

**National debt versus the right to social security:
How should states' obligations during a
financial crisis be interpreted?**

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*A thesis submitted in fulfillment of the requirements for the degree of
Doctor of Philosophy*

I declare that the thesis is my own work, and has not been submitted in substantially the same form for the award of a higher degree elsewhere. No parts of the thesis have been published, or submitted for a higher degree elsewhere.

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Abstract

During the recent financial global crisis that began in 2008, and the subsequent rise in national debt from the bail-out of the banks, many states claimed insufficient resources, and implemented austerity measures that included reducing spending on social security. This thesis argues that current approaches by international mechanisms, specifically the CESCR, to judge these austerity measures are insufficient and irrelevant. It puts forward its own interpretation of how the ICESCR particularly Articles 2(1) and 9 should be interpreted in order to properly evaluate the necessity and legitimacy of austerity measures that jeopardise the enjoyment of the right to social security. This is based on the reality that, to a large degree, available resources depend on a government's policies and choices, and that states must argue the necessity of such measures with clear and concluding evidence. They must show that they had no choice, and that any other measure would have worsened general welfare. Lastly, the thesis uses the analysis developed to suggest that the UK's austerity measures that undermine and violate the right to social security are not justified by its national debt.

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List of acronyms

ACCA	Association of Chartered Certified Accountants (UK)
CAB	Citizens Advice Bureau (UK)
CEACR	The ILO's Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Center for Economic and Social Rights
CHST	Canada Health and Social Transfer
CoE	Council of Europe
CPAG	Child Poverty Action Group (UK)
CPI	Consumer Price Index (UK)
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CSR	Comprehensive Spending Review (UK)
CWGL	Center for Women's Global Leadership
DEFRA	Department for Environment Food and Rural Affairs (UK)
DHP	Discretionary Housing Payment (UK)
DLA	Disability Living Allowance (UK)
DOTAS	Disclosure of Tax Avoidance Schemes (UK)
DWP	Department of Work and Pensions (UK)
EC	European Commission
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community Of West African States
ECSR	European Committee of Social Rights
EEA	European Economic Area
ESA	Employment and Support Allowance (UK)
ESCAP	Economic and Social Commission for Asia and the Pacific
ESR	Economic and social rights
EU	European Union
FAO	UN Food and Agriculture Organisation
FIAN	An international NGO working on the right to food
FIDH	International Federation for Human Rights
FTT	Financial transaction tax
GAAR	General Anti-Abuse Rule (UK)
GDP	Gross Domestic Product
GFCC	The German Federal Constitutional Court
GNP	Gross National Product
HMRC	Her Majesty's Revenue and Customs (UK)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFS	Institute for Fiscal Studies (UK)

ILC	International Labour Conference
ILO	International Labour Organisation
IMF	International Monetary Fund
IPPR	The Institute for Public Policy Research (UK)
JCHR	Joint Committee on Human Rights of the Houses of Lords and Commons (UK)
JRF	Joseph Rowntree Foundation (UK)
JSA	Jobseeker's Allowance (UK)
LAPSO	Legal Aid, Sentencing and Punishment of Offenders Act (UK)
LHA	Local Housing Assistance (UK)
NAB	National Assistance Board (UK)
NHF	National Housing Federation (UK)
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OPFS	One Parent Families Scotland
PIP	Personal Independent Payments (UK)
RPI	Retail Price Index
SLS	Socio-Legal Scholarship
TUC	Trades Union Congress
UDHR	Universal Declaration of Human Rights
UNCTAD	UN Conference on Trade and Development
UNDP	UN Development Programme
UNICEF	UN Children's Fund
USA	United States of America
VAT	Value Added Tax

Chapter 1: Introduction

1.1 General introduction

This thesis suggests how judicial and quasi-judicial bodies should interpret states' obligations under both Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which stipulates that states must take steps using "the maximum of its available resources" to implement the rights in the Covenant, and Article 9 of the same treaty on the right to social security. It presents an argument of how the ICESCR ought to be interpreted to help determine states' obligations during a financial crisis to implement the right to social security, and whether a national debt can or should be used to excuse non-implementation of Article 9 of the ICESCR as some governments are claiming. Lastly, it uses the analysis developed to examine whether the UK can be seen as violating the right to social security, and whether such measures can and should be justified by its national debt?

To fully answer this research question, there are numerous more detailed pertinent questions needing to be resolved such as: whether states' level of resources should dictate their human rights compliance or whether their human rights obligations ought to instead dictate the resources that need to be generated and allocated? And whether a national debt could justify significant cutbacks in social expenditure that threatens, or even violates, the right to social security?

While states have always defended the lack of implementation of human rights on insufficient resources,¹ the relevance of these questions has become sharper during the recent financial global crisis beginning in 2008 when one considers the "trillion of dollars being made available for bailing out the banking sector" and the only minimal social protection response to the crisis.² Under the guise of insufficient resources,

¹ On 4 October 2011, when presenting its report to the Working Group on the Universal Periodic Review, Antigua and Barbuda reminded delegations that its efforts in promoting and protecting human rights "should be considered in the context of the country being a third world, developing State with limited resources." International Service for Human Rights 'UPR of Antigua and Barbuda: notable achievements in education but concerns over LGBTI rights' (Geneva 2011) <www.ishr.ch/news/upr-antigua-and-barbuda-notable-achievements-education-concerns-over-lgbti-rights> accessed 3 January 2012.

² Sally-Anne Way and Shira Stanton 'Human Rights and the Global Economic Crisis; Consequences, Causes and Responses' (CESR 2009) <<http://cesr.org/downloads/CESR->

during the crisis governments have considerably reduced social spending that has substantially undermined human rights. They have essentially suggested that a national debt trumps social security concerns.

So far, despite clearly being a human rights issue, human rights have been noticeably absent from the discussion on austerity. Even amongst human rights scholars and practitioners there has been limited reference to the impact of these cutbacks on the right to social security and their necessity with regards to a state's maximum available resources.

1.2 Shortcomings of existing analysis

This thesis is motivated both by the clear need to analyse the relevant human rights standards regarding maximum available resources and the right to social security. Even before the financial crisis, as already noted, states have often argued they do not have the resources to implement human rights. In fact the 'maximum available resources' clause has been charged with weakening the ICESCR by giving states an excuse for non-compliance.³ It is often compared to the International Covenant on Civil and Political Rights (ICCPR) whose lack of such a clause reportedly strengthens enforceability by not providing states with such an excuse for non-implementation.⁴

Generally while human rights implementation often depends on resources, economics and human rights remain largely distinct and self-contained fields,⁵ and the human rights community remains cautious in examining issues relating to resources. This reluctance has not gone unobserved by other doctrines. Human rights activists are coming under increasing criticism and the relevance of human rights has been questioned. For instance at a meeting on human rights and the global economy, convened in 2010 by the International Council on Human Rights Policy, participants noted that "Many economists criticise advocates of human rights for avoiding tough

Human%20Rights%20and%20the%20Global%20Economic%20Crisis.pdf> accessed 10 January 2010, p. 2.

³ Henry Steiner and Philip Alston, *International Human Right in Context: Law, Politics, Morals – Text and Materials* (2nd Edition, Oxford University Press 2000), p. 275.

⁴ Ibid.

⁵ David Petrasek and Vijay Nagaraj, 'Human Rights in the Global Economy: Report from a Colloquium' (International Council on Human Rights Policy 2010).

choices. From their perspective, human rights advocates appear to affirm broad principles over specific policy choices.”⁶

More specifically the human rights community has yet to articulate how it should answer states’ claims of insufficient resources to justify their non-compliance with human rights treaties, in particular the ICESCR. Despite increasing analysis of the issue, Nolan has noted for instance that the scope of states’ obligations under Article 2(1) remains unclear.⁷ She further notes given this the increased difficulty of evaluating state responses and its compliance with the ‘maximum available resources clause’ in times of economic tumult.⁸

There has also been limited analysis on what the actual content of the right to social security actually includes. In 2010, the International Labour Organisation (ILO) observed that “the general international human rights instruments of the United Nations (UN) and their supervisory mechanisms have mostly remained silent as to the actual definition of the right to social security and its specific content.”⁹

This lack of analysis of both the maximum available resources clause in Article 2(1) of the ICESCR and the right to social security (Article 9 of the ICESCR) perhaps illustrates why the human rights community has yet to articulate how to address the austerity measures taken and in particular the attempts to reduce state expenditure on social security. While there has been a plethora of statements about the importance of human rights during times of crisis¹⁰ and that such crises do “not exempt states from complying with their human rights commitments,” or “entitle them to prioritize other issues over the realization of human rights”,¹¹ there has been limited analysis of the legitimacy and necessity of austerity measures within the framework of Article 2(1)

⁶ Ibid.

⁷ Aoife Nolan, ‘Introduction’ in Aoife Nolan (ed) *Economic and Social Rights After The Global Financial Crisis* (Cambridge University Press 2014), p. 8.

⁸ Ibid., p. 9.

⁹ ILO ‘Extending social security to all: A guide through challenges and options’ (International Labour Office, Geneva 2010), p. 12.

¹⁰ UNHRC ‘Report of the Independent Expert, Magdalena Sepulveda, on the question of human rights and extreme poverty: human rights based approach to recovery from the global economic and financial crises, with a focus on those living in poverty’ (2011) UN Doc A/HRC/17/34, para 38. See also Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic Social and Cultural Rights’ (1987) 9 Human Rights Quarterly, pp. 156-229.

¹¹ UNHRC (Independent Expert on the question of human rights and extreme poverty), (n 10), para 38.

and states' maximum available resources. Human rights bodies and academics have instead focused on emphasising the necessity of complying with the core obligations in times of financial crisis, and how any cutbacks should be proportional, and achieved through greater transparency and participation.¹²

As documented throughout the thesis, this lack of analysis has led to only limited progress in interpreting Article 2(1) with many rulings and judgments failing to take into account the reality of resources. This has limited the effectiveness of the human rights community's response to contemporary financial and economic issues.

1.3 Historical background

The global crisis that began in 2007/2008 is now considered to be the worst since the Great Depression of the 1930s. It "began with the collapse of the American mortgage market, quickly spread beyond North American borders, unraveled European financial markets and public finances, and stalled the global economy."¹³ The burst of the United States of America (USA) housing bubble caused the values of securities tied to real estate pricing to plummet, which in turn damaged financial institutions globally and even threatened their collapse. In many instances this was prevented by the bailout of banks by national governments. The UK Government for instance put together a bank rescue package of approximately £500 billion on 8 October 2008 to secure the stability of the banks. In January 2009, a second bank rescue package was put together totalling at least £50 billion.¹⁴

Amongst the causes of this crisis was the lack of effective regulation of the financial sector. The USA's Senate's Levin–Coburn Report concluded that the crisis was the result of "high risk, complex financial products; undisclosed conflicts of interest; the failure of regulators, the credit rating agencies, and the market itself to rein in the excesses of Wall Street".¹⁵ The Financial Crisis Inquiry Commission similarly

¹² CESCR 'Open Letter to State Parties to the ICESCR' (4 June 2012).

¹³ Janine Brodie, 'Elusive Equalities and the Great Recession: Restoration, Retrenchment and Redistribution' (2014) 10 *International Journal of Law in Context*, pp. 427–441, p. 427.

¹⁴ Grace Wong 'UK unveils second bank rescue plan' *CNN Money* (19 January 2009) <http://money.cnn.com/2009/01/19/news/international/britain_bank_bailout/> accessed 14 April 2016.

¹⁵ US Permanent Subcommittee on Investigations *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse* (United States Senate, 13 April 2011).

concluded that the financial crisis was avoidable, and was caused by inter alia "widespread failures in financial regulation and supervision".¹⁶

While initially governments responded to the financial crisis of 2008/2009 with counter-cyclical measures designed to boost economic activity and reduce unemployment "such as fiscal stimulus packages and social protection interventions"¹⁷ by 2010 states changed to adopting fiscal consolidation strategies and began making considerable cutbacks to reportedly help redress the large national deficits incurred by the bank bailouts. The cutbacks have included rationing social security through decreasing coverage and/or adequacy, and increasing emphasis on contributory systems and individual responsibilities through implementing strict conditionalities. In addition to reducing social spending, states also employed regressive taxation measures such as consumption taxes, which are seen as regressive since they disproportionately hit the poorest who spend a greater part of their income, labour market reforms, and structural reforms to pension plans.¹⁸

Therefore, despite the lack of regulation being a significant contributor to the crisis, governments' responses to the crisis have focused on reducing the role of the state and encouraging neo-liberalism. Grant and Wilson have observed the dominance of "neo-liberal Washington Consensus policies following the financial crisis".¹⁹ This in turn has resulted in increasing marginalisation and inequality. Nolan observes that the responses to the crisis have "largely served to shore up existing power distributions and inequalities to the detriment of ESR (economic and social rights)".²⁰

This has not come out of the blue. Over the last three decades, there has been "a movement away from the Keynesianism" economics of 1970s "where economic and

¹⁶ The Financial Crisis Inquiry Commission *The Financial Crisis Inquiry Report; Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Featured Commission Publications, 25 February 2011).

¹⁷ UNHRC (*Independent Expert on the question of human rights and extreme poverty*), (n 10), paras. 21-24.

¹⁸ Council of Europe 'Safeguarding Human Rights in Times of Economic Crisis' (Issue Paper, Strasbourg, 2013), <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa3f>> accessed 3 July 2014, p. 16.

¹⁹ Wyn Grant, and Graham Wilson, 'Introduction' in Wyn Grant, and Graham Wilson (eds.) *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation* (Oxford University Press 2012), pp. 1-14, p. 6.

²⁰ Nolan (n 7), p. 5.

social objectives were seen as reinforcing each other,”²¹ towards the neo liberal model that emphasises the role of markets in which social policy is seen as a cost seen rather than a central instrument for social development and stabilisation. In this neo-liberal era governments are trying to reduce the role of the state, favouring instead open competition.²² With taxation being believed to distort markets and undermine markets’ ability to efficiently distribute resources, the redistributive role in the state has been steadily eroded.²³ Policies of trade liberalisation have also resulted in a financial squeeze on fiscal space by restricting important sources of revenue (e.g. tariffs) that were previously available to governments to fund social expenditures.²⁴ This has led to, as Langford observes, a significant decline in the level and coverage of benefits in both developed and developing countries with “Governments frequently cite(ing) fiscal constraints, but a preference for smaller government appears to be dominating factor.”²⁵

1.4 Methodology

Methodology describes the steps that are generally adopted by a researcher in studying research problems and the logic behind them.²⁶ It is a system of principles and general ways of organising and structuring theoretical and practical activity in order to ensure the reaching of credible conclusions.

Historically legal research has been associated with a Black Letter Approach (BLA). This method is based on interpreting cases and statutes to identify the law on a particular issue or topic and is also described as doctrinal, law-in-books, legal formalism, expository, positivistic and analytical legal research.²⁷ It assumes law is

²¹ Emmanuel Reynaud ‘The Right to Social Security–Current Challenges in International Perspective’ in Eibe Riedal (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges*. (Springer-Verlag 2007), pp. 1-17.

²² Ibid.

²³ ECOSOC ‘Enhancing Social Protection and Reducing Vulnerability in a Globalizing World, Report of the Secretary-General’ (2001) UN Doc. E/CN.5/2001, para 55.

²⁴ Ibid., para 57.

²⁵ Malcolm Langford and Aoife Nolan, ‘The Right to Social Security’ in Centre on Housing Rights and Evictions (ed.), *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* (Centre on Housing Rights and Evictions 2006), p. 51.

²⁶ Robert Cryer, et al. (eds.) *Research Methodologies in EU and International Law* (Hart Publishing 2011), p. 8.

²⁷ D. Manderson and R. Mohr, ‘From Oxymoron to Intersection: an Epidemiology of Legal Research’ (2002) 6 *Law Text Culture*, pp 159-182.

positive, that is deliberately 'laid down' in the form of rules; law enacted by political (legislative) authorities, or affirmed by politically authorised agencies, such as courts. This compares to natural law, which is considered as deriving from nature, right reason and morality.

To identify the law on a particular issue, the BLA searches "...for principles governing and explaining the application of rules to facts in a body of case-law decisions."²⁸ This is regarded as crucial to finding *lex lata*, that is the law as it is. This compares to *lex ferenda*, which means 'how the law should be'. By focusing on reviewing existing cases and statutes to find the law on a particular issue or problem, this BLA approach considers the doctrine "as a pure legal proposition" with no links to other issues that may influence the problem.²⁹ It promotes the application of legal norms to facts and avoids judges imposing their own perspectives. This approach therefore views law as "a sealed system"³⁰ independent of moral, political judgement or other outside influences.³¹ It also assumes that "legal doctrine possesses logical coherence."³² The decisions of judicial bodies are not regarded as one-off but internally connected and related to each other since they relate to specific points of law.

As Qureshi recognises

"Black-letter approach assumes that the answers and solutions to every legal problem are available in the underlying logic and structure of rules which can be discovered by exposition and analysis of the legal doctrine."³³

²⁸ Michael Salter and Julie Mason *Writing Law Dissertations, an Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007), p. 68.

²⁹ Geoffrey Wilson 'Comparative legal scholarship' in Hong Chui, Wing and Mike McConville (eds) *Research Methods for Law* (Edinburgh University Press 2007), pp. 87-103, p. 92.

³⁰ Douglas Vick 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society*, p. 178.

³¹ Margaret Thornton 'The idea of the university and the contemporary legal academy' (2004) 6 *Sydney Law Review*, pp. 481-502, p. 483. See also Eli M. Salzberger, 'The economic analysis of law-the dominant methodology for legal research' (Legal Studies Research Paper No. 1044382, University of Haifa 2007), p. 4.

³² Salter and Mason (n 28), p. 68.

³³ Shazia Qureshi 'Research Methodology in Law and Its Application to Women's Human Rights Law' (2015) 22(2) *Journal of Political Studies*, pp. 629-643.

There are many criticisms of this doctrinal approach. Scholars have argued that it is self-limiting with circular reasoning and is “intellectually rigid, inflexible, and inward looking”³⁴ and “... dogmatic, formalistic and close-minded”.³⁵ This is because, as scholars have noted, the “law decides what is and can be law.”³⁶ The approach is accused of stifling any systematic and substantive critique of law.³⁷ Other commentators have noted that one of “fatal weaknesses” of the doctrinal approach is “its inability to cope with rapidly responding situations”.³⁸

Moreover, as Salter and Mason note, many scholars have observed that this view of positive law as a system of rules is misleading, asserting that

“Law is never simply positive law that is ‘just there’ to be studied as a certain type of object. Instead, it is a continuing, dynamic and largely institutional process of re-interpretation not only of doctrine but also of procedural requirements, analytical and rhetorical techniques, specialist craft skills and fact-finding.”³⁹

More recently Secker similarly observes that “neither international law nor human rights are static and fixed systems. Rather, both are in a constant state of evolution, development and redefinition”.⁴⁰

Lauterpacht similarly rejected the view of law as about finding the appropriate rule in an impartial manner. Instead he regarded it as about making choices between claims of varying legal merit.⁴¹ Other legal commentators have also found that law is a “discipline that takes normative positions and makes choices among values and interests” based on the promotion of common principles and values.⁴² Higgins similarly regards “...international law as a system of decision-making directed

³⁴ Wing Hong Chui *Research Methods for Law* (Edinburgh University Press 2007), p. 4.

³⁵ Salter and Mason (n 28), p. 112.

³⁶ Richard Noble and David Schiff *A Sociology of Jurisprudence* (Bloomsbury 2006), p. 46.

³⁷ Salter and Mason (n 28), p. 116.

³⁸ William Twining ‘Reflections on Law in Context’ in Peter Cane and Jane Stapleton (eds.) *Essays for Patrick Atiyah* (Clarendon Press 1992), pp 1-30.

³⁹ Salter and Mason (n 28), p. 113.

⁴⁰ Emily Secker, ‘Participation in international human rights law: a comparison of theory and practice’ (Ph.D thesis, Lancaster University 2008)

⁴¹ Hersch Lauterpacht, *The Development of International Law by the International Court*. (Stevens & Sons, 1958) p. 399.

⁴² Mark Van Hoecke, ‘Legal Doctrine: Which method(s)?’ in Mark Van Hoecke (ed.) *Methodologies of Legal Research* (Hart Publishing, 2013) p. 10.

towards the attainment of certain declared values” rather than as a system of neutral rules.⁴³ As such they can respond and adapt to contemporary problems and challenges. She suggests that “... if international law was just ‘rules’ then international law would indeed be unable to accumulate to, and cope with, a changing political world.”⁴⁴ Other scholars have gone further to assert:

“The idea of law as an autonomous body of rules is not only enigmatic and inscrutable. It is also potentially an instrument of injustice, with embedded but out-dated values that oppress a later and more enlightened population”.⁴⁵

Other commentators have similarly observed the necessity of going beyond BLA and *lex lata* to prevent the law from becoming static and irrelevant as situations change. They have specified that while impartiality is crucial, no rules can apply for every situation and where law is unclear choices and decisions need to be made that respect extra legal considerations and external values.⁴⁶ This view of law, as a process, allows context to become part of the conversation, and not an external irrelevant factor as suggested by a doctrinal or black letter approach that focuses on just establishing *lex lata*.

This view of law as processes rather than rules also changes the emphasis on *lex lata*. Higgins for instance notes "If law as rules requires the application of outdated and inappropriate norms, then law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve".⁴⁷ As Puvimanasinghe observes this virtually eliminates the distinction between *lex lata* and *lex ferenda* by allowing "choices/interpretations compatible with values", particularly when there is lacunae. In essence it gives tools to judge situations when there are no applicable rules for a particular problem.⁴⁸

⁴³ Rosalyn Higgins, *Problems and Processes, International Law and How We Use It* (Oxford University Press 1994), p.vi.

⁴⁴ *Ibid.*, p. 3.

⁴⁵ Steven Bottomley and Simon Bronitt *Law in Context*, (Third Edition, The Federation Press, 2006), p. v.

⁴⁶ Noora Johanna Arajärvi 'Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality' (2011) 15(2) *Tilburg Law Review: Journal of International and European Law*, pp. 163-183.

⁴⁷ Higgins (n 43).

⁴⁸ Shyami Puvimanasinghe *Foreign Investment, Human Rights and the Environment: Perspective from South Asia on The Role of Public International Law for Development* (Brill publishing 2007) p. 257-8.

In fact some argue that the reduced emphasis on *lex lata* is already being seen.

Academics have observed that in the USA

"the answer to many legal questions (and perhaps most of those that make their way to appellate courts) depends less on determining the precise semantic content and scope of the legal norms being applied and more on understanding which of the outcomes contended for would best serve the applicable norms' underlying purposes."⁴⁹

Other academics have also observed other courts making use of *lex ferenda*.

Academics have observed that at the international level

"Courts face constant juxtaposition between the positivist and natural law approaches. Neither end of the spectrum, however, seems to provide fully satisfactory outcomes in international criminal law, an area of public international law in which the principle of legality and moral standards often collide."⁵⁰

Arajärvi notes that the use of *lex ferenda* is especially valuable since international law is quite often "uncodified and imprecise". She notes that in particular regard to international criminal tribunals, since "many morally compelling, even universal, concerns... may not be (yet) grounded on positive legal rules", it may be desirable "even justifiable" to use *lex ferenda*.⁵¹

The importance of *lex ferenda* is particularly pertinent in human rights law since it is clearly concerned with external values, namely securing justice, equality and protecting the most vulnerable. Human dignity lies at the core of the main human rights treaties.⁵² As a recent example of how law can evolve to reflect values and respond to context, one could look at indigenous rights and the drafting and adoption

⁴⁹ Theunis Roux 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24(1) Legal Education Review, pp 173-200.

⁵⁰ Arajärvi (n 46).

⁵¹ Ibid.

⁵² Ibid.

of the Declaration on the Rights of Indigenous Peoples. This instrument elaborates new rights for indigenous peoples including a collective right to the ownership, use and control of lands, territories and other natural resources based on core principles of human dignity. Although only soft law it is indicative of a process that allows for the evolution of human rights law through the recognition and interpretation of core values and principles such as dignity, equality and non-discrimination. It demonstrates that the rights contained in international law are not the result of a fixed set of rules but the evolving interpretation of principles and judgments according to the current context and particular values.

In terms of methodologies, the move away from traditional doctrinal BLA approach associated with establishing *lex lata* has been reflected by emerging socio legal methodologies that enable legal problems to be examined in their wider context to determine how law should be read in the real world.⁵³ Nowadays there is increasing recognition of the “... need for an evolving paradigm which includes a more outward-looking focus encompassing interdisciplinary methodologies.”⁵⁴ This recognition has resulted in approaches that have been classified as socio-legal amongst others. They have been lauded for taking an external approach to the law that does not usually accept the way things are and instead rather stands at a distance to question the status quo.⁵⁵

This type of methodology has been given many different labels, according to the approach it adopts, such as Inter-disciplinary Research, Law-in-Action, Law Reform Research, Law and Society, and/or Law in Context. As suggested by its many titles, it is difficult to provide one single definition of what socio-legal scholarship (SLS) or a socio-legal approach involves beyond stating it is a very “broad church” and is based on a multi or inter-disciplinary approach to the study of legal phenomena.⁵⁶ There are many different and incompatible interpretations of the nature and scope of this approach to research.⁵⁷ As Qureshi notes given its flexibility and broad scope “there is

⁵³ Vick (n 30), p. 181.

⁵⁴ Terry Hutchinson, ‘Developing Legal Research Skills: Expanding The Paradigm’ (2008) 32 Melbourne University Law Review, pp. 1065-1095, p. 1082

⁵⁵ Timothy J Berard, ‘The Relevance of the Social Sciences For Legal Education’ (2009) 19(1) Legal Education Review, pp. 189-215, p. 199.

⁵⁶ Salter and Mason (n 28), p. 121

⁵⁷ Ibid.

no consensus on the definition of the SLS, its definitions are as diverse as the topics that are addressed by it.”⁵⁸ Despite all its diversities, taking an external perspective and identifying and addressing the discrepancies between law-in-books and law-in-action are central to its aims. SLS can for instance facilitate the review and exposure of apparent neutral legislation that could unfairly negatively impact particular groups.⁵⁹ It often requires a multidisciplinary or interdisciplinary approach. A multidisciplinary approach involves drawing appropriately from multiple academic disciplines to redefine problems outside normal boundaries, while an interdisciplinary approach draws from different disciplines to enhance the understandings of particular issues, or offer an original theory or concept.

Other methodologies include comparative legal research. This has been argued as helping improve domestic law and legal doctrine, and to assist in the harmonisation of law within different regions such as the European Union (EU). It can include comparing different legal systems to ascertain similarities and differences; analysing clearly the different solutions offered by various legal systems for a particular legal problem; investigating the causal relationship between different legal systems; comparing the several stages of various legal systems; and examining legal evolution in accordance with different periods and systems.⁶⁰ As observed by Levičev, while “... this categorisation is almost hundred years old, it is still provides us with appropriate representation of comparative legal research (at least in its general form)”⁶¹

In general terms academics have begun to realise that legal research does not have to rely on a single methodology wholly excluding the other; more than one methodology can be applied with varying degrees of analysis, depending upon the nature of the research problem.⁶² This includes the assessment whether a certain methodology occupies the ‘centre stage’ or is used at the initial phase of the research project that

⁵⁸ Qureshi (n 33), p. 633.

⁵⁹ Bottomley and Bronitt (n 45).

⁶⁰ Vitalij Levicev ‘The Synthesis of Comparative and Socio-Legal Research as the Essential Prerequisite to Reveal the Interaction of National Legal Systems’ in *The Interaction of National Legal Systems: Convergence or Divergence? Conference Papers* (Vilnius University, 2013), p. 164.

⁶¹ *Ibid.*, p. 165.

⁶² Cryer (n 26), pp. 14-15.

also employs other approaches.⁶³ Chynoweth similarly puts forward a matrix that shows that the methodology used by legal academics is rarely one pure discipline and that there are a myriad of possibilities including elements of socio-legal or law reform research, doctrinal research and legal theory.⁶⁴

There are many concerns that this evolution and use of different types of legal methodologies is opening the door to subjectivity. As already discussed underlying the idea of black-letter law or rules is the belief that law must be immune from other influences, and be objective. Many view that by taking a multi-disciplinary or socio-legal approach in particular, scholars “break the boundaries of law as a distinct and self-contained academic discipline...”⁶⁵ and introduce technically unsound methods to legal research. For instance “...many doctrinalists regard (socio-legal) interdisciplinary research as amateurish dabbling with theories and methods the researchers do not fully understand.”⁶⁶ Perhaps most pertinent is the question raised by Van Hoecke. He argues that “...The question here is: how far should legal scholars go in that direction and where do they reach their point of incompetence?”⁶⁷ This is certainly a valid question. To maintain intellectual rigour, the purposes of, and the reasons for using, different methodologies must be made clear thereby allowing the reader to critically evaluate a study’s overall validity and reliability.

1.5 The theoretical framework of the thesis

This thesis does not use the black letter or doctrinal approach in finding the implicit or explicit patterns of consensus in judicial decisions or jurisprudence to determine the underlying rules and the law on a particular issue. The black letter approach is not applicable as this thesis views human rights law as not simply a set of rules independent of context but as an evolving process of authoritative decision making that depends on and responds to context. It is about exercising judgement and choosing what is appropriate for the circumstances and how the law should be read.

⁶³ Ibid., p. 39.

⁶⁴ Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds.) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008), pp. 28–37.

⁶⁵ *Salter and Mason* (n 28), p. 35.

⁶⁶ *Vick* (n 30), p. 164.

⁶⁷ *Van Hoecke* (n 42), p. 18.

Given this the thesis focuses on identifying how the ICESCR, should be interpreted (*lex ferenda*) given the wider economic context within which the treaty is operating-

To do this the thesis takes a multi-disciplinary approach drawing appropriately from multiple academic disciplines to redefine the problems outside of the normal doctrinal boundaries. Its starting point is not determining the law itself, but identifying the context within which the law, and most specifically ICESCR is functioning, particularly the reality of resources. The thesis is not an economics paper. It is instead designed to provoke critical thinking about the relevance of CESC's current approach to the maximum available resources question. Rather than examining what is the situation and appropriate economic analysis or doctrine, it takes note of the variety of different economic view points and analysis to demonstrate that the situation is not as clear cut as may be portrayed by some politicians.⁶⁸ While this thesis may appear to focus on the Keynesian perspective, this is to counter the common neo-liberal approach that argues the necessity of austerity as the only option available to redress the national deficit.⁶⁹

Using this external perspective, the thesis examines the relevance of current interpretations by international human rights mechanisms particularly the CESC. To do this, it reviews the body's concluding observations and general comments using the 'universal human rights index'.⁷⁰ This website allows users to access and search the conclusions and recommendations of the UN Treaty Body, Special Procedure and the Universal Periodic Review mechanisms through several categories including particular rights (such as the right to social security) and key words (for instance 'maximum available resources' or 'regressive').⁷¹

Once having reviewed the current approach, the thesis focuses on suggesting how the ICESCR could be interpreted based on values rather than rules and using *lex ferenda* rather than *lex lata*. To ensure its credibility in determining how the law can be

⁶⁸ Deborah Summers, 'David Cameron warns of 'new age of austerity'' *The Guardian* (London, 26 April 2009) < www.theguardian.com/politics/2009/apr/26/david-cameron-conservative-economic-policy1 > accessed 16 June 2013.

⁶⁹ *Ibid.*

⁷⁰ For more information see <http://uhri.ohchr.org/en>.

⁷¹ *Ibid.*

interpreted it is still centred on legal principles, and past decisions and cases by international and regional human rights mechanisms, national courts, and other relevant bodies. However, rather than examining all cases to find the consensus principles to determine the law on a particular issue⁷² it has chosen to highlight those cases from a variety of different bodies and mechanisms, at the international, regional and national that demonstrate how particular principles could and should be applied in the specific context of maximum available resources. Rather than in engaging in comparative legal methodology that exhaustively compares different legal systems and draws conclusions, it uses the examples selected to illustrate particular points and demonstrate the possible role of courts.

