

Full Credit to Sweet & Maxwell

European Human Rights Law Review

2010

Article 2(1) ICESCR and states parties' obligations: whither the budget?

Aoife Nolan

Mira Dutschke

Subject: International law. **Other related subjects:** Banking and finance. Human rights

Keywords: Budgets; State responsibility; Treaties

Legislation: International Covenant on Economic, Social and Cultural Rights 1966 (United Nations) art.2(1)

***E.H.R.L.R. 280 Abstract**

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights sets out State parties' key obligations with regard to the implementation of the rights in the Covenant. According to that provision, States are under a duty to take steps to the maximum of their available resources, to achieve the full realisation of Covenant rights progressively. In addition to programmatic duties, art.2(1) has also been recognised as imposing a number of immediate substantive and procedural obligations. Numerous aspects of art.2(1) have been the subject of extensive discussion amongst academics, legal professionals and others. However, so far, only limited consideration has been given to the budget-specific obligations that are imposed by art.2(1). Linking budget decisions regarding resource allocation and expenditure with the range of immediate and programmatic duties imposed by ICESCR, this article analyses art.2(1) from a "budget perspective".

Introduction

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out the key international legal obligations of States Parties with regard to the implementation of the rights in the Covenant.¹ The employment of the phrases "maximum available resources" and "progressive achievement" constitutes a recognition by the drafters that the full realisation of all economic, social and cultural rights will generally not be able to be achieved immediately.² Article 2(1) is therefore frequently presented as:

"a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights."³

***E.H.R.L.R. 281** The obligations set out in art.2(1) have been the subject of extensive academic and judicial discussion.⁴ Debate has centred on the scope of those duties, addressing issues such as the appropriate balance to be struck between the immediate and progressive obligations under art.2(1). In particular, much recent work has focused on the question of how to evaluate whether or not states are giving effect to art.2(1) adequately, with an ever-greater focus on the development of methodologies to monitor the implementation of this and other economic and social rights (ESR) obligations.⁵ Research has also been done linking budget decisions with obligations imposed by specific ESR.⁶ So far, however, there has been only very limited academic consideration of the budget-specific obligations that are imposed by art.2(1).⁷

Given the pivotal role that the state budget plays in terms of national resource-related decision-making and activities, it is crucial that the implications that art.2(1) has for

budgetary decisions, processes and outputs should be fully assessed and analysed. The UN High Commissioner for Human Rights has observed:

“ the budget -- as the instrument that determines the extent of the State's resources, their allocation and prospective expenditures -- is particularly relevant for the realisation of economic, social and cultural rights.”⁸

Indeed, there can be no doubt that the budget is one of the most important of the “ legislative measures” that states are enjoined to take in order to ensure the full realisation of Covenant rights in terms of art.2(1).⁹

At the domestic level, the linkage between budgetary decisions and the realisation of ESR is recognised in a number of constitutions that afford strong protection to such rights, with states being constitutionally obliged to direct resources towards ESR-related services. This is particularly evident in Latin America. For example, the resource dimensions of ESR obligations are made explicit in the Transitional Provisions of the 2008 Constitution of Ecuador, which entrenches the duty to progressively allocate resources towards the national health system. According to that instrument, the general health budget destined for the financing of the health system will be increased annually by a percentage not less than 0.5 per cent of the GDP.¹⁰ Similarly, in relation to education, the Constitution obliges the state to assign public resources from the ***E.H.R.L.R. 282** General Budget in a progressive manner for the initial basic and secondary education,¹¹ stipulating an annual increase of at least 0.5 per cent of the GDP until a minimum of 6 per cent is reached.¹² Article 212 of the Brazilian Constitution requires that:

“ the Union shall apply, annually, never less than eighteen percent, and the states, the Federal District, and the municipalities, at least twenty-five percent of the tax revenues, including those resulting from transfers, in the maintenance and development of education.”

Funding for ESR is also entrenched in the Constitution of the Philippines, which requires the State to assign the “ highest budgetary priority” to education.¹³

This article builds on, and contributes to, the work already done on the relationship between budgets and the realisation of human rights by civil society organisations and alliances such as the International Budget Partnership, IHRIP, Fundar and IDASA.¹⁴ In it, the authors link budget decisions regarding resource allocation and expenditure with the range of immediate and programmatic of duties imposed by the ICESCR, analysing art.2(1) from a “ budget perspective” .

Article 2(1): a brief, general overview

One of the key objectives of ICESCR is to establish clear obligations for States in respect of the full realisation of the rights contained in that instrument.¹⁵ Progressive realisation is essentially a means to an end. The ultimate goal of ICESCR (including art.2(1)) is the full realisation of all the rights set out in the Covenant. Essentially, art.2(1) requires state parties to move as expeditiously and effectively as possible towards the full realisation of rights.¹⁶ It is understood that the progress of realisation of rights will not be universal but will be relative to the resources available.¹⁷ Implicit in the duty to progressively realise ESR is a prohibition on taking deliberately retrogressive measures,¹⁸ which Sepulveda has defined as backwards steps in the level of ESR enjoyment as a consequence of an intentional decision(s) by the state.¹⁹

The second element to address in terms of art.2(1) is the state's duty to use the maximum of its available resources. This obligation requires states to use all the resources which can be expended for a particular purpose without sacrificing other, essential services.²⁰ Like progressive realisation, this duty entails a prioritisation of resources²¹ : in times of resource constraints, the most vulnerable and disadvantaged members of society have to be prioritised,²² albeit that who is “ vulnerable” and/or “ disadvantaged” may vary depending on the particular domestic context.

