argument than would be possible if these elements were examined separately or analysed within a single discipline.

The uniqueness of this research lies in its synthesis of broad concepts and approaches to interpreting 'maximum available resources' in the context of ESC rights, drawing on scholarly work in human rights law, economics, public policy and public finance. This cross-disciplinary methodological approach is most appropriate for understanding State practice from a qualitative perspective. The in-depth analysis of State reports, the ESCR Committee's Concluding Observations and other relevant institutional documents, as well as the use of case studies, provided rich data on State practice in areas relevant to resource mobilisation, allocation and governance from an ESC rights perspective. The incorporation of economics and public policy into the analysis of State practice in relation to resource mobilisation and allocation is appropriate because such a broad-based approach captures more elements of actual State practice than would be the case if the problem was only investigated from human rights and legal perspectives.

The analysis of State reports to locate evidence in relation to resource mobilisation, allocation and utilisation is the first such exercise in human rights

scholarship. Using qualitative methodology, the analysis uncovered a rich source of evidentiary material on States' practice in relation to their obligation to use 'maximum available resources' within the context of progressive realisation of ESC rights. The interpretational elements of the concept of 'maximum available resources' presented in this thesis also provide a more grounded historical and practical perspective on the application of the concept and its implications for ESC rights policy.

#### **9.4.2 Practical implications and areas for future research**

Legal, political, social, economic and historical factors contribute to shaping the ability of a State to bring ESC rights concerns to the forefront of public policy and to afford them due priority in resource allocation. As indicated above, this approach is invaluable for better engagement and coordination between human rights advocates and governments in the area of ESC rights realisation.

This thesis has shown that States are increasingly confronted with multiple challenges in ensuring the rights guaranteed in the international human rights regime, especially ESC rights, due to resource constraints. The existing systems of international trade, investment and other economic institutional mechanisms and the power of international organisations and transnational business organisations are helping to create these challenges. Notwithstanding academic arguments on both sides of the globalisation debate, the ability of States to address the need to facilitate and, in many cases provide, essential goods and services for the fulfilment of ESC rights can be better approached through a policy of State-market partnership.

Given these challenges and policy dynamics, the notion of an 'activist State' in the promotion of ESC rights within the suggested resource framework fits well into the economic and social reality of the globalised world, especially with regard to ESC rights. State activism is clearly indicated given its resource mobilisation and allocation efforts require strategic engagement with the

market, the international community and, most importantly, with citizens as rights-holders.

Given the diversity of economic, social and political conditions among the nations of the world, and despite the fact that common values are imparted by the instruments of the international human rights system to which these States are party, practical observance of their ESC rights obligations cannot be gauged using the same indicators or yardsticks. Therefore, differences in the application of the concepts reflect the reality of the policy environment in each State. This would be a key area for future research which could further incorporate such variations into the resource model and further refine policy approaches to reflect State-level variables.

In summary, the cross-disciplinary re-conceptualisation of 'maximum available resources' presented in this thesis represents a valuable contribution to human rights scholarship. It consolidates theoretical, conceptual and practical aspects of macroeconomic policy within the framework of ESC rights obligations and can thereby enhance advocacy and policy monitoring activities in the area of State compliance. The conceptual parameters and indicators of State compliance in relation to resource mobilisation, allocation and governance proposed in this thesis also provide a set of practical tools to promote State compliance with taking steps to the maximum of available resources for the realisation of ESC rights.

## **9.5 SUMMARY AND CONCLUSIONS**

The cross-disciplinary model of resources for ESC rights presented in this thesis is unique in incorporating multiple dimensions of law, economics, public policy and public finance within the human rights framework. This provides a foundation on which future research on similar topics can be built.

This thesis has primarily been concerned with the *interpretation* of the concept of 'maximum available resources' and its implications in ESC rights policy. The outcomes of the research can best be appreciated within the context of human

rights in general and ESC rights in particular. Much of the work is concerned with expressing the nature of ESC rights policy from the perspective of State resources. These descriptive elements, however, provide the context in which the prescriptive model of resources is built. Every concept examined in this thesis can be seen as an interdependent element of a much wider environment of legal, economic and policy scholarship and practice.

The thesis does not simply add to the growing conversation on ESC rights policy and resource requirements using a cross-disciplinary lens. It has identified a number of fundamental points of interaction between legal, economic and public policy (including public finance) scholarship with the common objective of enhancing understanding of the practical dimensions of ESC rights realisation. This constitutes a significant contribution to scholarship which can enrich future research efforts in the area of economic, social and cultural rights.

