

HEINONLINE

Citation: 11 Int'l L. & Mgmt. Rev. 125 2015



Content downloaded/printed from [HeinOnline](#)

Tue May 9 17:42:20 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

STATE OBLIGATIONS CONCERNING SOCIO-ECONOMIC RIGHTS IN TIMES OF THE EUROPEAN FINANCIAL CRISIS

*Jernej Letnar Čerňič**

I. INTRODUCTION

The 2008 European financial crisis indirectly undermined socio-economic rights in several European countries. From Lisbon to Sevilla, Venice to Ljubljana, and Athens to Nicosia, Eastern and Southern European countries face the negative consequences of the financial crisis and subsequent structural reforms. As such, protection of social and economic rights is rapidly declining. Growing evidence suggests that the economic and public debt crises of Croatia, Cyprus, Greece, Ireland, Italy, Portugal, Slovenia, and Spain undermined the level of socio-economic rights individuals in those countries enjoy.¹ Reduction in government spending lessened the protection of economic and social rights—such as the right to social security, health care, education, housing, food, and water.

The economic crisis affected the everyday lives of ordinary people, both at micro and macro levels. For instance, the European Commission noted that “groups already at a heightened risk of poverty, such as young adults, children and to some extent migrants, are now experiencing an even worse situation.”² A young family in Spain can no longer repay its housing loan and quickly becomes homeless. A former Greek public employee can no longer access state health insurance, since she has no income. A Portuguese student cannot enroll at a public university as a result of increased tuition fees. Not to mention the suffering of applicants for international protection in reception centers at Athens, Lampedusa, and Malta. The Eurobarometer reports that, “financially vulnerable Europeans report feeling left out of society far more often than respondents as a whole. While 16 % of Europeans overall feel excluded, around a third of ‘poor’ Europeans feel this way.”³ Figure 1 illustrates the severe material deprivation rate in Europe in 2011 and 2012.

* Jernej Letnar Čerňič, Assistant Professor of Law, Graduate School of Government and European Studies.

¹ European Union Agency for Fundamental Rights, *Annual Report 2012*, http://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf, 11-38.

² European Union, *2012 'Employment and Social Developments in Europe' Review*, [Europa.eu/rapid/press-release_AGENDA-12-44_en.doc](http://europa.eu/rapid/press-release_AGENDA-12-44_en.doc).

³ Eurobarometer, *Poverty and Social Exclusion Report*, http://ec.europa.eu/public_opinion/archives/ebs/ebs_355_en.pdf (2010), 52.

Figure 1 : Severe material deprivation rate in Europe in 2011 and 2012⁴



(1) Estimated data, 2012
 (2) Break in time series, 2012
 IE: data not available, 2012

Spanish philosopher Ortega y Gasset in the 1930s framed what, aptly and accurately, describes the current European financial crisis. He wrote in his seminal work *The Revolt of the Masses* that:

Europe has been left without a moral code. It is not that the mass-man has thrown over an antiquated one in exchange for a new one, but that at the centre of his scheme of life there is precisely the aspiration to live without conforming to any moral code. Do not believe a word you hear from the young when they talk about the 'new morality.' I absolutely deny that there exists to-day in any corner of the Continent a group inspired by a new ethos which shows signs of being a moral code. When people talk of the 'new morality' they are merely committing a new immorality and looking for a way of introducing contraband goods.⁵

The gap between the southern and northern parts of Europe reflects the difference between these states' financial obligations and their obligation to respect socio-economic rights. In the modern era, a state's financial obligations take precedence over state obligations to respect economic and social rights. Many describe liberalism and generosity as

⁴ Eurostat, *People at risk of poverty or social exclusion, 2013*, Figure 4, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/People_at_risk_of_poverty_or_social_exclusion and http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ile_mddd11&lang=en.

⁵ Jose O. Gasset, *The Revolt of the Masses*, 136, (1930) available at <http://pinkmonkey.com/dl/library1/revolt.pdf>.

virtues of southern European nations. If Southern Europe cannot meet the minimum standards of social and economic rights, then they require help from richer European countries. The European Union is not only an economic community, but is, first and foremost, a community based on the fundamental rights of all member nations. As such, other European countries are obligated to assist the poorer nations.

A population needs to have a reasonable minimum of economic and social rights; an economic crisis undermines the state's financial ability to fully implement those standards. It does so by forcing a state into paying off its public debt. If a state is obliged to repay its public debt, it will be less capable of providing the reasonable minimum standard of economic and social rights.⁶ During a financial crisis, states are still obliged to uphold individual economic and social rights.⁷

Despite the growing attention paid to the financial crisis, there has been little examination of its impact on the enjoyment of socio-economic rights. As such, there is not much written about the relationship between an economic crisis and human rights, particularly from the perspective of human rights law.⁸ The majority of the literature treats human rights and financial or economic crises as separate notions. The literature focuses solely on either the lack of success of specific lenders and financial instruments or it focuses solely on human rights violations. The literature generally fails to study the common features between the human rights violations and the crises—and their attendant socio-economic problems.

This article examines the relationship between the economic crisis and socio-economic rights from the perspective of a state's human rights obligations. Further, the article enhances the discussion on how to adequately secure socio-economic rights during times of economic crisis. The article does so by asking two main questions:

⁶ Mary Dowell-Jones and David Kinley, *Minding the Gap: Global Finance and Human Rights, Ethics and International Affairs*, Vol. 25, No. 2, 184 (2011)(citing Rita Roca and Francesca Manta, *Values Added: The Challenge of Integrating Human Rights into the Financial Sector*, 14, Danish Institute for Human Rights, (2010)).

⁷ The Castan Centre of Human Rights notes, "it does not follow that from additional sites of responsibility comes a corresponding reduction of the State's liability in respect of human rights protection and promotion." R Chambers, D Kinley and S Joseph, Submission to the UN Office of the High Commissioner's review of the UN's Human Rights Norms for Corporations 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regards to Human Rights' the Castan Centre for Human Rights Law, Monash University, Melbourne, Australia, <http://www.law.monash.edu.au/castancentre/publications/ohchr-sub-final.pdf> (last visited June 30, 2013).