***E.H.R.L.R. 283** In further articulating the obligations stemming from art.2(1), the Committee on Economic, Social and Cultural Rights (hereafter called “ the Committee”)

has adopted the so-called tripartite typology of respect, protect and fulfil.²³ The analytical framework is useful in illustrating that all human rights give rise to a range of negative as well as positive obligations.²⁴ The obligation to respect refers to a prohibition on state interference with existing access or enjoyment of an ESR, with the state being under a corresponding duty to ensure that existing access is not disrupted.²⁵ While, in most cases, this will require the state to refrain from taking certain actions, the duty to respect may also impose positive obligations to ensure that existing access is maintained.²⁶ The duty to protect requires States to deter, stop or impose sanctions on third parties when they are unduly interfering with the enjoyment of a right or threatening to do so.²⁷ At the tertiary level, the duty to fulfil requires the state to facilitate, provide²⁸ or promote²⁹ the enjoyment of rights when people cannot secure the enjoyment of those rights of their own accord. In facilitating access, the state must pro-actively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood.³⁰ The duty to promote requires States to take a variety of actions necessary to create, maintain and restore access to ESR.³¹ Finally, States are required to provide access directly if individuals cannot realise the rights themselves on grounds reasonably considered to be beyond their control.³²

As mentioned above, in addition to the progressive obligations imposed by art.2(1), there are various immediate duties rooted in that provision, which have to be given effect to in budget decision-making. Substantively, states have to ensure immediately that everyone has access to the "minimum essential level of each of the rights"³³ and that all rights are enjoyed and exercised without discrimination.³⁴ Procedurally speaking States have to immediately adopt a plan which contains time bound goals and is subject to continuous monitoring.³⁵ States also have to provide mechanisms which ensure the participation of relevant stakeholders, access to information and transparency.³⁶ They must establish accountability mechanisms, respect due process in decision-making, and provide remedies in case of violations. Failure to duly include mechanisms to satisfy these procedural requirements may amount to violations of art.2(1).³⁷

Budget dimensions of ICESCR obligations

Budgets are generally viewed as being primarily focussed upon the employment of state resources, particularly those of a financial nature. The reference to "resources" in art.2(1) refers to a broad understanding of resources, of which financial resources are admittedly only one aspect.³⁸ The obligation ***E.H.R.L.R. 284** to use the "maximum of available resources" refers to the real resources (for example, human, organisational and scientific resources) available within the country in question and extends beyond those over which the state has direct control, to include sources such as development aid.³⁹ Consequently, existing governmental allocations are not automatically authoritative in determining what the maximum available resources for economic and social right realisation are.⁴⁰ This article, however, focuses very specifically on resources that are allocated through the budget--even though art.2(1) merits a much broader "resource" analysis, including issues such as revenue and external debt.⁴¹

The duty to progressively realise rights requires States Parties to continuously move towards full realisation of the rights in ICESCR. Crucially, available resources have to be optimally prioritised to give effect to ICESCR rights.⁴² If the realisation of ESR is diminishing or is remaining stagnant, States have to progressively *increase* budget allocations to ensure progressive realisation and adherence to ICESCR obligations, specifically art.2(1).⁴³ Fredman has stated that this prioritisation is guided by what have been labelled "competing principles" which should be weighted according to the range of ICESCR obligations based on effectiveness, participation, and accountability.⁴⁴ These are naturally dependent on the country-specific context, the degree to which full realisation of the various rights is lacking and in relation to whom.

The budget must, therefore, balance the various competing demands according to context-specific needs, prioritised in accordance with the full range of ICESCR obligations. Indeed, as the UN High Commissioner for Human Rights highlights:

"the budget is a useful source of information to evaluate which normative commitments are taken seriously by the State, because it provides a demonstration of the State's

preferences, priorities and trade-offs in spending.⁴⁵ ”

Apart from entailing an increase in the resources allocated towards the implementation of ESR, the duty to realise ESR progressively also refers to an increasingly *effective* use of the resources available.⁴⁶ Budgetary allocations must therefore be designed to ensure improvement in the implementation of rights, as well as expanding access to the rights. In other words, states have to ensure that the available resources are used to benefit a progressively increasing *number* of people as well as a progressively increasing *range* of people.⁴⁷ This has been explicitly noted by the Constitutional Court in South Africa in the famous *Grootboom* case.⁴⁸ Here, the Court stated that the requirement of progressive realisation means that:

***E.H.R.L.R. 285** “ accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.”⁴⁹

As stated above, implicit in the duty to progressively achieve full realisation of ESR is a prohibition on retrogressive measures. In budgetary terms, this includes unjustified reductions in public expenditure devoted to the implementation to ESR in the absence of adequate compensatory measures for the protection of injured individuals.⁵⁰ Various examples of retrogressive measures have been identified by the Committee in its consideration of state reports submitted under ICESCR. These range from the steady decline in expenditure on the health care system in Algeria,⁵¹ to budgetary cutbacks in the educational sector in Senegal,⁵² to the successive restrictions on social security benefits introduced by Canada.⁵³