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## APPENDICES

### Appendix 1:

#### List of State reports analysed

#	State Report	UN Document Number	Date
1	State party's report - Afghanistan	E/C.12/AFG/2-4	09-Jul-09
2	State party's report - Albania	E/C.12/ALB/2-3	25-Jul-11
3	State party's report - Algeria	E/C.12/DZA/4	06-Jan-09
4	State party's report - Angola	E/C.12/AGO/4-5	03-Jul-14
5	State party's report - Argentina	E/C.12/ARG/3	16-Jan-11
6	State party's report - Armenia	E/C.12/ARM/2-3	26-Feb-13
7	State party's report - Australia	E/C.12/AUS/4	07-Jan-08
8	State party's report - Austria	E/C.12/AUT/4	28-Oct-12
9	State party's report - Azerbaijan	E/C.12/AZE/3	16-May-11
10	State party's report - Barbados	E/1978/8/Add.33	27-Nov-81
11	State party's report - Belarus	E/C.12/BLR/4-6	28-Oct-12
12	State party's report - Belgium	E/C.12/BEL/4	18-Jun-12
13	State party's report - Benin	E/C.12/BEN/2	29-Mar-07
14	State party's report - Bolivia (Plurinational State of)	E/C.12/BOL/2	20-Aug-07
15	State party's report - Bosnia and Herzegovina	E/C.12/BIH/2	01-Nov-12
16	State party's report - Brazil	E/C.12/BRA/2	28-Jan-08
17	State party's report - Bulgaria	E/C.12/BGR/4-5	09-May-11
18	State party's report - Burundi	E/C.12/BDI/1	19-Jan-14
19	State party's report - Cambodia	E/C.12/KHM/1	07-Jan-09
20	State party's report - Cameroon	E/C.12/CMR/2-3	19-Jul-10
21	State party's report - Canada	E/C.12/CAN/6	22-Apr-14
22	State party's report - Chad	E/C.12/TCD/3	13-Jan-09
23	State party's report - Chile	E/C.12/CHL/4	13-Aug-13
24	State party's report - China	E/C.12/CHN/2	06-Jul-12
25	State party's report - China (Hong Kong)	E/C.12/CHN-HKG/3	06-Jul-12
26	State party's report - China (Macau)	E/C.12/CHN-MAC/2	06-Jul-12
27	State party's report - Colombia	E/C.12/COL/5	09-Jan-09
28	State party's report - Costa Rica	E/C.12/CRI/4	22-Jun-06
29	State party's report - Croatia	E/1990/5/Add.46	21-Aug-00
30	State party's report - Cyprus	E/C.12/CYP/5	21-Oct-08
31	State party's report - Czech Republic	E/C.12/CZE/2	16-Jan-13
32	State party's report - Democratic People's Republic of Korea	E/1990/6/Add.35	15-May-02

33	State party's report - Democratic Republic of the Congo	E/C.12/COD/5	21-Jan-09
34	State party's report - Denmark	E/C.12/DNK/5	22-Dec-11
35	State party's report - Djibouti	E/C.12/DJI/1-2	01-Nov-12
36	State party's report - Dominican Republic	E/C.12/DOM/3	30-Jun-09
37	State party's report - Ecuador	E/C.12/ECU/3	20-May-11
38	State party's report - Egypt	E/C.12/EGY/2-4	22-Dec-11
39	State party's report - El Salvador	E/C.12/SLV/3-5	29-Oct-12
40	State party's report - Estonia	E/C.12/EST/2	12-Jul-10
41	State party's report - Ethiopia	E/C.12/ETH/1-3	27-Mar-11
42	State party's report - Finland	E/C.12/FIN/6	13-Mar-13
43	State party's report - France	E/C.12/FRA/4	19-Mar-14
44	State party's report - Gabon	E/C.12/GAB/1	29-Jun-12
45	State party's report - Gambia	E/C.12/GMB/1	06-Nov-13
46	State party's report - Georgia	E/1990/6/Add.31	10-Aug-01
47	State party's report - Germany	E/C.12/DEU/5	27-Jul-10
48	State party's report - Greece	E/C.12/GRC/2	15-Dec-13
49	State party's report - Guatemala	E/C.12/GTM/3	11-Apr-13
50	State party's report - Guyana	E/C.12/GUY/2-4	03-Sep-12
51	State party's report - Honduras	E/1990/5/Add.40	23-Jul-98
52	State party's report - Hungary	E/C.12/HUN/3	17-Feb-06
53	State party's report - Iceland	E/C.12/ISL/4	27-Mar-11
54	State party's report - India	E/C.12/IND/5	01-Mar-07
55	State party's report - Indonesia	E/C.12/IDN/1	28-Oct-12
56	State party's report - Iran (Islamic Republic of)	E/C.12/IRN/2	16-May-11
57	State party's report - Iraq	E/C.12/IRQ/4	19-Nov-13
58	State party's report - Ireland	E/C.12/IRL/3	07-Nov-13
59	State party's report - Israel	E/C.12/ISR/3	12-Jul-10
60	State party's report - Italy	E/C.12/ITA/5	10-Oct-13
61	State party's report - Jamaica	E/C.12/JAM/3-4	14-Jun-11
62	State party's report - Japan	E/C.12/JPN/3	16-Jun-11
63	State party's report - Jordan	E/1990/6/Add.17	23-Jul-98
64	State party's report - Kazakhstan	E/C.12/KAZ/1	08-Jun-09
65	State party's report - Kenya	E/C.12/KEN/2-5	25-Feb-14
66	State party's report - Kuwait	E/C.12/KWT/2	22-Dec-11
67	State party's report - Kyrgyzstan	E/C.12/KGZ/2-3	07-Nov-13
68	State party's report - Latvia	E/1990/5/Add.70	21-Sep-05
69	State party's report - Lebanon	E/1990/5/Add.16	06-Jul-93
70	State party's report - Libya	E/1990/6/Add.38	15-Feb-05
71	State party's report - Liechtenstein	E/1990/5/Add.66	27-Oct-04
72	State party's report - Lithuania	E/C.12/LTU/2	22-Dec-11
73	State party's report - Luxembourg	E/1994/104/Add.24	28-Oct-01
74	State party's report - Madagascar	E/C.12/MDG/2	22-Aug-08
75	State party's report - Malta	E/1990/5/Add.58	26-May-03