⁸ Only a few articles have been so far published on this topic. See Ignazio Saiz, *Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis*, *Journal of Human Rights Practice*, Volume 1, Issue 2, 277-293; Felipe Gómez Isa, *The reversibility of economic, social and cultural rights in crisis contexts*, (El Tiempo de los Derechos, Working Papers 2011) available at <http://e-archivo.uc3m.es/bitstream/handle/10016/10137/wp37.pdf?sequence=1>. C; Raj Kumar, *Human Rights Crisis of Public Health Policy: Comparative Perspectives on the Protection and Promotion of Economic and Social Rights*, 52 *Indian Journal of International Law*, 351-87, 2012; Rachael Lorna Johnstone; Aðalheiður Ámundadóttir, *Defending Economic, Social and Cultural Rights in Iceland's Financial Crisis*, 3 *The Yearbook of Polar Law*, 455-77 (2011).

- 1) Do nation-states have an obligation to maintain a minimum standard of socio-economic rights during an economic crisis?
- And-
- 2) Could such obligations be shared between poorer, developing states and developed industrialized states—which could bear a duty to give “international assistance and cooperation?”

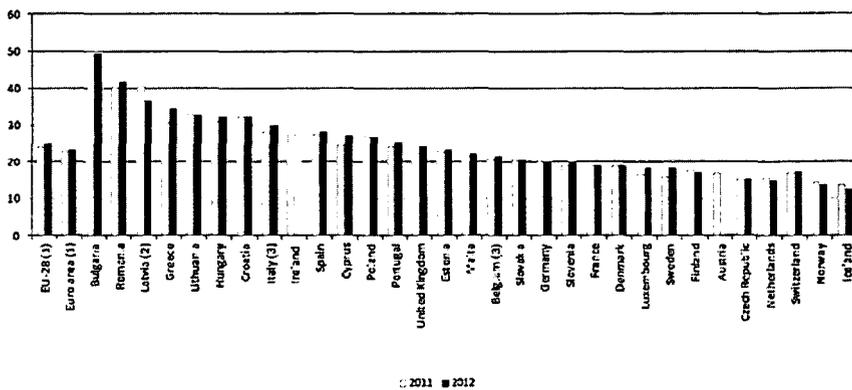
The remainder of the article explores a state’s obligations regarding economic and social rights. It also examines the nature, value, and scope of these obligations. The article also answers whether these obligations remain unchanged during an economic crisis. The task is divided as follows: Section II discusses implementation of economic and social obligations during an economic and social crisis. Section III analyzes the nature, scope, and standards of state obligations concerning economic and social rights. Section IV discusses extraterritorial state obligations to observe economic and social rights on the basis of a duty to co-operate; it does so by analyzing the legal nature of a state’s extraterritorial obligations and their duty to co-operate. On the basis of this analysis, Section V assesses the added value of territorial and extraterritorial state obligations regarding economic and social rights and how these could be better implemented. The article argues that territorial states have obligations to respect, protect, and fulfill economic and social rights—even during severe economic crises—and that developed states have extraterritorial obligations to ensure reasonable minimum socio-economic standards are being developed in other, less developed, nations.

II. SOCIO-ECONOMIC RIGHTS IN EUROPEAN FINANCIAL CRISIS

Economic crisis and a state repaying public debt directly affect the individual’s enjoyment of human rights, particularly economic and social rights, because they minimize the state’s ability to follow through on its socio-economic obligations to its citizenry. In recent decades, states borrowed funds directly from other countries, international organizations, and private financial institutions. Such loans often enabled excessive government spending, poor public resource management, and corruption. Excessive spending and poor management by the banking industry in Eastern and Southern Europe brought those countries to the brink of fiscal collapse. When the European Union and other international organizations set conditions on granting further loans to Eastern and Southern European countries, they often forget those states’ obligations to respect, protect, and fulfill the economic and social rights of ordinary people. This leads to individuals in Eastern and Southern Europe to struggle daily for their survival and their families. Research indicates that these heavily indebted states are less likely to ensure the

adequate level of protections of economic and social rights.⁹ Growing evidence from the economic crises of Southern European also suggests that repaying public debt directly undermines economic and social rights. Greece¹⁰, Portugal¹¹ and Spain¹² particularly illustrate how damaging restructuring public debt is on state resources to provide economic and social rights. For instance, Figure 2 illustrates the changes from 2011 to 2012 concerning people at risk of poverty or social exclusion in European Union and shows that risk has increased particularly in the Eastern and Southern European countries.

Figure 2 : People at risk of poverty or social exclusion in the European Union¹³



(1) Eurostat estimates for 2012
 (2) Eurostat time series for 2011
 (3) Provisional data for 2012

The United Nations Committee on Economic, Social and Cultural Rights (UN ESCR) observed in 2012 *Concluding Observations on Spain* that implementing economic and social rights is “reduced as a result of

⁹ Eduardo Borenstein & Ugo Panizza, *The Costs of Sovereign Default*, (IMF Working Paper No. 238, 8, 2008).

¹⁰ Joanna Kulpa, *Why Is Sovereign Debt Restructuring a Challenge? The Case of Greece*, (Bruges European Economic Policy Briefings n24 2012) available at <http://www.coleurope.eu/sites/default/files/research-paper/beep24.pdf> (2013).

¹¹ See the Constitutional Court of Portugal, case 187/2013, <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html> (2013), Eduardo Vitor Rodrigues, *O Estado e as Políticas Sociais em Portugal Sociologia: Revista do Departamento de Sociologia da FLUP*, Vol. XX, 2010. 191-230, available at <http://ler.letras.up.pt/uploads/ficheiros/8794.pdf> (15.4.2013).

¹² Informe Conjunto al Comité de Derechos Económicos, Sociales y Culturales, Examen del 5º Informe Periódico de España, 48ª sesión del CESCR, mayo 2012, http://www2.ohchr.org/english/bodies/cescr/docs/ngos/JointSubmission19NGOs_Spain_CESCR48_sp.pdf (2013); Gaby Ore Aguilar, *Derechos sociales; el otro déficit*, *El País*, 7 May 2012, http://elpais.com/elpais/2012/05/03/opinion/1336056886_000607.html (2013).