Moving from the international (law) to the domestic context, one instance in which budget-related retrogressive budgetary measure was found to be justified in light of a fiscal crisis was the Supreme Court of Canada's decision in *Newfoundland (Treasury Board) v NAPE*.⁵⁴ Here, a challenge was brought against legislation that cancelled a pay equity agreement, which--amongst other things--would have raised the salaries of a female-dominated work classifications to a comparable level to those of male-dominated classifications for work of equal value. The legislation clearly amounted to a retrogressive measure in terms of the right to fair pay (an element of the right to just and favourable conditions of work) of the female employees in question. The Court found the legislation to be in violation of the right to equality set out in s.15(1) of the Canadian Charter of Rights and Freedoms. However, it ruled that the infringement constituted a reasonable limitation in terms of s.1 of the Charter. In doing so, the Court highlighted that--while the Canadian courts would continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints--they could not close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis. The Court found that the provincial government's response to the fiscal crisis was proportional to its objective as: (1) because the pay equity payout represented a significant portion of the budget, its postponement was rationally connected to averting a serious financial crisis; (2) the government's response was tailored to minimally impair rights in the context of the problem it confronted; and (3) on a balance of probabilities, the detrimental impact of a delay in achieving pay equity did not outweigh the importance of preserving the fiscal health of a provincial government through a temporary but serious financial crisis.⁵⁵

This decision would seem to provide support to the notion that a fiscal crisis essentially negates state's budget-related obligations with regard to progressive realisation and non-discrimination. This is not the case, however. Notably, the Canadian Charter does not explicitly include ESR, nor did the Supreme Court ***E.H.R.L.R. 286** in this case refer to sources providing detail on the circumstances in which retrogressive measures are justifiable in terms of international human rights law. Therefore, it certainly cannot be assumed that the Committee would have come to a similar conclusion if faced with a retrogressive budgetary measure taken by a state in similar circumstances.⁵⁶

The obligation to use the maximum resources available is inextricably linked to the obligation to advance the realisation of ESR progressively. This obligation has been analysed by a number of civil society and research organisations carrying out ESR-based budget work in terms of the effectiveness⁵⁷ and sufficiency⁵⁸ of spending.⁵⁹ Diversion of

budget allocations intended for ESR can constitute a violation of ICESCR if it results in non-enjoyment or reduction of enjoyment of rights.⁶⁰ To this end, allocations and expenditure in relation to ESR budget line items vis-à-vis non-ESR-related line items provide an indication of compliance. Similarly, the duty to use the maximum of available resources means that budget allocations must be fully expended for their intended ESR purpose.⁶¹

Budgetary decisions and processes can also be assessed using the tripartite typology. The duty to respect requires states to ensure existing access to ESR is maintained. If budgetary cutbacks result in the interference with or diminution of current enjoyment of ESR, the duty to respect has been breached. In addition, budgetary obligations may be required for both the establishment and/or the maintenance of the institutional framework required to ensure existing enjoyment is preserved.⁶² In fluctuating economic climates, maintaining existing access can require additional budget allocations. For instance, in the case of natural disaster or armed conflict, a state might be required to make additional, ad hoc, resource allocations, on top of the original budgetary allocations for ESR, to maintain existing access.⁶³

It is also frequently necessary in terms of the obligation to respect for allocations to increase--rather than simply remain the same. This is particularly the case in the context of states experiencing inflation.⁶⁴ In one celebrated instance, the Argentinean Supreme Court ordered the readjustment of pension levels in accordance with official wage index variations which were linked to inflation levels. Effectively, additional resources had to be allocated to ensure that existing enjoyment of pension levels remained the same in the context of inflation.⁶⁵ The duty to allocate budgetary resources in order to maintain (or respect) existing levels of access to social security grants also came under discussion in the South African *Ncamile* litigation.⁶⁶ Applicants in this case approached the High Court with regard to the fact that the income threshold for the child support grant had not risen with inflation, unlike that for other social grants. The means test was built into the application procedure for the grant, yet the income threshold had remained the same since ***E.H.R.L.R. 287** 1998. This meant that, in the context of inflation, newly-applying caregivers would have to become progressively poorer in order to access the grant as time passed. The case was ultimately withdrawn when the Department of Social Development agreed to amend the existing regulations to replace the static income threshold with a new means test consistent with inflation levels.

The duty to protect requires states to allocate sufficient funding to regulatory mechanisms that protect against the interference by third parties with the enjoyment of ESR.⁶⁷ This would include budgetary provision for bodies such as labour courts dealing with complaints against non-state employers or housing tribunals empowered to address, amongst other things, allegations of discrimination perpetrated by private landlords. In the context of social security, the Committee has stated that:

" where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security." ⁶⁸

In order to prevent such abuses, an effective regulatory system must be established which includes framework legislation, independent monitoring, genuine public participation and imposition of penalties for non-compliance.⁶⁹ Such a regulatory system will inevitably need to be budgeted for.