76	State party's report - Mauritania	E/C.12/MRT/1	20-May-11
77	State party's report - Mauritius	E/C.12/MUS/4	06-Jan-09
78	State party's report - Mexico	E/C.12/4/Add.16	25-Feb-05
79	State party's report - Monaco	E/1990/5/Add.64	01-Jul-04
80	State party's report - Monaco	E/C.12/MCO/2-3	08-Mar-13
81	State party's report - Mongolia	E/C.12/MNG/4	01-Dec-13
82	State party's report - Montenegro	E/C.12/MNE/1	02-Sep-13
83	State party's report - Morocco	E/C.12/MAR/4	27-Mar-14
84	State party's report - Nepal	E/C.12/NPL/3	28-Oct-12
85	State party's report - Netherlands	E/C.12/NLD/4-5	17-Jul-09
86	State party's report - Netherlands (Antilles)	E/C.12/NLD/4/ADD.1	13-Jul-09
87	State party's report - Netherlands (Aruba)	E/C.12/NLD/4/ADD.2	19-Oct-10
88	State party's report - New Zealand	E/C.12/NZL/3	17-Jan-11
89	State party's report - Nicaragua	E/C.12/NIC/4	22-Oct-07
90	State party's report - Nigeria	E/1990/5/Add.31	23-Feb-96
91	State party's report - Norway	E/C.12/NOR/5	28-Oct-12
92	State party's report - Panama	E/1990/6/Add.24	31-Mar-00
93	State party's report - Paraguay	E/C.12/PRY/4	27-May-13
94	State party's report - Peru	E/C.12/PER/2-4	20-Jan-11
95	State party's report - Philippines	E/C.12/PHL/4	07-Sep-07
96	State party's report - Poland	E/C.12/POL/5	04-Aug-08
97	State party's report - Portugal	E/C.12/PRT/4	08-Mar-13
98	State party's report - Republic of Korea	E/C.12/KOR/3	04-Feb-08
99	State party's report - Republic of Moldova	E/C.12/MDA/2	26-Mar-10
100	State party's report - Romania	E/C.12/ROU/3-5	09-Apr-13
101	State party's report - Russian Federation	E/C.12/RUS/5	25-Jan-10
102	State party's report - Rwanda	E/C.12/RWA/2-4	04-Oct-11
103	State party's report - San Marino	E/C.12/SMR/4	05-Mar-07
104	State party's report - Senegal	E/1990/6/Add.25	31-Aug-00
105	State party's report - Serbia	E/C.12/SRB/2	12-Feb-13
106	State party's report - Slovakia	E/C.12/SVK/2	14-Jan-11
107	State party's report - Slovenia	E/C.12/SVN/2	26-Jun-13
108	State party's report - Solomon Islands	E/1990/5/Add.50	30-Jul-01
109	State party's report - Spain	E/C.12/4/Add.11	04-Jan-03
110	State party's report - Sri Lanka	E/C.12/LKA/2-4	27-Jan-10
111	State party's report - Sudan	E/C.12/SDN/2	18-Sep-13
112	State party's report - Suriname	E/1990/5/Add.20	02-Feb-94
113	State party's report - Sweden	E/C.12/SWE/6	24-Jun-13
114	State party's report - Switzerland	E/C.12/CHE/2-3	17-Jul-09
115	State party's report - Syrian Arab Republic	E/1994/104/Add.23	17-Nov-99
116	State party's report - Tajikistan	E/C.12/TJK/2-3	03-Apr-13
117	State party's report - Thailand	E/C.12/THA/1-2	09-Oct-13
118	State party's report - The former Yugoslav Republic of Macedonia	E/C.12/MKD/2-4	Feb-14