¹³ Eurostat, *People at Risk of Poverty or Social Exclusion, 2013*, ilo: peps11. 200, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/People_at_risk_of_poverty_or_social_exclusion.

the austerity measures.”¹⁴ UN ESCR further expressed this concern because “one in four minors is living below the poverty line,”¹⁵ and “pensions are in many cases below subsistence level, so that pensioners are at risk of falling into poverty.”¹⁶ Further, UN ESCR expressed trepidation over “the situation of individuals and families who find themselves overwhelmed by housing costs,”¹⁷ and “at the regressive measures adopted by the State party that increase university tuition fees.”¹⁸ The UN ECSR told Spanish authorities that “all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups.”¹⁹ Similarly, the UN ESCR noted in the 2012 *Concluding Observations on Bulgaria* that it:

[I]s concerned, particularly in the context of the economic and financial crisis, about the recent rise in unemployment and long-term unemployment rates, which negatively affect the population of the State party, especially young persons, immigrants, Roma persons and persons with disabilities, and increases their vulnerability in violation of their rights set out in the Covenant.²⁰

Further, the Committee on the Elimination of Discrimination Against Women (CEDAW) observed in its 2013 *Concluding Observations on Greece* “the current financial and economic crisis and measures taken by the State party to address it within the framework of the policies designed in cooperation with the European Union institutions and the International Monetary Fund (IMF) are having detrimental effects on women in all spheres of life.”²¹ The Committee further observed that:

¹⁴ Committee on Economic, Social and Cultural Rights, *Concluding Observations on Spain*, E/C.12/ESP/CO/5, Para. 8. 6 June 2012, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/433/06/PDF/G1243306.pdf?OpenElement> (2013).

¹⁵ *Id.* Para. 17. See also the 2012 Annual Report of the EU Fundamental Rights Agency, *Safeguarding fundamental rights in the time crisis*, in press.

¹⁶ *Id.* at Para. 20.

¹⁷ *Id.* at Para. 21.

¹⁸ *Id.* at Para. 28.

¹⁹ *Id.* at Para. 8. See also Magdalena Sepúlveda Carmona, UN Special Rapporteur on extreme poverty and human rights, *Impact of austerity measures on the enjoyment of human rights*, available at <http://www.ohchr.org/EN/Issues/Poverty/Pages/ImpactofausteritymeasuresontheenjoymentHR.aspx> (2013).

²⁰ CESCR, *Concluding observations on the combined fourth and fifth reports of Bulgaria*, adopted by the Committee at its forty-ninth session (12-30 November 2012), E/C.12/BGR/CO/4-5, 11 December 2012, Para. 11.

²¹ CEDAW, *Concluding observations on the seventh periodic report of Greece*, adopted by the Committee at its fifty fourth session (11 February – 1 March 2013), CEDAW/C/GRC/CO/7, 26 March 2013, Para. 6.

Due to the seriousness of the situation and lack of any gender - sensitive approach to the current crisis policy within the State party, the Committee recommends that all important policymakers in Greece, including the European Union institutions and the IMF, cooperate in setting up an observatory to fully evaluate the impact on women of the many measures taken during the economic and financial crisis. Furthermore, a comprehensive gender equality policy should be developed in order to respond to the crisis and make sure that the obligations under the Convention and the aim and spirit of the Treaty of the functioning of the European Union, which requires that in “all its activities the Union shall aim to eliminate inequalities, and to promote equality, between men and women,” can be fully implemented by the State party.²²

The foregoing pronouncements illustrate that any state attempting to restructure its growing public debt, which was caused by poor public and private sector management, at the expense of economic and social rights. As such, the public resources available for social expenditure decline substantially. This can lead to the decrease of level of effective protection of economic and social rights.²³ As a consequence, states cannot provide an equal level of access to health care, social housing, water, and food. Access to university education is thereafter often subjected to increasing tuition fees, and there are often more pupils per class in primary and secondary education. All in all, the enjoyment of economic and social rights and economic crises are directly intertwined and correlated.²⁴

III. CLARIFYING OBLIGATIONS OF TERRITORIAL STATES UNDER SOCIO-ECONOMIC RIGHTS

States are often described as primary duty-holders in international human rights law. Traditionally, states are obliged to protect human rights within their territory. This article, therefore, first examines obligations of territorial states in relation to economic and social rights. International Covenant on Economic, Social and Cultural Rights (ICESCR) provides in Article 2 (1) that states shall undertake “steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

²² *Id.* at Para. 40.

²³ Ariaranga G. Pillay, *Open letter to state parties*, May 16, 2012, available at <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>.

²⁴ See generally Sabine Michalowski, *Sovereign Debt and Social Rights—Legal Reflections on a Difficult Relationship*, 8 HUMAN RIGHTS L. REV., 35-68 (2008). See also Christian Barry, *Sovereign Debt, Human Rights, and Policy Conditionality*, 19 THE JOURNAL OF POLITICAL PHILOSOPHY, 282-305 (2011).

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.”²⁵ This provision includes the most common characteristics of economic and social rights, including that their full realization is achieved *progressively* depending on financial resources available to a state.²⁶ However, the phrase “maximum available resources” refers not only to the financial capabilities of a state, but also to the capabilities of the international community on the basis of “international assistance and co-operation.”²⁷ Positive obligations under economic and social rights are most often connected with financial resources. Therefore, always insisting on the immediate realization of the core of economic and social rights may impose unjustified burdens on states, which may be facing systematic and long-term public resource shortages. For instance, some states and even some corporations can provide free elementary education, whereas others, specifically lesser developed states, must charge for attending primary school simply due to a lack of available public financial resources. This occurs even though charging fees is often counterproductive and the obligation to provide free education falls within the core obligations under the ICESCR and is therefore not dependent on available resources.²⁸ Some commentators claim that international human rights law traditionally places only obligations of conduct, not results, on states. However, the views of the CESCR Committee and scholars on immediate obligations of results challenge this assumption.²⁹

Economic and social rights have long been considered as secondary rights, and even today both sets of rights are not placed on equal footing. Economic, social and cultural rights include rights to housing, food, education, water, and health.³⁰ This set of rights complements the so-called civil and political rights.³¹ As Scheinin notes, “there is no watertight division between different categories of human rights.”³² However,

²⁵ G.A. res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976).

²⁶ Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights*, 16 HUM. RTS. Q. 694, (1994).

²⁷ General Comment No. 3, para. 13. See MAGDALENA SEPULVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, 370-77 (Antwerp, Hart/Intersentia, Vol. 18, 2003).