The duty to fulfil tends to be the most resource-dependent of the duties, placing an obligation on states to do whatever it takes to overcome the obstacles for the full enjoyment of rights.⁷⁰ Budgetary allocations and expenditure will play a key role in state efforts to give effect to this obligation, whether with regard to the facilitation, promotion or provision of such rights.

Budgetary allocations *facilitating* rights include funding any initiative that lays the foundation needed for full realisation. This includes funding for an assessment of the current situation in the country as a whole, as well as a periodic repetition of that exercise at brief intervals.⁷¹ Budget allocations directed towards *promoting* ESR can similarly take

on a variety of forms but include the commitment of financial resources to provide necessary information and awareness-raising.⁷² Sufficient resources also have to be allocated to train public servants around human rights, and specifically the rights of those that are most vulnerable.⁷³ Broadly speaking, the state also has to fund institutions and initiatives that are necessary for *promoting* acceptance and understanding of rights and relevant enforcement procedures.⁷⁴ The final aspect of the duty to fulfil requires states to *provide* the rights directly where right-holders cannot do so for themselves. Depending on the level of development of the country in question, the duty of the state as provider can vary from the establishment of a minimum safety net to a full comprehensive welfare model as is found in Nordic countries.⁷⁵ As stated above, certain groups of people are entitled to special measures of protection and hence a calculated prioritisation in states efforts to provide for their rights--this prioritisation naturally has to be reflected in budget decisions. This applies in particular to people that cannot by their own efforts ensure satisfaction of their basic needs, including children, people living with disabilities, persons in state custody or care and displaced persons.

The second and tertiary levels of the tripartite typology of ESR obligations are particularly relevant in the context of privatisation, with states having to ensure that the discharge of the full range of ESR obligations are not hampered by governmental delegation of powers to non-state actors or the privatisation ***E.H.R.L.R. 288** of services.⁷⁶ In addition, where ESR-related services have been delegated or contracted out to third parties, the obligation to fulfil may also come into play. Regardless of whether an ESR-related service is provided by the state or by a private actor, the state ultimately remains responsible for ensuring the realisation of ESR. This includes an underlying duty to fulfil the full enjoyment of rights. Therefore, where the system selected by the State (public, private or, indeed, any mixture thereof) does not ensure such enjoyment of rights, the State has, amongst other things, a final duty to provide for the rights directly.

The distinction between the immediate and progressive duties imposed by art.2(1) has already been mentioned. When a significant number of people are lacking basic necessities or essentials, states are *prima facie* failing to discharge their minimum core obligations.⁷⁷ This has been interpreted to imply an obligation to intrude without limits into public and private resources previously used for other purposes to satisfy "core" obligations, based on the rebuttable presumption that all states have the resources necessary to give effect to minimum core obligations if they define resources broadly enough and are sufficiently aggressive in resource acquisition.⁷⁸ Failure to give effect to the minimum core places an increased justificatory burden on states to demonstrate that "every effort" has been made to satisfy minimum obligations as a matter of priority.⁷⁹ In the present context, such a justification could involve a transparent and accountable scrutiny of resource allocations in budgets. A minimum core type obligation was a recent subject of discussion of the German Constitutional Court in the so-called "Hartz IV case".⁸⁰ Here, the court was called upon to scrutinise the process by which the legislature set the level of unemployment and welfare assistance. The German Basic Law guarantees an "Existenzminimum" which loosely refers to a minimum benefit that provides the means to live with basic human dignity.⁸¹ In this sense, the "Existenzminimum" is similar to the minimum core as elaborated by the Committee on Economic, Social and Cultural Rights. In the *Hartz IV* case, the court found that the manner in which the country's welfare law was calculated did not meet constitutional muster. Importantly, the court found that the method used to evaluate the income and consumption levels of low-income households was not legitimate. In other words, the process of determining what is required for a basic, dignified existence was found not to be based on sound empirical data. Amongst other things, certain expenditure line items were reduced without a legitimate, statistical evaluation: for example, the benefits for electricity payments were reduced by 15 per cent of their original level. The court also highlighted, in relation to children, that the law makers had avoided any substantive evaluation of child specific rights or needs. The law makers were ordered to recalculate the level of benefits using sound statistical evidence of what is needed for a basic, dignified existence. This case is an example of judicial scrutiny of a minimum core-type duty and a principled decision-making process, demonstrating that calculations of what is needed for a dignified survival, have to be based on sound statistical data, through a process which is transparent, open and accountable.

The duty not to discriminate in art.2(2) is also of immediate application,⁸² and applies to all

art.2(1) obligations in the sense that the discharge of immediate as well as progressive obligations must not cause or perpetuate discrimination against groups of people.⁸³ It also applies across the tripartite typology. In terms of budget allocations, the obligation to ensure non-discrimination can require the funding of preventative measures and affirmative action initiatives, as well as financial compensation for past discriminations.⁸⁴

***E.H.R.L.R. 289** The duty to take account of the most vulnerable groups in society plays a key role with regard to the immediate procedural obligations identified by the Committee as necessary to ensure adherence to a principled policy making process, including those related to the development of policy⁸⁵ and implementation plans⁸⁶ and the monitoring the realisation of ESR.⁸⁷ National strategies have to identify the resources that are available and the most cost-effective way of using them.⁸⁸ This will necessarily involve a consideration of current and future budget allocations. Other procedural requirements such as the right to participation⁸⁹ can amount to a violation of international law if not adhered to.⁹⁰ Thus, if budget decision-making processes are to be in compliance with ICESCR, they must be transparent and participatory, with provision made for decision-makers to be held accountable to right-holders.⁹¹ Furthermore, participation and accountability efforts also have to be actively and inclusively budgeted for, bearing in mind again the needs of the most vulnerable and potentially excluded persons.