119	State party's report - Togo	E/C.12/TGO/1	04-Oct-11
120	State party's report - Trinidad and Tobago	E/1990/6/Add.30	02-Oct-00
121	State party's report - Tunisia	E/1990/6/Add.14	08-Oct-96
122	State party's report - Turkey	E/C.12/TUR/1	28-Jan-10
123	State party's report - Turkmenistan	E/C.12/TKM/1	27-Jul-10
124	State party's report - Uganda	E/C.12/UGA/1	04-Dec-13
125	State party's report - Ukraine	E/C.12/UKR/6	27-Dec-12
126	State party's report - United Kingdom of Great Britain and Northern Ireland	E/C.12/GBR/5	31-Jan-08
127	State party's report - United Kingdom of Great Britain and Northern Ireland (Overseas Territory)	E/C.12/GBR/5/Add.2	14-Feb-08
128	State party's report - United Nations Interim Administration in Kosovo	E/C.12/UNK/1	15-Jan-08
129	State party's report - United Republic of Tanzania	E/C.12/TZA/1-3	27-Mar-11
130	State party's report - Uruguay	E/C.12/URY/3-4	22-Jul-09
131	State party's report - Uzbekistan	E/C.12/UZB/2	28-Oct-12
132	State party's report - Venezuela (Bolivarian Republic of)	E/C.12/VEN/3	19-Nov-13
133	State party's report - Viet Nam	E/C.12/VNM/2-4	13-Mar-13
134	State party's report - Yemen	E/C.12/YEM/3	13-Mar-14
135	State party's report - Zambia	E/1990/5/ADD.60	01-Sep-03
136	State party's report - Zimbabwe	E/1990/5/Add.28	25-Sep-95

## Appendix 2:

### International Covenant on Economic, Social and Cultural Rights

Adopted by General Assembly *resolution 2200 (XXI)* of 16 December 1966

#### Preamble

The States Parties to the present Covenant,

*Considering* that, in accordance with the *principles proclaimed in the Charter of the United Nations*, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that these rights derive from the inherent dignity of the human person,

*Recognizing* that, in accordance with the *Universal Declaration of Human Rights*, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

*Agree* upon the following articles:

#### Part I

##### Article 1.

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust

Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## **Part II**

### **Article 2**

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

### **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

### **Article 4**

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.

### **Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## **Part III**

### **Article 6**

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

## **Article 7**

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

- a. Remuneration which provides all workers, as a minimum, with:
  - i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - ii. A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- b. Safe and healthy working conditions;
- c. Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- d. Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

## **Article 8**

1. The States Parties to the present Covenant undertake to ensure:
  - a. The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - b. The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
  - c. The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

- d. The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

### **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

### **Article 10**

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

### **Article 11**

1. The States Parties to the present Covenant recognize 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 States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through

international co-operation, the measures, including specific programmes, which are needed:

- a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- b. Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

## **Article 12**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b. The improvement of all aspects of environmental and industrial hygiene;
  - c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

## **Article 13**

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - a. Primary education shall be compulsory and available free to all;
  - b. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

- d. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - e. The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

#### **Article 14**

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

#### **Article 15**

1. The States Parties to the present Covenant recognize the right of everyone:
  - a. To take part in cultural life;
  - b. To enjoy the benefits of scientific progress and its applications;
  - c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

### **Part IV**

#### **Article 16**

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.
2.
  - a. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;
  - b. The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

### **Article 17**

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.
3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

### **Article 18**

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

### **Article 19**

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

### **Article 20**

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

**Article 21**

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

**Article 22**

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

**Article 23**

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

**Article 24**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

**Article 25**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

**Part V****Article 26**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 27**

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Article 28**

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 29**

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

#### **Article 30**

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

- a. Signatures, ratifications and accessions under article 26;
- b. The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

### **Article 31**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.