²⁸ U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment 11, *Plans of action for primary education*, 20th session, 1999, U.N. Doc. E/C.12/1999/4 para. 7.

²⁹ P. Alston and G. Quinn, ‘*The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, (1987) 9 HUM. RTS. Q., 185 (1987).

³⁰ ASHBJØRN EIDE et al., *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 22 (Dordrecht, Martinus Nijhoff Publishers, 2001); See also Amnesty International, *What are Economic, Social and Cultural Rights?* <<http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-es-cr>> (last visited April 30, 2013).

³¹ *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 540, 540 (Malcom Langford ed., 2008).

³² *Id.*

despite claims that both sets of rights are of equal importance and interdependent, civil and political rights are more solidly established under international and national law.³³ Economic and social rights generally have a programmatic nature and are not always directly justiciable to the same extent as civil and political rights.³⁴ Yeshanew defines justiciability as rights being “subjected to a judicial or quasi-judicial procedure of enforcement.”³⁵ Scheinin argues that “the problem relating to the legal nature of economic and social rights does not relate to their validity but rather to their applicability.”³⁶ The central question of economic and social rights therefore lies in their enforcement or justiciability. However, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force on May 5, 2013, which thereby recognized the political acceptance by states of their justiciability.³⁷ Further, the European Committee of Social Rights examines more and more collective complaints. Additionally, the body of case law in domestic jurisdictions is growing substantially.³⁸

The UN ESCR Committee developed in General Comment no. 3 the concept of a minimum core of each economic and social right that every individual should enjoy. It argued that:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, 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*.³⁹

³³ EIDE, *supra* note 31 at 22.

³⁴ *Id.*

³⁵ SISAY A. YESHANEW, THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 37 (2013). See also JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, (F. Coomans ed. 2006). See also MALCOLM LANGFORD, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (2008).

³⁶ EIDE, *supra* note 31 at 22; see also Christian Courtis, *Standards to Make ESC Rights Justiciable: A Summary Exploration*, 2 ERASMUS L. REV. 379 (2009).

³⁷ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Doc.A/63/435; C.N.869.2009.TREATIES-34, 11 December 2009, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> last visited May 15, 2013.

³⁸ M. Craven & M. Langford, *The International Covenant on Economic, Social and Cultural Rights*, Rev'd Edition (Oxford University Press, forthcoming 2014). Katherine G. Young and Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa* 26 HARV. HUM. RTS. J. 181, 181 (2013). Fons Coomans, *Justiciability of the Right to Education*, 2 ERASMUS L. REV. 427, 427-43 (2009).

³⁹ Comm. on Econ., Soc. and Cultural Rights, General Comment 3, *The Nature of States Parties' Obligations* 5th session, 1990, U.N. Doc. E/1991/23, annex III at 86 (Dec. 14, 1990) [hereinafter CESCER General Comment 3].

The minimum core model requires states to ensure minimum level compliance with a right, not progressively as has been the case with economic and social rights, but immediately.⁴⁰ Nonetheless, the CESCR Committee cautions state parties “to move as expeditiously and effectively as possible towards that goal.”⁴¹ More problematic is how to define or identify the minimum or basic level of a right in a particular country. Chapman pinpointed that the CESCR Committee, “lacks concrete standards for evaluating the performance of governments and their compliance with the Covenant,” and therefore “it should come as no surprise that the Committee itself does not use progressive realization as the standard by which it reviews the performance of states parties.”⁴² What is more, courts and human rights bodies may easily employ the minimum core model to identify the minimum levels of negative obligations, whereas its applicability is questionable in relation to positive obligations.⁴³

In applying this principle, the minimum core approach particularly applies to the obligations to respect and protect economic and social rights, and to a lesser extent, to the obligations to fulfill these rights, which involves financial resources of the state. However, the phrase, “maximum available resources” does not refer only to financial capabilities of a state, but also to those of the international community on the basis of obligations of, “international assistance and co-operation.”⁴⁴ Positive obligations under economic and social rights are most often connected with financial resources.⁴⁵ Therefore, insisting on the immediate realization of the core of economic and social rights in every situation may impose an unjustified burden on states, which have been facing systematic and long-term public resource shortages. It may even cause the state not to be able to meet the bare minimum requirements, which under other circumstances could have been fulfilled. For instance, a state which cannot ensure basic health care, housing or education to the majority of the population cannot expect to provide an individual with life-saving drugs, social flat, or even some years of free education.⁴⁶ For this reason, it is more convincing and appropriate to employ and interpret the minimum core model together with the “reasonableness test” drafted by the South-African Constitutional Court in *Grootboom* case⁴⁷ and subsequent cases.⁴⁸ The Court eloquently stated in *Grootboom* that:

⁴⁰ CESCR, General Comment No. 15, para. 37.

⁴¹ CESCR, General Comment 3, para. 9.

⁴² Audrey R. Chapman, *A Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q., 23, 32 (1996).

⁴³ SANDRA LIENBERG, CONSTITUTIONAL CONVERSATIONS, 303, (2008).

⁴⁴ General Comment No. 3, para. 13. See Sepulveda, *supra* note 28 at 370-77.

⁴⁵ Robertson, *supra* note 27 at 694.

⁴⁶ See e.g., Carol Steinberg, *Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence*, 123 SALJ 264, 268-271 (2006); see also *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 33 (S. Afr.).

⁴⁷ *Id.*

⁴⁸ See e.g., *Mazibuko v. City of Johannesburg*, 2000 (4) SA 1 (CC), Para. 93-97 (S. Afr.). The Court stated that “what is clear from the conduct of the City is that it has progressively sought to increase access to water for larger households who are prejudiced by the 6 kilolitre limit. It has

They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favorable (sic) measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize (sic) that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁴⁹

The state policies to implement economic and social rights must be reasonable, according to the jurisprudence of the South-African Court of Human Rights. However, this approach also has quite a few disadvantages, one of the most prominent is the non-transparency of reasons for state policy, which could be deemed as reasonable, and another is the reverse burden of proof, which creates difficulties in showing that the state policy was unreasonable.⁵⁰ Therefore, the combination of both approaches can overcome their deficiencies. Yeshanew observes that the minimum core model, “more or less concentrates on the content of the rights to identify minimum obligations,” the reasonableness test, “focuses on the obligations of states or measures to realize rights.”⁵¹ The two-tiered approach can effectively address the deficiencies of both approaches. In the same way, courts and human rights bodies can apply such approach towards negative and positive obligations under social and economic rights.⁵² The concept of the minimum core identifies minimum core obligations to respect, protect, and fulfil economic and social rights. It has been illustrated that economic crises often affect the ability of a state to even comply with this minimum core obligation to provide economic and social rights.⁵³

continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city. It cannot therefore be said that the policy adopted by the City was inflexible, and the applicants’ argument on this score too must fail” (para. 97). *See also* Nokotyana v. Ekurhuleni Metropolitan, 2009 (4) BCLR 312 (CC) (S. Afr.); *see also* Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 SAJHR 464, (1992).