Conclusion

The importance of the principle of the progressive realisation of ESR and the obligation to use the maximum resources available set out in art.2(1) are reflected in the widespread inclusion of these principles (and variants thereof) in a range of international, regional and domestic human rights instruments.⁹²

In addition to the increasing legal protection being afforded to the principles set out in art.2(1),⁹³ as the introduction to this article highlighted, there is a growing recognition of the importance of budgetary decisions in terms of achieving the realisation of ESR. These factors combine to produce a strong inducement--and perhaps a compulsion--to evaluate budgets from an ESR perspective and from that of art.2(1) in particular. Indeed, there is a growing body of examples of innovative efforts to employ ESR-based budget work in efforts to advance ESR in a range of contexts, including general advocacy⁹⁴ and litigation.⁹⁵

Much work remains to be done in terms of developing frameworks and methodologies to evaluate state compliance with its obligations under ICESCR--whether budget-related or otherwise. This article, however, constitutes a step towards the advancement of general understanding of the budget-related obligations stemming from art.2(1) ICESCR and the way in which states can and should give effect to such.

E.H.R.L.R. 2010, 3, 280-289

1. Article 2(1) ICESCR provides 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." For more information on the nature of the obligations imposed by international law (including international human rights law), see James Crawford, *The International Law Commission's Articles on State Responsibility* (CUP: Cambridge, 2002).

2. Committee on Economic Social and Cultural Rights (ComESCR), " General Comment No. 3, The Nature of States Parties Obligations" UN Doc. E/1991/23 annex III at p.86 (1990), para.9.

3. ComESCR, " General Comment No.3" (1990).

4. See, e.g. M. Craven (ed.), *The International Covenant on Economic, Social and Cultural Rights--A Perspective on its Development*, (Oxford: Oxford University Press, 1995); M. Sepulveda (ed.), *The Obligations under the International Covenant on Economic Social and Cultural Rights* (Antwerp: Intersentia, 2003); " The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691; " The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 122; P. Alston and G. Quinn, " The Nature and Scope of the States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156; A. Chapman and S. Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002); S. Liebenberg, " The International Covenant on Economic, Social and Cultural Rights and its Implementation for South Africa" (1995) 11(3) *South African Journal on Human Rights* 359; G.B. Ramcharan, " The Content of Legal Obligation to Implement Economic, Social and Cultural Rights" in G.B. Ramcharan, (ed.), *Judicial protection of economic, social and cultural rights: cases and materials* (Leiden: M. Nijhoff Publishers, 2005); R. Robertson, " Measuring State Compliance with the Obligation to Devote the ' Maximum of Available Resources' to Realising Economic, Social and Cultural Rights" (1994) 16 *Human Rights Quarterly* 693; C. Scott, " Reaching Beyond (Without Abandoning) the Category of ' Economic, Social and Cultural Rights" ' (1999) 21 *Human Rights Quarterly* 633; K. Young, " The Minimum Core of Economic and Social Rights: A Concept in Search of Content" 33 *Yale Journal of International Law* 113 (2008).

5. J. V. Welling, " International Indicators and Economic, Social and Cultural Rights" (2008) 30 (4) *Human Rights Quarterly* 933; T. Landman and E. Carvalho, *Measuring Human Rights* (New York: Routledge, 2010); S. Hertel and L. Minkler (eds) *Economic Rights: Conceptual, Measurement and Policy Issues* (New York: Cambridge University Press, 2010); P. Hunt, " Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" ,

(March 3, 2006), UN Doc. E/CN.4/2006/48, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/114/69/PDF/G0611469.pdf> ; OHCHR, " Report on Indicators for Promoting and Monitoring the Implementation of Human Rights" , June 6, 2008, UN Doc. HRI/MC/2008/3.

6. See, with regard to the right to education, IHRIP/International Budget Project, *Reading the books: Government budgets and the right to education* (Washington: IHRIP/IBP, 2010). For an example involving a consideration of the obligations imposed by the child's right to health, see Landman and Carvalho, *Measuring Human Rights*, 2010, p.26-7. For a discussion of budgetary allocations and the right to adequate housing, see the discussion of process indicators for the right to adequate housing outlined in Annex 2 of 2006 Annual Report of the Special Rapporteur on the right to Adequate Housing as a Component of the Right to an Adequate Standard of Living, UN Doc. A/HRC/4/18, 5 February 2007, p.27-8.

7. Much of the academic literature that does exist in this area is referred to throughout this article.

8. OHCHR, " Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights" (June 8, 2009), UN Doc. E/2009/90, at para.46.

9. J. Schultz (ed.) *Promises to Keep: Using Public Budgets as a Tool to Advance Economic, Social and Cultural Rights* (Mexico: Fundar, 2002), p.31.