This also applies to the parts of the thesis on the right to social security. The thesis similarly analyses the relevance of recent decisions on the right to social security against the reality and whether, given this reality, they comply with key human rights principles such as non-discrimination and universality with a view to developing what the law should be.

With regards to the situation in the UK, it was beyond the scope of this thesis to do in depth first-hand research. Instead it used the reports and findings of credible organisations working with individuals on the ground. These organisations have both documented individual cases and overall trends, demonstrating for instance how austerity measures have affected certain population groups.

This thesis is thus broadly based on research about law rather than research in law, and more specifically research about 'law in context'. It is designed to facilitate a change in the way the ICESCR is interpreted to ensure its continued relevance given the economic context and the ends that the law is intended to serve. Throughout all, the thesis is designed to be provocative showing how the ICESCR could and should be interpreted.

The approach chosen is especially important given the issues addressed by this thesis. To determine a state's obligations during a financial crisis requires a discussion of

⁷² *Van Hoecke* (n 42), p. 10.

what is meant under the ‘maximum available resources’ clause in Article 2 of the ICESCR: The exact meaning of the ‘maximum available resources’ clause cannot be determined in isolation from the economic reality since resources themselves are governed by economic policy. As such, the ‘answers’ and ‘solutions’ to this problem do not lie solely in law. The law cannot provide the answer to how to determine a state’s level of resources to measure compliance with Article 2(1) of the ICESCR. This discussion therefore transcends a pure legal or doctrinal approach, and clearly requires an interdisciplinary approach that takes into account the economic reality. Moreover, a purely doctrinal approach would not be able to take an external view and objectively review whether the CESCR is taking a neo-liberal approach as accused by some scholars.⁷³ This is discussed further in Chapter 2.

Similarly, with regards to evaluating the right to social security, it is not possible to determine what the law should be without considering the wider context and the relationship the right to social security has with other human rights. Moreover, in many instances the limited jurisprudence available actually falls short of key human rights principles especially non-discrimination and universality, and the values human rights law seeks to promote. Maintaining a broader perspective is therefore crucial in discovering how the law should be interpreted in today’s world.

Furthermore, in many areas there are few decisions and limited jurisprudence particularly on the issues of maximum available resources that would allow for a fully comprehensive black letter approach. The economic situation is also continually changing to take into account for instance the impact of financial markets, and increasing globalisation. While contemporary and complex economic issues such as capital flows, financial regulation, and taxation policies have all affected states’ ability to implement human rights, human rights practitioners have not yet fully addressed this issue by failing to take full advantage of the tools available under human rights law. The legal academic must therefore find other approaches than pure doctrinal to formulate appropriate responses to these new challenges.

⁷³ Joe Wills and Ben Warwick ‘Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse’ (2016) 23(2) *Indiana Journal of Global Legal Studies*.

1.6 Outline of the thesis

To answer the main research questions the thesis unpacks a number of crucial issues using the methodology outlined above. Most importantly, before it can even discuss and suggest how states' obligations in a financial crisis, should be interpreted it must establish both what is meant by 'maximum available resources' as contained in Article 2 of the ICESCR, and states' obligations under the right to social security. As has already been noted, both these two issues remain somewhat neglected.

Chapter 2 starts by identifying what maximum available resources actually means within the premise that resources are in fact determined by economic policies and decisions adopted by the government. This moves it away from a quantifying approach that tries to identify capability to examining how the human rights community can judge whether a state is doing enough to mobilise its resources to implement human rights. The last part of this chapter examines how this new approach to judging maximum available resources affects the rest of Article 2(1) of the ICESCR, which stipulates in its entirety that

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

This has been regarded as by many as confusing and vague,⁷⁴ and this chapter explains how this new approach can give greater clarity to states' obligations.

Chapter 3 presents the second leg of the thesis in determining what the content of the right to social security should be using both recent court decisions and core human

⁷⁴ Matthew Craven 'The Justiciability of Economic, Social and Cultural Rights' in Richard Burchill, David Harris and Anne Owers (eds.) *Economic, Social and Cultural Rights: Their Implementation in the United Kingdom* (University of Nottingham Human Rights Law Centre 1999), p. 5. See also Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009).

rights principles. As already highlighted the content of this right has had little elaboration and clarification compared to other economic and social rights. Establishing this is becoming more and more pertinent with increasing pressure for social security reform following the financial crisis reportedly reducing resources and the fiscal space of states, and continuing demographic changes with an increasingly ageing population further questioning the sustainability of social security systems.

In what could be perceived as the crux of the thesis, Chapter 4 builds on the analysis contained in Chapters 2 and 3 to suggest how states' obligations to implement the right to social security during a financial crisis should be interpreted. It demonstrates how both states' core obligations regarding the right to social security regardless of their apparent resource levels should be read, and whether there are possibilities of escaping their broader obligations during a financial crisis. Again taking a multi-disciplinary approach, it goes beyond quantifying resources to explain how, even when there is a large national debt, resources available are a result of economic choices and can and should be judged accordingly.

Chapter 5 applies this analysis developed in the previous chapters to the situation in the UK from May 2010 to May 2015 to examine impact of the Coalition Government's actions on the right to social security, and whether they can be excused by a national debt. Having ratified the ICESCR, the UK Government is obligated to ensure that the right to social security (including social assistance) in accordance with international standards as elucidated and clarified in Chapter 3. However many have observed that the national debt is being used to justify unprecedented cutbacks that have resulted in worsening inequality and increasing poverty.⁷⁵ Since it is beyond the capacity of this chapter to present a comprehensive analysis, it focuses on reviewing the main elements of welfare reform and how it has affected the most vulnerable using evidence documented by national and local charities and well regarded social organisations that work on poverty related issues, including assisting people in need.

⁷⁵ Oxfam 'The True Cost of Austerity and Inequality: UK Case Study' (Oxfam 2013) <www.oxfam.org/sites/www.oxfam.org/files/cs-true-cost-austerity-inequality-uk-120913-en.pdf> access 3 September 2014.

Finally, while reiterating the relevance of this thesis and its two-pronged approach, the Conclusion summarises the key findings of the thesis and presents the answers to the research question of whether a national debt should trump human rights obligations to realise the right to social security. It also positively makes suggestions to clarify how states should meet their continued human rights obligations during financial crises. Importantly it demonstrates how the thesis puts forward a new way of thinking with regards to resources that could help judge the necessity and legitimacy of austerity measures, which has so far been lacking from current approaches.

Chapter 2: Maximum Available Resources: Changing the Conversation

2.1 General introduction

To further clarify how states' obligations during a financial crisis should be interpreted, it is imperative to understand what the clause 'maximum available resources' as contained in Article 2(1) of the ICESCR should mean and how a state's conduct with regards to this could and should be judged. For years the 'maximum available resources' clause has been regarded as weakening the ICESCR by giving states an excuse for non-compliance.⁷⁶ This thesis, by recognising that the resources available to implement human rights depend largely on the economic policies adopted by governments, suggests moving the discussion from trying to judge a state's capability to defining and judging what governments should be doing to make the maximum use of their available resources. As the UN Conference on Trade and Development (UNCTAD) notes, fiscal space is not an exogenously determined static variable, but a "largely endogenous variable", affected by internal factors such as monetary policy.⁷⁷ Similarly the UN Children's Fund (UNICEF) has noted, for a large number of countries, including developing ones, there remains numerous ways of expanding their fiscal space.⁷⁸

So far numerous scholars and quasi-judicial bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR), have taken a more quantitative approach to measuring maximum available resources, using Gross Domestic Product (GDP) or economic growth rates to assess countries' capabilities. The CESCR suggests using the States Parties' current economic situation, in particular whether it is undergoing a period of economic recession, to determine whether a state can use claims of insufficient resources to excuse non-implementation of any retrogressive measure.⁷⁹ The focus on just using GDP or economic growth indicators assumes

⁷⁶ Steiner and Alston, (n 3).

⁷⁷ UNCTAD 'Trade and Development Report, Post Crisis Policy Challenges in the World Economy' (2011) UN. Doc. UNCTAD/TDR/2011.

⁷⁸ Isabel Ortiz, et al 'Identifying Fiscal Space: Options for Social and Economic Development for Children and Poor Households in 184 Countries' (Social and Economic Policy Working Paper, UNICEF 2011).

⁷⁹ CESCR 'An evaluation of the obligation to take steps to the maximum of available resources under an optional protocol to the covenant' (2007) UN Doc. E/C.12/2007/1, para 10.

resources are a fixed constraint, independent of governments' policies, instead of being more elastic and responsive to internal factors such as policy.

Balakrishnan et al. criticises these existing approaches, observing "Often a narrow interpretation (of resources) is adopted, assuming that available resources have been fixed by previous policy choices."⁸⁰ However, while they acknowledges that governments can determine the resources available through debt and deficit financing, and monetary policy and financial regulation and the various choices and alternatives they have, she still focuses on measuring capabilities rather than examining how to assess states' conduct. They could go further in defining the parameters needed to judge what the government is doing and should be doing as "an institution that mobilises resources to meet core human rights obligations".⁸¹

In a later publication (2013), Elson, Balakrishnan and Heintz further elaborate the role of the state as mobiliser of resources rather than just an "efficient administrator of existing resources"⁸² They highlight the different approaches adopted by neoclassical and Keynesian approaches to economic policy and demonstrate how the concepts of fiscal and monetary space can enrich human rights practitioners' understanding of 'maximum available resources'. The authors particularly argue that "the human rights community needs to be aware that there are alternative policies and to push for open and transparent discussion of alternatives before any decision is made."⁸³ However, again they do not go further in developing how compliance with the maximum available resources clause is to be adjudicated. In the same book, focusing specifically on the role of the state in mobilizing resources through fiscal policies, Saiz addresses the link between taxation and human rights and the "need to bring taxation under the lens of human rights scrutiny given the impact of the crises and the non-fulfilment of many of the Millennium Development Goals (MDGs)".⁸⁴ He particularly draws

⁸⁰ Radhika Balakrishnan, *et al* 'Maximum Available Resources and Human Rights' (CWGL, New Jersey 2011) <www.cwgl.rutgers.edu/docman/economic-and-social-rights-publications/362-maximumavailableresources-pdf/file> accessed 2 February 2012, p. 2.

⁸¹ *Ibid.*, p. 4.

⁸² Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Aoife Nolan, Rory O'Connell and Colin Harvey (ed.) *Human Rights and Public Finance* (Hart 2013), p. 14.

⁸³ *Ibid*

⁸⁴ Ignacio Saiz 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds.) *Human Rights and Public Finance* (Hart 2013).

attention to the imbalances and inequities in the tax structure that “result in tax systems skewed in favour of wealthy economic elites or powerful business interests rather than accountable to the ordinary citizen,” and argues in favour of a global financial transaction tax and the clamping down on tax havens. However, he has also not fully addressed how compliance with maximum available resources clause can be judged.

Any attempts to develop such parameters must bear in mind who has the burden of proof to demonstrate that the state does not have enough resources to implement human rights. Despite the CESCR making it clear that such a burden of proof rests with the state⁸⁵ many human rights approaches focus on proving a state’s capability instead of examining whether it has proved that it is unable, through resource constraints, to meet its obligations.⁸⁶ There has also been little reference to the standard of proof needing to be fulfilled. In criminal law, shifting the burden of proof to the defendant when using particular defences such as insanity is well established,⁸⁷ and the usual standard of proof is “clear and convincing evidence” or “preponderance of evidence” (a less rigorous standard of proof).⁸⁸ In light of the primacy of human rights obligations, this thesis argues that human rights practitioners should use the higher standard of proof of “clear and convincing evidence” that is “so clear as to leave no substantial doubt” and “sufficiently strong to command the unhesitating assent of every reasonable mind.”⁸⁹ Given this, the question changes from judging whether a state is capable of fulfilling rights to examining the ‘certainty’ of states’ economic arguments that it cannot do more to raise the necessary resources to implement human rights.

This thesis acknowledges that one cannot determine the parameters to judge states’ compliance with the ‘maximum available resources’ clause by using a doctrinal legal

⁸⁵ CESCR ‘An evaluation of the obligation to take steps to the maximum of available resources under an optional protocol to the covenant’ (2007) UN Doc. E/C.12/2007/1, para 9.

⁸⁶ Ibid.

⁸⁷ S. Cooper ‘Human Rights and Legal Burdens of Proof’ (2003) 13 Web Journal of Current Legal Issues.

⁸⁸ Ibid.

⁸⁹ *Angelia P., a Minor. Department of Social Services, (Petitioner and Respondent) v. Ronald P. et al.* [1981] 28 Cal. 3d 908 (Supreme Court of California SF 24184). Richardson Opinion states “ ‘Clear and convincing’ evidence requires a finding of high probability. This standard is not new. We described such a test, 80 years ago, as requiring that the evidence be ‘so clear as to leave no substantial doubt’; ‘sufficiently strong to command the unhesitating assent of every reasonable mind’ ”.

approach that is isolated from the economic reality. It, thus, builds on the observations outlined here to define the meaning of ‘maximum of available resources’, which reflects the politics and ideologies of the drafting process and as a whole is convoluted and difficult to intuitively understand. Using relevant jurisprudence and decisions, it then gives tools to human rights practitioners and judicial bodies to judge state compliance.

To fully define the term ‘maximum available resources’ and develop the necessary means to judge states’ compliance, the first section breaks the clause down into its three parts, allowing its full spectrum to be defined and addressed. The second section uses existing human rights principles to complete the picture by demonstrating how human rights practitioners can further judge economic policy to ensure compliance with international human rights law. The last section examines how this new understanding of maximum available resources can give more clarity to the other parts of Article 2(1) that have been accused of being vague and lacking concrete obligations.

2.2 Maximum available resources

2.2.1. Resources

When defining what is meant by the term ‘maximum available resources’, human rights practitioners have focused on discussing what is meant by ‘resources’, questioning for instance whether private resources should be included? What is the impact of public debt on a state’s available resources to implement human rights? So far the CESCR has not gone beyond defining it as including domestic resources and those that can be gained from international sources such as technical cooperation and assistance. The Committee on the Rights of the Child (CRC Committee) argues that

“resources must be understood as encompassing not only financial resources but also other types of resources relevant for the realisation of economic, social and cultural rights, such as human, technological, organisational, natural and information resources.”⁹⁰

⁹⁰ CRC Committee ‘Recommendations: Resources for the Rights of the Child – Responsibility of States’ (2007) (46th session 21 September 2007), para 24

This differs to how economists broadly view resources, that is, as factors of production that generate goods and services, and financial resources or revenue. These factors of production include: labour (human capital and the capabilities of individuals), land (all natural resources), capital (physical goods and infrastructure) and enterprise.⁹¹

As highlighted in the introduction, numerous academic bodies and quasi-judicial bodies have used indicators concerning central government expenditure and revenue to indicate a state's level of resources and therefore capability for implementing human rights. While this approach has some validity, taking this further and using such indicators as economic growth/GDP rates to assess a state's resources and subsequently its compliance with human rights standards is problematic. Such an approach does not address the fact that low GDP and economic growth can result from poor domestic policy. Sakiko Parr *et al.* use the example of Zimbabwe to illustrate how using per capita GDP to indicate state resource capacity is flawed since low GDP may be the result of poor macroeconomic policy choices by governments, rather than genuine resource constraints.⁹² A poor balance of payments situation could also be the result of government policy, and thus reflect the macro-economic choices of the government rather than being an objective measure of resources.

Similarly national debt is also an inaccurate indicator of resources. Comparing it to a household, many regard national debt as a static balance sheet or snapshot indicating that a country has reduced resources and must curb spending. While there are different views amongst economists about how to treat national debt, viewing it in this simplistic way is misleading. When a household is in debt, it has to reduce spending as its income is relatively fixed. States, unlike most households, can for instance increase their financial resources by increasing taxation or introducing new forms of taxation. Also, unlike households, by reducing spending states do not automatically increase income available to pay off debt. In fact some economists argue it has the opposite effect and reducing government spending in times of recession can actually decrease

⁹¹ Federal Reserve Bank of St Louis 'Factors of Production – The Economic Lowdown Podcast Series, Episode 2. Economic Lowdown Podcast Series' <www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-2-factors-of-production> accessed 1 May 2016.

⁹² Sakiko Fukudar-Parr, et al 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment' (Working Paper 8, University of Connecticut 2008) <http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1361&context=econ_wpaper> accessed 25 May 2010.p. 13.

economic growth by decreasing aggregate demand.⁹³ Moreover, deficit spending can be used to invest in a country, develop its assets and spur an economy. Lusiani writing for the Center for Economic and Social Rights (CESR) notes that it is in fact (in moderation) “a standard and important economic policy tool which has allowed governments worldwide the ability to maximize resources and invest in current and future human and economic potential.”⁹⁴ This issue is discussed further in Chapter 4, which includes a section discussing the relationship between national debt and the ‘maximum available resources’ clause.

This thesis considers the term ‘resources’ as just one element of the maximum available resources clause and defines it appropriately. The term ‘resources’ must be regarded as the potential of a state; factors at a state’s disposal to mobilise to gain the necessary revenue to implement and realise human rights rather than the outcome of certain policy measures such as GDP or economic growth. Such factors can include natural resources that the Organisation for Economic Co-operation and Development (OECD) defines as raw materials occurring in nature that can be used for economic production or consumption such as minerals, water, and land.⁹⁵ They also include human capital, which can briefly be described as the talent, skills and capabilities of the people living within a country.⁹⁶ These should be regarded as a country’s stocks or assets, namely the factors “that provide the basis for present and future economic activity, establishing the range of possibilities open to society.”⁹⁷ This is opposed to flows in terms of income and expenditure that derives predominantly from governments’ policies.⁹⁸ This is not a new concept. During the ICESCR’s drafting process the Lebanese representative noted that “it must be made clear that the

⁹³ Buttonwood ‘Fiscal Policy: What is austerity?’ *The Economist* (London, 20 May 2015) <www.economist.com/blogs/buttonwood/2015/05/fiscal-policy> accessed 10 June 2015.

⁹⁴ Nicholas Lusiani ‘Fiscal Fallacies: Eight Myths about the ‘Age of Austerity’ and Human Rights Responses’ (CESR 2012) <<http://cesr.org/downloads/CESR-FiscalFallacies.pdf>> accessed 13 July 2013, p. 6.

⁹⁵ OECD ‘Glossary of Statistical Terms’ (Paris 2007) <http://ec.europa.eu/eurostat/ramon/coded_files/OECD_glossary_stat_terms.pdf> accessed 22 July 2014.

⁹⁶ World Economic Forum ‘The Human Capital Report’ (Geneva 2013) <www3.weforum.org/docs/WEF_HumanCapitalReport_2013.pdf> accessed 23 May 2014.

⁹⁷ David Parker, ‘Resources and Child Rights: An Economic Perspective’ (Innocenti Child Rights Series, Number 6, UNICEF, Florence 1994), p. 4.

⁹⁸ *Ibid.*

reference [to resources] was to the real resources of the country and not to budgetary appropriations.”⁹⁹

Human rights practitioners have focused on a country’s ‘assets’ to assess compliance with the ‘maximum available resources’ clause. UN special procedures for instance have noted clear disparities between the physical wealth of a country in terms of natural resources, and the wealth of its inhabitants. The former Special Rapporteur on the right to food noted in Bolivia that the vast majority of people had not benefitted from its enormous wealth in “natural gas, oil and metals, including silver, gold, iron, zinc and tin”.¹⁰⁰ Treaty monitoring bodies have also often noted the disparity between a state’s natural resources and the situation of its peoples.¹⁰¹

These approaches however are too simplistic to measure or judge a state’s compliance with the ‘maximum available resources’ clause. While such ‘assets’ could be useful yardsticks, by themselves they only have limited application in judging the validity of states’ defences of insufficient resources. In many instances they are privately owned and not able to be used directly to implement human rights. States must therefore mobilise such assets, that is take steps to extract the necessary revenue from them.¹⁰² To do this properly, states must thus be fully functioning and have the necessary institutional infrastructure; a point made by Dowell Jones when critically analysing the CESCR’s response to the situation in the Democratic Republic of the Congo.¹⁰³ Moreover, without proper appropriate legislation, regulation and enforcement, the extraction or use of natural resources can lead to human rights abuses and violations. To illustrate this, Skogly referred to the situation of oil extraction in Ogoni-land in Nigeria where the national and international oil companies’ exploitation of the natural resources has polluted the local population’s land to the extent that they cannot grow

⁹⁹ UNCHR ‘Summary Records of the 271st meeting of the Commission on Human Rights’ (1952) UN Doc. E/CN.4/SR.271, p. 5.

¹⁰⁰ UNHRC ‘Report of the Special Rapporteur on the right to food (Jean Ziegler), Mission to Bolivia’ (2007) UN Doc. A/HRC/7/5/Add.2, para 5.

¹⁰¹ CESCR ‘Concluding Observations on Angola’ (2009) UN Doc. E/C.12/AGO/CO/3, para 26, and CESCR ‘Concluding Observations on Chad’ (2009) UN Doc. E/C.12/TCD/CO/3, para 23.

¹⁰² Audrey Chapman and Sage Russel, ‘Introduction’ in Audrey Chapman and Sage Russel (eds.) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Transnational Publishers 2002), p. 11.

¹⁰³ Mary Dowell-Jones, ‘The Committee on Economic, Social and Cultural Rights: Assessing the Economic Deficit’ (2001) 1(1) Human Rights Law Review, p. 17.

their own food.¹⁰⁴ Water sources have also been severely contaminated.¹⁰⁵ Skogly notes “In this situation, the state has failed to increase the financial resources through adequate taxation of the oil companies; and at the same time failed to enhance the already existing resources (land and water) through environmental regulation.”¹⁰⁶ More recently the buying or leasing of large pieces of land in developing countries, by domestic and transnational companies, governments, and individuals, (land grabbing) has come under significant criticism. While governments and investors have justified it as helping to ensure agricultural development, it has often led to large-scale human rights violations and abuses.¹⁰⁷

Judicial and quasi-judicial bodies should therefore examine whether states are managing such assets appropriately. Several international initiatives and instruments such as the UN Food and Agriculture Organisation (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security¹⁰⁸ can offer further guidance on this. These Guidelines promote responsible governance of land, fisheries and forests and cover issues such as taxation, valuation and spatial planning. This in turn contributes to achieving sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable economic and social development.¹⁰⁹ The Guidelines can thus be used to examine states’ actions and whether they are doing enough to manage appropriately a state’s natural assets and to sustainably extract the necessary revenue for human rights implementation.

Countries lacking such infrastructure must seek international assistance in this regard. While there has been a lot of discussion on states’ obligations to provide international

¹⁰⁴ Sigrun Skogly, ‘The Requirement of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12(3) Human Rights Law Review, pp. 393-420.

¹⁰⁵ Ibid., p. 406

¹⁰⁶ Ibid.

¹⁰⁷ OHCHR, ‘UN human rights experts denounce land-grabbing case in Viet Nam’ *OHCHR Press Release*, (Geneva, 26 March 2014)

<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14438&LangID=E> accessed 18 April 2016.

¹⁰⁸ FAO ‘Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security’ (Rome 2012).

¹⁰⁹ Ibid.

assistance and there is still yet no “firm agreement” on its exact nature,¹¹⁰ it is clear that states are obligated to seek international assistance when they cannot implement human rights. This is explicitly referred to in Article 2(1) of the ICESCR which stipulates that all States Parties must "... take steps, individually and through international assistance and cooperation, especially economic and technical ..." to fully realize economic and social rights. Such assistance should include technical assistance in improving the country's ability to mobilise resources from its 'assets' such as improving tax revenue collection and fiscal reforms.¹¹¹ Therefore, in examining whether states' defences of insufficient resources is valid, judicial and quasi-judicial bodies should also pay attention to whether the country has sought such assistance.

2.2.2. Maximum

From a linguistic point of view, 'maximum' can be defined as the greatest possible quantity or degree. While not a legal definition, human rights bodies have implicitly supported this view. Some of their judgments and opinions suggest states are obligated to both expand resources available and get the most out of already existing resources.

Greatest possible: Using a linguistic perspective, the term 'greatest possible' suggests states are obligated to preserve and expand resources (including its assets) at its disposal to implement human rights. Governments' economic and social policies should therefore be geared towards expanding a state's assets rather than undermining them. This has been partly affirmed by human rights bodies. They have particularly called on states to not deliberately undermine or deplete existing natural resources. The CESCR for instance expressed concern that in the Democratic Republic of the Congo the exploitation and mismanagement of the country's natural resources, including by foreign companies, significantly hinders the enjoyment of economic, social and cultural rights.¹¹²

To assess whether states' arguments of insufficient resources are 'clear and

¹¹⁰ Skogly (n 104), p. 403.

¹¹¹ Alison Graham, 'Ways and means of ensuring that social protection helps realise economic and social rights and achieve the MDGs' in UNDP (ed) *Accelerating Achievement of MDGs by Ways and Means of Economic and Social Rights*, (UNDP Asia-Pacific Office, Bangkok 2012).

¹¹² CESCR 'Concluding Observations on the Democratic Republic of the Congo' (2009) UN Doc. E/C.12/COD/CO/4, para 6.

convincing’ as needed by the standard of proof outlined earlier in this chapter, the CESCER and other judicial and quasi-judicial bodies must ask states what they are doing to preserve and expand its assets. This includes going beyond natural resources and applying it to other ‘assets’ especially human capital. They should be examining states’ actions in investing in employment, education, training, and health care.¹¹³ States should provide easily accessible and quality education both as right in itself and as a means of expanding a state’s assets. It could also therefore be used to argue for central bank and monetary policies supporting full employment given that “when central bank policy does not support full employment, this reduces available resources.”¹¹⁴

The obligation to preserve and expand resources (a state’s assets) could also be used to examine the actions of states in encouraging speculation in the financial market, through *inter alia* deregulation, to generate wealth. Financial speculation is basically making money from price changes, particularly on assets. Epstein and Habbard argue that speculation “divert(s) valuable resources” including financial and human capital “from productive investment in the real economy”.¹¹⁵ They further asserted that “speculation is financial activity that does not contribute to income or sustainable wealth in the real economy” and is socially unproductive.¹¹⁶ It can drive up prices and create bubbles that are not always supported by the actual earnings from the underlying asset. This can lead to spectacular crashes and economy disruptions, as demonstrated by the financial crisis of 2008 that led to governments having to use public funds to bailout financial institutions rather than invest in their assets. There are therefore numerous questions about whether it contributes to preserving and expanding states’ assets in compliance with the term ‘maximum available resources’.

Getting the most out of resources: The term ‘maximum’ linguistically implies that states are required to get the most revenue they can out of existing resources. This could also be regarded as governments’ obligations to mobilise resources within the

¹¹³ The World Bank has recognized that human capital can be increased by investing in health care, education, and job training. Tatyana Soubbotina, *Beyond Economic Growth; An Introduction to Sustainable Development* (2nd Edition World Bank 2004). See also Skogly (n 104), p. 406.

¹¹⁴ Balakrishnan, *et al.* (n 80), p. 10.

¹¹⁵ Gerald Epstein and Pierre Habbard ‘Speculation and Sovereign Debt: An Insidious Interaction’ in Martin Wolfson and Gerald Epstein, (eds) *The Handbook of the Political Economy of Financial Crises* (Oxford University Press 2013), pp. 326-356, p. 337.

¹¹⁶ *Ibid.*

country to its utmost ability.¹¹⁷ As mentioned in the previous section this includes both privately and publicly held resources.

Taxation: Governments use taxation to raise the necessary finances for amongst other things implementing social policy,¹¹⁸ and it has “traditionally been regarded as one of the most important functions of the state.”¹¹⁹ As noted by Saiz, “it is it is one of the most important policy instruments governments can deploy to generate the resources needed to realise the full range of human rights.”¹²⁰ Despite this, in recent years many governments have followed the views of neo-liberal economists that taxation distorts markets and obstructs their ability to allocate resources efficiently. They believe in minimising the role of the state and adopting policies and maximising the ability of markets to operate unrestrictedly. This translates into policies such as tax cuts, which are often argued as being expansionary and used to stimulate the economy.¹²¹

Despite the clear relevance, and the frequent urging of governments to use the “maximum of available resources”,¹²² with some exceptions, the human rights community is yet to actively discuss how a state should and can fully mobilise its resources. Alston, the current Special Rapporteur on human rights and extreme poverty, for instance, noted that “current policies in the human rights area have (not) come anywhere near recognizing the fact that tax policy is, in many respects, human rights policy.”¹²³ Saiz similarly observed that despite the importance of taxation as a source of revenue to implement human rights it is a “a rarely explored topic on the human rights agenda”.¹²⁴ In substantiating this, both Saiz and Balakrishnan *et al* note that two key treaty body statements from 2007 analysing the meaning of ‘maximum

¹¹⁷ Magdalena Sepulveda, *The Nature of the Obligations Under The International Covenant on Economic Social and Cultural Rights* (Intersentia 2003).

¹¹⁸ Balakrishnan et al. (n 80), p. 10.

¹¹⁹ Neil A. Englehart, ‘State Capacity, State Failure, and Human Rights’ (2009) 46(2) *Journal of Peace Research*, pp. 163-180, p. 168.

¹²⁰ Saiz (n 84).

¹²¹ David M. Kotz, *The Rise and Fall of Neoliberal Capitalism* (Harvard University Press, Cambridge MA 2015).

¹²² This appears to be a standard phrase that, according to the Universal Human Rights Index has been included in numerous concluding observations. Some examples include: CESCR ‘Concluding Observations on Equatorial Guinea’ (2012) UN Doc. E/C.12/GNQ/CO/1, para 13 and CESCR ‘Concluding Observations on Portugal’ (2014) UN Doc. E/C.12/PRT/CO/4.

¹²³ UNHRC ‘Report of the Special Rapporteur (Philip Alston) on the question of human rights and extreme poverty and human rights to the Human Rights Council’ (2015) UN Doc. A/HRC/29/31, para 53

¹²⁴ Saiz (n 84).

available resources’ under Article 2(1) ICESCR and Article 4 of the UN Convention on the Rights of the Child do not address the issue of taxation as a means of resource generation, focusing largely on budget allocations and international assistance”.¹²⁵

As observed there are several exceptions. One exception is the 2014 report by the former Special Rapporteur on extreme poverty and human rights, which highlighted how states can strengthen revenue raising for the realisation of human rights, including by widening the tax-base and improving efficiency, tackling tax abuse and broadening contributions of financial sector.¹²⁶ The former Special Rapporteur explicitly states that the effective collection of tax is the most “straightforward” way of ensuring compliance with human rights obligations.¹²⁷

While not frequently, the UN human rights treaty-monitoring bodies have suggested that states use taxation to fully mobilise their resources and raise revenue.¹²⁸ They have, in isolated cases, expressed concern over poor tax systems and low tax rates, and have urged State Parties to improve their effectiveness in collecting taxes and adopt comprehensive and progressive tax reform.¹²⁹ However their approaches are far from systematic. Dowell-Jones for instance argued that in 1996 the CESCR’s assessment of Hong Kong’s resources by using its level of financial reserves did not reflect macro-economic principles, and demonstrates limited contextual understanding of the economy as a whole.¹³⁰ She asserts that it should have considered instead the trade-off between low (on which Hong Kong’s economy is based) and high taxes.¹³¹ While the CESCR changed its approach in 2001 when regarding the situation in Hong Kong, it observed that low tax regimes for at least 50 years, had negatively impacted inhabitants economic, social and cultural rights,¹³² it has in total given very few recommendations on taxation policy, apart from asking states to implement tax

¹²⁵ Ibid.

¹²⁶ UNHRC ‘Report of the Special Rapporteur (Magdalena Sepulveda) on the question of human rights and extreme poverty and human rights to the Human Rights Council’ (2014) UN Doc. A/HRC/26/28 and Corr.1.