⁴⁹ *Grootboom*, SA 46 (CC) Para. 41.

⁵⁰ *Yeshanew*, *supra* note 36, at 289-290.

⁵¹ *Id.* at 294.

⁵² *Id.*

⁵³ *See* SOVEREIGN FINANCING AND INTERNATIONAL LAW, THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING (Carlos Espósito et al. eds., 2013).

At a regional level the European Social Charter provides only one quasi-judicial complaint mechanism for enforcing economic and social rights.⁵⁴ The European Social Charter offers only a right to lodge collective complaints and the European Committee of Social Rights (ECSR) issues only non-binding recommendations. However, the ECSR has in past years developed extensive case law stemming from collective complaints arising from the crisis and has confirmed that state shall guarantee the enjoyment of economic and social rights.⁵⁵ It noted in 2009 *General Introduction to Conclusions* that “the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.”⁵⁶ Such pronouncement follows the principle of non-retrogression deriving from the CESCR.⁵⁷ The ECSR also dealt with the issue of socio-economic rights in times of crisis in decisions stemming from collective complaints. For instance, they noted in the case *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, that spending cuts due to crisis “should not excessively destabilize the situation of those who enjoy the rights enshrined in the Charter.”⁵⁸ It further noted “that a greater employment flexibility . . . should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labor law, protecting them from arbitrary decisions by their employers or from economic fluctuations.”⁵⁹ Furthermore, the Committee continued that “doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems.”⁶⁰ In a similar decision against Greece, the Committee emphasized that that any spending cuts, “should not undermine the core framework of a national social security system or deny individuals the opportunity to enjoy the protection it offers against serious social and

⁵⁴ See generally Olivier D. Schutter & Matthias Sant’ana, *The European Committee of Social Rights (the ECSR)*, in G. de Beco (ed.), *HUMAN RIGHTS MONITORING MECHANISMS OF THE COUNCIL OF EUROPE*, 71-99 (Gauthier de Beco ed., 2013).

⁵⁵ See *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011; *Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece*, Complaint No. 76/2012

⁵⁶ European Comm. of Social Rights [ECSR], *European Social Charter, Conclusion XIX-2*, at 13 (2009).

⁵⁷ Comm. on Econ., Soc. and Cultural Rights, *General Comment 3, The Nature of States Parties’ Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991).

⁵⁸ *European Committee of Social Rights, Complaint No. 65/2011 General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, 23 May 2012, para. 17.

⁵⁹ *Id.* at Para. 18.

⁶⁰ *Id.*

economic risk.”⁶¹ Such reasoning reminisces on the minimum core concept of the CESCR Committee, however without including reasonableness test. The Committee further elaborated on economic and social rights in five complaints against Greece,⁶² where it adopted the combination of the minimum core approach and reasonableness test of state compliance with their obligations under economic and social rights. The Committee held in *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece* that “even when reasons pertaining to the economic situation of a state party make it impossible for a state to maintain their social security system at the level that it had previously attained, it is necessary . . . for that state party to maintain the social security system on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security.”⁶³ The Committee does not require a state party to maintain the equal level of rights in times of crisis; as it takes a more cautious, reasonable, and humane approach to the difficulties faced by governments in times of crises. Nonetheless, the Committee held that “the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.”⁶⁴

However, states also seek to justify the adoption of the austerity measures, which affect economic and social rights. In a private law setting, a debtor would be obliged to repay her debt to the creditor, unless it declares insolvency. In a sovereign financing context, a state is also liable to repay its debt to creditor, being another state, international organisation or corporation. However, states are often faced with multiple obligations they need to address. Further, the ranking of repayment of such obligations is not clear.⁶⁵ Dowell-Jones and Kinley aptly noted that “human rights are intimately tied up with the economic health of the state, as well as, of course, much else besides.”⁶⁶ In answering these questions, a dilemma arises: should a state give priority to repayment of its public debt or should it first ensure that it observes, at very least, reasonable minimum essential level of every economic and social right? Respect for economic and social rights and sovereign

⁶¹ European Comm. of Soc. Rights, complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*; Decision on the merits, 23 May 2012, para. 47.

⁶² European Comm. of Soc. Rights, No. 80/2012, *Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece*; No. 79/2012 *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*; No. 78/2012 *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*; No. 77/2012 *Panhellenic Federation of Public Service Pensioners v. Greece*; No. 76/2012 *Federation of Employed Pensioners of Greece ((IKA –ETAM) v. Greece*.

⁶³ European Comm. of Soc. Rights, Complaint No. 65/2011, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, Para. 69.

⁶⁴ *Id.* at. Para. 79.

⁶⁵ Anna Gelpern, *Building a Better Seating Chart for Sovereign Restructurings*, 53 *Emory L.J.*, 1119, 1142-1147 (2004).

⁶⁶ Dowell-Jones, *supra* note 7, at 184.

financing obligations illustrate the dilemma encountered by many states in reconciling two conflicting values: whether the public debt repayment would undermine the protection of economic and social human rights, and whether the protection of fundamental human rights may impede the repayment or terminate state public debt obligations. In this respect, the UN ESCR Committee states that “in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁶⁷ What “every effort” is remains unclear. On the other hand, states must show their willingness to repay their debt in order to be able to borrow further on the international credit markets.⁶⁸

Traditionally, the protection of human rights has always concentrated on balancing the interests of the individual with those of society as whole, which include its international obligations to repay its debt to creditors. It is very easy to claim that debt repayment violates economic and social rights.⁶⁹ However, by not repaying public debt, financial markets and lenders will probably not be willing to continue lending to a needed state. Thereby, in the worst-case scenario, leaving the state without necessary resources to secure the reasonable minimum standard of economic and social rights. Joyce argues that “In the end, governments must raise cash both on the markets and from other governments . . . People might not like the idea of secondary debt . . . but would any lender lend unless they had scope to sell on bad debt in the event of a default?”⁷⁰ All of this calls for a middle approach where not only individual reasonable minimum core of social and economic rights, but also rights of lenders will be heeded. However, such solution is often difficult to achieve.