10. DISPOSICIONES TRANSITORIAS, point 20. The provision goes on to say that this increase shall continue until it reaches at least 4% of the GDP.

11. DISPOSICIONES TRANSITORIAS, point 18.

12. DISPOSICIONES TRANSITORIAS, point 18.

13. See s.5(5) of art.XIV of the Constitution of the Philippines (1987). The limitations in terms of the enforcement of this provision are evident from the decision in *Guingona JR v Carague*, G.R. No. 94571, Unreported April 22, 1991 Supreme Court of the Philippines, where petitioners questioned the constitutionality of automatic appropriations for debt servicing, which were more than triple the budgetary allocation for education. The Court found that education received the largest allocation amongst all the government departments, as the Constitution required, while debt servicing was necessary for the creditworthiness of the country and, thus, the survival of its economy. See http://www.lawphil.net/judjuris/juri1991/apr1991/gr_94571_1991.html [Accessed May 2, 2010].

14. For a discussion of the work of these groups and others, see chapters in M. Robinson (eds) *Budgeting for the Poor* (New York: Palgrave MacMillan, 2008).

15. ComESCR, " General Comment No.3" , para.9. For further analysis of art.2(1), see article by Harvey and Rooney in this Special Issue.

16. ComESCR, " General Comment No.3" , para.9.

17. A. R. Chapman, " A ` Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 *Human Rights Quarterly* 23, 31.

18. ComESCR, " General Comment No.3" (1990), para.9.

19. Sepulveda, *The Obligations under ICESCR*, 2002, p.323.

20. P. Alston and G. Quinn, " States Parties' Obligations under ICESCR" (1987) 9 *Human Rights Quarterly* 156, 178.

21. See, e.g. ComESCR, " General Comment No.4, The Right to Adequate Housing" U.N. Doc. E/1992/23 annex III (1991) at p.114, para.11.

22. ComESCR, " General Comment No.3" (1990), para.12.

23. See, e.g. ComESCR, " General Comment No.12 The right to adequate food" , U.N. Doc. E/C.12/1999/5 (1999), para.15; ComESCR, " General Comment No.13, The right to education" , U.N.Doc.E/C.12/1999/10 (1999), paras 46-47 and 50; ComESCR, " General Comment No.14, The right to the highest attainable standard of health" , U.N.Doc.E/C.12/2000/4 (2000), paras 33-37; ComESCR, " General Comment No.15, The right to water" , U.N. Doc. E/C.12/2002/11 (2002), paras 20-29; ComESCR, " General Comment No.19, The right to social security" , U.N. Doc E/C.12/GC/19 (2007), paras 43-50. For more on the evolution of the typology, see A. Nolan, " Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the ` Obligation to Protect" ' (2009) 9(2) *Human Rights Law Review* 225, 227.

24. I. Koch " Dichotomies, Trichotomies or Waves of Duties?" (2005) 5(1) *Human Rights Law Review* 81, 82. See also OHCHR, " Report of the High Commissioner" , para.10.

25. ComESCR, " General Comment No.15" (1999), para.21.

26. I. Koch, " Dichotomies, Trichotomies or Waves Duties?" (2005) 5(1) *Human Rights Law Review* 81, 89.

27. OHCHR, " Report of the High Commissioner" , para.11.

28. ComESCR, " General Comment No.12" (1999), para.15.

29. ComESCR, " General Comment No.14" (2000), fn.23.

30. ComESCR, " General Comment No.12" (1999), para.15.

31. ComESCR, " General Comment No.14" (2000), para.37.

32. ComESCR, " General Comment No.19" (2007), para.50.

33. ComESCR, " General Comment No.3" (1990), para.10.

34. ComESCR, " General Comment No.3" (1990), para.1. See also art.2(2) and ComESCR, " 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)" , U.N. Doc. E/C.12/GC/20 (2009).

35. S. Fredman, *Human Rights Transformed -- positive rights and positive duties* (Oxford: Oxford University Press, 2008), p.83; ComESCR, " General Comment No.15" (2002), para.27; ComESCR " General Comment No. 14" (2000), para.43(f).

36. OHCHR, " Report of the High Commissioner" (2009), p.33.

37. OHCHR, " Report of the High Commissioner" (2009), p.33.

38. Alston and Quinn, " States Parties' Obligations under ICESCR" (1987) 9 *Human Rights Quarterly* 156, 178.

39. R. Robertson, " Measuring State Compliance" (1994) 16 *Human Rights Quarterly* 693, 699.

40. Alston and Quinn, " States Parties' Obligations under ICESCR" (1987) 9 *Human Rights Quarterly* 156, 178.

41. E.g. in discussing indicators for measuring states' compliance with their art.2(1) obligations, the UN Special Rapporteur on the Realisation of Economic, Social and Cultural Rights, Danilo Tuerk, stated that " much can be derived about a State's maximum available resources and the measures taken to progressively fulfil them if indicators concerning central government expenditure and revenue, balance of payments, development assistance and external debt are considered in such analyses" (Danilo Tuerk, " The New International Economic Order and the Promotion of Human Rights" E/CN.4/Sub.2/1990/19 (1990), para.48).

42. A. Eide, " Economic and Social Rights" in Janusz Symondies (ed.), *Human Rights: Concepts and Standards* (Hampshire: Ashgate, 2000), pp.109, 126.