¹²⁷ Ibid para 42.

¹²⁸ CESCR ‘Concluding Observations on Guatemala’ (2014) UN Doc. E/C.12/GTM/CO/3, para 8.

¹²⁹ CRC Committee ‘Concluding Observations on Georgia’ (2003) UN Doc. CRC/C/15/ADD.222, para 13, and CRC Committee ‘Concluding Observations on Guatemala’ (2010) UN Doc. CRC/C/GTM/CO/3-4, para 26.

¹³⁰ Dowell-Jones (n 103), p. 13.

¹³¹ Ibid.

¹³² CESCR ‘Concluding Observations on Hong Kong’ (2001) UN Doc. E/C.12/1/ADD.58, para 14.

incentives for companies hiring persons belonging to particularly marginalised groups.¹³³

Given that governments are obligated to mobilise resources within the country to its utmost ability, when claiming they have insufficient resources to implement human rights they have the burden of proof to demonstrate that they cannot do more. The state in question for instance must demonstrate why it could not increase taxation with clear and convincing evidence. This may be difficult to do so since the case for low taxes to stimulate the economy is not clear-cut. One study finds that high tax countries have been more successful in achieving their social objectives than low-tax countries, with no economic penalty such as reduced or stagnant growth rates.¹³⁴ Saiz similarly observes that the argument that lower corporate taxes helps encourage business investment and entrepreneurial activity is increasingly being questioned.¹³⁵ Governments therefore may be unable to excuse deficiencies in people's enjoyment of economic and social rights on insufficient resources when there are low tax rates. While not formulating it in these terms, non-governmental organisations (NGOs) have already recognised that low tax rates are not 'in line' with states' obligations to use maximum available resources. In its 2012 report on Ireland, CESR noted that the country favoured cuts in social spending over progressive tax reform despite being one of lowest tax economies in Europe, particularly for corporations and high-income people.¹³⁶ It asserted that the country's fiscal policies "do not appear to be in line with the obligation to devote the maximum of available resources to fulfil economic and social rights progressively."¹³⁷

Similarly, states cannot justify violations of economic, social and cultural rights on the grounds of insufficient resources if they permit tax havens (regions with high financial

¹³³ CESCR 'Concluding Observations on Belgium' (2008) UN Doc. E/C.12/BEL/CO/3, para 30.

¹³⁴ Neil Brooks and Thaddeus Hwong 'The Social Benefits and Economic Costs of Taxation: A Comparison of High and Low-Tax Countries' (Canadian Centre for Policy Alternatives 2006) <www.taxjustice.net/cms/upload/pdf/Benefits_and_Costs_of_Taxation.pdf> accessed 1 April 2010, p. 6.

¹³⁵ Saiz (n 84).

¹³⁶ Luke Holland 'Mauled by the Celtic Tiger: Human rights in Ireland's Economic Meltdown' (CESR Madrid 2012) <www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf> accessed 3 February 2013.

¹³⁷ Ibid., p. 4.

secrecy and very low or zero levels of tax)¹³⁸ and tax avoidance schemes (ensuring that less tax is paid than might be required by law). Such schemes significantly impact states' financial resources. In 2011, Christian Aid estimated that the USA loses approximately US \$160bn from multinational corporations using tax haven secrecy to dodge taxes.¹³⁹ It asserts "More than half of all banking assets and a third of multinational company investments are routed via tax havens" and "in 2010 the International Monetary Fund (IMF) estimated that the money lost through small island tax havens alone amounted to US\$18tn – about a third of the world's financial wealth".¹⁴⁰ In the UK, since 2012 there has been much debate about the behaviour of 'celebrities' and international companies, such as Starbucks, Amazon and Google in avoiding paying tax during a time of cutbacks.¹⁴¹ While the Prime Minister is not incorrect in labelling such behaviour "morally wrong",¹⁴² the UK's obligations do not stop there. As a State Party to the ICESCR, the UK must make the most of its resources and thus should ensure the illegality of such schemes. This thesis thus contends that states cannot use the defence of insufficient resources if they continue to allow tax avoidance and evasion.

While it is not for the CESCR to determine economic policy, it can examine whether the state is providing 'clear and convincing' evidence that increasing tax rates, introducing new methods of taxation, cutting down on tax evasion and avoidance or other means of raising revenue will negatively impact the economy to the extent of further jeopardising human rights. While this section has focused on taxation since this is the principal way for a state to earn revenue, this approach can be equally applied to other economic policies including monetary policy and expanding national debt. The requirement of looking at evidence is crucial to prevent judicial bodies from implicitly accepting states' positions of fixed resources and the importance of low taxes to improve market functioning.¹⁴³ In fact the CESCR's position of not robustly

¹³⁸ Helen Collinson 'Tax Haven Secrecy – keeping the poor poor' (Christian Aid, London 2011) <www.christianaid.org.uk/images/TaxHavenBriefing.pdf> accessed 5 June 2014.

¹³⁹ Ibid

¹⁴⁰ Ibid.

¹⁴¹ Rajeev Syal and Patrick Wintour 'MPs attack Amazon, Google and Starbucks over tax avoidance' *The Guardian*, (London, 3 December 2012) <www.theguardian.com/business/2012/dec/03/amazon-google-starbucks-tax-avoidance> accessed 16 January 2013.

¹⁴² BBC 'Jimmy Carr tax affairs "morally wrong" – Cameron' *BBC*, 20 June 2012 <www.bbc.com/news/uk-politics-18521468> accessed 15 January 2013.

¹⁴³ Proponents of neo-liberalism often argue that taxation can distort markets, and thus has negative impacts on an economy. See for instance Dag Einar Thorsen and Amund Lie 'What is Neoliberalism?'

examining the validity of state's arguments for low taxes could already be arguing as determining economic policy by failing to question and thus reinforcing neo-liberalism.¹⁴⁴ Moreover, by taking this more 'cautious' approach, the CESCR does not engage in any external questioning of the validity of its previous conclusions and deliberations. As Wills and Warwick note, the CESCR "despite its insistence of political neutrality, ends up embracing a variant of neoliberalism that has been termed the 'Post-Washington Consensus?'"¹⁴⁵ Commentators have also noted that several courts have "entrenched principles of neo-liberalism" by embracing a "deferential standard of review" that has resulted in undermining economic and social rights.¹⁴⁶ To better serve their position of holding the executive to account, national courts must similarly robustly examine government's justifications for its policy decisions including those pertaining to tax. Economic and social rights can be used to challenge existing economic policies, provided judicial bodies go beyond formal legal doctrine and bear in mind external values such as justice, equality and protecting the most vulnerable.

The approach suggested here is not outside the remit of a legal or quasi-legal body. The CESCR should be able to judge whether states have provided compelling evidence to justify for instance low tax rates. Courts often use legal principles to judge complex issues on the basis of evidence supplied by experts. As Langford has noted, "every area of law requires some level of specialist expertise and adjudicatory institutions have responded to the challenge of information by using specialist bodies an expert witnesses as well as submitting submissions from *amicus curiae* interventions..."¹⁴⁷ However, it would require some modifications to the information submitted to the CESCR. As well as documenting the impact of policies, both NGOs and states would have to address the economic justification for such actions. There would also need to be expert testimony by economists. The consensus approach of the Committee would also be a likely obstacle to changing its 'cautious' approach.

(Department of Political Science, University of Oslo) <<http://folk.uio.no/daget/neoliberalism.pdf>> accessed 3 June 2016.

¹⁴⁴ Wills and Warwick particularly talk of the failure of the Committee to address and question austerity measures as evidence of neoliberalism. See *Wills and Warwick* (n 73).

¹⁴⁵ *Ibid.*

¹⁴⁶ Paul O'Connell 'The Dearth of Socio Economic Rights' (2011) 74 (4) *The Modern Law Review* pp 532-554.

¹⁴⁷ Malcolm Langford, 'Domestic adjudication and economic, social and cultural rights: a socio-legal review' (2009) 6(11) *Sur. Revista Internacional de Direitos Humanos*.

Corruption: Corruption clearly undermines the ability of governments to make the maximum use of available resources. Defined by United Nations Development Programme (UNDP) as “the misuse of public power, office or authority for private benefit through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement,”¹⁴⁸ it prevents states from getting the most out of their resources both, and significantly reduces the revenue available to implement human rights.

The UN treaty bodies have highlighted the impact corruption has on the ability of governments to comply with their human rights obligations and raised it in their concerns and recommendations, in particular through diverting resources.¹⁴⁹ The CESCR for instance expressed concern that the Government of Georgia had not addressed properly the “...widespread and rampant problem of corruption” that results in decreased revenue and resources and their inappropriate allocation.¹⁵⁰ It called on Georgia to take effective measures to combat corruption and, in particular, increase transparency and consultations at all levels of decision-making and concerning evaluation of distribution of funds, especially with regard to determination of use of aid, monitoring of fund distribution and evaluation of impact.¹⁵¹ The CRC Committee similarly was concerned that in Togo pervasive corruption continues to divert resources available from the effective implementation of the convention.¹⁵² Following his mission in 2006, the Special Rapporteur on the right to adequate food called on India “Corruption must be challenged at all levels of the system and all public officials and shop licensees held accountable for any diversion of resources.”¹⁵³

In a case concerning Nigeria submitted to the African Commission on Human and Peoples’ Rights, the petitioners made a direct link between corruption and resources available to implement human rights. They alleged that large-scale corruption has contributed to a serious and massive violation of the right to education among other rights by diverting resources and impeding the Nigerian Government’s ability to utilise

¹⁴⁸ UNDP *Fighting Corruption to Improve Governance* (UNDP New York, 1999).

¹⁴⁹ CESCR ‘Concluding Observations on Moldova’ (2003) UN Doc. E/C.12/1/Add 91.

¹⁵⁰ CESCR ‘Concluding Observations on Georgia’ (2002) UN Doc. E/C.12/1/ADD.83, para 11.

¹⁵¹ *Ibid.*, para 30.

¹⁵² CRC Committee ‘Concluding Observations on Togo’ (2012) UN Doc. CRC/C/TGO/CO/3-4, para 17.

¹⁵³ UNCHR ‘Report of the Special Rapporteur on the right to adequate food (Jean Ziegler) mission to India’ (2006) UN Doc. E/CN.4/2006/44/Add.2, para 48 (i).

Nigeria's natural resources for the benefit of its people.¹⁵⁴ However, while the Commission ruled that the petition was inadmissible since the petitioner had not exhausted domestic remedies before submitting the complaint to the Commission, it did rule that it was compatible with the Charter of the Organisation of African Unity (OAU) and/or the African Charter on Human and Peoples' Rights.¹⁵⁵ This link was further strengthened on 6 December 2010 when the Economic Community of West African States (ECOWAS) Community Court of Justice ruled that corruption must not undermine or jeopardise the right to education and underscored the responsibility of the Universal Basic Education Commission to ensure that funds earmarked for education are used appropriately.¹⁵⁶ This ruling thus affirms the responsibility of states to combat corruption as part of their obligations to ensure the necessary resources to realise rights.

From this analysis it is clear that states cannot use the defence of insufficient resources to justify a lack of implementation of economic, social and cultural rights if they continue to allow corruption. Since combating corruption would free up significant resources, the state cannot prove with 'clear and convincing' evidence that it does not have the resources to implement human rights.

2.2.3. Available

Linguistically speaking, for something to be 'available' it must be 'present and ready for use', that is, not assigned elsewhere. When a government is choosing how to allocate its financial resources, the revenue mobilised from a state's 'assets', it is essentially choosing what is available for what with the amount awarded reflecting the governments' choices and priorities. The available clause can thus be regarded as states' wriggle room¹⁵⁷ since states can justify different policy choices by arguing they do not have the necessary financial resources or revenue. This has been clearly illustrated during the financial crisis when governments made available "trillions of dollars ... for bailing out the banking sector" and only minimal towards a social

¹⁵⁴ *Socio Economic Rights and Accountability Project v Nigeria* [2008] 25th Activity Report: May–Nov 2008 (African Commission on Human and Peoples' Rights, 300/05).

¹⁵⁵ *Ibid.*

¹⁵⁶ *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, 30 November 2010)

¹⁵⁷ Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights' (1994) 16(4) *Human Rights Quarterly*, pp. 693-714, p. 694.

protection response to the crisis.¹⁵⁸ Given the enormous impact such policy choices have on human rights realisation, this section examines whether and how it is possible for the human rights community including quasi-judicial and judicial bodies to develop “a principled way of adjudicating between competing claims”.¹⁵⁹

There is a general consensus at least amongst human rights advocates that, when allocating revenue, states must prioritise human rights. The CESCR has further clarified that within this wide premise states must prioritise those social groups living in unfavourable conditions and that policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.¹⁶⁰ But what does such a prioritisation mean in practice, and how can the human rights community assess the adequacy of different allocations?

Despite the clear relevance, many human rights commentators have articulated the difficulties of evaluating the trade-offs made between competing demands. Courts have often been reluctant to examine issues concerning the allocation of financial resources arguing that such allocation is a political rather than a judicial function for which judges lack both expertise and accountability.¹⁶¹ As Syrett noted in 2000, many scholars and courts have contended that judicial processes are not the appropriate format in which decisions about the allocation of scarce resources (revenue) among competing claims should be taken.¹⁶² He noted that several UK court decisions have demonstrated “a near-universal refusal to intervene on the basis that courts are not the appropriate fora for determination of such issues”.¹⁶³ Lie observes that even one of the most progressive courts in the world on economic and social rights, that is the South African Constitutional Court, “has been reluctant to get involved in this type of

¹⁵⁸ *Way and Stanton* (n 2), p. 2.

¹⁵⁹ Reidar Lie ‘Health, Human Rights and Mobilisation of Resources for Health’ (2004) 4(4) *BMC International Health and Human Rights* <www.ncbi.nlm.nih.gov/pmc/articles/PMC524497/> accessed 10 May 2016.

¹⁶⁰ CESCR ‘General Comment No 4: The right to adequate housing’ (1992) UN Doc E/1992/23, para 11.

¹⁶¹ Jennifer Tooze ‘The Rights to Social Security and Social Assistance: Towards an Analytical Framework’ in Mashood Baderin and Robert McCorquodale (eds.) *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007), pp 321-359, p. 334.

¹⁶² Keith Syrett ‘Of Resources, Rationality and Rights: Emerging Trends in the Judicial Review of Allocative Decisions’ (2000) *Web Journal of Current Legal Issues*.

¹⁶³ *Ibid.*

questions.”¹⁶⁴

More recently human rights advocates have tried to assess governments’ priorities and choices by using a human rights framework including standards and principles such as non-discrimination and equality to analyse budget decisions and allocations.¹⁶⁵ In fact, Nolan noted in 2013 that this practice has “ballooned”.¹⁶⁶ The analysis can be dynamic examining different allocations over time and/or static evaluating a specific budget at a particular point in time.¹⁶⁷ By promoting access to information and opening up the numbers, budget analysis can improve transparency and accountability.¹⁶⁸ Moreover human rights-based budget analysis can indicate thematic, geographical or social bias. For instance, are women and children being marginalised in public sector allocations? In the Dominican Republic the CESCR noted that “the Ministry of Women receives 0.08 per cent of the national budget”, making it “the ministry with the lowest budget allocation” and ruled that this made “the implementation of the National Gender Equity Plan II virtually impossible.”¹⁶⁹ It also noted that per capita expenditure on health care is disproportionately divided throughout the country.¹⁷⁰ Human rights treaty bodies have also observed when governments are not spending enough on particular areas, and called on them to increase budget allocations.¹⁷¹ Budget analysis can also be used to assess execution issues in the administration and allocation of financial resources, and where there may be blockages or misuse.¹⁷² This helps ensure resources are used effectively in line with the Limburg Principles on the

¹⁶⁴ *Lie* (n 159).

¹⁶⁵ Aoife Nolan, ‘Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges’ in Aoife Nolan, Rory O’Connell, and Colin Harvey, *Human Rights and Public Finance* (Hart Publishing, Oxford 2013), pp 41-58, p. 43.

¹⁶⁶ *Ibid.*, p. 41.

¹⁶⁷ *Ibid.*, p. 44. This is also discussed and documented in Rory O’Connell, Aoife Nolan, Colin Harvey, Mira Dutschke and Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014)

¹⁶⁸ Jim Shultz, ‘Promises to Keep, Using Public Budgets as a Tool to Advance Economic, Social and Cultural Rights’ (Ford Foundation and FUNDAR-Center for Analysis and Research, 2002), p. 7.

¹⁶⁹ CESCR ‘Concluding Observations on the Dominican Republic’ (2010) UN Doc. E/C.12/DOM/CO/3, para 13.

¹⁷⁰ *Ibid.*, para 30.

¹⁷¹ CESCR ‘Concluding Observations on Ukraine’ (2001) UN Doc. E/C.12/1/ADD.65, para 17; CESCR ‘Concluding Observations on Colombia’ (2001) UN Doc. E/C.12/1/ADD.74, para 13; CESCR ‘Concluding Observations on the Democratic People’s Republic of Korea’ (2003) UN Doc. E/C.12/1/ADD.95, para 38; and CESCR ‘Concluding Observations on Bosnia and Herzegovina’ (2006) UN Doc E/C.12/BIH/CO/1, para 18.

¹⁷² FUNDAR International, International Human Rights Internship Program, International Budget Project ‘Dignity Counts: A Guide to using Budget Analysis to Advance Human Rights’ (2004) <www.internationalbudget.org/wp-content/uploads/Dignity-Counts-A-Guide-to-Using-Budget-Analysis-to-Advance-Human-Rights-English.pdf> accessed 28 January 2013.

Implementation of the International Covenant on Economic, Social and Cultural Rights.¹⁷³ It can also help human rights advocates add weight to their recommendations by allowing them to suggest where the finance for a particular activity may come from.¹⁷⁴ O’Connell *et al* also note how budgetary data has been used to support numerous alleged violations.¹⁷⁵

While budget analysis makes explicit the choices and trade-offs, does it provide the tools to judge whether those made by governments comply with international human rights law? Since under human rights law human rights are equal and indivisible, states cannot sacrifice one essential service for another and a balancing act is required. In this instance how can the human rights community respond when a state says it cannot increase its budget allocation to education because of competing claims from the health and transport allocations?

Building upon this budget analysis, the human rights communities including judicial and quasi-judicial bodies have employed different tools, strategies and principles to examine the question of choice and competing demands, however it remains debatable how effective and appropriate these really are in addressing the questions above.

a. Dealing with choice: contrasting allocations

Human rights advocates have used budget analysis to contrast different allocations, most commonly contrasting expenditure on military with expenditure on social goods. Robertson suggested such an approach in 1994, arguing that “spending more on the military than on health, education, housing, or social assistance would be indicative of non-compliance.”¹⁷⁶ He further notes “similar ratios could be developed which compare ICESCR expenditures to other expenditures which clearly do not claim the priority.”¹⁷⁷

¹⁷³ The Limburg Principles were developed by a group of experts to explain and build upon the basic obligations assumed by states in relation to the ICESCR. These Principles have since been endorsed, both explicitly and implicitly, in the work of the CESCR and other bodies. See UNCHR ‘Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights - The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1987) UN Doc. E/CN.4/1987/17.

¹⁷⁴ *FUNDAR et al.*, (n 172), p. 3.

¹⁷⁵ Rory O’Connell, et al, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014), p. 40

¹⁷⁶ *Robertson* (n 157), p. 711.

¹⁷⁷ *Ibid.*

On several occasions the CESCR has accompanied its observations on budget allocations with concerns over high levels of expenditure on other factors, in particular military expenditure.¹⁷⁸ With regards to Algeria, it was concerned over a “significant decrease in public spending on health and education in the 1990s, as a percentage of both Gross National Product (GNP) and GDP, and relative to military expenditure, which more than doubled as a percentage of GDP.”¹⁷⁹ On other occasions the CESCR has contrasted changes in spending on social goods with changes in GDP,¹⁸⁰ noting for instance that in Uzbekistan annual per capita spending on public health has declined despite rising GDP.¹⁸¹

While something can clearly be gained from this analysis, can one conclude that a government spending more on the military than social goods demonstrates unwillingness to use its maximum available resources to realise economic, social and cultural rights and thereby violates its human rights obligations? Can human rights law judge a government’s argument that it needs to fund the military to ensure national security? Is it easy to determine ESR and non-ESR related issues? Can this analysis evaluate trade-offs such as infrastructure versus health?

b. Dealing with choice: comparisons of spending levels with peer countries

Other suggestions include comparing peer countries. In 1994 Robertson, suggested comparing spending levels between similar countries to judge compliance with the maximum available resources clause.¹⁸² He contended:

“If developed countries with comparable economies are spending different amounts on realizing ICESCR rights, then that is indicative, in the case of the low-spender, of non-compliance with Article 2. The same would be true of developing countries similarly situated. This is not to say that the high spenders are in compliance. It simply means that by one indicator the

¹⁷⁸ CESCR ‘Concluding Observation on Senegal’ (2001) UN Doc. E/C.12/1/ADD.62, para 23.

¹⁷⁹ CESCR ‘Concluding Observations on Algeria’ (2001) UN Doc. E/C.12/1/ADD.71, para 23.

¹⁸⁰ CESCR ‘Concluding Observations on the Philippines’ (2008) UN Doc. E/C.12/PHL/CO/4, para 17; CESCR ‘Concluding Observations on Azerbaijan’ (2004) UN Doc. E/C.12/1/ADD.104, para 29.

¹⁸¹ CESCR ‘Concluding Observations on Uzbekistan’ (2006) UN Doc. E/C.12/UZB/CO/1, para 30.

¹⁸² *Robertson* (n 157), p. 711.

low spender is not.”¹⁸³

However is it really reasonable to compare countries each having different histories and problems? What proxy do you use to compare countries? As already noted, GDP rates are not necessarily indicative of a state’s level of resources. Although, as Robertson recognises, it can indicate that something is wrong, it cannot be used alone to determine whether a violation of human rights is taking place through the government failing to use its maximum available resources.

c. Dealing with choice: Using international spending benchmarks:

In 1996, Robertson criticised the CESCR for failing in 1993 to respond adequately to the situation in Canada where only 1.3% of government expenditure was on social housing.¹⁸⁴ He claimed the CESCR should have indicated “the level of resources that should be spent on social housing, either as a percentage of government expenditure or as a percentage of a broader measurement like GNP”, and generally needs to answer “what resources must be devoted to realising” economic, social and cultural rights.¹⁸⁵

The CESCR has so far addressed this by using international recommendations for spending on social goods; expressing concern when social spending falls below these and calling on states to increase the proportion of GDP devoted to the particular social good in line with international recommendations such as those developed by the World Health Organisation.¹⁸⁶ Special procedures have also used such international standards. In 2010, the Special Rapporteur on the right to education noted that in Paraguay “the education budget should grow by at least 0.5 per cent of GDP per year until it reaches at least the level of 6 per cent” as established by the High Level Group on Education For All in Oslo in 2008.¹⁸⁷

¹⁸³ Ibid., p. 711.

¹⁸⁴ Robert E. Robertson, ‘Nutrition, Human Rights and Resources’ (1996) 21(1) Food Policy, pp. 57-71, p. 62.

¹⁸⁵ Ibid., p. 62.

¹⁸⁶ CESCR ‘Concluding Observations on the Dominican Republic’ (2010) UN Doc. E/C.12/DOM/CO/3, para 30 (a).

¹⁸⁷ UNHRC ‘Report of the Special Rapporteur on the right to education (Vernor Muñoz), mission to Paraguay’ (2010) UN Doc. A/HRC/14/25/ADD.2, para 82 (a).

However, is this approach feasible? Does it take into account the impact of indirect spending on the realisation of human rights such as infrastructure investment to secure access to essential services? Should the states be told what to spend on what? Moreover, since many challenges occur both between and within sectors, should there be guidelines on every element of spending? What about states' margin of discretion? What if states argue they simply cannot devote that many resources to that particular sector?

d. Dealing with choice: seriousness of the situation and proportion of budget

Despite the reluctance of some, several national courts have countered government's claims of not having the necessary resources to fulfil a particular service or guarantee a right. Langford has observed that "the degree and extent to which judicial or quasi-judicial authorities will place a financial burden upon states is likely to be affected by a number of factors" including "the seriousness of the effects of the alleged violation and the manageability of the order for the government in terms of resources".¹⁸⁸ To illustrate this, Langford refers to several cases. He notes that the Indian Supreme Court "faced with complaints of starvation deaths – made executive orders concerning increased resources for the poorly functioning famine relief scheme..." including school meals at lunchtime.¹⁸⁹ The Supreme Court discounted the authority's claims of insufficient resources by noting that the Government should "cut the flab somewhere else".¹⁹⁰ Although not mentioned by Langford, the Federal Court of Switzerland ruled that it would only intervene on matters concerning the allocation and prioritisation of resources when someone has been denied the minimum claims guaranteed by the Constitution.¹⁹¹ Regarding the second element, namely the 'manageability of the order', Langford drew attention to the Canadian Supreme Court rejection of the British Columbian Government's claim it did not have the necessary resources to provide interpretation services to the deaf in hospitals.¹⁹² It based this ruling on that fact

¹⁸⁸ Malcolm Langford, 'Judging Resource Availability' in John Squires, Malcolm Langford, and Bret Thiele, (eds.) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*. (Australian Human Rights Centre, the University of New South Wales 2005), p.106.

¹⁸⁹ *Ibid.*, p. 99.

¹⁹⁰ *People's Union for Civil Liberties v. Union of India & Ors* [2001] 1 SCC 39 (Supreme Court of India, Writ petition (Civil) No.196).

¹⁹¹ *V. v. Einwohnergemeinde X. und Regierungsrat Des Kantons Bern* [1995] BGE/ATF 121 I 367 (Swiss Federal Court).

¹⁹² *Eldridge v. British Columbia (Attorney General)* [1997] 2 SCR 624 (Canada Supreme Court)

that providing such a service would represent only 0.0025% of the health budget at the time it was needed.¹⁹³

While these have been positive judgments, it may not always be possible to measure the degree of severity of a situation; where do you draw the line? Would it be more urgent if it concerned one person or two hundred? Moreover what happens if there are several (competing) situations that can be regarded as severe?

e. Dealing with choice: using the human rights principle of participation

Human rights actors have also used the degree of participation with affected communities to judge the fairness of budget allocations. The key human rights principle of participation has been both used to judge, and as a proactive measure to ensure, the fairness of allocation decisions. Several human rights groups and mechanisms have called for participatory budgeting to help solve some of the problems of trade-offs and to ensure the rights of vulnerable groups are protected.¹⁹⁴ The Center for Women’s Global Leadership (CWGL) stated “budget allocations should be determined in ways that are participatory and transparent.”¹⁹⁵

This approach is not invalid. Participation is a basic human rights principle. In many instances opaque decision-making has led to different groups being marginalised in budget allocations, and participation helps promote cohesion and prevent social instability.¹⁹⁶ However does this approach completely solve the problem of competing claims? While it can ensure that some groups are not left behind and excluded from budget decisions, the ability of different groups to participate is not equal. This could result in more resourced groups having better representation and access to local officials and thereby greater influence over the budget.

24896).

¹⁹³ Ibid.

¹⁹⁴ De Schutter, O ‘Cameroon: Stricter taxes for companies drawing on natural resources to better tackle hunger – UN Special Rapporteur’ *Special Rapporteur on the Right to Food Press* (Geneva, 23 July 2012) <www.srfood.org/en/cameroon-qgreater-taxes-on-resource-users-for-greater-efforts-to-tackle-hungerq-un-special-rapporteur> accessed 1 August 2012.

¹⁹⁵ Balakrishnan, et al. (n 80), p. 9.

¹⁹⁶ EU Agency for Fundamental Rights ‘Protecting fundamental rights during the economic crisis’ *Working Paper* (2010) http://fra.europa.eu/sites/default/files/fra_uploads/1423-FRA-Working-paper-FR-during-crisis-Dec10_EN.pdf accessed 5 January 2012.

Budgets can suggest resources are fixed or at least very static. Even if they show movements over time and identify how resources can be raised, budget analysis is relatively limited in demonstrating the full range of choices available to a government. Moreover, the findings of O'Connell *et al*, as they recognise “suggest a historical reluctance on the part of those carrying out budget analysis work to move beyond the allocation and expenditure elements to engage with issues around revenue and macroeconomics”.¹⁹⁷ As we have seen, government spending is part of the tools that can be used to stimulate an economy, and therefore it has implications on the resources available to implement human rights. Certainly this may be difficult to foresee in budget analysis work. Budget work may not always be able to evaluate “the changing context of public expenditure” and the impact for instance of neo-liberalism on this.¹⁹⁸

Furthermore, by trying to judge the allocation of resources, human rights practitioners appear to be putting the ‘burden of proof’ on those accusing the state of failing to allocate its resources in a manner that complies with international human rights law. However if states are using insufficient resources to justify different spending decisions that undermine economic, social and cultural rights, they bear the burden of proof to demonstrate with ‘clear and convincing evidence’, that this in fact the case. Rather than judging whether the allocations comply with human rights law, it therefore becomes a question of examining the validity of states arguments that they cannot improve their allocations. Given the dynamic nature of resources, and the related expert observations that there remain many opportunities for countries to expand their resource base even amongst the poorest nations,¹⁹⁹ this may be difficult for many states.

This approach does not undermine the competence of courts to decide about revenue allocation, it merely puts a different light on the way the courts can adjudicate. This approach is proactive instead of reactive. Coupled with the view of the state as a proactive body in determining its level of financial resources rather than assuming resources are fixed, this approach requires state to demonstrate that they have done all

¹⁹⁷ O'Connell, *et al*, (n 175), p. 44-5

¹⁹⁸ *Ibid.*, p. 59

¹⁹⁹ Ortiz, *et al*. (n 78).

they can when raising and allocating resources. It therefore ensures that the human rights analysis does not stop at the lowest common denominator that is just identify the minimum that can be done with existing resources.

It also addresses many of the highlighted weaknesses of the existing approaches of dealing with choice by going beyond the need to monitor specific allocations. While on the surface this approach may not appear to adequately respond to accusations of human rights advocates being unable to make tough choices,²⁰⁰ it may actually better address the reality. One can argue that the existence of trade-offs, or competing claims, between different expenditure such as health versus infrastructure is intrinsically linked with the idea of a fixed level of resources that as already discussed does not correspond with reality. It is an over simplification that serves the interests of certain groups including politicians that play the idea of fixed resources and the need for trade-offs when presenting arguments for cutting expenditure on certain goods. This has been seen in the UK when, in justifying reduced social expenditure, Prime Minister Cameron has equated the country's debt with a household debt and emphasised the need to live within the UK's means.²⁰¹ Such trade-offs also fail to take into account the indivisibility and interrelatedness of both economic variables and human rights. Spending on one issue could for instance reduce the expenditure needed for another. Investing in better mental health care would prevent countries losing significant financial resources through lost productivity from early retirement, premature mortality or sick leave.²⁰² Increased investment in education will not only help realise the right to education but also help persons develop the means of securing an adequate standard of living, and realise the right to health by promoting awareness of better eating habits and adverse effects of vices such as smoking. In the long term, it will also increase a state's resources through developing human capital.

Also, in many circumstances making the resources available for human rights implementation is a matter of political will rather than capability. The Economic and Social Commission for Asia and the Pacific (ESCAP) for instance notes that

²⁰⁰ *Petrasek and Nagaraj* (n 5), p. 1.

²⁰¹ David Cameron, 'Speech by Prime Minister Cameron at the Conservative Party Conference' (Conservative Party Conference, 5 October 2011).

²⁰² ILO 'Mental Health in the Workplace' (International Labour Office, Geneva 2000). The report estimated that mental health cost as much as 3-4% of the GNP of EU States.