The practice of financial markets and investment arbitration panels illustrates that economic and social rights are not only underrated but that they do not play even a slightly significant role. However, it is argued that the reasonable minimum core of every human right, even economic and social rights, is untouchable. In the context of economic crises only a false dilemma arises when states are obliged to non-discriminatorily provide at least a reasonable minimum core of economic and social rights. Raffer, similarly, argues that “the right of creditors to interest and repayments collides and the principle recognized generally (not only in the case of loans) by all civilized legal systems that no one must be

⁶⁷ U.N. ESCR Comm., *supra* note 58, at para 10; *see also* CESCR, General Comment No. 19: The right to social security (Art. 9 of the Covenant), Feb. 4 2008, E/C.12/GC/19, para. 59-61.

⁶⁸ Edmund S. Phelps & Amar Bhidé, *The Root of All Sovereign-Debt Crises, Project Syndicate*, <http://www.project-syndicate.org/commentary/the-root-of-all-sovereign-debt-crises#sfmDj1OX9mB1mRT.99> (last visited March 15, 2013). The authors provide that: “governments offer no collateral, and their principal incentive to repay – the fear of being cut off by international credit markets – derives from a perverse addiction.”

⁶⁹ Michalowski, *supra* note 25, at 46-50.

⁷⁰ Eric Joyce, *Congo's victory against a 'vulture fund' is hollow*, *The Guardian*, July 19, 2012, <http://www.theguardian.com/commentisfree/2012/jul/19/congo-victory-vulture-fund-hollow>.

forced to fulfil contracts if that leads to inhumane distress, endangers one's life or health, or violates human dignity."⁷¹ All in all, states must guarantee at the least the reasonable minimum core of economic and social rights.

IV. EXTRATERRITORIAL OBLIGATIONS OF INTERNATIONAL ASSISTANCE AND COOPERATION OF DEVELOPED STATES

A. Legal Nature and Scope of Obligations of International Assistance and Cooperation of Developed States

Territorial states have an obligation to ensure the protection of one's enjoyment of human rights via the tripartite obligations to respect, protect and fulfil human rights. This section advances the argument that the home states have the obligation to respect, protect and fulfil human rights not only inside but also outside its national context. The previous section illustrated that territorial states have an obligation to uphold at least the reasonable minimum core of economic and social rights. However, the question that arises is whether developed (European) states have extraterritorial obligations to uphold the reasonable minimum core in Eastern and Southern European states? It has been much debated whether obligations of international assistance and cooperation are legal or not. Alston and Quinn do not find the obligation "legally binding."⁷² However, they add in the same paragraph that "in the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant."⁷³

If obligations of international assistance and cooperation are legally binding, are they equal for all states? Most commentators argue that they are not. Sepulveda argues that the obligations are "different."⁷⁴ Another question would be: which developed or industrialized states would be duty-bearers of such obligations? Vandenhole and Benedek argue, "the *prima facie* duty-bearers under the extraterritorial obligation to fulfill can be understood to be primarily those belonging to the donor community."⁷⁵ This includes "at least all member States of the Organization for Economic Cooperation and Development (OECD)."⁷⁶

⁷¹ Kunibert Raffer, *Solving Sovereign Debt Overhang by Internationalizing Chapter 9 Procedures*, University of Klagenfurt (2002)

http://www.jahrbuch2002.studien-vonzeitfragen.net/Weltfinanz/RAFFER_1/raffer_12.HTM (last visited March 20, 2013).

⁷² Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS QUARTERLY, 191 (1987).

⁷³ *Id.*

⁷⁴ Sepulveda, *supra* note 28, at 370.

⁷⁵ GLOBAL JUSTICE, *STATE DUTIES: THE EXTRA-TERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW*, 345, (Malcolm Langford et al. eds., Cambridge Univ. Press, 2013).

⁷⁶ *Id.*

However, the problem with such argument is that a number of OECD countries, for example Spain, are facing difficulties to provide socioeconomic rights to their own citizens due to current crisis. What is more, the phrase, “belonging to the donor community” is quite vague. Therefore, the situation of each traditional donor country must be examined before the obligation is imposed.⁷⁷ The better criteria would be standard of living or its decline in past years or even the rate of economic growth and decline. However, it is hard to argue, even though Salomon does,⁷⁸ that the obligation to assist and cooperate exists even outside the group of industrialized states. Nonetheless, the latter provision could also be interpreted as saying that the international community has the obligation to provide at least minimal and reasonable respect for economic and social rights.

B. State Obligations Beyond Their Borders to Respect, Protect, and Fulfill Human Rights

This section analyses a tripartite typology of human rights obligations under economic and social rights. The tripartite obligations to respect, protect, and fulfil economic and social human rights apply universally to all rights and entail a combination of negative and positive duties.⁷⁹ This tripartite typology of human rights obligations refers, under traditional human rights doctrines, to state obligations.⁸⁰ However, the fact that the state is the bearer of human rights obligations does not imply

⁷⁷ *Id.*

⁷⁸ Margot E. Salomon, *The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive ‘Obligations to Fulfil’*, EJIL Talk, (November 16, 2012), <http://www.ejiltalk.org/the-maastricht-principles-on-extraterritorial-obligations-of-states-in-the-area-of-economic-social-and-cultural-rights-and-its-commentary-an-overview-of-positive-obligations-to-fulfil/>.

⁷⁹ See generally Dinah Shelton, *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria)*, 44 THE AM J. INT’L L. INT’L L., ACHPR/COMM/AO44/1 (2002) (reporting that the Commission interpreted the African Charter for Human and Peoples’ Rights and developed a four-fold typology of human rights obligations in the case of Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria). The Commission held that “internationally accepted ideas of the various obligations engendered by human rights indicate that all rights — both civil and political rights and social and economic — generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfill these rights.”