43. Eide, " Economic and Social Rights" in *Human Rights: Concepts and Standards*, 2000, p.126.

44. Fredman, *Human Rights Transformed*, 2008, p.83.

45. OHCHR, " Report of the High Commissioner" (2009), para.46.

46. Eide, " Economic and Social Rights" in *Human Rights: Concepts and Standards*, 2000, p.126.

47. S. Liebenberg. " The Right to Social Assistance: the Implications of Grootboom for Policy Reform in South Africa" (2001) 17 *South African Journal for Human Rights* 232, 251. While Liebenberg makes her comments in relation to the South African Constitutional Court's jurisprudence regarding ss.26 and 27 of that country's constitution, they are equally valid in terms of art.2(1) ICESCR.

48. *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 (CC) at [45], where the Court stated that the progressive realisation of the right to adequate housing requires that " Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses."

49. *South Africa v Grootboom*, (2001) 1 SA 46 at [45]. It must be pointed out that recent decisions such as *Lindiwe Mazibuko & Others v City of Johannesburg & Others Case CCT 39/09* [2009] ZACC 28 appear to be reflective of an increasingly deferential and conservative approach on the part of the South African Constitutional Court in the context of ESR cases, including with regard to

- art.2(1)-related obligations. In this constitutional right to water case, the Court refused to find that the City of Johannesburg's highly controversial Free Basic Water policy and instalment of pre-payment meters contravened s.27 of the Constitution, which sets out the right to everyone to have access to sufficient water. In doing so, the Court stated that: "ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right" (at [61]). For further analysis, see P. Danchin, "A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case" (January 13, 2010), *EJIL: Talk!* (available at: <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%99s-decision-in-the-mazibuko-case/> [Accessed May 4, 2010]). Other judgments evidencing a deferential approach on the part of the Constitutional Court include *Residents of Joe Slovo Community & Others v Thubelisha Homes & Others*, Case CCT 22/08, [2009] ZACC 16 and *Nokotyana and Others v Ekurhulni Metro and Others* CC31/09 [2009] ZACC 33.
50. M. Sepulveda, *The Obligations under ICESCR*, 2003, p.324.
51. ComESCR, "Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Algeria", U.N.Doc.E/C.12/1/Add.71 (2001), para.20.
52. ComESCR, "Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Senegal", U.N. Doc. E/C.12/1993/18 (1994), para.7.
53. ComESCR, "Conclusions and Recommendations of the Committee on Economic, Social and Cultural Rights, Canada", U.N. Doc. E/C.12/1/Add.31 (1998), para.20.
54. *Newfoundland (Treasury Board) v NAPE* [2004] 3 S.C.R. 381, 2004 SCC 66.
55. *Newfoundland v NAPE* [2004] 3 S.C.R. 381 at [77]-[98].
56. In 2006, following economic improvements and lobbying by NAPE, the Government of Newfoundland paid the CAD 24 million that they had reneged on. As a result, in its 2006 Concluding Observations on Canada, the Committee "welcomed] the measures taken by the State party in the area of equal pay for equal work, in particular the payment of retroactive adjustments to women who had suffered discrimination" (ComESCR "Conclusions and Recommendations, Canada", UN Doc E/C.12/CAN/CO/4 (2006), para.6).
57. See, A. Blyberg, "Notes from an International Budget Project roundtable discussion on The obligation to use 'Maximum of Available Resources'", (International Human Rights Internship Programme, 2008), p.1.
58. See H. Hofbauer, A. Blyberg and W. Krafchik, *Dignity Counts: A guide to using budget analysis to advance human rights* (Fundar: IHRIP, 2004), p.36.
59. See S. Fredman, *Human Rights Transformed*, 2008, p.82 for a summary of these principles.
60. "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691, 697.
61. H. Hofbauer et al., *Dignity Counts*, 2004, p.36. See also ComESCR, "Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Columbia", U.N. Doc. E/C.12/1995/18 at 41 (1996), para. 200(b).
62. I. Koch, "The Justiciability of Indivisible Rights" (2003) 72 *Nordic Journal of International Law* 3, 13.
63. See, e.g. where a state has to allocate and spend resources on the protection of drinking water installations and irrigation works during times of conflict and natural disasters. (See, ComESCR, "General Comment No.15" (2002), para.22).
64. Liebenberg "The Right to Social Assurance" (2001) 17 *South African Journal for Human Rights* 232, 241.
65. See, *Sánchez, María del Carmen v ANSeS s/reajustes varios*, Supreme Court of Argentina, May 17, 2005, reaffirmed on July 28, 2005. For a discussion of this case see C. Courtis, "Argentina: Some Promising Signs" in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) pp.163, 170. The positive obligations in relation to the duty to respect were first spelled out in ComESCR, "General Comment No.15" (2002), para.22 obliging states to ensure that access to water is maintained even during times of armed conflict.
66. *Ncamile and the Children's Institute v the Minister of Social Development and Minister of Finance* (unreported case) see K. Hall and P. Proudlock, "Litigating for a better deal" in *Children's Institute Annual Report 2008*, available at <http://www.ci.org.za/depts/ci/pubs/pdf/general/annual/report08/litigating.pdf> [Accessed May 4, 2010].
67. ComESCR "General Comment No.15" (2002), para. 24; ComESCR "General Comment No.19" (2007), para.46; ComESCR, "General Comment No.16, The equal rights of men and women to the enjoyment of all economic, social and cultural rights" U.N.Doc. E/C.12/2005/3 (2005), para.20.
68. ComESCR "General Comment No.19" (2007), para.46.
69. ComESCR "General Comment No.19" (2007), para.46.
70. Koch, "The Justiciability of Indivisible Rights" (2003) 72 *Nordic Journal of International Law* 3, 12.
71. Eide, "Economic and Social Rights" in *Human Rights: Concepts and Standards*, 2000, p.138.
72. ComESCR, "General Comment No.14" (2000), para.37.
73. ComESCR, "General Comment No.14" (2000), para.37.
74. Sepulveda, *The Obligations under ICESCR*, 2003, p.164.
75. Eide, "Economic and Social Rights" in *Human Rights: Concepts and Standards*, 2000, p.140.
76. See, for example in relation to health: ComESCR "General Comment No.14" (2000), para.35.
77. ComESCR, "General Comment No.3" (1990), para.10.
78. Robertson "Measuring State Compliance" (1994) 16 *Human Rights Quarterly* 693, 702.
79. Liebenberg, "ICESCR and its Implementation for South Africa" (1995) 11(3) *South African Journal on Human Rights* 359, 367.
80. BverfG, 1 BvL 1/09 vom 9.2.2010, Abstaz-Nr. (1-220): http://www.bverfg.de/entscheidugen/ls20100209_1bv100109.html [Not Accessed].
81. See Ann Riley, "Germany court rules welfare law unconstitutional", (February 9, 2010) http://jurist.law.pitt.edu/paperchase/2010_02_09_indexarch.php [Accessed June 2, 2010].
82. ComESCR "General Comment No.3" (1990) para.1.
83. For more, see ComESCR "General Comment No.20" (2009).
84. Chapman and Russell, *Core Obligations*, 2002, p.6. See also ComESCR, "General Comment No.4" (1991), paras 11-12.
85. See e.g. ComESCR, "General Comment No.14" (2000), para.43(f).
86. See e.g. ComESCR, "General Comment No.15" (2002) para.26.
87. ComESCR, "General Comment No.3" (1990), para.11.
88. ComESCR, "General Comment No.4" (1991), para.12.
89. See, e.g. ComESCR, "General Comment No.4" (1991), para.9.
90. OHCHR, "Report of the High Commissioner", 2009, para.33.
91. A. Blyberg gives examples of process related indicators relevant for budget analysis: "Has the government established structures and processes to facilitate civil society participation in commenting on/proposing/effecting modifications in revenue at the national and local levels?" and "Has the government established structures and processes to facilitate civil society access to information on revenue in national and local budgets?" (Government Human Rights Obligations and Budget Work (2008), unpublished (on file with the authors)).
92. For example, art. 26 of the American Convention on Human Rights refers expressly to "progressive development" in the context of economic and social rights, while ss.26(2) and 27(2) of the South African Constitution require the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of" a range of ESR. In other instances incorporation has been implicit, resulting from judicial or quasi-judicial interpretations of the obligations imposed by human rights instruments which do not include explicit ESR-specific qualifications, e.g. in the case of the African Charter of Human and Peoples' Rights and the European Social Charter (or the Revised European Social Charter). The ESR set out in these instruments have been interpreted as being, in effect, subject to progressive