“budgetary decisions are not just financial but political.”²⁰³ With regards to establishing social protection programmes, it notes that the allocation of resources “...is likely to be strongly influenced by political attitudes concerning who deserves support and in what form.”²⁰⁴ This further demonstrates the importance of states providing ‘clear and concluding evidence’ of the necessity of its choices and that it cannot do more to raise the necessary revenue.

Some domestic courts have already put the burden of proof on states to establish the validity of their arguments when justifying cutbacks in social goods on insufficient resources. While acknowledging that some changes might have to be made given the country's financial situation, the Latvian Court ruled that the *Law on State Pension and State Allowance Disbursement in the Period from 2009 to 2012* stipulating a reduction in pensions from 1 July 2009 to 2012 due to an apparent decline in available resources was unconstitutional as among other things the state had not demonstrated that it had not exhausted alternative possible sources of funding or less restricting means.²⁰⁵ In part attributed to the haste and insufficient involvement of experts, the Court ruled in

“adopting the impugned provisions, the legislator has not considered with sufficient care the alternatives to these provisions and has not envisaged a more lenient solution. Therefore, the impugned provisions do not comply with Article 109 of the Constitution”.²⁰⁶

Similarly the European Committee of Social Rights (ECSR)²⁰⁷ concluded that the Greek Government had amongst other things not demonstrated that it had given sufficient attention to whether other measures could have been put in place when ruling that it had violated the obligation to raise progressively the system of social security to a higher level.²⁰⁸ The Government had implemented a pension reform that

²⁰³ ESCAP ‘The Promise of Protection, Social Protection and Development in Asia and the Pacific’ (ESCAP Bangkok 2011), p. 64.

²⁰⁴ Ibid.

²⁰⁵ Case number 2009-43-01 [2009] Constitutional Court (Latvia).

²⁰⁶ Ibid.

²⁰⁷ The ECSR monitors the implementation of the Europe Social Charter.

²⁰⁸ *Pensioners' Union of the Agricultural Bank of Greece v. Greece* [2012] (ECSR 80/2012); *Panhellenic Federation of Pensioners v. Greece* [2012] (ECSR 79/2012).

drastically reduced the amount most pensioners received.²⁰⁹ From this, it is not too much of a jump to ask the Government to show conclusively that it had no alternatives.

Using this analysis, instead of deciding on the minimum to be done with existing resources, that is how to divide the existing pie between competing claims, quasi-judicial and judicial bodies can go further in considering how additional financial resources can be gained, that is how to increase the pie. It requires states to prove with *certainty* that any cuts in existing essential services or reduced spending are strictly necessary. They must thus demonstrate that other options in raising financial resources such as curbing corruption, increasing taxation, debt raising, and monetary policy generating employment will *certainly* undermine the economy and further jeopardise human rights. Unless this can be established with certainty, governments cannot claim ‘insufficient resources’ to justify reductions in expenditure that undermine the realisation of human rights.

2.3. Using human rights principles to further clarify states’ obligations under the ‘maximum available resources’ clause

While the maximum available resources clause obligates states to use economic policy to expand and mobilise the resources available to human rights implementation, it does not justify further human rights violations or abuses that may result from the economic policy chosen. Economic policies have often incurred significant human rights losses both in the short and long term. In Cameroon economic and social policies, adopted during the 1990s under the framework of structural adjustment programmes, such as suspending support services to rural producers and reducing public spending on health and education, and social benefits increased deprivation levels for the rural poor to below the core content of basic economic and social rights.²¹⁰ Moreover as Salomon notes,

²⁰⁹ Ibid.

²¹⁰ FIAN International ‘Parallel Report on the Right to Adequate Food in Cameroon submitted to the 21rd session of the Committee on Economic, Social and Cultural Rights’ (Heidelberg, Germany, 1999).

“The liberal policies that have dominated the economic landscape for the past two and half decades are widely understood by even mainstream economists and policymakers to have failed in terms of their announced goals of more rapid economic growth, reduced poverty and more stable economies.”²¹¹

Although it has been repeatedly stated that economic policies must not jeopardise or violate human rights, the application of this in practice has been limited. The following section demonstrates how existing human rights principles can be used to judge economic policies beyond their immediate purpose of increasing resources to implement human rights.

2.3.1. Due diligence

Human rights practitioners have used the principle of due diligence to illustrate and judge the degree of effort a state must make to comply with its human rights obligations particularly when non-state actors and/or private individuals are involved or when the perpetrator cannot be identified.²¹² It is particularly useful for examining the validity of a state’s defence of unawareness of a particular policy posing a risk to the enjoyment of human rights.

Given the ‘risk’ state led economic policy often poses to human rights, can the due diligence principle be applied to examine whether states have made the necessary efforts to ensure compliance with their international human rights obligations when conducting economic policy? To what extent are governments obligated to foresee the impact of their economic policy decisions? Should the USA have paid heed to warnings of an upcoming crisis? Former Federal Reserve Governor Edward Gramlich for instance warned of a coming crisis in subprime mortgages in a speech published in 2004.²¹³ Should states have learnt from the Scandinavian countries’ significant financial crisis of the early 1990s, attributed by some economists to financial liberalisation?²¹⁴

²¹¹ Margot Salomon ‘Strengthening the Effectiveness of International Assistance and Cooperation’ (Panel Discussion, UN Social Forum, Geneva, 31 Aug – 2 Sep 2009).

²¹² Amnesty International ‘Mexico: Intolerable killings: ten years of abductions and murder of women in Ciudad Juarez and Chihuahua’ AI-Index AMR 41/026/2003.

²¹³ Edmund Andrews, ‘Fed Shrugged as Subprime Crisis Spread’ *New York Times*, 18 December 2007 <www.nytimes.com/2007/12/18/business/18subprime.html> accessed 15 November.

²¹⁴ Lars Jonung, ‘Lessons From Financial Liberalisation in Scandinavia’ (2008) 50 *Comparative Economic Studies*, pp. 564-598.

The principle of ‘due diligence’ stems from national law where traditionally it has been used as a defence in a court of law against being inadvertently involved in a crime by allowing the person concerned to prove he or she has taken all necessary measures to identify, address, and avert or minimise that risk.²¹⁵ This requires the defendant to have “offensively and proactively” taken action to prevent the harm that, despite his good faith and duly diligent efforts, nevertheless occurred.²¹⁶ Since then, it has been used within a variety of contexts. If a company is charged with an environmental incident, it can avoid liability by proving that it exercised due diligence in taking all reasonable steps to ensure compliance with environmental laws and prevent the incident or violation from occurring.²¹⁷

The concept of ‘due diligence’ with regards to human rights has been explicitly included in inter alia the General Comments of the Human Rights Committee;²¹⁸ and the Guiding Principles for Business and Human Rights;²¹⁹ and in exploring states’ obligations to protect women from violence.²²⁰ More specifically several human rights bodies and standards have recognised that duty bearers must exercise due diligence to prevent human rights violations and abuses. This includes the 1993 Declaration on the Elimination of Violence against Women, which requires states to act with due diligence to prevent, investigate and punish acts of violence against women. Moreover, in 2001 the Inter-American Commission on Human Rights (IACHR) concluded that Brazil had failed to exercise due diligence by neglecting to prevent degrading treatment in a domestic violence case.²²¹ General Comment 31 of the Human Rights Committee specifies that states contravene their human rights

²¹⁵ Mark Taylor, Luc Zandvliet, and Mitra Forouhar ‘Due Diligence for Human Rights: A Risk-Based Approach’ (Corporate Social Responsibility Initiative Working Paper No 53, Harvard University 2009).

²¹⁶ US Securities Act (1933), Section 11.

²¹⁷ Robin L. Barton (ed) ‘Due Diligence: What Makes an Environmental Incident Foreseeable’ (2008) 3 (8) Environmental Compliance Insider <<https://ohsinsider.com/wp-content/uploads/2015/08/ECI-Aug08.pdf>> accessed 28 January 2013.

²¹⁸ Human Rights Committee ‘General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para 8.

²¹⁹ UNHRC ‘Report of the Special Representative of the Secretary - General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie) Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) UN Doc. A/HRC/17/31, para 6.

²²⁰ UNCHR ‘Report of the Special Rapporteur on Violence Against Women (Yakin Ertürk) on the Due Diligence Standard’ (2006) UN Doc. E/CN.4/2006/61, para 23.

²²¹ *Maria da Penha v. Brazil* [2001] Report 54/01 (Inter-American Commission on Human Rights, Case 12.051), para. 56.

obligations when they fail “... to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.²²² Although not explicitly referred to as ‘due diligence’, Principle 13 of the Maastricht Principles on Extra-territorial Obligations (ETO Principles) calls on states to “desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially.”

This then begs the question of how the ‘due diligence’ principle concretely translates into states’ obligations. What are states’ obligations to determine risks? Importantly Principle 13 of the ETO Principles clarifies that “uncertainty about potential impacts does not constitute justification for such conduct.” Instead the question is whether the impacts are foreseeable.²²³ This is not a new concept. The assessment of whether risks are ‘reasonably foreseeable’ has also been used in private law when analysing compliance with due diligence.²²⁴ Environmental law similarly stipulates that when a court evaluates whether a company took all reasonable steps to avoid an environmental incident, foreseeability is one of the key factors it considers.²²⁵ De Schutter et al. further observed the conclusions of the International Law Commission that, when considering something as ‘unforeseen’, “... the event must have been neither foreseen nor of an easily foreseeable kind.”²²⁶ They suggest that this gives “two dimensions of foreseeability: whether the result was actually foreseen, and whether the result should have been foreseen.”²²⁷ The authors further recognise that determining whether something should have been foreseen requires an assessment of whether the appropriate steps were taken to obtain the necessary information.²²⁸

²²² Human Rights Committee ‘General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para 8.

²²³ Olivier De Schutter et al. ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 Human Rights Quarterly, pp. 1084–1169, p. 1114.

²²⁴ Larry Nelson and Lisa Sulek, ‘Due Diligence Defence in Regulatory Prosecutions Developmental Trends And Current Interpretation’ (Fasken Martineau, 2006) <www.fasken.com/files/Publication/c4fbe96f-f724-4f5f-9bda-82f0add9f12e/Presentation/PublicationAttachment/4ac26fc1-6b68-4ce9-ba3e-d6f6d8afeb01/DUE_DILIGENCE_PAPER.PDF> accessed 10 August 2010.

²²⁵ Barton (n 217).

²²⁶ De Schutter et al. (n 223), p. 1113. The authors specifically referred to the International Law Commission’s Commentary to Article 23 of its Articles on Responsibility of States for Internationally Wrongful Acts.

²²⁷ Ibid. (emphasis added).

²²⁸ Ibid., pp. 1113-1114.

States' obligations to proactively take appropriate steps to foresee the impact of their proposed activities has been recognised by other human rights mechanisms and standards, particularly with regards to conducting human rights assessments. Unanimously endorsed by the Human Rights Council, the *Guiding Principles on Business and Human Rights* obligates companies to use due diligence to

“identify, prevent, mitigate and account for how they address their adverse human rights impacts’ by inter alia ‘assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.’”²²⁹

These steps also apply to states in exercising due diligence in their economic policy decisions, and has already, albeit implicitly, been taken up by quasi-judicial bodies. The Committee monitoring the implementation of the Convention on the Elimination of Discrimination against Women for instance has already applied elements of the principle of due diligence when evaluating states budget cuts and their compliance with the Convention. It urged the Netherlands to conduct gender assessments of its social sector legislation and policies as well as its cuts in the health-care budget.²³⁰ The CESCR similarly asked states to examine and identify the human rights implications of their economic and social policy on the right to social security,²³¹ and the CRC Committee has called on states to implement a tracking system to conduct impact assess on how investments in any sector may serve “the best interests of the child”.²³²

State obligations to use due diligence to prevent human rights violations and abuses can be expanded beyond analysing the possible impact of different policies to learning from past experiences and guaranteeing non repetition. This is particularly relevant in today’s context with states repeatedly implementing economic liberalisation policies, without the necessary safeguards that have previously undoubtedly contributed to

²²⁹ UNHRC (*Special Representative of the Secretary - General on the issue of human rights and transnational corporations and other business enterprises*) (n 219), para 17.

²³⁰ CEDAW Committee ‘Concluding Observations on the Netherlands’ (2010) UN Doc. CEDAW/C/NLD/CO/5, para 45.

²³¹ CESCR ‘Concluding Observation on Canada’ (2006) UN Doc. E/C.12/CAN/CO/4-5, para 53.

²³² CRC Committee ‘Concluding Observations on Paraguay’ (2010) UN Doc. CRC/C/PRY/CO/3, para 17(c).

increasing marginalisation and poverty. Many attributed the 2001/2002 crisis in Argentina to its liberalisation policies backed and partly required by the IMF.²³³ Surely a risk can be argued as foreseeable if something similar has happened before and the same policies and practices are adopted without mitigation measures. At the national level, courts certainly take this into account. When considering whether companies did enough to avoid an environmental disaster, courts examined whether similar incidents occurred in the past.²³⁴ Even without a human rights impact assessment, it is reasonably 'foreseeable' that liberalisation policies without the necessary mitigation measures being taken will result in increased marginalisation since it has done so in the past.

2.3.2. Equality and non-discrimination

Non-discrimination and equality are long recognised fundamental principles within international human rights law requiring states to ensure equality and non-discrimination both as a right and a reality.²³⁵ It is not about just prohibiting direct and indirect discrimination but about eliminating it. If there are long standing structural inequalities, equal treatment can often just reinforce power asymmetries and marginalisation. States are therefore required to take both negative and positive measures including implementing temporary and appropriate preferential treatment for certain groups if needed.²³⁶ Applying this principle to states' obligations under the maximum available resources clause allows the human rights community to further examine and judge states' actions in both generating and allocating resources. As the CESCR has stated, "economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination."²³⁷

²³³ Sabine Michalowski, 'Human Rights in Times of Economic Crisis: The Example of Argentina' in: Roger Brownsword (ed.) *Global Governance and the Quest for Justice* (Hart Publishing 2004), p. 34.

²³⁴ Barton (n 217).

²³⁵ Equality both under the law and in fact are recognised in many constitutions. See for instance the Constitutions of South Africa and Canada.

²³⁶ Alison Graham, 'Affirmative action as a way and means of achieving economic and social rights and the MDGs' in *Accelerating Achievement of MDGs by Ways and Means of Economic and Social Rights* (UNDP Asia-Pacific Office, Bangkok 2012).

²³⁷ CESCR 'General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights' (2009) UN Doc. E/C.12/GC/20, para 38.

While taxation policies are crucial in generating much needed revenue for governments, they can often be implemented in ways that add further to patterns of inequality. One widely cited example of this is consumer taxes such as the UK's Value Added Tax (VAT). While VAT increases revenue for the government, it also has a disproportionate impact on those living in poverty as it increases the prices of goods and services. Since low-income households spend a larger share of their income on goods and services than high-income households they are disproportionately affected by any increase. This has been noted by NGOs such as CWGL and CESR.²³⁸ As already noted, Saiz has highlighted the imbalances and inequities in the tax structure that "result in tax systems skewed in favour of wealthy economic elites or powerful business interests rather than accountable to the ordinary citizen."²³⁹ He particularly drew attention to the lowering of corporate taxes in many countries.²⁴⁰

In contrast, many human rights mechanisms view the European Commission's proposal in 2011 for a common financial transaction tax in the EU,²⁴¹ as a more equitable tax. The former Special Rapporteur on human rights and extreme poverty asserted "It is high-time that governments re-examine the basic redistributive role of taxation to ensure that wealthier individuals and the financial sector contribute their fair share of the tax burden."²⁴² Saiz similarly notes that financial transaction taxes can in addition to generating additional resources, "introduce greater progressivity into the tax system..."²⁴³

Human rights commentators and judicial bodies have also observed that often the means of funding different legal entitlements are discriminatory, and can therefore unintentionally reinforce patterns of inequality. In the USA courts and scholars alike found funding for education to be discriminatory. In 1989 the Texas Supreme Court found Texas's property tax-based system for financing public education violated its Constitution since property taxes in more affluent areas where houses are more

²³⁸ *Balakrishnan et al.* (n 80), p. 11.

²³⁹ *Saiz* (n 84).

²⁴⁰ *Ibid.*

²⁴¹ EC 'Proposal for a Council Directive of 28 September 2011 on a common system of financial transaction tax and amending Directive 2008/7/EC' (28 September 2011) EC (COM (2011) 594.

²⁴² UN 'A Global Financial Transaction Tax, A Human Rights Imperative Now More Than Ever' *UN Press Release* (Geneva 14 May 2012)

<www.un.org/apps/news/story.asp?NewsID=41988#.WMlZKIXyu1s> accessed 28 January 2013.

²⁴³ *Saiz* (n 84).

expensive generate more revenue than in poorer areas. While the Court used arguments of adequacy rather than equality the case can also be considered under the principle of substantive equality. Although appearing equal in principle and opportunity, this system of funding resulted in an unequal outcome.²⁴⁴ In 1976 in *Serrano v. Priest* the California State Supreme Court used an equity argument that has since been used in other successful cases: It recognised

“Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities (and) for this reason the school financing system before the court fails to provide equality of treatment to all the pupils in the state.”²⁴⁵

While the allocation of resources can directly or indirectly discriminate and/or lead to the exclusion of particular groups, the human rights community notes that this does not mean that resources have to be distributed equally. With large inequalities between groups, equal allocation can reinforce inequalities. Instead substantive equality necessitates special treatment for certain groups to ensure equality in reality. Recognising this, the CRC Committee called on Paraguay to define and protect strategic budgetary lines for situations possibly requiring affirmative social measures (such as birth registration, indigenous children education, violence against children), even in situations of economic crisis, natural disasters or other emergencies.²⁴⁶ There are also national examples of both legislative frameworks and court decisions providing for substantive equality through allowing budget provisions for ‘special measures’ or ‘affirmative action’ favouring disadvantaged communities. To help address inequalities, Kenya’s Constitution (2010) provides that 0.5% of the national revenue is to be used by the national government or given to the counties to provide basic services for marginalised areas on criteria determined by the Commission on Revenue Allocation.²⁴⁷ In the UK, the High Court ruled against one spending cutback since it could exclude or target a particular group in need of assistance. In December

²⁴⁴ Jessica Shultz ‘Economic and Social Rights in the United States: An Overview of the Domestic Legal Framework’ (2003) 11(1) Human Rights Brief.

²⁴⁵ *Serrano v. Priest* [1976] 18 Cal.3d 728 (Supreme Court of California LA 30398).

²⁴⁶ CRC Committee *Concluding Observations on Paraguay* (2010) UN Doc. CRC/C/PRY/CO/3, para 17 (d).

²⁴⁷ Constitution of Kenya (2010), Paragraph 204. See also Yash Ghai and Jill Cottrell Ghai, *Kenya’s Constitution: An Instrument for Change* (Katiba Institute 2011).

2009, it ruled against Barnet Council's cost-cutting decision to replace 24-hour live-in wardens with alarm buttons for residents, and a mobile night service, arguing amongst other things, the Council's decision was unlawful under the UK Disability Discrimination Act as it ignored the special duties the Council owed to persons living with disabilities.²⁴⁸

As illustrated above, NGOs, courts and quasi-judicial bodies have used the principle of non-discrimination to judge both the generation and allocation of financial resources. Since governments must ensure equality as a reality, this principle can be taken further to also other indirect impacts of economic policies. It is worth considering for instance whether it could be used to judge monetary policy and its impact on unemployment by influencing interest rates,²⁴⁹ and the disproportionate effect on women, and ethnic and racial minorities. During the 1980s in the UK, for example, Prime Minister Thatcher's policy of keeping interest rates high to squeeze inflation arguably resulted in unemployment levels of 9%²⁵⁰ that increased regional inequality particularly between northern industrial areas and the south, and especially affected populations groups including women, racial and ethnic minorities.²⁵¹

2.3.3. Accountability

By recognising states' maximum available resources as fluid and dependent on and influenced by economic policies, this thesis is providing a new way in developing the appropriate framework that can be used to hold states accountable for economic policy choices. However, it has not yet examined the necessary institutions and mechanisms. Accountability has moved beyond finding who or what to blame and providing redress to being a "process to determine what is working (so it can be repeated) and what is not (so it can be adjusted)."²⁵² This incorporates several key elements including a legislative framework and means of redress, review processes and monitoring

²⁴⁸ *R. (on the application of Boyejo & Ors) v. Barnet London Borough Council* [2009] All ER (D) 169 (EWHC 3261 (Admin)).

²⁴⁹ Balakrishnan, et al. (n 80), p. 19.

²⁵⁰ Mark Tran 'Unemployment' *The Guardian* (London, 15 May 2002)

<<https://www.theguardian.com/world/2002/may/15/qanda.globalrecession>> accessed 28 January 2013.

²⁵¹ Ron Martin, 'The Political Economy of Britain's North-South Divide' (1988) 13(4) *Transactions of the Institute of British Geographers*, pp. 389-418.

²⁵² UNHRC 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Paul Hunt)' (2007) UN Doc. A/HRC/4/28, para. 46.

systems.²⁵³ As well as being human rights principles in their own right, transparency and participation are vital in ensuring both legal and political accountability. Yamin notes, for instance, that as well as effective and accessible redress mechanisms, realising accountability requires effective monitoring, "... transparency, access to information and active popular participation."²⁵⁴

NGOs have called for governments to remain accountable in how they allocate resources in particular emphasising the importance of transparency. CWGL *et al* particularly noted that despite this, the USA has so far

"... failed to take steps to ensure transparency as to what happened to the resources that have been allocated to the financial sector, making it exceedingly difficult to analyse the State Party's measures from a human rights perspective".²⁵⁵

The principle of accountability regarding economic policies has also been upheld in a number of international human rights bodies. As highlighted under due diligence, treaty bodies have asked state parties to track expenditure and resource allocation and their impact on human rights. They have also called on states to ensure transparent and participatory budgeting.²⁵⁶

At the national level, governments have only sporadically implemented different accountability mechanisms for economic policy and spending decisions, often in isolation from one another. For instance in the UK, while judicial reviews²⁵⁷ have been used to hold local and national authorities legally accountable for spending

²⁵³ Partnership for Maternal, Newborn & Child Health 'A Review of Global Accountability Mechanisms for Women's and Children's Health' (Geneva 2011) <www.who.int/pmnch/knowledge/publications/20110222_global_accountability_final.pdf?ua=1> accessed 20 January 2012, p. 5.

²⁵⁴ Alicia Yamin 'Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health' (2008) 10(2) Health and Human Rights Journal, pp 1-20, p. 2.

²⁵⁵ CWGL, ESCR-Net and University of Massachusetts 'Towards a human rights-centered macroeconomic and financial policy in the US' (2010) <www.cwgl.rutgers.edu/docman/economic-and-social-rights-publications/753-towards-a-human-rights-centered-macroeconomic-and-financial-policy-in-the-u-s-1/file> accessed 2 January 2011.

²⁵⁶ CRC Committee 'Concluding Observations on Paraguay' (2008) UN Doc. CRC/C/PRY/CO/3, para 17.(b).

²⁵⁷ Judicial Review is a mechanism in which the judiciary can review and even invalidate executive actions should they be deemed unlawful either in procedure or substance.

decisions both on technicalities and substance,²⁵⁸ this is not being done systematically. Courts are reluctant to interfere with difficult social or economic decisions made by elected officials, providing all aspects have been considered.²⁵⁹ In 2015 the effectiveness of this mechanism was further undermined with the introduction of financial liabilities that increase the difficulty of challenging unlawful government decisions.²⁶⁰ This is further discussed in Chapter 5. There was also no human rights review of the 2010 Comprehensive Spending Review (CSR), nor has there been any since, or on the June 2010 Emergency Budget, the 2011 Budget, and the 2011 Autumn Financial Statement. Nolan also notes that the Government appears to be ignoring its own guidelines including Her Majesty's Treasury guidance for Central Government (the Green Book), which sets out a framework for the appraisal and evaluation of all policies that includes the ICESCR.²⁶¹ If this is the case, where is the accountability for failure to comply? Moreover on several occasions, such as with the Welfare Reform Bill, the UK Government claimed financial privilege to prevent review by the House of Lords.²⁶² This rarely used parliamentary device stipulates that only the House of Commons has the right to make decisions on bills that have large financial implications, thus removing the possibility of review by the House of Lords. This is further discussed in Chapter 5.

Ensuring accountability with regards to economic policies is vital. As public policies

²⁵⁸ *Royal Brompton and Harefield NHS Foundation Trust v. Joint Committee of Primary Care Trusts and Croydon Primary Care* [2012] ACD 31 (EWHC, 2986 (Admin)). See also *R. (Green) v. Gloucestershire County Council* [2012] D PTSR 19 (EWHC 2687 (Admin)).

²⁵⁹ Alasdair Henderson, 'Courts still slow to interfere in spending cuts decisions' *UK Human Rights Blog*, (London, 15 September 2011). Available from: <<https://ukhumanrightsblog.com/2011/09/15/courts-still-slow-to-interfere-in-spending-cuts-decisions/>> accessed 1 October 2011. Ellie Palmer has extensively discussed the reluctance of UK courts to be involved in positive obligations arising from the ECHR and the subsequent implications for UK expenditure. See Ellie Palmer *Judicial Review, Socio Economic Rights and the Human rights Act* (Hart Publishing, 2007), p.242.

²⁶⁰ Patrick Wintour and Owen Bowcott 'David Cameron plans broad clampdown on judicial review rights' *The Guardian* (London, 19 November 2012) <www.theguardian.com/politics/2012/nov/19/david-cameron-clampdown-judicial-review> accessed 25 November 2012.

²⁶¹ Aoife Nolan 'Is the government's austerity programme breaking human rights law?' *Open Democracy* (1 March 2011) <www.opendemocracy.net/ourkingdom/aoife-nolan/is-governments-austerity-programme-breaking-human-rights-law> accessed 12 April 2012.

²⁶² Patrick Wintour 'Coalition overturns Lords amendments on welfare and bans further dissent' *The Guardian*, (London, 1 February 2012) <www.theguardian.com/politics/2012/feb/01/coalition-overturns-welfare-reform-amendments> accessed 30 June 2013. It was also used in 2016 with regards to cuts to disability benefits. See Ashley Cowburn 'ESA benefit cuts forced through by Tories on 'black day for disabled people'' *Independent* (London, 8 March 2016) <www.independent.co.uk/news/uk/politics/a-black-day-for-disabled-people-as-government-pushes-through-cuts-to-esa-a6918421.html> accessed 10 March 2016.

that impact the rights of individuals, governments must be held accountable for their formulation and implementation. While this thesis opens up new legal possibilities for improving accountability in economic policy, it is meaningless without appropriate mechanisms and institutions. It is not a question of legal impossibilities but rather of political will.

2.4. Maximum available resources and the rest of Article 2(1) of ICESCR

In its entirety Article 2(1) of the ICESCR stipulates that

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

As stated earlier, while this provision was included to supposedly add practicality and to reflect the situation in the real world where human rights could not be realised overnight, there have many criticisms by scholars and activists. Craven has noted that Article 2(1) does not seem to imply real and concrete obligations for states.²⁶³ In a later contribution, Ssenyonjo notes that “the language of Article 2(1) is clearly wide and full of caveats”,²⁶⁴

So far most of the work on Article 2 frames the obligations to take steps to progressively realise economic, social and cultural rights within the framework of available resources. Essentially these obligations are being recognised as being constrained by a country’s level of resources.²⁶⁵ They assume the level of resources available to implement human rights is fixed, and outside of any influence of the state.²⁶⁶ This in turn generates many questions such as: Is progressive realisation

²⁶³ Craven (n 74).

²⁶⁴ Ssenyonjo (n 74).

²⁶⁵ ECOSOC ‘Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights’ (2009) UN Doc. E/2009/90, para 13.

²⁶⁶ Chapman and Russel (n 102), p. 5.

contingent on an increase in resources? What happens in times of financial crisis when a government's fiscal space and therefore spending capacity tends to shrink? Are retrogressions justified by an alleged lack of resources?

This Chapter's earlier analysis turns this approach and the questions on their head. Since resources to implement human rights, are, as UNCTAD has noted, an endogenous variable based on economic policy, they are not an external factor governing the extent of governments' obligations to take steps to progressively realise. Resources should therefore not be seen as an external constraint but instead as an internal factor, influenced by state policy and choices, and therefore part of the obligation "to take steps to progressively realise". Rather than raising questions about how this obligation responds to changes in resources, it now becomes a question of how the resources issue is part of these obligations. This section examines how this enhanced understanding of the 'maximum available resources' can give clarity to the rest of Article 2(1).

2.4.1. Progressive realisation

The obligation of states to progressively realise human rights according to available resources, as specified in Article 2(1) of the ICESCR, stems from the drafters' realisation that human rights cannot be implemented overnight.²⁶⁷ They also originally based this clause on the premise that economic growth would prevail and permit continued expansion of the welfare state.²⁶⁸ However, rather than helping implementation by better reflecting reality, as already stated, many argue that the progressive realisation clause gives states an excuse to indefinitely postpone the fulfilment of human rights.²⁶⁹ Moreover as we have seen, economic growth has not prevailed, and since the drafting of the Covenant, countries have often experienced economic crisis and recession such as Argentina in 2001 and 2002, and most recently many European countries and the USA during and following the financial crisis of 2008.

²⁶⁷ CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 9.

²⁶⁸ *Tooze* (n 161), p. 333.

²⁶⁹ Lillian Chenwi, 'Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and for some methodological considerations for assessing compliance' (2013) 46(3) *De Jure*, pp. 742-769, p. 744.

So far there has been limited discussion on what progressive realisation beyond defining it as a continuous forward movement.²⁷⁰ This in turn is recognised as generating ‘two complementary obligations’ namely: “the obligation to continuously improve conditions and the obligation to abstain from taking deliberately retrogressive measures except under specific circumstance.”²⁷¹ This has been explicitly mentioned in Article 11 para 1 of the ICESCR, which obligates states to guarantee a “continuous improvement of living conditions”. As Nolan, Porter and Langford so aptly note “the parameters of this obligation still remain somewhat unresolved.”²⁷²

Since maximum available resources is a question of and determined by economic policy, can one turn the assumptions states made when drafting the ICESCR on their head? Rather than reacting to resource changes and treating them as if they are exogenously determined, could the progressive realisation clause be an umbrella clause obligating states to be proactive in creating the environment to ensure progressive realisation, which would include creating the necessary fiscal space? The question of creating a facilitating environment is not new and has been frequently used in international human rights law.²⁷³ Moreover, in 1993 the IACHR noted

“the rationale behind the principle of progressive rights is that governments are under the obligation to ensure conditions that, according to the state’s *material* resources, will advance gradually and consistently toward the fullest achievement of rights.”²⁷⁴

By explicitly referring to material resources, it could be argued that the IACHR differentiates between a country’s assets and its fiscal space, and that the “obligations to ensure conditions according to a state’s material resources” could include ensuring the necessary fiscal space.

²⁷⁰ *Sepulveda* (n 117), p. 319.

²⁷¹ *Ibid.*, p. 368. See also Aoife Nolan, Bruce Porter, and Malcolm Langford, ‘The Justiciability of Social and Economic Rights: an updated appraisal’ (Working Paper Number 15, Center for Human Rights and Global Justice 2007), p. 32.

²⁷² *Nolan, Porter, and Langford* (n 271), p. 34.

²⁷³ UNHRC ‘Report of the Special Rapporteur on the question of extreme poverty and human rights (Magdalena Sepulveda) Final draft of the guiding principles on extreme poverty and human rights’ (2012) UN Doc. A/HRC/21/39, para 17.

²⁷⁴ IACHR ‘Annual Report of the Inter-American Commission on Human Rights’ (11 February 1994) Doc. OAE/Ser.L/V/II.85 Doc.9 rev. Chapter VII ‘The principle of progressive realisation’. (emphasis added).