⁸⁰ See International Commission of Jurists [ICJ], *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, at 6 (Jan. 26 1997), available at <http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgeleerdheid/organisatie/onderdelen/studieeninformatiecentrummensenrechten/publicaties/simspecials/20/Documents/20-01.pdf> accessed 30 March 2013 (requiring states responsible for violating international legal obligations to establish mechanisms for investigating, prosecuting, and correcting such violations); U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), para. 15 (12 May 1999) (explaining that the obligation to “respect” imposes on states a duty not to take any measures that in any way deprive protected parties of the right concerned); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (Princeton, Princeton University Press, 1980) (observing the tripartite typology of duties to include (1) duties to avoid the deprivation of the right concerned, (2) duties to protect rights holders from deprivation, and (3) duties to aid rights holders who have been deprived).

that only the state has such obligations.⁸¹ Shue notes in this regard that “for every basic right — and many other rights as well — there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions.”⁸² This includes state obligations to observe the reasonable minimum core of economic and social rights. State tripartite obligations to respect, protect, and fulfil also apply to questions of economic and social rights.⁸³ As states are often reluctant to recognize and protect the reasonable minimum core of economic and social rights extraterritorially, it is necessary to map out the nature and scope of state obligations. Do more developed, mostly Northern European states, have normative extraterritorial obligations to assist less developed, mostly Eastern and Southern European states in protecting economic and social rights? If so, what is the nature and scope of such obligations? In this way, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights provide in principle 9 that:

[A] State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.

However, the Maastricht principles do not specify what is the nature and scope of those obligations. Nonetheless, it appears that obligations of territorial states to ensure economic and social rights could be shared with that of developed or industrialized states, which could be duty-bearers of obligations of, “international assistance and co-operation” as it

⁸¹ See A. Rosas & M. Scheinin, *Categories and beneficiaries of human rights*, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 57–58 (R. Hanski and M. Suksi, eds., Turku, Åbo, Åbo Akademi University, 2nd ed. 1999).

⁸² HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY, 76, (Princeton University Press, 1980); see also Ashbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L. J., 35, 37 (1989) (arguing that the tripartite typology of duties bestows on states a negative obligation to abstain from acts contrary to human rights principles and a positive obligation as a “protector and provider” of rights).

⁸³ U.N. S.C. Rep. of the Comm’n on the promotion and protection of Human Rights, *The Right to Adequate Food and to Be Free from Hunger – Updated Study on the Right to Food, Economic & Social Counsel*, U.N. Doc. E/CN.4/Sub.2/1999/12 (June 28, 1999).

derives from practice of international human rights bodies. The Committee on the Rights of the Child noted that “when States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.”⁸⁴ The next subsections explore the emerging extraterritorial obligations to respect, protect and fulfill the reasonable minimum core of economic and social rights.

States’ obligations to respect the reasonable minimum core of economic and social rights is a negative right and thereby obliges states to refrain from interfering in the enjoyment of individuals’ economic and social rights both within and outside its territorial borders.⁸⁵ The extraterritorial obligation to respect suggests that states must undertake due diligence ensuring not only that they comply with human rights obligations concerning the reasonable minimum core economic and social rights, but that they additionally do everything possible to avoid causing harm to them. The United Nations Millennium Declaration recognizes that “we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we therefore have . . . a duty to all the world’s people, especially the most vulnerable and, in particular, the children of the world.”⁸⁶ Several international treaties and documents support extraterritorial obligations of states to respect economic and social rights.⁸⁷ For instance, the Convention on the Rights of Persons with Disabilities affirms, “the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries.”⁸⁸ Cooperatively, state parties commit that they, “will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.”⁸⁹ The measures that states can adopt to ensure respect for the reasonable minimum core of economic and social rights include: acknowledging them in external policies, constantly and consistently examining human rights situations where economic and social rights are at stake, effectively monitoring policies that protect economic and social rights, and implementing an

⁸⁴ Comm. on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (2003).

⁸⁵ See Int’l Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 (12 May 1994).

⁸⁶ United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (2000), 2.

⁸⁷ See Optional Protocol to the Convention on the Rights of the Child in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. GAOR, 44th Sess., annex II art. 10, U.N. Doc. A/54/49 (2000); *Id.* Annex I, art. 10.

⁸⁸ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* 3 May 2008, Preamble (1).

⁸⁹ *Id.* at Article 32.

effective monitoring system to ensure that economic and social rights are being implemented. States are also obliged to prevent and investigate violations, bring to justice and punish the perpetrators, and provide reparations for harm and injuries caused. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights specify in Article 13 that:

States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.

For instance, the CESCR Committee asked Germany, “to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations concerning international assistance and cooperation.”⁹⁰ Such an obligation to respect suggests that states must undertake extraterritorial due diligence over corporations on their territory to ensure that they comply with human rights obligations regarding the reasonable minimum core of economic and social rights, and do everything possible to avoid causing harm. All in all, state practice appears to be emerging in relation to extraterritorial obligation to respect. The next section discusses the extraterritorial obligation of states to protect economic and social rights.

The obligation of states to protect the reasonable minimum core of economic and social rights includes protecting the individual and collective enjoyment of economic and social rights. For instance, the Maastricht Principles on Extraterritorial Obligations of States in the area

⁹⁰ Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant*, E/C.12/1/Add.68, para. 31 (Sept. 24 2001). See also Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant* E/C.12/1/Add.54, para. 31 (Dec. 1, 2000); Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant*, E/C.12/1/Add.43, para. 20 (May 23, 2000); Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant*, E/C.12/1/Add.70, para.24 (Nov. 30, 2001); Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant*, E/C.12/1/Add.72, para.32 (Nov. 30, 2001); Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant*, E/C.12/1/Add.77, para.37 (June 5, 2002); Comm. on Economic, Social and Cultural Rights, *Consideration Of Reports Submitted ByParties Under Articles 16 and 17 Of The Covenant*, E/C.12/1/Add.79, para.26 (June 5, 2002); It is also notable that the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights deem a human rights violation of omission, “[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations” Office of The United Commissioner For Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, U.N. Sales No. E.04.XIV.8 (2005).