implementation and limited by available resources in some circumstances. See, e.g. *Purohit v Moore*, Communication 241/2001. Decided at 33rd Ordinary Session of the African Commission (May 15-29, 2003) at para.84 and Complaint No.13/2002, *Autisme-Europe v France* November 7, 2003 at para.53. Notably, art.2(1) has also been recognised indirectly within domestic constitutional frameworks which do not deal explicitly with progressive realisation or maximum available resources (or even ESR) by means of explicit constitutional recognition that particular international human rights treaties that have been ratified by the relevant state, including ICESCR, form part of, or take precedence over, domestic law. See, e.g. s.75(22) of the Argentine Constitution and art.8 of the Slovenian constitution.

93. See, e.g. arts 29(5) and 30(2) of the Draft Harmonised Constitution of Kenya which were recently discussed by the Parliamentary Select Committee.

94. See e.g. T. Hammarberg, "State Budgets Reveal Whether Governments are Committed to Human Rights" *Viewpoint*, August 3, 2009.

95. See the account of the Argentinean case *Asociación Civil por la Igualdad y la Justicia c/Gobierno de la Ciudad de Buenos Aires* (Expte. N°23360/0) by Sigal and Antúnez in this Special Edition. See also, the use of budget-based argumentation by the applicants in the matter of *Mahlangu v Minister for Social Development & Ors*, Case No. 25754/05 (South African High Court, Transvaal Provincial Division). This case sought the extension of the child support grant to all qualifying children under the age of eighteen (the grant was previously only available to children under fourteen). The case has been rendered moot as result of the Cabinet's October 2009 approval of the extension of the grant to eligible children up to their 18th birthday as of January 1, 2010. Copies of the heads of argument available from the authors.

© 2010 Sweet & Maxwell and its Contributors