The idea that states must create the necessary fiscal space to maintain and increase spending levels on social goods has also been in part implicitly supported by the CESCR's approach. In applying and monitoring the progressive realisation clause, it has focused on states' spending levels, expressing concern when states' spending on social entitlements such as social security, education, and health has effectively decreased either by a nominal decrease in budget allocation or failed to keep abreast with rising costs.²⁷⁵ States' constitutions have also interpreted progressive realisation as progressively allocating more revenue to a particular social good with several constitutions stipulating that the duty to progressively realise a right requires increasing annual expenditure on the social good such as health and education.²⁷⁶

To create an environment that allows for the progressive realisation, states must show that they have adopted fiscal policies that allows for economic stability, and ensure it can deal with the boom and bust characteristic of today's capitalist economies and maintain spending even when the economy contracts. CWGL for instance asserts

“to uphold the principle of non-retrogression, any human rights-centred tax policy must be able to manage the ‘booms’ and ‘busts’ of modern capitalist economies in ways which reduce the negative consequences of drastic revenue shortfalls in downturns, which make difficult for states to maintain spending during downturns.”²⁷⁷

CWGL suggests that “one option is to create a reserve fund, sometimes called ‘rainy day fund’ into which the additional revenues during good times are placed. These funds can then be used to maintain spending and prevent retrogression, during the bad times.”²⁷⁸ The ILO has similarly noted that despite the diversity of financing

²⁷⁵ CESCR ‘Concluding Observations on Colombia’ (2001) UN Doc. E/C.12/1/ADD.74; CESCR ‘Concluding Observations on Jamaica’ (2001) UN Doc. E/C.12/1/ADD.75, para 17; CESCR ‘Concluding Observations on Mongolia’ (2000) UN Doc. E/C.12/1/ADD.47, para 17; and CESCR ‘Concluding Observations on Ukraine’ (2001). UN Doc. E/C.12/1/ADD.65.

²⁷⁶ The Transitional Provisions of the 2008 Constitution of Ecuador stipulates the duty to progressively allocate resources towards the national health system, increasing it annually by a percentage not less than 0.5 per cent of the GDP, until it accounts for at least four percent (4%) of GDP (para 22).

²⁷⁷ Balakrishnan, et al. (n 80), p. 12.

²⁷⁸ *Ibid.*, p. 13.

arrangements across countries, sound financial management promoting stability includes

“Setting up contingency reserves or stabilization funds that ensure a reliable provision of benefits during cyclical economic fluctuations or even in case of unforeseen expenditure shocks, for example through financial, economic or natural crises that suddenly increase the number of beneficiaries”²⁷⁹

This analysis allows human rights bodies including quasi-judicial bodies to be proactive rather than reactive. Rather than waiting for the crisis and retroactively criticizing the government, the CESCR could proactively ask what the government is doing to ensure long-term economic stability and to prevent fluctuations or ‘boom and bust’ along the lines as suggested by CWGL and the ILO. Other questions include how they are investing in their assets and ensuring maximum (sustainable) revenue in a manner that complies with human rights principles.

2.4.2. The obligation to take steps

CESCR also recognises Article 2(1) of the ICESCR as obligating states to take steps that “should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”²⁸⁰ If the wording progressive refers to an umbrella obligation requiring the state to create the necessary environment, then ‘taking steps’ towards full implementation is the practical application of this obligation over time.

The CESCR is clear that a variety of measures are needed to implement human rights, specifying that they will include but not be limited to legislative administrative, financial, educational and social actions.²⁸¹ While the CESCR is clear that it is up to each State Party to decide on which means are the most appropriate and to demonstrate why they are appropriate, it has indicated that a number of different

²⁷⁹ ILO ‘Social protection floors for social justice and a fair globalization’ (International Labour Office, Geneva 2012), p. 41.

²⁸⁰ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 2.

²⁸¹ Ibid., para 7.

actions are desirable. These include diagnosing the existing situation,²⁸² adopting legislative measures²⁸³ and ensuring judicial remedies.²⁸⁴ The assumption is that all these appropriate measures and their justification will be included in programmes or plans of action, the drawing up of which is also included as one of the key steps a government must take.²⁸⁵

So far there has also been little elaboration on their relationship with resources beyond stipulating that the plan or programme of action must be drawn up regardless of a state's level of resources.²⁸⁶ Ssenyonjo further notes "it is clear that the Covenant does not make an absurd demand – a state is not required to take steps beyond what its available resources permit."²⁸⁷ This however does not fully reflect the reality of states having a role in determining the resources necessary to implement human rights.

It is clear that Programmes or Plans of Action must include the necessary budget allocations such as the proportion of the budget to devote to education or social security. Moreover, to fully reflect the role of the state in determining resources available, if there are gaps in available resources they must include steps needed to raise the additional finances, and the time it would take. This is not a new concept. The ILO suggests that a checklist of components for a national strategy on the social protection floor that includes tax reforms to ensure the necessary fiscal resources.²⁸⁸ To comply with the human rights principles of due diligence and non-discrimination, the Plan of Actions should also include steps aimed at identifying or anticipating the possible or 'reasonably foreseeable' detrimental side effects of raising the necessary finances, and the mitigating actions needing to be taken.

²⁸² CESCR 'General Comment 1: Reporting by State Parties' (1989) UN Doc. E/1989/22), para 3.

²⁸³ CESCR 'General Comment 3: The nature of States Parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 3.

²⁸⁴ *Ibid.*, para 5.

²⁸⁵ This has been raised in many General Comments including: CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23; CESCR 'General Comment 11: Plans of Action for Primary Education' (1999) UN Doc. E/C.12/1999/4; and CESCR 'General Comment 13: Right to Education' (1999) UN Doc. E/C.12/1999/10.

²⁸⁶ CESCR 'General Comment 11: Plans of action for primary education' (1999) UN Doc. E/C.12/1999/4, para 9.

²⁸⁷ Manisuli Ssenyonjo, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15(6) *The International Journal of Human Rights*, pp. 969-1012, p. 980.

²⁸⁸ *ILO* (n 9), p. 30.

The importance of states looking ahead to cover all foreseeable eventualities in the discharge of their human rights obligations was emphasised in the South African Blue Moonlight case.²⁸⁹ In this case the South African Constitutional Court reasoned that the City had not demonstrated sufficiently that it lacked the resources to rehouse the people evicted. More specifically it stipulated that the lack of budget was not a reason to deny implementation of its human rights obligations. While the City argued “that it cannot budget for that which it is unable to show is a current need” and that the eviction was “not something which it can predict, plan and budget for and thus all that is expected of it is to deal with an emergency as it arises in an *ad hoc* fashion by way of an application to the province”, the Court argued that the event was not unforeseen, and the City should have budgeted for this.²⁹⁰ This demonstrates that states must be proactive in covering all foreseeable eventualities in its budget, and thereby also secure the necessary funding.

2.4.3. The obligation to ensure minimum essential content

The CESCR reads Article 2(1) of the ICESCR as establishing a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights²⁹¹ regardless of states’ levels of development. The validity of this approach rests on the “moral and legal imperative to do all that is possible to ensure that the urgent survival needs of the public are met is accepted”.²⁹² This notion of minimum essential levels is supposed to add content to Article 2(1) and improve the justiciability of economic and social rights. Young notes “with the minimum core concept as its guide, economic and social rights are supposed to enter the hard work of hard law.”²⁹³ This has particular resonance given the recent coming into force of the Optional Protocol to

²⁸⁹ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (PTY) Ltd and Lawyers for Human Rights* [2011] BCLR 150 (ZACC33).

²⁹⁰ *Ibid.*

²⁹¹ The CESCR has explicitly noted that there is “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.” CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 10.

²⁹² David Bilchitz, ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’ (2003) 19(1) South African Journal of Human Rights, pp. 1-26.

²⁹³ Katherine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33(1) Yale Journal of International Law, p. 114.

the ICESCR in 2013, which allows for individuals to make formal complaints to the CESCR if they feel their rights are being violated.

Yet many question whether it is affordable for states.²⁹⁴ As Chapman and Russel explain, “A potential weakness in the approach is that its basic assumption – that minimum state obligations are by definition affordable – may be untenable.”²⁹⁵ They further argue that:

“The somewhat abstract international human rights system has not grappled fully with the potential contradictions in the minimum state obligations approach. States are assumed to have access to the resources needed to meet their minimum obligations, but in fact **may not**, and wealthier states frequently **disregard their international obligations**.”²⁹⁶

Some constitutions and courts have upheld this obligation, regardless of resources, to ensure minimum essential levels, although it may be under different labels such as minimum level of subsistence, vital minimum or survival kit.²⁹⁷ However, most controversially, the South Africa Constitutional Court, in three judgments,²⁹⁸ rejected the concept of the core obligation to ensure minimum essential levels by arguing that the state can only do what is reasonable within available resources.²⁹⁹ To paraphrase Scheinin these questions of affordability, however, are a matter of applicability or practicality, rather than validity,³⁰⁰ and does not mean that the concept of minimum essential levels should be disregarded. As Higgins states “problems about delivery

²⁹⁴ *Chapman and Russel* (n 102).

²⁹⁵ *Ibid.*, p.10.

²⁹⁶ *Ibid.*, p. 11. (emphasis added).

²⁹⁷ Article 19 of the German Constitution recognises *Wesensgehaltgarantie*, i.e. the guarantee of essentiality and specifies ‘in no case may the core content of a constitutional right be infringed.’ Translation taken from Sandra Fredman, *Human Rights Transformed, positive rights and positive duties* (Oxford University Press 2008), p. 86.

²⁹⁸ *Government of the Republic Of South Africa and Others v. Grootboom and Others* [2000], BCLR 1169 (ZACC 19). *Soobramoney v. Minister of Health -Kwazulu-Natal* [1997] CCT32/97 (ZACC 17). *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] BCLR 1075 (ZACC 16).

²⁹⁹ *Government of the Republic Of South Africa and Others v. Grootboom and Others* [2000], BCLR 1169 (ZACC 19).

³⁰⁰ Scheinin observed that many problems of legal nature of economic, social and cultural rights “does not relate to their validity but rather to their applicability.” Martin Scheinin ‘Economic and Social Rights as Legal Rights’ in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds.) *Economic, Social and Cultural Rights* (Martinus Nijhoff 1995), pp. 41-62, p. 41.

leave his (one's) right a right none the less."³⁰¹ Instead it becomes a question of how to improve deliverability.

Improving deliverability becomes a question of how to judge whether states have the necessary resources, and/or whether they are disregarding their obligations. The decision of the South Africa Constitutional Court neglected the state's role in determining the resources able to be devoted to human rights implementation. It assumed resources are fixed and an external constraint, unable to be influenced by a Government. While the CESCR has tried to address this affordability issue, it has been far from consistent.³⁰² On one hand it states that the obligation to ensure minimum essential levels is *non-derogable* regardless of resources, effectively creating *prima facie* violation, on the other it also observes that a State Party can argue that the resources are unavailable (General Comment 3).³⁰³ Trying to clarify this situation, its 2007 statement on maximum available resources leaves behind the concept of *non-derogability* and restates the position puts in General Comment 3. However, while commended by some for removing the *non-derogability* concept that is regarded as having many theoretical, practical and legal problems,³⁰⁴ this approach still has inherent difficulties in assuming resources including fiscal space are fixed and rather than the result of conduct and policy choices. Perhaps illustrating these weaknesses, and as Mueller notes, the CESCR, as well as rarely finding violations of the minimum essential levels, has also failed to "rigorously ask states to prove that they did all they could, as a matter of priority to remedy the situation."³⁰⁵

Human rights advocates have noted that when allocating resources, states are obligated to prioritise fulfilling minimum essential levels; "the obligation 'to make every effort' to ensure minimum core entitlements places these obligations at a higher resource

³⁰¹ Higgins (n 43), pp. 99-100.

³⁰² Amrei Mueller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review, pp. 557-601, p. 588

³⁰³ The CESCR has recognised "... it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned." CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 10.

³⁰⁴ Malcolm Langford and Jeff King, 'Committee on Economic, Social and Cultural Rights' in Malcolm Langford (ed.) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, (Cambridge University Press 2008), p. 493.

³⁰⁵ Amrei Mueller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian law, An Analysis of Health-Related Issues in Non-International Armed Conflict* (Nottingham Studies on Human Rights, Martinus Nijhoff 2013), p. 79.

priority than the duty to realise the full scope of the right....”³⁰⁶ Both treaty bodies, including the CRC Committee, and NGOs have translated this prioritisation into calling on governments to ring fence their budgets for such social goods.³⁰⁷ This however does not address the affordability issue. Moreover it essentially stays at the level of treating resources/revenue as fixed with governments staying the “administrator of existing resources” instead as the “mobiliser” of revenue/resources.³⁰⁸

Taking the view that a state’s available resources are not a question of capability but of internal policy decisions and choices allows the human rights community to further develop the applicability or deliverability of the minimum essential levels concept along the lines already developed in this thesis. While remaining a question of priorities, it shifts from judging what the state is capable of doing *vis a vis* existing resources to how it is guaranteeing the necessary resources to ensure minimum essential levels. The state must demonstrate that its macro-economic policies are aimed at realising the minimum essential levels. Moreover, given the immediacy of such core obligations and their importance to survival, states’ burden of proof should be increased to ‘beyond reasonable doubt’ i.e. in instances where people are not enjoying the minimum essential levels, states are required to prove beyond doubt that they cannot do anymore to raise the necessary revenue. This approach can give greater scope to the reasonability argument put forward by the South Africa Constitutional Court. Instead of what is reasonable within available resources, courts should examine whether it is reasonable to expect states to increase the resources able to be devoted to the implementation of the minimum essential levels, using the standard of proof ‘beyond reasonable doubt’ as discussed.

³⁰⁶ QUB Budget Analysis Project ‘Budgeting for Economic and Social Rights: A Human Rights Framework’ (QUB School of Law, Belfast 2010) <www.researchgate.net/profile/Rory_Oconnell2/publication/228189073_Budgeting_for_Economic_and_Social_Rights_A_Human_Rights_Framework/links/557a96f608aeb6d8c0206b5b.pdf> accessed 23 June 2016, p. 51.

³⁰⁷ CRC Committee ‘Concluding Observations on Dominican Republic’ (2001) UN Doc. CRC/C/15/Add.150; and CRC Committee ‘Concluding Observations on the Seychelles’ (2012) UN Doc. CRC/C/SYC/CO/2-4; See also *Way and Stanton* (n 2), p. 7

³⁰⁸ *Balakrishnan et al.* (n 80) p. 4.

2.4.4. Non-retrogression

The obligation of non-retrogression stems from states' obligations to progressively realise economic and social rights. As the Council of Europe explains, in an issue paper, "the logical corollary of this duty of progressive realisation is that governments must avert retrogression in the realisation of ESC rights, even in times of severe resource constraints such as economic recessions."³⁰⁹ However there is still a long way to go in determining what a retrogressive measure actually is, whether it is justified and importantly its relationship with resources. For greater clarity, this thesis clearly delineates between determining what a retrogressive measure is, and the circumstance under which it may be permissible.

What is a retrogression?

The CESCR definition of a retrogression is very ambiguous. General Comment four on the right to adequate housing stipulates that a retrogression is "a general decline in living and housing conditions, directly attributable to policy and legislative decisions by State Parties, and in the absence of accompanying compensatory measures would be inconsistent with the obligations under the Covenant".³¹⁰ Sepulveda defined retrogression as "a step backward in the level of protection accorded to the rights contained in the Covenant which is the consequence of an intentional decision by the state."³¹¹

General Comment 19 on the right to social security further clarifies that when determining whether any retrogressive measures are justified, the CESCR will consider carefully whether there was genuine participation of affected groups in examining the proposed measures and alternatives and an independent review of the measures at the national level; and whether the measures were directly or indirectly discriminatory; have a sustained impact on the realization of the right to social security; an unreasonable impact on acquired social security rights or deprive an individual or group access to the minimum essential level of social security.³¹²

³⁰⁹ *Council of Europe* (n 18), p. 30.

³¹⁰ CESCR 'General Comment 4: The right to adequate housing' (1992) UN Doc E/1992/23, para 11.

³¹¹ *Sepulveda* (n 117), p. 323.

³¹² CESCR 'General Comment 19: The Right to Social Security' (2008) UN Doc E/C.12/GC/19, para 42.

Further clarification was provided in CESCR's Open Letter to States Parties within the context of retrogressive measures and the financial crisis. This letter was issued quite late given that the financial crisis first hit in 2008. This could indicate the problems the CESCR had in addressing this issue. While the legal status of this letter is unclear, Warwick has suggested that it could acquire some soft law status resulting from Committee's use in subsequent documents,³¹³ and it has in fact it has been referenced in many concluding observations.³¹⁴ The Open Letter to States Parties states that any proposed policy change or fiscal adjustment must identify the minimum core content of rights or a social protection floor, as developed by the ILO, and ensure the protection of this core content at all times.³¹⁵

While some of these considerations are relevant, this author considers the 'genuine participation of affected groups' and 'an independent review of the measures' as elements to be considered when evaluating whether the retrogressive measure is justified rather than when deciding whether or not something is retrogressive. She also questions the Letter's focus on minimum essential levels since this suggests different levels of compliance, and that retrogressive measures are somewhat permissible providing they do not violate the minimum core. As violations of both non-discrimination and minimum essential levels are already non-permissible under international human rights law regardless of a state's level of resources, there is also little value in including them to non-retrogression. This has also been noted by Warwick, who observes "these are general, long-standing and immediate obligations that exist beyond the circumstances of retrogression".³¹⁶ Including minimum essential levels also undermines the idea of progressive realisation; that is a steady and

³¹³ Ben Warwick, 'Socio-Economic Rights During the Financial Crises: A Changed Approach to Non-Retrogression' (2016) 65(1) *International and Comparative Law Quarterly*.

³¹⁴ CESCR 'Concluding Observations on New Zealand' (2012) UN Doc. E/C.12/NZL/CO/3; CESCR 'Concluding Observations on Bulgaria' (2012) UN Doc. E/C.12/BGR/CO/4-5; CESCR 'Concluding Observations on Japan' (2013) UN Doc. E/C.12/JPN/CO/3; CESCR 'Concluding Observations on Iceland' (2012) UN Doc. E/C.12/ISL/CO/4; CESCR 'Concluding Observations on Portugal' (2014) UN Doc. E/C.12/PRT/CO/4; CESCR 'Concluding Observations on Romania' (2014) UN Doc. E/C.12/ROU/CO/3-5; CESCR 'Concluding Observations on Slovenia' (2014) UN Doc. E/C.12/SVN/CO/2; CESCR 'Concluding Observations on Canada' (2016) UN Doc. E/C.12/CAN/CO/6; CESCR 'Concluding Observations on Spain' (2012) UN Doc. E/C.12/ESP/CO/5; CESCR 'Concluding Observation on Ukraine' (2014) UN Doc. E/C.12/UKR/CO/6; CESCR 'Concluding Observations on the Czech Republic' (2014) UN Doc. E/C.12/CZE/CO/2.

³¹⁵ CESCR 'Open Letter to State Parties to the ICESCR' (4 June 2012)

³¹⁶ Warwick (n 313)

continuous improvement from one level to another by implicitly suggesting that states are not required to do any more than stay at the minimum essential levels.

Given the above, it is submitted that measures are retrogressive if they have a sustained negative impact on the realization of the economic and social rights; and/or an unreasonable impact on acquired economic and social rights. It would also add “actions jeopardising the realisation of economic and social rights” as being retrogressive even if it is not possible to determine that a violation, or regression in the enjoyment, of a particular right has taken place. This would allow human rights jurists to differentiate between a breach of the obligation to progressively realise under Article 2 and a violation of a specific right.

This is not new. When the Constitutional Tribunal of Portugal held that the abrogation of the statute that established the National Health Service breached the prohibition of retrogression and was thus unconstitutional,³¹⁷ it asserted “The State, which was obliged to act to satisfy a social right, also becomes obliged to abstain from threatening the realization of that social right.”³¹⁸ It held that the right to health expressly obligated the Government to create a national health service and that the “State cannot move backwards – it cannot undo what it has already accomplished, ... and put itself again in the position of debtor (...).” Although inconsistent, some of CESCR’s concluding observations have similarly categorised measures as regressive for *jeopardising* or *threatening* economic and social rights. It for instance expressed concern at “regressive measures adopted by the State Party that increase university tuition fees” because they “jeopardize access to university education for disadvantaged and marginalized individuals and groups”.³¹⁹

Since Programmes or Plans of Action, if properly executed, should include all actions needed to fully implement human rights, including budget allocations and details of how the revenue is to be raised, by definition any deviation would put at risk the realisation of human rights and would thus be a retrogressive measures unless

³¹⁷ Decision (Acórdão) Nº 39/84 [11 April 1984] Portuguese Constitutional Tribunal (Tribunal Constitucional).

³¹⁸ International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (Geneva, 2008), pp. 32-33. See also Decision (Acórdão) Nº 39/84 [11 April 1984] Portuguese Constitutional Tribunal (Tribunal Constitucional).

³¹⁹ CESCR ‘Concluding Observations on Spain’ (2012) UN Doc. E/C.12/ESP/CO/5, para 28.

alternative measures are put into place. Retrogressive measures could thus include cut backs in social expenditure and changes to raising revenue if alternatives have not been put in place. This remains the case even if the rights themselves have not been violated. As already indicated CESCR has expressed concerns over declining expenditure on social goods, but has rarely if it all considered that this is a retrogression and asked for a justification. Nolan has similarly noted during the many economic crises of the 1990s and 2000s in various countries such as Hungary, Argentina, Mexico, and Thailand, the CESCR has never considered that the subsequent structural adjustment or public expenditure cuts have contravened the ICESCR.³²⁰

Taking this approach with retrogression would undoubtedly strengthen the status and importance of comprehensive Plans or Programmes of Action, and help address the grey area between a violation of a right and actions jeopardising its enjoyment and realisation. It would ensure forward-looking policies that do not just stop at the minimum essential levels and reinforce states' obligation to ensure an enabling environment for the progressive realization of human rights.

Using Programmes/Plans of Action would also help determine whether something is intentional or not. Nolan *et al* attributes the reluctance of the CESCR to invoke non-retrogression when it comes to budget cuts amongst other things to the difficulty in determining state responsibility that “requires an evidential link between particular state action (action or omission) on the one hand... and the factual outcome of decreased rights enjoyment on the other.”³²¹ Relatedly, they also observed that “the Committee has never addressed the difference between retrogressive measures that are deliberate and those that are not...”³²² Since all actions necessary, including funding and budget arrangements, should have been included in the plan of action, any deviation without the implementation of mitigating measures must be considered as intentional, and it is ‘reasonably foreseeable’ that it will undermine or jeopardise the implementation of the right in question. This is particularly evident given that states

³²⁰ Aoife Nolan, Nicholas Lusiani, and Christian Courtis, ‘Evolving Criteria on Retrogression’ in Aoife Nolan (ed) *Economic and Social Rights after the Global Financial Crisis*. (Cambridge University Press 2014), p. 126.

³²¹ *Ibid.*, p. 127

³²² *Ibid.*, p. 133

must justify and demonstrate the appropriateness of all actions included in the Plan/Programme.³²³ The principle of due diligence and the requirement of states to proactively determine the impact of its policies can also be used to judge whether the state concerned has taken the necessary measures to examine the impact of any proposed deviation and identify the necessary mitigating measures.

Whether the retrogressive measures are justified?

As Nolan notes ‘Prohibition of retrogressive measures is not so absolute,’³²⁴ the CESCR ‘has recognised that there are some circumstances, such as an economic crisis or a natural disaster, that require additional resources and in which the adoption of retrogressive measures or the omission to actively take steps to improve the conditions is unavoidable.’³²⁵ However it has consistently maintained that it is up to the state in question to demonstrate the ‘strict necessity’ of the measures.³²⁶ The CESCR has frequently reiterated that states have the burden of proof to demonstrate that the retrogressive measures had only been introduced after ‘the most careful consideration’ and would need to be “justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of maximum available resources.”³²⁷ Nolan has further clarified that states cannot justify retrogressive measures simply by referring to resource scarcity, fiscal discipline or savings: it needs to show why the measures in point were necessary for the protection of the totality of the rights provided for in the Covenant.³²⁸ Mueller regards the term ‘totality of rights’ as implying that ‘general welfare’ should suffer as little as possible by retrogressive measures.³²⁹

More recently the CESCR has developed criteria, through its General Comments, its statement on maximum available resources, and most recently its Open Letter to States

³²³ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 4.

³²⁴ Nolan (n 165), p. 48.

³²⁵ Sepulveda (n 117), p. 328.

³²⁶ Nolan, Lusiani and Courtis noted that that “the language employed by the Committee also suggests that a stringent standard will be used to assess the justification offered by the State Party”. Nolan, Lusiani and Courtis (n 320), p. 125 (footnote 12).

³²⁷ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 45.

³²⁸ Nolan, Lusiani and Courtis (n 320), p. 134.

³²⁹ Mueller (n 304), p. 133. She specifically refers to the ‘general welfare principle’ as contained in Article 4 of ICESCR.

Parties (May 2012) on austerity measures to help evaluate whether any retrogressive (or regressive measures) are permitted.³³⁰ General Comment 19 includes whether there was reasonable justification for the action and stipulates that alternatives must be comprehensively examined.³³¹ As discussed above, it also recognises that there must be genuine participation of affected groups in examining the proposed measures and alternatives and an independent review of the measures at the national level.³³² The CESCR has further stated it will look at the country's level of development, whether it has sought low cost solutions, and the cooperation of the international community.³³³

The Open Letter however is seen as regressing on the criteria already established, and as Warwick has argued, it goes backwards in allowing retrogressive measures through the back door.³³⁴ In contrast to the General Comment 19 that lists eight criteria, the Open Letter only lists four criteria, two of which have already been discussed and discounted in the previous paragraphs. The remaining two criteria suggest that retrogressions are permissible providing that any proposed policy change or fiscal adjustment is necessary and proportionate,³³⁵ yet does not elaborate further on how this can be determined and evaluated beyond stating that “the adoption of any other policy, or a failure to act, would have to be more detrimental to economic, social and cultural rights.”³³⁶ This according to Warwick does not meet the necessity and proportional test by suggesting the balancing of rights with crisis, which in turn suggests “economic necessities can buy out rights protection.”³³⁷ The second criteria suggests that the policy can be permissible if it is temporary covering only the period of the crisis. This ignores the relationship between many economic and social rights such as the right to social security, and the rights to life and to be free from degrading treatment, which are non-derogable under the ICCPR. This is discussed further in Chapter 4.

³³⁰ CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

³³¹ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 42.

³³² *Ibid.*

³³³ CESCR ‘An Evaluation Of The Obligation To Take Steps To The ‘Maximum Of Available Resources’ Under An Optional Protocol To The Covenant’ (2007) UN Doc. E/C.12/2007/1, para 10.

³³⁴ *Warwick* (n 313)

³³⁵ CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

³³⁶ *Ibid.*

³³⁷ *Warwick* (n 313)

Warwick contends that the Letter gives states more flexibility to states by permitting exceptional powers to substantially weaken rights protection in times of crisis.³³⁸ While the CESCR had “afforded States an everyday flexibility in protecting Covenant rights, (it) did not permit exceptional powers or the authority to substantially weaken rights protection in times of crisis”.³³⁹ The CESCR has previously consistently claimed that emergency powers are not permissible,³⁴⁰ and that economic and social rights are even more important in times of crisis.³⁴¹

To be consistent with previous deliberations and conclusions, the CESCR must revert back to General Comment 19, but go further especially in clarifying the principle of necessity with regards to maximum available resources. Necessity is not the same as convenience or desirability. It means that there are no alternatives; that there are no other (more lenient) measures that can be taken with a lesser adverse impact. The Letter itself has not developed this further beyond stating “the adoption of any other policy, or a failure to act, would have to be more detrimental to economic, social and cultural rights.”³⁴² However, by previously only listing lack of development or growth in GDP rates as grounds for retrogressive measures the CESCR is not only failing to recognise that maximum available resources depends on state actions and choices, it is also inaccurately portraying the question of the necessity. Taking a fixed approach to resources and viewing them as largely beyond a government’s control enables governments to more easily justify retrogressive measures as it obviously limits the amount of alternative measures that can be taken.

This must be taken further with regards to maximum available resources if the standard used to assess the justification offered by the State Party is as stringent as possible, as suggested by the CESCR’s wording on the topic.³⁴³ The CESCR and other quasi/judicial bodies should be examining whether the State Party has provided

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ While Article 4 of the ICESCR permits limitations it does not allow derogations. It is thought that there is sufficient flexibility in Article 2(1) to cover “all seasons”. This wording has been taken from *Warwick* (n 313), p. 251.

³⁴¹ *Warwick* (n 313), p. 256. See also CESCR, ‘General Comment 2: International Technical Assistance Measures’ (1990) UN Doc E/1990/23, para 9.

³⁴² CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

³⁴³ Nolan, Lusiani and Courtis noted that that “the language employed by the Committee also suggests that a stringent standard will be used to assess the justification offered by the State Party”. *Nolan, Lusiani and Courtis* (n 320), p. 125 (footnote 12).

clear and convincing evidence that the state cannot raise more resources. In other words, there must be no credible alternatives. Again, it is not a question of the court or other judicial or quasi-judicial body deciding how the country is to raise more revenue but of examining whether there is clear and concluding evidence that it cannot do more. The afore mentioned Latvia judgment on the unconstitutionality of the Latvian Government's decision to lower state pensions following an alleged reduction in available resources,³⁴⁴ demonstrates the possibility of this. While also acknowledging that some changes might have to be made given the country's financial situation, it considered that the state had not demonstrated that it had exhausted alternative possible sources of funding or less restrictive means.³⁴⁵

2.5. Concluding remarks

In contrast to the approach being taken by many others, this thesis uses two basic principles to define states' obligations under the maximum available resources clause. It recognises that resources are not static or an external constraint but depend on states' own economic policy as recognised by UNCTAD and UNICEF amongst others, and the fact that the states have the burden of proof to show that they have done everything possible to raise the resources necessary to implement human rights without undermining the 'totality of human rights' and 'general welfare'.³⁴⁶ Using these, it focuses on developing a legal framework to judge a state's conduct in maximising available resources to implement human rights.

While some may argue this approach undermine the 'separation of powers' principle whereby **powers** and responsibilities are divided among the Government's legislative branch, executive branch, and judicial branch, the Courts would not necessarily be prescribing economic policy but judging whether the Government has complied with the 'maximum available resources' clause on the basis of expert evidence. As already noted, courts often use legal principles to judge complex issues on the basis of evidence supplied by experts. Moreover, courts and other judicial processes should first and foremost protect rights in an independent and impartial manner, and

³⁴⁴ Law on State Pension and State Allowance Disbursement in the period from 2009 to 2012 (Latvia).

³⁴⁵ Case number 2009-43-01 [2009] Constitutional Court (Latvia).

³⁴⁶ CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 9. See also *Mueller* (n 305), p. 133.

sometimes this may require decisions on policy. The main function of the separation of powers principle is to separate courts from the executive to ensure independence.

As demonstrated, this approach gives renewed scope to improving the relevance of human rights law, including the whole of Article 2(1), compared to a more rigid and quantifiable approach focusing on just trying to measure state capability. Adjudicating 'maximum available resources' in this manner facilitates a more constructive approach that goes beyond carving up an existing pie between competing demands to judging what a state could be doing to ensure the implementation of all human rights. It allows the 'maximum available resources' clause to better represent reality and address contemporary and pertinent issues by allowing more accountability for economic policy. It allows human rights advocates to more effectively address the complexity of macro-economics, and the interdependence of different variables, which has arguably been missing from the CESCR's approach.³⁴⁷ It also gives greater clarity to the rest of Article 2(1), addressing its many weaknesses and ensuring its relevance, applicability and utility.

These findings helped prepare a crucial platform from which the thesis can better analyse states' human rights obligations during financial crises, and whether a national debt can be used by states to justify retrogressive measures. However before this can be done, to fully determine states obligations during a financial crisis, the thesis needs to establish the content of the right to social security.

³⁴⁷ *Dowell-Jones* (n 103), p. 14.