of Economic, Social and Cultural Rights highlight that “states must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially. . .”⁹¹ A state’s obligation to protect is of a positive nature and requires the state to adopt protective measures to secure the observance of economic and social rights. States have to undertake extraterritorial due diligence ensuring that they comply with human rights obligations concerning food, water, housing, and a decent standard of living, as well as, doing everything possible to avoid causing harm. The obligation to protect is a substantive obligation and a primary obligation relating to the conduct of third parties, such as rebel groups or corporations. States are also obliged to ensure that private actors will not violate economic and social rights outside their borders. Such reading is supported by the general comments and concluding observations of state reports of international human rights bodies. The UN Committee on Economic, Social and Cultural Rights advises that “States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.”⁹² The Committee further note that “States Parties home to companies active abroad shall also encourage such companies to assist, as appropriate, including in situations of armed conflict and natural disaster, host States in building capacities needed to address the corporate responsibility for the observance of economic, social and cultural rights.”⁹³ The same Committee observes concerning the right to health that “States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries.”⁹⁴ Similarly, in relation to the right to water, the Committee notes that “International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.”⁹⁵ Further, the UN Committee on the Rights of the Child emphasizes that “home States also have obligations, arising under the Convention and the optional Protocols thereto, to respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its

⁹¹ *The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, principle, 23 (2012) [hereinafter *The Maastricht Principles*] available at <http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf> (further defining the obligation in Principles 24 to 27).

⁹² CESCR, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/120 May 2011.

⁹³ *Id.* at Para. 6.

⁹⁴ CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, art. 12, E/C.12/2000/4 (Aug. 11, 2000).

⁹⁵ CESCR, *General Comment No. 15: The Right to Water*, arts. 11 and 12, E/C.12/2002/11 (Jan. 20, 2003); See also CESCR, *General Comment 19: The Right to Social Security*, art. 9 E/C.12/GC/19 (Feb. 4, 2008).

centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.”⁹⁶ Furthermore, the Committee on the Elimination of Racial Discrimination suggests that the State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party’s courts when such violations are committed outside the State party. The Committee reminds the State party to sensitize corporations registered in its territory to their social responsibilities in the places where they operate.⁹⁷

Such statements and comments illustrate that international human rights bodies recognize that home states have extraterritorial obligations to respect, protect and fulfil human rights of individuals against corporate violations abroad.

The third category of state obligations concerning economic and social rights includes the obligation to fulfil, which is defined as a positive obligation. It is further divided into obligation to facilitate, provide and promote.⁹⁸ It depends, but is not limited to, available financial resources of the state. It requires states to take active measures to ensure the availability, accessibility, and affordability of economic and social rights.⁹⁹ Therefore, states are obliged to work towards abolishment of obstacles for the enjoyment of economic and social human rights.¹⁰⁰ For example, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights instruct, “[a]ll States must take action, separately, and jointly, through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially . . .”¹⁰¹ In a failed state relating to corporate actors registered on its territory, where there is no efficient governmental control or authority, which would protect economic and social rights, an extraterritorial state may become the primary holder of an obligation to fulfil economic, social and cultural rights. The size and availability of a state’s financial resources will play a large role in meeting these standards to protect economic and social

⁹⁶ Committee on the Rights of the Child, *General Comment No 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is Its Standing, Meaning, and Effect?*, 62nd Sess., U.N. Doc. CRC/C/GC/16 (April 17, 2013).

⁹⁷ Committee on the Elimination of Racial Discrimination, CERD/C/GBR/CO/18-20, (September 14, 2011); *see also* Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/CAN/CO/19-20, (March 9, 2012).

⁹⁸ *See* Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food 20th session*, 1999, U.N. Doc. E/C.12/1999/5 (1999).

⁹⁹ *See generally* *Economic, Social, and Cultural: Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 4 (2003); *The Maastricht principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf (last visited June 30, 2013).

¹⁰⁰ *See* QUB Budget Analysis Project, *Budgeting for Economic and Social Rights: A Human Rights Framework*, 43 (QUB School of Law, Belfast, 2010).

¹⁰¹ *The Maastricht principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf (last visited June 30, 2013).

rights. While the resources available for fulfilling human rights obligations may not be as plentiful in small states as in large states, states may adopt such policies to the maximum extent given their available resources.

This section has attempted to explore if states also have obligations to respect, protect, and fulfil the reasonable minimum core of economic and social rights outside their borders. From this analysis it is clear that no straightforward extraterritorial obligations of states to respect, protect and fulfil human rights emerge. The least controversial of them are extraterritorial obligations to respect the reasonable minimum core of economic and social rights. Such state obligations develop from international and national levels. The extraterritorial obligations to protect and fulfil, which impose positive obligations on states, require states to exercise diligent monitoring and allocate funding, are yet to be developed from their embryonic forms. More specifically, state obligations to protect the reasonable minimum core of economic and social rights exist at least where territorial states exercise authority or effective control over private actors. However, effective obligations should be established in the future at domestic and international levels to examine alleged extraterritorial violations of economic and social rights. Nonetheless, states currently are already obliged not to extraterritorially infringe on the reasonable minimum core of economic and social rights.

V. CONCLUSIONS

The enjoyment of economic and social rights is crucial for survival and wellbeing of an individual. States have both existing territorial obligations, and emerging extraterritorial obligations to respect, protect and fulfil. They should not infringe upon the reasonable minimum core of economic and social rights, not only when requiring states to repay their public debt, but also before loan is granted. The overall aim of this article was to examine the territorial and extraterritorial obligations of states to observe economic and social rights. While it can be concluded that territorial states have obligations to respect, protect and fulfil the reasonable minimum core of economic and social rights, it is more controversial to submit that those obligations exists also extraterritorially on the basis of a duty to cooperate. Nonetheless, extraterritorial obligations to respect the reasonable minimum core of economic and social rights presently obliges states to violate them outside their territory. States must be accountable for the failure to meet their obligations under economic and social rights. If Eastern and Southern European states are unable to provide even the reasonable minimum core of economic and social rights, extraterritorial obligations of more developed, often Northern, European States to respect the reasonable minimum core arises. Europe is first and foremost a community based on the fundamental rights of all of its members. Territorial states must

primarily ensure that they will respect, protect and fulfil the reasonable minimum core of economic and social rights throughout the whole debt cycle. On the other hand, developed states should provide for the reasonable minimum core of economic and social rights even outside their borders. In summation, territorial states must take efforts to provide the reasonable minimum core of economic and social rights within their borders, whereas developed states are additionally obliged to respect outside their borders.