Chapter 3: The right to social security: who should be entitled to what, and when?

3.1 General introduction

Before establishing states' obligations during a financial crisis, it is paramount to establish the content of the right to social security as extensively as possible. Without a clear base line clarifying what states are obligated to ensure, it is impossible to determine states' obligations during times of crisis. Moreover, such a baseline is increasingly necessary given the continuing trend to reduce the role of the state in part exacerbated by the shift from Keynesian to neo-classical economic theory and the subsequent reduced fiscal space due to reducing trends in taxation levels.³⁴⁸ States have also claimed other pressures on the implementation of the right to social security. In 1996, the ECSR noted that almost all the reports received refer to problems in implementation such as demographic changes, changing structures of employment and the increasing costs of social welfare.³⁴⁹

While the right to social security is recognised as a human right under international human rights law,³⁵⁰ in 2007, over 30 years after ICESCR's entry into force, Tooze noted that it is surprising "that so little has been done to determine the content of that right in international law."³⁵¹ With the exception of the right of everyone to take part in cultural life, it was one of the last rights to receive a general comment, which was finally written in 2008. In one article written prior to the drafting of this general comment, CESCR member Riedel observes "The right to social security in Article 9 of the ICESCR has not received the attention it deserves", and attributes this to both the brevity and vagueness of Article 9 and the sense of opening Pandora's box due to the perceived technical nature of the right.³⁵²

Even after the CESCR drafting General Comment 19 in 2008, many ambiguities still

³⁴⁸ Reynaud (n 21).

³⁴⁹ ECSR 'Conclusions XIII-4' (CoE Strasbourg 1996), p. 34.

³⁵⁰ This includes the ICESCR, the Convention on the Rights of the Child, the Convention on the Elimination of Racial Discrimination and many regional instruments.

³⁵¹ Tooze (n 161), p. 331.

³⁵² Eibe Riedel 'The Human Right to Social Security: Some Challenges' in Eibe Riedel (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer-Verlag 2007), pp. 17-28, p. 18.

surround the content of the right to social security. In 2010, the ILO noted that the UN human rights instruments and mechanisms "... have mostly remained silent as to the actual definition of the right to social security and its specific content."³⁵³ With an array of different schemes and terminology being implemented and used worldwide, questions arise about what falls under the right to social security and its relationship with social protection, welfare services, social assistance and insurance? There also remains confusion about the different models implemented, for instance should it be universal and given to everyone or targeted to just a particular population group? And whether receiving social assistance should be conditional on meeting certain criteria?

After first establishing how the right to social security is stipulated in international human rights law, this chapter discusses the main challenges in defining the right and establishes its content by examining international and regional instruments and practices, such as the CESCR, ILO and ECSR as well as the jurisprudence of national courts. However, rather than being doctrinal and examining all jurisprudence to identify the existing 'rules' governing the right to social security, it reviews, within the wider context, how relevant judicial decisions comply or not with key human rights principles to discover how Article 9 of the ICESCR should be read in today's world.

3.2 The right to social security in international and regional human rights law

The right to social security is well entrenched in international human rights law. Article 22 of the Universal Declaration of Human Rights (UDHR) stipulates that

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Article 25 of the UDHR reiterates this right, linking it with the right to an adequate standard of living. It states that “Everyone has the right to a standard of living

³⁵³ ILO (n 9), p. 12.

adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” It further specifies “Motherhood and childhood are entitled to special care and assistance”. Both of these Articles were formally codified by the ICESCR in Article 9, which stipulates “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

Other international human rights treaties stipulate the entitlement of specific groups to social security including Article 27 of the Convention on the Rights of the Child (CRC);³⁵⁴ Article 27 of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW);³⁵⁵ Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD);³⁵⁶ and Article 5 of the International Convention on the Elimination of Racial Discrimination (CERD).³⁵⁷ The Convention on the Elimination of Discrimination against Women (CEDAW), in addition to specifying the right of women to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave,³⁵⁸ lists the different levels of social security applying specifically to women. Article 11 (2) calls on State Parties to: introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; and encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities. Article 24 of the 1951 Refugees Convention stipulates that State Parties must give the same treatment

³⁵⁴ Article 27 of the CRC stipulates “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”.

³⁵⁵ Article 27 of the CMW stipulates the rights of all migrant workers to social security on the basis of receiving equal treatment as the nationals of the country of residence.

³⁵⁶ Article 28 of the Convention on the Rights of Persons with Disabilities stipulates, ‘the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right

³⁵⁷ Article 5 of Convention on the Elimination of Racial Discrimination stipulates that the right to social security and social assistance must be guaranteed without distinction.

³⁵⁸ See Article 11 1 (e).

to refugees lawfully staying in their territory as according to nationals in respect to labour legislation and social security although there may be some limitations particularly concerning benefits or portions of benefits which are payable wholly out of public funds.

Within the Council of Europe (CoE),³⁵⁹ the primary instrument on economic, social and cultural rights is the European Social Charter (revised). Articles 12, 13 and 14 of the Charter recognise the right to social security, the right to social and medical assistance and the right to benefit from social welfare services. Article 30 also stipulates the right to “protection against poverty and social exclusion”. The revised European Social Charter also recognises the situation of specific groups of people with Article 23 recognizing the right of elderly persons to social protection;” Article 18 stipulating the right of migrant workers and their families to protection and assistance in the territory of any other Party; and Article 17 specifying the right of children and young persons to social, legal and economic protection.

While not explicitly recognising the right to social security, several articles of the European Convention of Human Rights (ECHR) have been progressively interpreted by the European Court of Human Rights (ECtHR) as protecting a person’s right to social security. In *Larioshina v. Russia*, the ECtHR considered that complaints about insufficient social benefits “...may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment”.³⁶⁰ More recently, in 2011, the ECtHR linked inadequate living conditions with inhumane treatment when it ruled that both the detention circumstances and the living circumstances of an Afghan asylum seeker amounted to a violation of Article 3 of the ECHR.³⁶¹ Since the asylum seeker entered the EU through Greece and travelled on to Belgium where he applied for asylum, Greece was held to be the responsible Member State for the examination of his asylum application. Upon being returned to Greece, the asylum seeker was detained, and after his release, abandoned to live on the streets without any support from the Greek authorities.

³⁵⁹ The Council of Europe, founded in 1949, is a regional intergovernmental organisation whose stated goal is to promote human rights, democracy, and the rule of law. The organisation is separate to the EU, and, unlike the EU, the Council of Europe cannot make binding laws.

³⁶⁰ *Larioshina v. Russia* (decision on admissibility) [2002] 35 EHRR (ECtHR 56869/00).

³⁶¹ *M.S.S. v. Belgium and Greece* [2011] ECHR 2011-I (ECtHR 30696/09).

The ECtHR also interpreted Article 8 on respect for private and family life as recognising that states have positive obligations when there is a direct link between “the measures sought by the applicant and his or her private and/or family life”.³⁶² Perhaps most progressively of all, it interpreted Article 1 of Protocol 1 to the ECHR on the rights of persons to the peaceful enjoyment of their possessions as including social insurance and social assistance.³⁶³ Using these interpretations, the ECtHR has adjudicated other cases involving the right to social security not in terms of the substance of the right itself but in terms of other rights and principles contained in the Convention such as non-discrimination and the right to a fair trial (article 6).³⁶⁴

Also at the European level, Article 34 of the EU Charter of Fundamental Rights³⁶⁵ stipulates that states must recognise and respect the entitlement to social security benefits and social services for everyone residing and moving legally within the EU. It also stipulates the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. While there is considerable scope for states to determine their own social security system, the principle of equal treatment and non-discrimination under the Charter means that states must ensure that those legally residing in an EU country have the same conditions as the nationals of the country.³⁶⁶ This is seen as an important part of ensuring freedom of movement, which is a core principle of the EU.

Article 16 of the American Declaration on the Rights and Duties of Man stipulates the right to social security in specific situations such as unemployment, old age and mental or physical disability. This is further elaborated upon in Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights which recognizes everyone’s right to social

³⁶² Eva Brems, ‘Indirect Protection of Social Rights by the European Court of Human Rights’ in Daphne Barak-Erez and Aeyal Gross (eds.) *Exploring Social Rights Between Theory and Practice* (Hart Publishing 2007), p. 156.

³⁶³ *Gaygusuz v. Austria* [1996] ECHR 1996-IV (ECtHR 17371/90).

³⁶⁴ *Salesi v. Italy* App no 13023/87 (ECtHR, 26 February 1993), *Schuler Zraggen v. Switzerland* (1993) ECtHR Series A Volume 263, and *Wasilewski v. Poland* (decision on admissibility) App no 32734/96 (ECtHR, 20 April 1999).

³⁶⁵ The Charter enshrines certain political, social, and economic rights for EU citizens and residents into EU law.

³⁶⁶ See EU Directive 2004/38/E.

security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. It also specifies “in the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.”³⁶⁷ Article 17 specifies that “everyone has the right to special protection in old age” and called on states to take the necessary steps “to make this right a reality”, particularly by providing food and adequate medical services; undertaking work programmes specifically designed for the elderly and establishing social organizations designed to improve the quality of life for the elderly.

While the African Charter on Human and Peoples’ Rights does not specifically refer to the right to social security, it recognises the vulnerable position of older persons and stipulates that “the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs”.³⁶⁸ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) recognizes the particular vulnerability of older women and requests states to take a number of measures “commensurate with their physical, economic and social needs as well as their access to employment and professional training”.

International Labour Organisations Conventions

The preamble to the ILO Constitution of 1919 establishes the role of the ILO to improve conditions of labour, inter alia, through the “...the protection of the worker against sickness, disease, and injury arising out of his employment, the protection of children, young persons and women, provision for old-age and injury”. This is also reaffirmed in the Declaration of Philadelphia (1944), which reiterates the ILO’s aims and purposes, including pursuing “the extension of social security measures to provide

³⁶⁷ Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

³⁶⁸ Article 18 of the African Charter on Human and Peoples’ Rights.

a basic income to all in need of such protection and comprehensive medical care”.³⁶⁹

To realize its mandate ILO has so far established 31 Conventions and Recommendations on social security. In 2002, the ILO Governing Body confirmed six out of the 31 Conventions as up-to-date social security conventions. These are as follows: Social Security (Minimum Standards) Convention 1952 (No. 102); the Employment Injury Benefits Convention 1964 (no 121); the Invalidity, Old-Age and Survivors’ Benefits Convention 1967 (No 128); the Medical Care and Sickness Benefits Convention No 1969 (no 130); the Employment Promotion and Protection against Unemployment Convention; and lastly the Maternity Protection Convention, 2000 (No 183). In general these conventions stipulate both the amount of benefit that should be paid and its coverage in terms of percentage of population in regards to the particular type of social security covered. Ratification of these instruments however remains low, particularly in comparison with human rights treaties; Convention 102 for example has been ratified by 53 countries, including the UK,³⁷⁰ as of 26 June 2016.

Human rights bodies (both regional and international) have referred extensively to these ILO conventions. Article 12 of the European Social Charter requires contracting State Parties to undertake to maintain a level of protection “at least equal to that required for ratification of” ILO Convention No 102 Concerning Minimum Standards for Social Security. The CESCR’s General Comment 19 on the right to social security references the ILO Convention 102 when stipulating the nine principal areas social security should cover.³⁷¹ On several occasions the CESCR has called on states to ratify these various ILO conventions in its concluding observations.³⁷²

In 2001 the International Labour Conference (ILC), composed of representatives of states, employers, and workers, affirmed that social security “is a basic human right

³⁶⁹ ILO Declaration of Philadelphia (adopted 10 May 1944, 26th session of the International Labour Conference). Declaration concerning the aims and purposes of the International Labour Organisation, para III (e).

³⁷⁰ On 27 April 1954, the UK accepted Parts II to V, VII and X. see www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312247 for more details

³⁷¹ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 12.

³⁷² See, for example, CESCR ‘Concluding Observations on Morocco’ (2006) UN Doc. E/C.12/MAR/CO/3, para 46; and CESCR ‘Concluding Observations on the Dominican Republic’ (2010) UN Doc. E/C.12/DOM/CO/3, para 20.

and a fundamental means for creating social cohesion”. Over ten years later, in 2012 the ILO adopted Recommendation 202 calling on states to ensure a minimum social protection floor for all persons including the unprotected, those living in poverty and the most vulnerable, including workers in the informal economy and their families.³⁷³

3.3 Challenges in defining the right to social security

There are numerous challenges related to defining the right to social security including the array of terminology used with schemes being identified as social welfare, social insurance, social assistance and social protection.³⁷⁴ Examples include cash transfer schemes such as the Target Social Assistance Scheme in Kazakhstan, which provides families with the subsistence minimum if the total income of a family falls below the regional poverty line³⁷⁵; school stipends such as the Primary Education Stipend Project in Bangladesh, which provides a conditional income transfer to poor rural households to keep children in primary education;³⁷⁶ social pensions in Nepal; food vouchers in the USA; income guarantee schemes such as public works or employment guarantee schemes such as the Maharashtra Employment Guarantee Scheme in India that guarantees a job for every adult who want one, providing he or she is willing to do unskilled manual work on a fix piece-rate basis amounting to the minimum wage;³⁷⁷ user fee exemptions for health care or education or subsidized services.³⁷⁸ This thesis follows the practice of the ILO and other United Nations, as noted by Sepulveda and Nyst, and uses the term social security and social protection

³⁷³ ILO Recommendation 202: National Floors of Social Protection (101st Conference Session 14 June 2012), para 3(h).

³⁷⁴ Riedel (n 352), p. 19. Different terms are used by the UN human rights treaty monitoring bodies. The Convention on the Rights of Persons with Disabilities uses the term social protection, while other human rights treaties refer to social security, with the exception of the Convention on the Rights of the Child which stipulates state obligations to provide “material assistance and support programmes to parents in need”.

³⁷⁵ ESCAP (n 203), p. 41.

³⁷⁶ Barrientos, Armando, Miguel Nino-Zaraxua, and Mathilde Maitrot ‘Social Assistance in Developing Countries Database Version 5’ Brooks World Poverty Institute Working Paper (Brooks World Poverty Institute, Manchester 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672090#%23> accessed 10 January 2011, p. 55.

³⁷⁷ Overseas Development Institute ‘The Maharashtra Employment Guarantee Scheme’ (ODI Policy Brief 6 2006) <www.odi.org/publications/1072-maharashtra-employment-guarantee-scheme-india> accessed 10 February 2011.

³⁷⁸ General Assembly ‘Report of the Independent Expert on human rights and extreme poverty (Magdalena Sepulveda) to the 65th session of the General Assembly’ (2010) UN Doc. A/65/259, para 9.

interchangeably.³⁷⁹ Social protection systems are often seen as a means of implementing the right to social security.³⁸⁰ This thesis has taken note of the 2014 report of the Special Rapporteur on extreme poverty and human rights, arguing for greater attention to social protection and the establishment of a human right to social protection.³⁸¹ However, it is unclear of the added value of such a right, given the existence of both a right to an adequate standard of living, and social security.

When categorising such schemes, a distinction has traditionally been drawn between earned benefits (contributory systems where persons essentially "insure" themselves against defined risks) and those solely financed by public funds such as tax revenue (non-contributory). Contributory systems tend to be seen as more politically justifiable and acceptable than social assistance or welfare schemes that are seen by many as imposing "a burden on the productive members of society in order to benefit the unproductive."³⁸²

Although brief, Article 9 of the ICESCR confirms a broad understanding of the right to social security. By specifying that social security includes social insurance, it thereby acknowledges more than one form of protection. Liebenberg comments that although ICESCR Article 9 does not define social security, "given the express inclusion of 'social insurance', one can infer that the provision refers to both contributory and non-contributory social security benefits".³⁸³ Moreover, the CESCR also explicitly specifies that the right to social security includes the right to social assistance that is universal or targeted *non-contributory* schemes.³⁸⁴

While the revised Europe Social Charter includes separate articles (Articles 12 and 13)

³⁷⁹ Sepulveda, M., and Nyst, C., *The Human Rights Approach to Social Protection* (Ministry of Foreign Affairs of Finland 2012).

³⁸⁰ ILO 'World Social Security Report 2014/15: Building economic recovery, inclusive development and social justice' (International Labour Office Geneva 2014), p. xxi.

³⁸¹ General Assembly 'Report of the Special Rapporteur on extreme poverty and human rights (Philip Alston) to the General Assembly' (2014) UN Doc. A/69/297.

³⁸² Sandra Fredman, *Human Rights Transformed, positive rights and positive duties* (Oxford University Press 2008), p. 232.

³⁸³ Sandra Liebenberg 'Children's Right to Social Security. South Africa's International and Constitutional Obligations' (Conference on Children's Entitlement to Social Security organised by the Child Health Policy Institute, Soul City, Children's Rights Centre and the Committee of Inquiry into a comprehensive social security system for South Africa, Cape Town, February 2001).

³⁸⁴ CESCR 'General Comment 19: The Right to Social Security' (2008) UN Doc. E/C.12/GC/19, para 4(b).

on the right to social security and the right to social and medical assistance, it broadly understands social security to include both universal and professional schemes, and contributory (often classified as social insurance), non-contributory (often classed as social assistance) and combined allowances covering particular risks.³⁸⁵ This therefore does not contradict the CESCR's understanding of social security since it does not differentiate between traditional definitions of contributory systems (social insurance) and non-contributory (social assistance). Moreover, the ECSR notes

“that the division no longer corresponds entirely to the current situation as regards the European systems of social protection characterised by their complexity and their varying structures, the result of successive reforms and which often put social security and social assistance together.”³⁸⁶

Similarly, in 1993 in *Salesi v. Italy*, the ECtHR argued that the differences between social insurance and social assistance were not fundamental in the current development of social security law.³⁸⁷ It had already ruled in 1986 that a person's deprivation of her social insurance without a fair trial was covered by Article 6 (1) of the ECHR.³⁸⁸ In the afore-mentioned *Salesi* case the defendant was denied her 100% publicly financed disability allowance, which was thereby classified as social or welfare assistance. The ECtHR however saw no convincing reason for distinguishing between the two types of benefit, and concluded that Article 6(1) also remained applicable in this case. In determining the admissibility of a later case (*Stec v. UK*), the ECtHR had to decide whether non-contributory benefits fell within the scope of the interests protected by Article 1 of Protocol No. 1 (the right to property) in order to ascertain whether the alleged discriminatory treatment fell within its competence. In its 2005 admissibility decision, the Court concluded that non-contributory benefits did fall under Article 1 of Protocol 1 given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, the reliance of many

³⁸⁵ ECSR 'Conclusions XIII-4' (CoE Strasbourg 1996), p. 35-36.

³⁸⁶ *Ibid.*

³⁸⁷ *Salesi v. Italy* App no 13023/87 (ECtHR, 26 February 1993).

³⁸⁸ *Feldbrugge v. The Netherlands* [1986] Series A Vol 99 (ECtHR 8562/79).

individuals on social security and welfare benefits for survival, and the recognition by many domestic legal systems of individuals' need for certainty and security.³⁸⁹

There are also questions concerning what exactly the right to social security covers. In both its General Comment 19, and reporting guidelines for states, the CESCR follows the ILO specifications drawn up in the ILO Convention 102 on Social Security (Minimum Standards) (1952) and lists the contingencies as: health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and survivors and orphans.³⁹⁰ However, it is worth questioning whether these are still applicable and/or appropriate bearing in mind that the ILO Convention 102 was drafted when Western Europe was enjoying stable employment levels with the husband generally assumed as the breadwinner and the wife a mother and the main caregiver.³⁹¹ The contingencies also assume that the main source of insecurity comes from losing your job. In fact the ILO has already recognised other forms of insecurity in 1944. Recommendation 67 lists the nine contingencies mentioned in the Minimum Standards Convention that social insurance should cover and also establishes several principles for social assistance programmes to provide general assistance “for all persons who are in want and do not require internment for corrective care.”³⁹² This suggests that ILO Convention 102 was drafted to essentially govern social insurance rather than assistance.

A similar perspective can be seen in the revised European Social Charter and the European Code of Social Security.³⁹³ The ECSR distinguishes between social security and social assistance on the basis of entitlement: entitlement to social security rests on

³⁸⁹ *Stec v. the UK* (decision on admissibility) [2005] ECHR 2005-X (ECtHR 65731/01 and 65900/01)

³⁹⁰ CESCR ‘Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant On Economic, Social And Cultural Rights’ (2009) UN Doc. E/C.12/2008/2, paras 10 -21 and 27.

³⁹¹ Angelika Nussberger, ‘ILO’s Standard Setting in Social Security’ in Eibe Riedal (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer-Verlag 2007), pp. 103-116, p.108.

³⁹² ILO Recommendation 67: Income Security (26th Conference Session 12 May 1944). This Recommendation and others is discussed more fully in ILO ‘Setting Social Security Standards in a Global Society’ (International Labour Office, Geneva 2008), p. vii.

³⁹³ The European Code of Social Security is one of the key CoE standards in the field of social security. The Code defines norms for social security coverage and establishes minimum levels of protection which Parties must provide in such areas as medical care, sickness benefits, unemployment benefit, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, survivors' benefits, etc. As of 22 June 2016, it had been ratified by 21 countries. European Code on Social Security (adopted 16 April 1964, entered into force 17 March 1968) ETS No.048.

the contingency incurred while entitlement to social assistance rests on need.³⁹⁴ Therefore the Code of Social Security can be regarded as concerning social insurance only, and this is reflected in its listing of the same nine contingencies for social security as ILO Convention 102. The risk of need or poverty is covered by social assistance (Article 13 of the revised European Social Charter), which is outside the competence of this Code.³⁹⁵

Rather than listing certain contingencies, the commitment to social protection contained in ILO Recommendation 202, defines the social protection floor as covering “nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion”.³⁹⁶ This thus includes both the traditional elements assigned to social insurance and the social assistance element.

In the CESCR’s elaboration of the content of the right to social security, there is clearly a dichotomy between recognising that social security includes social assistance, and the listing of the nine principal areas social security should cover without also explicitly including the need to address general insecurity in the same paragraph.³⁹⁷ Social insurance is regarded as contributory insurance schemes providing pre-specified support for affiliated members in particular circumstances while social assistance is awarded on the basis of need to those who cannot afford insurance schemes or to those who are falling through the cracks of insurance schemes. Essentially this listing undermines the value of having the broad definition of social security and fails to represent the current understanding of the right to social security. Moreover by specifying such contingencies, it fails to fully protect persons from the vulnerabilities and insecurities created by the current global economy and future, presently unknown, threats.

³⁹⁴ ECSR ‘General Introduction, Conclusions XIII-4’ (CoE Strasbourg 1996), p. 36-37.

³⁹⁵ Jason Nickless ‘European Code of Social Security, short guide’ (Council of Europe Publishing, Strasbourg 2002) <www.coe.int/t/dg3/socialpolicies/source/socialsecurity/shortguide_en.pdf>, p. 8.

³⁹⁶ ILO Recommendation 202: National Floors of Social Protection (101st Conference Session 14 June 2012).

³⁹⁷ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19.

Another related challenge (perhaps the greatest) is the question of universality.³⁹⁸ Universality is a key principle in human rights law along with equality and non-discrimination. However, with regards to the right to social security there are questions and controversy about whether the application of this principle means that everyone receives a minimum income regardless of status and situation. A universal social pension for instance allows everyone over a certain age access to a minimum payment from the state regardless of income. This chapter views universality as meaning that everyone has the right to social security, and must be entitled to, and able to access, social security if they are in need. In some cases, this ‘need’ is determined by the person being in a certain situation such as the contingencies listed above i.e. being unemployed or above a certain age. In other cases, as earlier discussed, people may fall outside of these specific situations yet still be in need. To determine ‘need’ industrialised countries for instance usually means-test (i.e. examine income levels and amount of savings). In this instance the person concerned usually receives social assistance.

Breaking this down further, universality requires that everyone must be able to contribute to a social insurance scheme to cover certain contingencies, and that this access must be respected and protected by the state. Everyone must also have access to social assistance if they are unable to make sufficient contributions to insurance schemes and are in need of assistance for other reasons such as having an inadequate income. Such non-contributory schemes must be established by the state.³⁹⁹

There are also questions about whether conditionalities can undermine the universality principle. They are being increasingly applied to social security with governments conditioning receipt of such benefits on certain behaviour such as making a certain number of job applications or attending interviews with job-centre staff. Can a benefit therefore be regarded as universal if there are conditions attached to receiving it? From a human rights perspective, this conditioning of basic entitlements on ‘good behaviour’ such as the right to an adequate standard of living, health and education undermines the agency of a person. Moreover it can threaten the universality of the

³⁹⁸ Riedel (n 352), p. 26.

³⁹⁹ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 50. See also Asbjorn Eide ‘Economic and Social Rights’ in Janusz Symonides (ed.) *Human Rights: Concept and Standards* (UNESCO Publishing, 2000), p.148.

right to social security by resulting in the exclusion of those most in need, particularly already disadvantaged or marginalised persons, and exacerbate existing inequalities. This is examined further under the sub-heading below entitled ‘Accessibility’.

3.4 Content of the right to social security

Following the work done on other economic and social rights such as the right to education and health, numerous judicial and quasi-judicial decisions have established that social security must be available, acceptable, and accessible including affordable. However, as already indicated, there has so far only been limited analysis of what this actually means in practice, and the resulting state obligations to respect, protect and fulfil the right to social security including social assistance.

3.4.1. Available

According to the CESCR the concept of availability requires states to ensure a long-term social security system.⁴⁰⁰ This first requires an appropriate legal framework, establishing social security as a legal entitlement rather than an act of charity, accompanied by appropriate standards establishing right holders and duty bearers with appropriate accountability and enforcement mechanisms.

Such a framework prevents a person’s entitlement and access to social security being manipulated for political means, and captured by elites groups and special interest groups.⁴⁰¹ The Special Rapporteur on the right to food for instance, in his 2012 report on his mission to China, called on the country:

“to define the right to social security as a human right, which beneficiaries may claim before courts or administrative tribunals, and inform beneficiaries about their rights, which is essential to ensuring respect for the right to social security and reducing the risks of corruption or favouritism at the local level.”⁴⁰²

⁴⁰⁰ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 11.

⁴⁰¹ ECOSOC ‘Enhancing Social Protection and Reducing Vulnerability in a Globalizing World, Report of the Secretary-General’ (2001) UN Doc. E/CN.5/2001, para 12.

⁴⁰² UNHRC ‘Report of the Special Rapporteur (Olivier De Schutter) on the Right to Food: Mission to China’ (2012) UN Doc. A/HRC/19/59/Add.1, para 43(d).

An appropriate legal framework also helps protect social security from other threats such as “budgetary cuts resulting from economic downturns and political changes.”⁴⁰³ It will also guarantee the long-term involvement of state authorities in all stages of the programme regardless of political or policy change.

To fully hold governments accountable, an adequate legal framework must also be accompanied by mechanisms making them answerable for their performance.⁴⁰⁴ Importantly this includes courts and other redress mechanisms or institutions that apportion blame and punishment, provide remedies or action to put things right. It must also however be extended to processes that “determine what is working (so it can be repeated) and what is not (so it can be adjusted).”⁴⁰⁵ The High Commissioner for Human Rights has similarly recognised that establishing accountability goes beyond addressing past grievances to “correcting systematic failure to prevent future harm”.⁴⁰⁶ States must also implement monitoring mechanisms to find out what is happening where, and to whom; and review processes, either independent or non-independent, that assesses whether or not pledges, promises and commitments have been kept, and whether duties have been discharged.⁴⁰⁷

This has been recognised by CESCR’s General Comment 19 on the right to social security, which calls on states to establish a legislative framework, and provide opportunities for redress. Social protection needs to be embedded in a framework of legally binding and enforceable rights and obligations that enables beneficiaries of social protection to become ‘rights-holders’ that can make claims against the state. The General Comment also specifies that clear legal and institutional frameworks are needed to clarify the various roles and responsibilities of all stakeholders and spell out eligibility requirements, provide for mechanisms to ensure transparency and access to information about programmes, define the various roles and responsibilities of all

⁴⁰³ Hailu, Degol, Michelle Madeiros, and Paula Nonaka ‘Legal Protection for Cash Transfers: Why We Need It’ in Degol Hailu and Fabio Veras Soares (eds) *Poverty in Focus, Cash Transfers lessons from Africa and Latin America*, No. 15, (International Poverty Centre, Brazil 2008).

⁴⁰⁴ *Partnership for Maternal, Newborn and Child Health* (n 253), p. 5.

⁴⁰⁵ UNHCR (*Special Rapporteur on the Right to Health*) (n 252).

⁴⁰⁶ UNHRC ‘Report of the Office of the United Nations High Commissioner for Human Rights on preventable maternal mortality and morbidity and human rights’ (2010) UN Doc. A/HRC/14/39, para 33.

⁴⁰⁷ *Partnership for Maternal, Newborn and Child Health* (n 253), p. 5

those involved in implementing the programme and establish accessible complaints mechanisms. In addition to frequently asking states about possibilities for redress for people who have been denied their right to social security,⁴⁰⁸ the CESCR has called on State Parties to improve monitoring systems and the collection of data. It for instance called on Moldova to develop a reliable database providing timely, disaggregated and comparative statistics on social security issues.⁴⁰⁹ The CRC Committee and Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) have also made similar recommendations to State Parties in order to properly monitor the implementation of relevant policies.⁴¹⁰

This is not just confined to state institutions and services. The CESCR has noted the increasing number of private enterprises becoming more responsible for social services, and calls for strong and effective monitoring. In Zambia it recommends that the State Party exercise stronger monitoring functions in relation to private social security schemes and funds to ensure that those schemes provide adequate social protection to beneficiaries.⁴¹¹ Domestic courts have already applied this obligation to protect through regulation and monitoring. On 13 March 2001, the Latvian Constitutional Court ruled that the Transitional Provisions of the Social Insurance Law was inconsistent with the right to social security and Articles 9 and 11 of the ICESCR by effectively allowing non-compliance by employers who were failing to pay social insurance premiums into a fund for their employees, to the detriment of employees.⁴¹²

The emphasis on long term also requires sustainable funding since any sudden withdrawal of social security would result in increasing the vulnerability of persons it was supposed to protect. General Comment 19 recognises the importance of sustainability, stating “The schemes should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for

⁴⁰⁸ CESCR ‘Summary Records on New Zealand’ (2003) UN Doc. E/C.12/2003/SR.11; and CESCR ‘Summary Records on Canada’ (2006) UN Doc. E/C.12/2006/SR.9.

⁴⁰⁹ CESCR ‘Concluding Observations on Moldova’ (2003) UN Doc. E/C.12/1/Add.91, para 40.

⁴¹⁰ CRC Committee ‘Concluding Observations on Nigeria’ (2005) UN Doc. CRC/C/15/Add.257, para 23; and CEDAW Committee ‘Concluding Observations on Cambodia’ (2006) UN Doc. CEDAW/C/KHM/CO/3.

⁴¹¹ CESCR ‘Concluding Observations on Zambia’ (2005) UN Doc. E/C.12/1/ADD.106, para 44.

⁴¹² Case number 2000-08-0109 [2001] Constitutional Court (Latvia).

present and future generations.”⁴¹³ As well as being reiterated at the international level, this need for permanency (judicial guarantees matched by sustainable funding) has been adjudicated at the national level. In Latvia, following a decision by the government to reduce pensions, the Applicants highlighted that several basic legal principles follow from Article 1 of the Constitution, namely:

“the principle of protection of legitimate expectations, the principle of proportionality, the principle of the rule of law, the principle of social state, the principle of good governance and the principle of social solidarity.”⁴¹⁴

They further argued that the issue of old-age pensions

“has a long term nature and requires stability (and that) therefore legal order in this area should be sufficiently stable and unchanging, so that individual persons could plan their future with confidence based on legal provisions.”⁴¹⁵

This argument was upheld by the Latvian Constitutional Court. In its judgment on the unconstitutionality of the decision to reduce pensions, the Court amongst other things referred to “The principle of protection of legitimate expectations”⁴¹⁶ and upheld the rights of persons to plan with confidence their future in the context of the rights granted by this legal provision.⁴¹⁷

On the issue of sustainability, the CESCR has limited itself to responding to the situation of developed countries that already have a system in place. In such cases it has frequently asked State Parties whether their social security systems (particularly social pensions) are financially viable and whether they are expected to remain so in the coming years.⁴¹⁸ Often it has also asked for precise information on how the

⁴¹³ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 11.

⁴¹⁴ Case number 2009-43-01 [2009] Constitutional Court (Latvia).

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ CESCR ‘Summary Records on Hungary’ (2007) UN Doc. E/C.12/2007/SR.7, para 49; CESCR ‘Concluding Observations on Italy’ (2003) UN Doc. E/C.12/Q/ITA/2, para 16; and CESCR ‘Summary Records on Finland’ (2007) UN Doc. E/C.12/2007/SR.7, para 49.

security system has been financed.⁴¹⁹ It has also questioned policy decisions and its possible impact on the sustainability.⁴²⁰ In the list of issues presented to Belgium, the CESCR for instance asked the Government to

“provide detailed statistical information on an annual basis on the financing of the Ageing Fund established in 2001, as well as on other measures the State Party intends to take to cover the higher pensions and health costs arising from the ageing Belgian population.”⁴²¹

It similarly asked Italy and Iceland to indicate what measures are being taken to deal with these demographic changes, namely a decreasing overall population and an expected increase in the number of elderly persons dependent on social security.⁴²²

However, despite the importance of ensuring a sustainable social security system, the CESCR for the large part has refrained from expressing concern and formulating recommendations on how social security systems are to be financed. One exception is CESCR's concluding observations on San Marino's initial, second, third and fourth periodic reports. It explicitly recommends the State Party to consider “increasing the allowances financed directly through income tax, in particular the amount of the social pension, in order to ensure a decent standard of living for pensioners in accordance with Article 9 of ICESCR.”⁴²³ The Committee has also made occasional recommendations about how certain revenue gained should be used. It for instance called on the Democratic Republic of the Congo to ... ensure that revenues from the mining sector are allocated towards developing the Katanga province and providing its inhabitants with basic social services and infrastructure to improve their living conditions.⁴²⁴ Similarly following his 2007 mission to Bolivia, the former Special Rapporteur on the right to adequate food (Ziegler) called on the country to direct new resources from the hydrocarbon tax directly to the Zero Malnutrition Programme and

⁴¹⁹ CESCR ‘Concluding Observations on Monaco’ (2004) UN Doc. E/C.12/Q/MCO/1, para 15; and CESCR ‘Concluding Observations on Great Britain’ (2008) UN Doc. E/C.12/GBR/CO/5, para 16.

⁴²⁰ CESCR ‘Summary Records on Greece’ (2004) UN Doc. E/C.12/2004/SR.6, para 66.

⁴²¹ CESCR ‘List of Issues on Belgium’ (2006) UN Doc. E/C.12/BEL/Q/3, para 14.

⁴²² CESCR ‘List of Issues on Italy’ (2003) UN Doc. E/C.12/Q/ITA/2, para 16; and CESCR ‘List of Issues on Iceland’ (2002) UN Doc. E/C.12/Q/ICE/2, para 8.

⁴²³ CESCR ‘Concluding Observations on San Marino’ (2008) UN Doc. E/C.12/SMR/CO/4, para 26.

⁴²⁴ CESCR ‘Concluding Observations on the Democratic Republic of the Congo’ (2009) UN Doc. E/C.12/COD/CO/4, para 13.

the Renta Vitalicia Dignidad programme, both at the national level and at the municipal level.⁴²⁵

While for many this may be too prescriptive, there is potential or scope for the human rights community to go further in examining how states should guarantee appropriate and sustainable funding. Without prescribing a particular policy there are a number of existing principles that can be used as relevant parameters. The principle of solidarity in particular consistently underlies the funding of social security or protection, that is the sharing of advantage and burdens equally, under which contributions or taxes for financing benefits are charged on the basis of persons' ability to pay regardless of their individual risks.⁴²⁶ This is perceived as critical to both the sustainability of the public social security system and the securing of social justice through income redistribution."⁴²⁷

This is also stipulated in several international standards, resolutions and declarations. Article 71 of ILO Convention 102 requires that the costs of benefits and administration be borne effectively through insurance contributions or taxation in a manner that avoids hardship to persons of limited means. ILO Recommendation 202 on social protection floors calls on states to apply the solidarity principle in financing while seeking to achieve an optimal balance between the responsibilities and interests among those who finance and benefit from social security schemes.⁴²⁸ The European Code of Social Security also specifies

“The cost of the benefits provided in application of this (revised) Code and the related administrative costs shall be borne collectively in such a way as to prevent hardship to persons of small means and take account of the capacity of the persons protected to contribute.”⁴²⁹

⁴²⁵ *UNHRC (Special Rapporteur on the right to food)* (n 100), para 59(e).

⁴²⁶ OECD 'Adequacy and social security principles in pension reform' (Working Paper 3.1. Paris, 1997).

⁴²⁷ *Ibid.*

⁴²⁸ ILO Recommendation 202: National Floors of Social Protection (101st Conference Session 14 June 2012).

⁴²⁹ Article 76 of the revised European Code of Social Security (1990).

On several occasions this principle of solidarity has been applied and upheld by national and regional courts and quasi-judicial bodies. The ECSR for instance upheld the solidarity principle when monitoring State Parties' compliance with the European Social Charter. In 1998 it observed that in the Netherlands "that sickness insurance is no longer collectively financed for most workers since 1996" and thus "considered that by making sickness risks depend principally on enterprises the principle and spirit of social security are infringed and no longer in conformity with Article 12 para 3."⁴³⁰ The ECSR further stated that:

"the effective social protection of all members of society... involves maintaining in the Contracting Parties Social security systems functioning through solidarity, as this represents a basic safeguard against differentiation in this field... Financing by the community as a whole in the form of contributions and/or taxes is a vital factor of this safeguard, as it guarantees the sharing of risks between the various members of the community."⁴³¹

However, the CDESCR has so far referred to the solidarity principle on very few occasions. It once noted that in El Salvador the administration of the pension fund to private organizations dispensed with the principle of solidarity of the redistributive system.⁴³² However it merely "recommend(ed) that the State Party conduct an evaluation of the social security system adopted in 1998."⁴³³ The CDESCR could have gone further and stressed to call on states to ensure the sustainability of social security through the principle of solidarity. The CESR also has other tools to use in the event of solidarity being insufficient to ensure the sustainability of social security systems because of reductions in working populations. The CDESCR and other human rights bodies can use the parameters developed in Chapter 2 to evaluate whether the state is optimising its revenue collection to secure the right to social security. As Chapter 2 explains, states are obligated to mobilise revenue from their resources and broaden their fiscal space in progressive, non-discriminatory ways that could include financial transaction taxes, improving tax collection, and combating corruption, tax evasion/havens and illicit financial flow.

⁴³⁰ ECSR 'General Introduction, Conclusions XIV-1' (CoE Strasbourg 1998), p. 47.

⁴³¹ Ibid.

⁴³² CDESCR 'Concluding Observations on El Salvador' (2007) UN Doc. E/C.12/SLV/CO/2, para 15.

⁴³³ Ibid, para 33.

3.4.2. Adequacy

Under international human rights law, social security must be adequate in terms of both amount and duration “in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in Articles 10, 11 and 12 of the Covenant”.⁴³⁴ This principle has also been frequently recognised and emphasised by the former Independent Expert (later Special Rapporteur) on extreme poverty and human rights.⁴³⁵ The ECSR has similarly noted the importance of social security systems being “adequate to protect the population, particularly as regards families, the disabled, the elderly and migrant workers.”⁴³⁶ Human rights bodies are also clear that the amount awarded must be monitored and updated regularly to reflect changes in living costs.⁴³⁷

Human rights practitioners have stipulated that the amount must also enable the person to graduate from poverty, as part of states’ obligations to ensure substantive equality. Fredman for instance has noted that “particular models of the welfare state can also entrench socio-economic inequalities both through stigmatising welfare recipients, and through keeping benefits levels low.”⁴³⁸ Bilchitz similarly observes “if the culturally variable range of needs is not met, they are likely to impair the ability of people to realise their purposes within a particular society.”⁴³⁹ Inadequate benefits can perpetuate disadvantage through not enabling people to feed themselves and their families adequately and can thus reduce attention levels at schools and the ability to learn and increase sickness levels. It can also force people to pursue unhealthy or dangerous work that can further exclusion.⁴⁴⁰

However, despite this consensus that the state must respect and protect the right to

⁴³⁴ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 22.

⁴³⁵ UNHRC ‘Report of the Independent Expert on the question of human rights and extreme poverty (Magdalena Sepulveda)’ (2010) UN Doc. A/HRC/14/31, para 87.

⁴³⁶ ECSR ‘General Introduction, Conclusions XII-1’ (CoE Strasbourg 1991).

⁴³⁷ CESCR ‘Concluding Observations on Lithuania’ (2004) UN Doc. E/C.12/1/ADD.96, para 16. See also ECSR ‘General Introduction, XIII-4’ (CoE Strasbourg 1996), p. 56.

⁴³⁸ Fredman (n 382), p. 226 and 232.

⁴³⁹ David Bilchitz, *Poverty and fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2008), p. 192.

⁴⁴⁰ Fredman (n 382), p. 226 and 232.

adequate social insurance, and if necessary provide adequate social assistance directly, there remains a larger question of how the initial adequacy levels in terms of amount is defined or measured. Questions include whether a quantitative approach should be taken, since circumstances differ from country to country? And what goods and services should it cover?

Mostly adequacy has been determined by comparison to a macro-economic indicator such as the average wage, the national income per capita, and/or household equivalent income.⁴⁴¹ The ILO for instance has traditionally specified that the minimum rate of benefit must be based on the wage level in the country concerned.⁴⁴² The exact rate differs according to the category of population covered and benefit in question.⁴⁴³ The European Parliament resolution 2010/2039 stipulates that adequate minimum income schemes must set minimum incomes at a level equivalent to at least 60% of median income in the member state concerned.⁴⁴⁴ In 2012, the ECSR held that “the income of the elderly should not be lower than the poverty threshold, defined as 50% of median equivalised income...”⁴⁴⁵

This approach however assumes that wages themselves are fair and secure, yet in many countries (developed and developing) there are very low wages, and working poverty is on the increase especially amongst the unskilled, migrants, and racial, ethnic and religious minorities. Despite working full time in the formal sector, some people are unable to cover their basic needs and often rely on social assistance.⁴⁴⁶ While the CESCR has also used minimum wage as a benchmark,⁴⁴⁷ it has also challenged the adequacy of the minimum wage itself thereby implicitly acknowledging the weakness of this approach. It noted with concern that in Estonia the unemployment benefits that are calculated at 50% of the amount earned in

⁴⁴¹ *Tooze* (n 161), p. 346.

⁴⁴² ILO Convention 102: Social Security (Minimum Standards) (35th session of the International Labour Conference 28 June 1952, entered into force on 27 April 1955).

⁴⁴³ *Ibid.*

⁴⁴⁴ European Parliament ‘Resolution on the role of minimum income in combating poverty and promoting an inclusive society in Europe’ (20 October 2010) 2010/2039(INI).

⁴⁴⁵ *Pensioners’ Union of the Athens-Piraeus Electric Railways (ISAP) v. Greece* [2012] (ECSR, 78/2012). Equivalised income is defined as the household’s total disposable income divided by its “equivalent size”, to take account of the size and composition of households.

⁴⁴⁶ BBC ‘Most people classed as being in poverty ‘have job’ *BBC*, (London, 8 December 2013) Available from <www.bbc.com/news/uk-25287068> accessed 10 December 2013.

⁴⁴⁷ *Tooze* (n 161), p. 347.

previous job, may in some cases be insufficient to secure decent standard of living for worker and family.⁴⁴⁸ The approach of using such parameters also fails to take into account the different needs of individuals: The CESCR's General Comment on the rights of persons with disabilities notes that social security benefits for persons with disabilities should address their special needs and expenses.⁴⁴⁹

As Tooze noted, the inability to afford essential goods has also been used to judge the adequacy of social security in a particular country.⁴⁵⁰ On several occasions, the CESCR, and other human rights mechanisms including the Special Rapporteur on the right to adequate food, have used the number of people using food banks to demonstrate the inadequacy of benefits.⁴⁵¹ The CESCR noted in Canada “about 51% of food bank users while receiving social assistance benefits in 2005, still had to resort to food banks because of insufficient level of these benefits.”⁴⁵² While these approaches can be useful and clearly indicative of a problem, it would surely be of greater value and more proactive if states could be guided on how to calculate adequacy to prevent such destitution in the first place.

Both domestic courts⁴⁵³ and the CESCR⁴⁵⁴ have suggested that states establish their own levels of adequacy in line with people's ability to access goods and services they require to enjoy the Covenant's rights and to monitor them accordingly. However, more guidance is needed in this regard as states have echoed the claims of some commentators that it is difficult to establish minimum consumption basket.⁴⁵⁵ In 1998 for instance the UK Labour Government “rejected proposals to link benefit levels to

⁴⁴⁸ CESCR ‘Concluding Observations on Estonia’ (2002) UN. Doc. E/C.12/1/Add.85, para 17.

⁴⁴⁹ CESCR ‘General Comment No 5: Persons with Disabilities’ (1994) UN Doc. E/1995/22, para 28.

⁴⁵⁰ Tooze (n 161), p. 346.

⁴⁵¹ Olivier De Schutter, ‘Food banks can only plug the holes in social security nets’ *The Guardian*, (London, 27 February 2013) <www.theguardian.com/commentisfree/2013/feb/27/food-banks-social-safety-nets> accessed 10 February 2015.

⁴⁵² CESCR ‘Concluding Observations on Canada’ (2006) UN Docs. E/C.12/CAN/CO/4 -5, para. 27.

⁴⁵³ German Federal Constitutional Court (BVerfG) Judgment of the First Senate of 18 July 2012 – 1 BvL 10/10 – paras (1-110). The Federal Constitutional Court ruled that benefits provided to asylum seekers are evidently insufficient since they had remained unchanged since 1993 despite considerable price increases. There has also been no comprehensive needs-based calculation.

⁴⁵⁴ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 22. The CESCR however has refrained from producing a list of the goods and services that people require in order to enjoy the rights contained in the ICESCR.

⁴⁵⁵ Rolf Kunnemann, ‘Basic food income – option or obligation’ (FIAN International 2005), p. 12.

estimates of minimum needs, arguing that there is no objective way of deciding what constitutes an adequate income.”⁴⁵⁶

There is increasing guidance available on determining adequacy through referencing recent court cases and the work of social organisations. Growing jurisprudence shows several Courts going beyond calling on states to do the needs-assessment to actually providing indications of what should be included.⁴⁵⁷ While some needs are clearly essential for survival such as access to food, safe housing, health care, and can be regarded as subsistence/survival needs others may be more technical such as ensuring access to justice without which recipients are unable to seek and obtain a remedy for breaches and escape their poverty. Technical needs could also include access to training and education that would help facilitate the move out of poverty, and help ensure substantive equality. Courts can and have given some guidance with regards to such technical needs. For instance on 9 April 2014, following a judicial review of the benefits awarded to asylum seekers, the UK High Court accused the UK Government of failing to account for their real needs and the cost of maintaining interpersonal relationships and a minimum level of participation in social, cultural and religious life.⁴⁵⁸ This included travel by public transport to attend appointments with legal advisors, where this is not covered by legal aid; telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress their asylum claims, such as with legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim; and writing materials where necessary for communication and for the education of children.⁴⁵⁹

For what Fabre regards as “socially determined needs”⁴⁶⁰ such as access to television, Internet or public transport, the CESCR could suggest that State Parties use a methodology such as the Joseph Rowntree Foundation (JRF) in the UK, who has annually engaged with the public about the minimum consumption basket to determine what the living wage should be in the UK. In 2014, for instance, these

⁴⁵⁶ Steven Kennedy, Richard Cracknell and Roderick McInnes, *Welfare Benefits Updating Bill, Bill No 116 of Session 2012-13* (2013 HC Research paper 13/01), p. 6.

⁴⁵⁷ *Regina (Refugee Action) v. Secretary of State for the Home Department* [2014] D WLR 089 (EWHC 1033 (Admin))

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Cécile Fabre, ‘Social Rights in European Constitution’ in Grainne De Burca and Bruno De Witte (eds.) *Social Rights in Europe* (Oxford University Press 2005), p. 17.

consultations revealed that the public considered for the first time access to computers and the Internet as essential for all groups, including pensioners. They also considered a car essential for families with children, and that other households, while not needing a car, require more taxis because bus services are insufficiently flexible in terms of frequency and timetabling.⁴⁶¹

Duration

With regards to duration, the situation appears a little more straightforward. As noted in the CESCR's General Comment on the right to social security, adequacy is also a question of duration, and in human rights law social security should be provided as long as it is needed. With regards to the situation in Estonia the CESCR expressed concern about the limited duration of the payment of unemployment benefits and called on the State Party to review its social security policy to ensure that benefits, both in terms of amount and duration guarantee an adequate standard of living to recipients and their families.⁴⁶² The ECSR similarly clarified with regards to the right to social and medical assistance, "the assistance must be provided as long as the need persists in order to help the person concerned to continue to lead a decent life."⁴⁶³ In *European Roma Rights Centre (ERRC) v. Bulgaria*, (18 February 2009), the ECSR concluded that the 2006 and 2008 amendments to the Bulgarian Social Assistance Act, which lowered the maximum time periods for which most unemployed persons of working age can obtain monthly social assistance benefits violates Article 13(1) of the Revised Charter. While by its nature there may be some limits to social insurance, it is clear that there must be in place a system of social protection that includes adequate social assistance for as long as the person is in need and that does not leave people without the means to live a life in dignity.

3.4.3. Coverage (eligibility)

As established earlier, the principles of universality requires states to ensure that everyone in need is entitled to receive social security, with need usually being determined by a means test or by being in particular situations such as unemployed, old age or sick. This entitlement must be respected, protected and fulfilled by states.

⁴⁶¹ Donald Hirsch, Abigail Davis, and Matt Padley, 'A Minimum Income Standard for the UK in 2014' (JRF, York, 2014) <www.jrf.org.uk/report/minimum-income-standard-uk-2014> accessed 5 June 2015.

⁴⁶² CESCR 'Concluding Observations on Estonia' (2011) UN Doc. E/C.12/EST/CO/2, para 18.

⁴⁶³ ECSR 'Conclusions XIII-4' (CoE Strasbourg 1996), p. 55-57.

Yet many states question whether migrants (particular irregular), refugees and asylum seekers should benefit regardless of need. Several State parties, including France and Monaco, have reservations to Article 9 of the ICESCR allowing them to award social benefits only to residents.⁴⁶⁴ As Dupper notes, some countries deny social assistance to irregular migrants altogether, while others recognize entitlements only to minimal forms of aid that can include housing, food vouchers.⁴⁶⁵ This system ignores the contribution such migrants make to an economy including by paying indirect taxes. Unfortunately, however, and as noted by several academics, international human rights treaty law is not as explicit with regards to the eligibility of migrants (especially irregular) and refugees and asylum seekers.⁴⁶⁶ While there are signs of it being progressively interpreted and applied, so far there still appears to be two approaches; one emphasizing non-discrimination and the right of everyone to social security, and the second related to the prevention of destitution and allowing a reduced rate to be paid to migrants and refugees.

While the ICESCR does not explicitly in its General Comment refer to irregular migrants, since it clearly states that all non-nationals (including migrant workers, refugees, asylum-seekers and stateless persons) should have access to both contributory and non-contributory systems for income support, affordable access to health care and family support, and has frequently reiterated the right of all to social security, one can infer that irregular migrants are entitled to receive social security if in need. Moreover, although not explicitly referring to the right to social security, its concluding observations have called on states to ensure that migrants, including those undocumented, can enjoy the right to health, adequate standard of living, education and access to essential services for which social security remains key.⁴⁶⁷ Several of the other treaty bodies have also recognized the rights of undocumented migrants to social security, again taking a non-discrimination approach. The CERD Committee has made specific recommendations concerning undocumented migrants and the right to social

⁴⁶⁴ See UN Treaty Collection, Chapter IV Human Rights, Part 3: International Covenant on Economic, Social and Cultural Rights. Available from: <http://treaties.un.org/>

⁴⁶⁵ Ockert Dupper, *Migrant workers and the right to social security: an international perspective* (2007) 18(2) *Stellenbosch Law Review*, pp. 219-254, p. 251.

⁴⁶⁶ Paul Schoukens and Danny Pieters, 'Explanatory Report on the Access to Social Protection for Illegal Labour Migrants' (CoE Publishing, Strasbourg 2004).

⁴⁶⁷ CESCR 'Concluding observations on the Netherlands' (2010) UN Doc. E/C.12/NDL/CO/4-5, para 25(a); CESCR 'Concluding observations on Norway' (2013) UN Doc. E/C.12/NOR/CO/5, para 21; and CESCR 'Concluding Observations on the UK' (2009) UN Doc. E/C.12/GBR/CO/5, para 27.

security. It for instance observed with concern that in Canada undocumented migrants and stateless persons, particularly those whose application for refugee status has been rejected but who cannot be removed from Canada, are excluded from eligibility for social security and health care, as it requires proof of residence in one of Canada's provinces.⁴⁶⁸ The CRC Committee has similarly recognised that policies and programmes and measures to protect children from poverty and social exclusion must include children in the context of migration regardless of their status.⁴⁶⁹

Article 27 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted December 1990) however is more ambiguous than similar provisions in the other human rights treaties. It stipulates that:

“With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.”

In clarifying, the Convention's monitoring body, the Committee on Migrant Workers, (CMW Committee) recalled that “Article 9 of the Covenant (ICESCR) applies to all migrant workers, regardless of their legal status and documentation,” yet also stipulated that under Article 27 of the Convention on Migrant Workers, assistance is dependent on whether, “the applicable legislation of the State Party concerned provides for such an entitlement.”⁴⁷⁰ As Dupper notes that States Parties can thus “adopt provisions that would, for example, differentiate between regular and irregular

⁴⁶⁸ CERD Committee ‘Concluding Observations on Canada’ (2007) UN Doc. CERD/C/CAN/CO/18, para 23.

⁴⁶⁹ CRC Committee ‘Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration’ (28 September 2012).

⁴⁷⁰ CMW Committee ‘General Comment on the Rights of Irregular Migrants’ (2013) UN Doc. CMW/C/GC/2, paras 67-71

migrants” and argues that this “negat(es) the protection that the article is meant to confer on all migrants, irrespective of their status.”⁴⁷¹

The CMW Committee further suggests a two-tiered approach by stipulating

“that in cases of extreme poverty and vulnerability, States Parties should provide emergency social assistance to migrant workers in an irregular situation and members of their families, including emergency services for persons with disabilities, for as long as they might require it.”⁴⁷²

Again while not explicitly recognising the entitlement of migrants to social security, as already noted in 2012, the ILO has moved from its traditional employment based approach to a more universal approach, calling on states to implement social protection floor for all.⁴⁷³ However it has fallen short of explicitly acknowledging that migrants (documented and undocumented), refugees and asylum seekers are entitled to the social protection. Instead, while reaffirming the right to social security and the principle of non-discrimination, Recommendation 202 states “Subject to their existing international obligations, Members should provide the basic social security guarantees referred to in this Recommendation to at least all residents and children, as defined in national laws and regulations.”

The European regional systems appear to promote a two-tier system on the basis of nationality. The European Social Charter formally restricts access to social security (insurance) and assistance benefits to those legally moving to and residing in the territory in question,⁴⁷⁴ and to only those lawful refugees providing the State Party has accepted these obligations under this charter and other applicable treaties.⁴⁷⁵ This

⁴⁷¹ *Dupper* (n 465), p 233.

⁴⁷² CMW Committee ‘General Comment on the Rights of Irregular Migrants’ (2013) UN Doc. CMW/C/GC/2, paras 67-71

⁴⁷³ ILO Recommendation 202: National Floors of Social Protection (101st Conference Session 14 June 2012).

⁴⁷⁴ An appendix to the revised European Social Charter stipulates “Without prejudice to Article 12, paragraph 4, and Articles 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.”

⁴⁷⁵ An appendix to the revised European Social Charter stipulates that state parties will grant refugees and stateless persons “treatment as favourable as possible, and in any case not less favourable than

however, as Langford notes, is slowly being more expansively interpreted.⁴⁷⁶ In 2004, the ECSR found that the rights of children to social, legal and economic protection (Article 17) in France were contravened by a 2002 legislative reform that restricted access to medical services for children of illegal immigrants.⁴⁷⁷ The ECSR held that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”⁴⁷⁸ Although the complainants also challenged the ending of the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment, the ECSR only found a violation of Article 17 (right of children to protection), and not Article 13 on the right to social and medical assistance. In this regard it noted that the legislation in question does not deprive illegal immigrants of all entitlement to medical assistance, since it does provide for treatment for emergencies and life. It also argued that Article 17 was more expansive and directly inspired by the CRC and thus protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance.⁴⁷⁹

In 2006, the CoE’s Parliamentary Assembly clarified that “Social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity.”⁴⁸⁰ However it does recognise that due to their particularly vulnerable situation children should be entitled to social protection “on the same footing as national children.”⁴⁸¹

Three years later, in 2009, the ECSR also explicitly interpreted Article 13.4, as requiring State Parties to provide emergency social assistance to “all persons requiring it, including those who are unlawfully present for as long as their need for it persists and whenever the need arises.”⁴⁸² This was upheld in 2012 in *CEC v. The Netherlands*

under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.”

⁴⁷⁶ Malcolm Langford, ‘The Right to Social Security and Implications for Law, Policy and Practice’ in Eibe Riedal (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer-Verlag 2007), pp. 29-53, p. 30.

⁴⁷⁷ *International Federation of Human Rights Leagues (FIDH) v. France* [2003] (ECSR, 14/2003).

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ CoE ‘Resolution 1509 Human Rights of Irregular Migrants’ (2006) Resolution 1509 (2006).

⁴⁸¹ *Ibid.*

⁴⁸² ECSR ‘Conclusions XIX-2, Luxembourg’ (CoE Strasbourg 2009).

the ECSR found that the Netherlands was violating the rights of irregular migrants in particular Article 13(4) by failing to provide shelter and access to medical assistance.⁴⁸³ This emergency social assistance will be more limited than that allocated to nationals or foreigners covered by paragraph 1, since the ECSR has specified that the minimum of emergency aid provided only has to be enough “... to enable them to cope with an immediate state of need (accommodation, food, emergency care and clothing).”⁴⁸⁴

The ECtHR has used the article on non-discrimination in conjunction with other articles such as the right to peaceful enjoyment of property to protect access to social security including social assistance for all regardless of whether they had contributed to the scheme. In *Stec v. the UK*, the ECtHR considered “If a State does decide to create a benefits scheme, it must do so in a manner which is compatible with (the right to the enjoyment of Convention rights without discrimination.”⁴⁸⁵ This has also included non-nationals, although in this case the person in question has been residing lawfully in the state concerned.⁴⁸⁶ In fact with regards to the lauded *Gaygusuz v. Austria* decision of the ECtHR, Dembour observes that “it merely targeted the exclusion of legally resident migrant workers from social security benefits, which was already an exceptional phenomenon in the mid-1990s.”⁴⁸⁷ While Dembour is very critical of the ECtHR, it is clear that the Court did not explicitly address the issue of access by irregular migrants and universal coverage. In reality, however the principle of non-discrimination should stay the same.

The EU Charter on Fundamental Rights focuses on the rights of EU residents, and following the principle of equal treatment and non-discrimination requires states to ensure that those legally residing in an EU country have the same conditions as the nationals of the country.⁴⁸⁸ EU law thus “distinguishes between EU citizens and non-

⁴⁸³ *Conference of European Churches (CEC) v. The Netherlands* [2013] (ECSR, 90/2013).

⁴⁸⁴ ECSR ‘General Introduction, Conclusions XIII-4’ (CoE Strasbourg 1996). p. 62.

⁴⁸⁵ *Stec v. the UK* (decision on admissibility) [2005] ECHR 2005-X (ECtHR 65731/01 and 65900/01), para 55.

⁴⁸⁶ *Gaygusuz v. Austria* [1996] ECHR 1996-IV (ECtHR 17371/90).

⁴⁸⁷ Marie Bénédicte Dembour, ‘*Gaygusuz* Revisited: The Limits of the European Court of Human Rights’ Equality Agenda’ (2012) 12(4) *Human Rights Law Review*, pp. 689-721.

⁴⁸⁸ Article 18 of the Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on the basis of nationality.

EU citizens (third-country nationals).”⁴⁸⁹ There is thus no entitlement of refugees, irregular migrants and/or migrants from third states to social security. Moreover with many governments arguing that they need to limit the access of EU migrants to benefits to prevent ‘benefit tourism’⁴⁹⁰, this already narrow understanding of non-discrimination is being further limited by the European Court of Justice (ECJ), whose judgments on the issue rarely refer to international human rights law or the rulings and judgments of the ECSR and the ECtHR. The European Commission (EC) for instance claimed that the UK’s introduction of tougher ‘right to reside’ tests for EU nationals were discriminatory. However, the Advocate General said that such discrimination was justified to protect taxpayers’ money from abuse. While this opinion is non-binding, it indicates the decision that the court may later take.⁴⁹¹ In 2015 the ECJ ruled that a member state may exclude EU citizens who go to that state to find work from certain non-contributory social security benefits.⁴⁹²

Domestic courts have also been cautious in explicitly affirming the principle of universal coverage as including all migrants (especially irregular), refugees and asylum seekers. In a petition to the South African Constitutional Court, permanent residents of South Africa alleged that the exclusion of non-citizens from social grant entitlement was unfair discrimination. While the Court held that the Constitution gave ‘everyone’ the right to social security and not just citizens, it qualified this to those residing in the country legally. It found the exclusion of permanent residents amounted to unfair discrimination since they had become part of South African society, made their homes in South Africa and were on track to becoming citizens.⁴⁹³ In light of this reasoning, it is doubtful whether this ruling would be extended to temporary and/or irregular migrants who typically have more tenuous links to the country.⁴⁹⁴ When other national courts have made rulings with regards to irregular migrants and asylum seekers receiving benefits, they have usually used the principle

⁴⁸⁹ Frans Prennings, ‘Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?’ (2013) 9(1) Utrecht Law Review.

⁴⁹⁰ Benefit tourism is a political term coined in the 1990s and later used for the perceived threat that a huge number of EU citizens from the newly joined states would move to the existing member states to benefit from their social welfare systems rather than to work.

⁴⁹¹ Case C-308/14 *European Commission v. United Kingdom of Great Britain and Northern Ireland* (Opinion of Advocate General Cruz Villalón) [2015] (ECJ 6 October 2015)

⁴⁹² C-67/14 *Jobcenter Berlin Neukölln v Nazifa, Sonita, Valentina and Valentino Alimanovic* [2015] OJC 142.

⁴⁹³ *Khosa v. Minister of Social Development* [2004] BCLR 569 (ZACC 11).

⁴⁹⁴ *Bilchitz* (n 439), p. 173.

of minimal level of subsistence for a life in dignity for example in Switzerland⁴⁹⁵ or preventing destitution in line with Article 3 of the ECHR such as in the UK *Limbuella* case. In this case the House of Lords held that the refusal of any assistance, beyond a list of charities, to the claimant who had sought asylum on the day after arrival, amounted to inhuman or degrading treatment.⁴⁹⁶ This was however premised by the fact that the state was to blame in not allowing refugees and asylum seekers to work.

More progressively, in 2012 the German Federal Constitutional Court used the principle of non-discrimination to declare that the 1993 Asylum Seekers Benefit Act was unconstitutional for providing different amounts of benefit to residents and non-residents. It ruled that the fundamental right to a guaranteed minimum existence applied equally to German and foreign nationals living in Germany.⁴⁹⁷ This right guarantees all people in need the material conditions necessary for their physical existence and minimum participation in social, cultural and political life. As FIAN Germany notes, the Court explicitly prohibits “general differentiation of benefits based on residence status”, observing that any differentiation must be based on a transparent needs assessment.⁴⁹⁸

Universality is a clear human rights principle supported by the principles of non-discrimination and equality. While this view has been taken by most of the treaty monitoring bodies, at the regional and national levels courts are taking a different angle that focuses on the principle that people should not be left without what is needed to survive in dignity regardless of their status. While this recognition that everyone must have enough to survive in dignity is positive, this two-tiered approach being adopted by the European Social Charter amongst others, violates the non-discrimination principle of international human rights law. This two-tiered approach, which includes a lower rate for certain members of the population based on their status rather than need can promote unequal treatment, and widen inequality between

⁴⁹⁵ *V. v. Einwohnergemeinde X. und Regierungsrat Des Kantons Bern* [1995] BGE/ATF 121 I 367 (Swiss Federal Court).

⁴⁹⁶ *R (Limbuella) v. Secretary of State for the Home Department* [2006] 1 AC 396 (UKHL 66).

⁴⁹⁷ German Federal Constitutional Court (BVerfG) Judgment of the First Senate of 18 July 2012 – 1 BvL 10/10 – paras (1-110).

⁴⁹⁸ FIAN Germany ‘Abolish the Asylum Seekers Benefits Act!’ FIAN Germany Policy Brief (FIAN Germany 2012)
<www.fian.org/library/publication/germany_asylum_seekers_benefits_act_must_be_abolished>
accessed 24 July 2014.

different sectors of the population by not giving them the same chance to escape poverty. Following on from the discussions under the heading of ‘Adequacy’ earlier in this Chapter, this approach contravenes state’s positive obligations to ensure substantive equality. Given this there are clear gaps between core human rights principles and the application of law in practice.

3.4.4. Accessible

Universality also means that those in need must be able to access social security. CESCR has particularly recognised that the accessibility of economic and social rights has four dimensions, namely non-discrimination; physical accessibility; financial accessibility and information accessibility.⁴⁹⁹ Each of these dimensions must therefore be respected, protected and, where it is not already enjoyed directly, fulfilled by states.

States must address the real impediments preventing certain persons from accessing and enjoying their right to social security including social assistance. This includes ensuring that any conditionalities imposed can easily be met by beneficiaries and does not result in exclusion from the social security scheme. However, those in need are exactly those who may have the most problems accessing social security. Illiteracy and lack of education, physical distance and/or little public transport in poorer areas, corruption, and a lack of documentation all disproportionately affect those living in poverty especially women, and can prevent people being aware of their entitlements to social assistance and being able to access them. The same factors can also make it difficult for these individuals to comply with conditionalities such as actively looking for work. Given the increasingly strict sanctions for non-compliance such as the suspension or termination of benefits, this can result in losing access to social security. In developed countries this is one of the biggest causes of problems in accessibility. Other problems include the linking eligibility with household incomes. This assumes the equal distribution of resources within a household and can leave women in particular not having access to their own income. So far, despite the links with the principles of non-discrimination and equality, this issue of accessibility has not been fully addressed at either the national or international levels.

⁴⁹⁹ CESCR ‘General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (2000) UN Doc. E/C.12/2000/4, para 12.

CESCR's recommendations have included both positive and negative actions for the state. It has called on countries to remove administrative obstacles preventing different groups of persons from gaining the personal documents necessary to realise their right to social security.⁵⁰⁰ Positive recommendations have included "...widely disseminat(ing) accessible information on system to all, and especially to those who, owing to language, educational or cultural difficulties, need specific targeted information",⁵⁰¹ and "carry(ing) out a targeted information campaign about the pension reforms to make people aware of their rights and responsibilities."⁵⁰² Regarding physical access, the CESCR has also called on states to allocate resources for making the necessary arrangements for improving accessibility of public institutions and services for people with disabilities,⁵⁰³ and it is probable that similar positive recommendations can be made regarding other vulnerable groups to access social security. On the subject of conditionalities, while the CESCR and the ECSR recognise that they must be reasonable and not lead to destitution,⁵⁰⁴ there have been very few concrete recommendations on the impact of these and the accompanying sanctions on accessibility. With regards to the job seeking requirements in Germany, for instance, the CESCR's concerns focused on possible violations of Articles 6 and 7 of the ICESCR regarding individual's right to freely accept employment of his or her choosing as well as the right to fair remuneration, and does not include the impact this might have on people's ability to access social security.⁵⁰⁵

At the national level while there have been few court decisions on the accessibility of the right to social security, there are several cases concerning other rights that can be used to clarify and demonstrate states' positive obligations in this regard. In the often-quoted Canada *Eldridge v. British Columbia*, for instance, the Canadian Court ruled that, in compliance with the right to equality that obligates government actors to

⁵⁰⁰ CESCR 'Concluding Observations on Monaco' (2006) UN Doc. E/C.12/MCO/CO/1, para 10; and CESCR 'Concluding Observations on Russia' (2003) UN Doc. E/C.12/1/Add. 94, para 12.

⁵⁰¹ CESCR 'Concluding Observations on New Zealand' (2003) UN Doc. E/C.12/1/Add.88, para 29.

⁵⁰² CESCR 'Concluding Observations on Great Britain' (2009) UN Doc. E/C.12/GBR/CO/5, para 23.

⁵⁰³ CESCR 'Concluding Observations on Turkey' (2011) UN Doc. E/C.12/TUR/CO/1, para 11.

⁵⁰⁴ The ECSR for instance recognizes where states parties link social assistance to an individual willingness to seek employment or undergo vocational training, conditions must be reasonable and contribute to finding a lasting solution to the individual's needs and regarding Art 13 only if the individual in need is not deprived of their source of subsistence. See Urfan Khaliq and Robin Churchill 'The European Committee of Social Rights' in Malcolm Langford, *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*. (Cambridge University Press 2008), pp. 428-452, p. 441.

⁵⁰⁵ CESCR 'Concluding Observations on Germany' (2011) UN Doc. E/C.12/DEU/CO/5, para 19.

allocate resources to ensure that disadvantaged groups have full advantage of public benefits, interpreters must be provided to help the deaf secure access to health care.⁵⁰⁶

However, like the CESCRC, there are even fewer on the possible impact of conditionalities on access to social security. For example one of the few court cases in the UK concerning conditionalities focused on legal technicalities rather than substantive questions of discrimination. In 2013 the UK Supreme Court found that the government's employment schemes, which made jobseekers work unpaid under the threat of having benefits stripped, were operating outside of the law.⁵⁰⁷ The Court ruled that the "Work Programme" schemes had not been enacted and implemented entirely lawfully and did not enhance employment opportunities as required by Section 17a of the Jobseekers Act 1995, which regarded "work-related activity" to be any "activity which makes it more likely that the person will obtain or remain in work or be able to do so." In response to this ruling of the Appeal Court, the Government drafted and the Parliament adopted the 2013 Jobseeker Act as an emergency piece of legislation, to address the difficulties in the 1995 Act of the same name. This new Job Seekers Act had a retrospective aspect, by making past actions of the government, which the courts had considered unlawful, to be lawful.⁵⁰⁸ In 2013, the Supreme Court found this new law to be unlawful, contravening their rights under Article 6 (right to fair trial) of the ECHR as given effect by Section 1 of the Human Rights Act 1998.⁵⁰⁹

Governments must also ensure that social security is financially accessible i.e. affordable. This includes social insurance. However, low and irregular wages, exacerbated by the "flexibilisation" of labour markets worldwide, make it difficult for many, including migrants and women, to contribute to social insurance schemes.⁵¹⁰ Women and migrants tend to be primarily employed by the part time and informal economy. Women are also disadvantaged by interrupted work histories due to traditionally assigned caregiver role.⁵¹¹ As Fredman notes, the social insurance model:

⁵⁰⁶ *Eldridge v. British Columbia (Attorney General)* [1997] 2 SCR 624 (Canada Supreme Court 24896).

⁵⁰⁷ *Regina (Reilly) v. Secretary of State for Work and Pensions* [2014] 1 AC 453 (UKSC 68).

⁵⁰⁸ BBC 'IDS attacks people who 'think they're too good' for work schemes' *BBC*, (London, 17 February 2013)

<www.bbc.com/news/uk-politics-21490542> accessed 28 February 2013.

⁵⁰⁹ *Regina (Reilly) v. Secretary of State for Work and Pensions* [2014] 1 AC 453 (UKSC 68).

⁵¹⁰ Sandra Fredman, 'Egendering socio-economic rights' (2009) 25(3) *South African Journal of Human Rights*, p. 412.

⁵¹¹ ILO 'Social Security: A New Consensus' (International Labour Office, Geneva 2001).

“Is ... deliberately biased against women and other non-standard workers. It also tends to entrench inequalities, in that it aims to maintain the beneficiary in his or her previous position, for example, through a link to previous earnings.”⁵¹²

It is clear that states cannot rely just on social insurance schemes if social security is to be accessible to all, and the CESCR has often called on states to implement non-contributory systems to reach those in need.⁵¹³ Regarding the affordability of contributory systems, it has also stipulated that “If a social security scheme requires contributions, those contributions should be stipulated in advance,” and “the direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realization of other Covenant rights.”⁵¹⁴ This means that the spending on social insurance should not compromise people’s access to food, water, health care or education amongst others.

The CESCR has tried to address the inequality that has led to affordability problems for women particularly regarding social insurance. Recognising that women are more likely to live in poverty and often have sole care of the children, CESCR’s General Comment on the right to social security calls on states to “take steps to eliminate the factors that prevent women from making equal contributions to such schemes” due to employment patterns on account of family responsibilities and care provider roles.⁵¹⁵ It also recognises that differences in the average life expectancy of men and women can also lead directly or indirectly to discrimination in provision of benefits.⁵¹⁶ The CEDAW Committee has similarly recommended that states focus on addressing the, often unintentional, impact of apparent neutral policies and programmes on women particularly in light of employment patterns. With regards to Austria it noted persistent significant occupational segregation and considerable wage gap and high concentration of women in part-time and low-paying jobs, with related consequences

⁵¹² Sandra Fredman, ‘Human Rights Transformed: Positive Duties and Positive Rights’ (Oxford University Legal Research Paper Series Paper 38/2006, 2006)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923936&rec=1&srcabs=1623261&alg=1&pos=9> accessed 5 June 2011.

⁵¹³ CESCR ‘Concluding Observations on Angola’ (2009) UN Doc. E/C.12/AGO/CO3, para 23.

⁵¹⁴ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 25.

⁵¹⁵ *Ibid.*, para 32.

⁵¹⁶ *Ibid.*

for women's pension rights and social protection.⁵¹⁷ However, for other groups in vulnerable situations such as migrants who often work in low paid and/or seasonal jobs and are subject to significant discrimination in employment, there have been very few similar recommendations.

While the CESCR does include positive recommendations that address some of the structural issues preventing or obstructing the accessibility of social security schemes, it is questionable whether it (and national judicial bodies) have adequately addressed the full spectrum of barriers preventing people from accessing their right to social security including being able to contribute to social insurance schemes. To fully comply with the principles of equality and non-discrimination, these bodies need to go further in defining states obligations to respect, protect and fulfil access to social security including social insurance.

3.4.5. Cultural accessibility (acceptability)

Social security is not always culturally accessible or acceptable to those who receive it. In some countries, those receiving benefits have been labelled as lazy by society and politicians, and this might prevent some people from claiming their entitlements. Moreover, in many instances, conditionalities imposed can compromise the autonomy of persons or exacerbate a person's insecurity.⁵¹⁸ This has been particularly noted with regards to the situation of women. For instances the responsibility to meet conditionalities such as school attendance disproportionately falls on women, reinforces their care giver role and can sometimes leave them vulnerable to violence if the conditionalities are not met and the benefit withheld.⁵¹⁹ Often targeted social security systems can result in stigmatising those receiving the benefit thus furthering their marginalisation and exclusion. The stigmatization could be on the grounds of the poverty itself or other qualifying elements such as HIV status. In many countries HIV positivity is still highly stigmatized and public disclosure of being HIV positive could result in physical violence, loss of livelihood and forced relocation.⁵²⁰ In other examples, due to negative portrayal by governments and/or media of people on

⁵¹⁷ CEDAW Committee 'Concluding Observations on Austria' (2007) UN Doc. CEDAW/C/AUT/CO7-8, para 34.

⁵¹⁸ *Graham* (n 111).

⁵¹⁹ *General Assembly (Independent Expert on human rights and extreme poverty)* (n 376), para 53.

⁵²⁰ *Graham* (n 111).

benefits, misrepresenting the degree of benefit fraud even just receiving the benefit can be stigmatizing and lead to harassment⁵²¹ and further discrimination in accessing housing, education and health services.⁵²²

While not explicitly mentioned in General Comment 19, cultural accessibility (acceptability) is an important component of economic and social rights as has been recognised with other rights such as the right to health.⁵²³ Moreover, poverty and socio-economic status are recognized as prohibited grounds of discrimination⁵²⁴ thus further strengthening states' legal obligations in preventing the stigmatisation and further discrimination and marginalization of this group in the same manner as it should for people belonging to ethnic, sexual, linguistic or racial minorities amongst others.

The CESCR therefore needs to deal with this more strongly. So far it has only commented a few times on the acceptability of social security schemes and usually only implicitly despite the clear stigmatization of recipients in both developing and developed countries.

3.5. Concluding remarks

To comply with international human rights law, social security must be accessible to all those in need and of an adequate level to ensure that people can escape poverty, and help the state ensure substantive equality and non-discrimination. However, as this chapter has demonstrated, that there are still many weaknesses in the application

⁵²¹ Frances Ryan, 'On Benefits and Proud: The show where 'deserving taxpayers' stalk 'proud benefit claimants' *NewStatesman*, (15 October 2013) <<http://www.newstatesman.com/culture/2013/10/benefits-and-proud-show-where-deserving-taxpayers-stalk-proud-benefit-claimants>> accessed 21 March 2016.

⁵²² In the UK parents receiving social security described lunch supervisors at schools telling children that their parents are lazy, and giving them the worst of the food to eat. Damian Killeen 'Is Poverty in the UK a denial of people's human rights?' (JRF 2008) <www.jrf.org.uk/report/poverty-uk-denial-peoples-human-rights> accessed 3 December 2010.

⁵²³ CESCR 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (2000) UN Doc. E/C.12/2000/4, para 12(c).

⁵²⁴ This was first recognised in Canada when the Court of Appeal struck down the provisions of the Residential Tenancies Act that exempted public housing from its security of tenure. The Court found that the exclusion constituted adverse direct discrimination on the grounds of race, sex, marital status and poverty. *Sparks v. Dartmouth/Halifax County Regional Housing Authority* [1993] 101 DLR (4th) 224 (Nova Scotia Court of Appeal)

of the right to social security by states, national and regional judicial decisions, and the CESCR. Courts and regional human rights systems have not always respected basic human rights principles, and in that regard have not yet fully addressed issues such as conditionalities and sanctions for non-compliance that can considerably impede access. Many of their approaches also foster a two-tiered system that bases the amount awarded on status and/or nationality rather than need and promotes inequality between different sectors of society. This is further exacerbated by states' reluctance to fully assess the amount to be awarded to people in need of assistance, instead often basing it on wage levels. The work of NGOs and courts have demonstrated that minimum needs can be estimated, and that governments should take heed of their work in this regard.

This chapter is crucial in establishing the content of the right to social security and addressing the ambiguities still surrounding the right. This is especially important given the increasing pressures put on this right by the financial crisis of 2008 and the trend of many states to erode social protection. The next chapter builds on this further combining the analysis here and in Chapter 2 to discuss states' obligations during a financial crisis to implement the right to social security.

Chapter 4: States' obligations to implement the right to social security during a financial crisis

4.1. General introduction

Building on the analysis contained in both Chapters 2 and 3, this Chapter examines the extent to which states are obligated to respect, protect and fulfill the right to social security, as elucidated in Chapter 3, during a financial crisis. Should social security ever be rationed? Does a large national debt allow states to derogate from their obligations under the ICESCR?

The financial crisis of 2008 threatened the collapse of many financial institutions and resulted in many governments increasing their national debt to bail them out such. Since then governments have used this increased national debt to justify austerity measures aimed at reducing expenditure on social assistance and services.⁵²⁵ These cutbacks are all the more the poignant since during times of financial crisis people are in greater need of assistance and protection due to greater unemployment levels and other forms of insecurity.

How can the human rights community respond to states' claims that they must cut back on social expenditure following apparent reductions in their revenue and/or fiscal space? Are governments allowed to suspend their obligations under the ICESCR by arguing either a decrease in resources available or the existence of a public emergency? What is a retrogression in the right to social security and is it allowed in times of financial crisis? Should the human rights community allow certain trade-offs such as reducing coverage or adequacy? Should paying off the national debt take priority over peoples' rights?

Human rights advocates and mechanisms have extensively called on governments to maintain spending on essential social goods.⁵²⁶ Since the start of the financial crisis in

⁵²⁵ For more information on some of the measures imposed, see *UNHRC (Independent Expert on the question of human rights and extreme poverty)* (n 10).

⁵²⁶ UNHRC 'Resolution S-10/1: The Impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights' (2009) UN Doc. A/HRC/RES/S-10/1, op. 5.

2008, there has been a plethora of statements about the importance of human rights during times of crisis.⁵²⁷ The former Independent Expert on human rights and extreme poverty has argued that such crises do “not exempt States from complying with their human rights commitments,” or “entitle them to prioritize other issues over the realization of human rights.”⁵²⁸ However, while human rights activists have extensively written about the prohibition of non-retrogression, the necessity of complying with the core obligations in times of financial crisis, and how the cutbacks should be proportional and achieved through greater transparency and participation, there is limited analysis of the legitimacy and necessity of austerity measures within the framework of Article 2(1) and states’ maximum available resources. Although Lusiani writing for CESR has gone further, analysing the fiscal fallacies of the age of austerity, he has not done so explicitly within the framework of Article 2(1) and the maximum available resources clause.⁵²⁹

The CESCR has also not really engaged substantively in these issues. As already recognized in Chapter 2 it has rarely gone beyond calling on states to use their maximum available resources to ensure the right to social security and reiterating the non-derogability of core obligations to ensure minimum essential levels. As already explored, its understanding of maximum available resources is limited. Contrary to statements by UNCTAD⁵³⁰ and UNICEF⁵³¹, by using criteria such as economic growth for judging a state’s maximum available resources, it appears to assume that states cannot influence its fiscal space and/or resource base to implement human rights.⁵³² Again, while its Open Letter to State Parties on austerity measures, dated 16 May 2012 has been praised for “provid(ing) certain important guideposts” to help states formulate appropriate policies that protect economic and social rights during financial crises,⁵³³ it fails to get to the root of the maximum available resources clause and provide tools to assess the real legitimacy and necessity of austerity measures given their considerable impact on human rights. In fact as already discussed in

⁵²⁷ UNHRC (*Independent Expert on the question of human rights and extreme poverty*), (n 10), para 38. See also *Alston and Quinn* (n 10).

⁵²⁸ UNHRC (*Independent Expert on the question of human rights and extreme poverty*), (n 10), para 38.

⁵²⁹ *Lusiani* (n 94)

⁵³⁰ UNCTAD (n 77).

⁵³¹ *Ortiz, et al.* (n 78).

⁵³² CESCR ‘An evaluation of the obligation to take steps to the maximum of available resources under an optional protocol to the covenant’ (2007) UN Doc. E/C.12/2007/1.

⁵³³ CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

Chapter 2, it undermines the CESCR's previous approach that afforded states an everyday flexibility in protecting economic and social rights but did not permit exceptional powers to substantially weaken rights protection in times of crisis emergency response.⁵³⁴ The Letter in fact goes against previous statements of the CESCR that economic and social rights become more important in times of crisis.⁵³⁵

Since states have frequently justified cutbacks claiming economic necessity and a lack of resources, more work is needed to clarify the scope of states' obligations. As Skogly notes "... In such a situation, it is important both to assess whether there is some flexibility in the obligations and indeed to determine whether the perception of the existence of constraints in their implementation is real."⁵³⁶ By building on both the analysis in Chapter 2 and 3, this chapter establishes the core obligations regarding the right to social security, and examines how the human rights community can assess states' arguments of insufficient resources or states of emergency to justify austerity measures that threaten the full realization of human rights and in some cases even violate core obligations.

While one cannot assume states' full autonomy in deciding on its economic and social policy since many of the cutbacks have been required by international finance institutions (IFIs) in exchange for bailouts, such as in Greece, and it being beyond the scope of this study to clarify IFIs' obligations in this regard, this does not erode the relevance of this Chapter. Several courts have used legal principles to counter such requirements even in times of economic turmoil when international assistance is both needed and being actively sought. In 1995, when, during a time of high inflation and economic instability, the IMF threatened to quit Hungary if social benefits were not cut, the Hungarian Constitutional Court helped protect the right to social security by invalidating the central provisions of the new Economic Stabilisation Act (a comprehensive austerity package seriously targeting social benefits).⁵³⁷ Although

⁵³⁴ See *Warwick* (n 313).

⁵³⁵ CESCR, 'General Comment 2: International Technical Assistance Measures' (1990) UN Doc E/1990/23, para 9.

⁵³⁶ Sigrun Skogly 'The Global Financial Crisis: A Human Rights Meltdown' in Peter Maynard and Neil Gold (eds.) *Poverty, Justice and the Rule of Law, The report of the second phase of the IBA Presidential Taskforce on the Global Financial Crisis* (International Bar Association 2013), p. 82.

⁵³⁷ This is discussed in Renata Uitz and Andras Sajo 'A Case For Enforceable Constitutional Rights: Welfare Rights in Hungarian Constitutional Jurisprudence' in Fons Coomans (ed.) *Justiciability of Economic and Social Rights Experiences from Domestic Systems* (Intersentia 2006), p. 112.

controversial amongst Hungarian politicians, this paved the way for other court decisions protecting welfare rights, although admittedly these decisions focused on social insurance schemes and upholding the principle of protecting property rather than providing social assistance for the most marginalised.⁵³⁸ As Gauri and Brinks notes, “the inclusion of social and economic rights provisions in the constitutions of Hungary and Russia, and their invocation by constitutional courts, strengthened the hand of national governments when negotiating austerity programmes with the IMF.”⁵³⁹

Following these examples, the analysis contained in this chapter is still relevant to courts and other judicial and quasi-judicial bodies in protecting and enforcing welfare rights. Given the dominance of IFIs in determining national economic priorities, independent courts may often be the last possible recourse to challenge such policies. This makes the role of the courts, and the analysis developed here, more important than ever in protecting people’s rights.

4.2 Responses to the crisis and the effects on the right to social security

The impact of the financial crisis and the subsequent states’ actions and policies have been well documented by academics, NGOs, UN special procedures, UN human rights treaty bodies, and the Human Rights Council. This section uses the existing extensive analysis and research to outline the emerging trends and patterns as to how the financial crisis and state responses have affected the right to social security.

While initially governments responded to the 2008 financial crisis with counter-cyclical measures designed to boost economic activity and reduce unemployment (such as fiscal stimulus packages and social protection interventions)⁵⁴⁰ by 2010 states changed to adopting fiscal consolidation strategies and began making considerable cutbacks, which included rationing social security. They argued that austerity measures were needed to reduce deficit levels. In addition to reducing social spending,

⁵³⁸ Ibid.

⁵³⁹ Varun Gauri and Daniel Brinks ‘The impact of legal strategies for claiming economic and social rights’ in Thomas Pogge (ed.) *Freedom from Poverty as a Human Rights, Theory and Politics*, Vol. 2. (UNESCO, Paris 2009), p. 203.

⁵⁴⁰ *UNHRC (Independent Expert on the question of human rights and extreme poverty)* (n 10) paras 21,22,23 and 24.

states across Europe also employed regressive taxation measures, labour market reforms, and structural reforms to pension plans.⁵⁴¹ States rarely used progressive taxation to increase revenue. Heise and Lierse note in all the cases they investigated (except Iceland) "regressive spending cuts predominate, regardless of the composition of government. Revenue increases by means of progressive tax rate rises at best play a subordinate role..."⁵⁴²

In the name of austerity, cutbacks on social security have tended to reduce adequacy and/or coverage by making eligibility rules tighter.⁵⁴³ In 2011 the ILO noted that Ireland halved unemployment benefit for job seekers under the age of 20, introducing a pension levy of 1% across all wage earners and freezing welfare expenditure for at least two years.⁵⁴⁴ It also noted that Hungary scrapped the 13th-month pension; reduced the duration of paid parental leave; and indexed future pension increases to GDP growth and inflation rather than wages and inflation.⁵⁴⁵ As will be discussed in Chapter 5, the UK introduced new rates and testing for disability allowances with the aim of reducing coverage. It also introduced a maximum amount of benefits that can be claimed each year, and limited the rate at which benefits increase each year.⁵⁴⁶ Spain amongst other things has frozen pensions resulting in a decrease in their real value over time, and reduced family benefits.⁵⁴⁷

Measures introduced have also directly and indirectly impacted physical, cultural and financial accessibility. There has been increased stigmatisation of those on benefits by politicians and the media alike that has discouraged many from claiming their entitlements.⁵⁴⁸ Several countries have imposed greater conditionalities, such as

⁵⁴¹ *Council of Europe* (n 18), p16.

⁵⁴² Arne Heise and Hanna Lierse 'The Effects of European Austerity Programmes on Social Security Systems' (2011) 2 *Modern Economy*, pp. 498-513, p. 511.

⁵⁴³ *UNHRC (Independent Expert on the question of human rights and extreme poverty)* (n 10), para 43.

⁵⁴⁴ ILO 'World Social Security Report 2010/11: Providing coverage in times of crisis and beyond' (International Labour Office Geneva 2010), p. 113.

⁵⁴⁵ *ILO* (n 511), p. 113.

⁵⁴⁶ UK Welfare Reform Act (2012) and Welfare Benefits Up-rating Act (2013). This is discussed further in Chapter 5.

⁵⁴⁷ CESR and Observatorio para los Derechos Economicos Sociales y Culturales (DESC) 'List of issues in response to the fifth Periodic Report of Spain' (2011) <www.cesr.org/downloads/Spain%20Presessional%20Working%20Group%20Submission%20-%20CESR%20Observatori%20DESC%20_%20CESR.pdf> accessed 5 April 2012.

⁵⁴⁸ Raneep Ramesh, 'Scrounger' stigma puts poor people off applying for essential benefits' *The Guardian*, (London, 20 November 2012) <www.theguardian.com/society/2012/nov/20/scrounger-stigma-poor-people-benefits> accessed 13 November 2014.

increased evidence of job searching, accompanied by harsher penalties for non-compliance including stopping benefits.⁵⁴⁹ Through no fault of their own, people may be prevented from complying with conditionalities given increasing claims on time and limited mobility following cuts in public transport and inability to travel to and register with job centres.⁵⁵⁰ In many areas, the financial crisis has resulted in both increased physical and mental health issues, which coupled with cutbacks on health services, is likely to further undermine people's ability to comply with conditionalities.⁵⁵¹

Organisations have noted “austerity-driven policy responses to the crisis are exacerbating already widening inequalities and ingrained discriminatory practices.”⁵⁵² Both increasing unemployment and decreasing social security levels and coverage have pushed many into poverty, particularly those who already face considerable barriers in the job markets such as migrants, refugees, and racial, ethnic and religious minorities, as well as those who typically occupy low paid jobs such as temporary workers with limited education. Their situation is further compounded by the current spike in food prices that has not in many countries been reflected in increased benefit levels. In developed countries, more and more people are resorting to food banks to feed themselves.⁵⁵³ The cutbacks in social expenditure and increasing unemployment and perceived competition over scarce resources are also helping increase intolerance and racism.⁵⁵⁴

Many UN bodies, academics and NGOs have also documented the disproportionate impact of cutbacks on women given existing structural and economic disadvantages

⁵⁴⁹ Hélène Mulholland ‘Welfare reforms will lead to 'extreme hardship', say campaigners’ *The Guardian* (London, 11 November 2011) <<https://www.theguardian.com/politics/2010/nov/11/iain-duncan-smith-unveils-welfare-contract>> accessed 13 September 2014.

⁵⁵⁰ Mary O’Hara ‘You’ll notice bus cuts when your neighbours lose their independence’ *The Guardian* (London, 17 February 2016) <www.theguardian.com/public-leaders-network/2016/feb/17/lose-independence-bus-cuts-council-funding> accessed 3 May 2016.

⁵⁵¹ N.G. Christodoulou, ‘Financial Crises: Impact on Mental Health and Suggested Responses’ (2013) 82(5) *Psychology and Psychosomatics*, pp. 279-284.

⁵⁵² *Council of Europe* (n 18), p. 22.

⁵⁵³ In Germany human rights NGOs have noted an increased use of food banks. See FIAN Germany ‘Food Banks in Germany: Right to Food Must Not be Privatized’ (Report) (Heidelberg 2013) <www.fian.org/fr/actualites/article/food_banks_in_germany_right_to_food_must_not_be_privatized/> accessed 3 May 2016.

⁵⁵⁴ Human Rights Watch ‘Hate on the Streets: Xenophobic Violence in Greece’ (Report) (2012) <www.hrw.org/report/2012/07/10/hate-streets/xenophobic-violence-greece> accessed 3 May 2013.

and their position as main care providers.⁵⁵⁵ Since women disproportionately feature amongst those living in poverty worldwide, they are more likely than men to be in need of assistance from the state. They are also more at risk of being in low paid jobs in the informal sector without labour protection and having interrupted work histories, all of which reduces their likelihood of being able to pay into formal contributory social insurance schemes. Their role as care-givers means they disproportionately take up the slack following cuts in services, and cuts to child benefit and pensions. Increasing claims on their times could also create further difficulties in complying with conditionalities for social security payments such as actively looking for work. Financial pressure at home and in the community can also increase societal and domestic violence.⁵⁵⁶

These cut backs are all the more the poignant since during times of financial crisis people are in greater need of protection. Increasing poverty and decreasing social protection has led to many people using, and often exhausting, detrimental coping strategies such as removing children from school to work, reducing number and quality of meals, women giving their share of the food to children and/or the men in the household, selling assets such as land and livestock.⁵⁵⁷ This reduces their chances of escaping poverty in the long run.

4.3 Core obligations to implement the right to social security during times of crisis

The CESCR has established that even in times of difficulty, states have immediate core obligations regardless of resources and/or level of development. Though different terms have been used such as immediate or specific obligations, the general consensus is that “resource scarcity does not relieve states of certain minimum obligations in

⁵⁵⁵ Aldo Cariari et al ‘Bringing Human Rights to Bear in Times of Crisis, A human rights analysis of government response to the economic crisis’ (AWID, ESCR-NET, CESR, Center of Concern, 2010) <https://docs.escr-net.org/usr_doc/HRResponsestoEconCrisis_Final.pdf> accessed 8 June 2014, p. 4. See also UNHRC ‘Report of the Working Group on the issue of discrimination against women in law and in practice’ (2014) UN Doc. A/HRC/26/39, para 28.

⁵⁵⁶ Claire Renzetti, ‘Economic Stress and Domestic Violence?’ (University of Kentucky, Center for Research on Violence Against Women 2009) <http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1000&context=crvaw_reports> accessed 10 December 2011.

⁵⁵⁷ UNHRC (Independent Expert on the question of human rights and extreme poverty) (n 10), para 33.

respect of the implementation of economic, social and cultural rights.”⁵⁵⁸ This includes ensuring minimum essential levels⁵⁵⁹; non-discrimination; protection of vulnerable populations; taking steps (adopting programmes or plans of action, and establishing and maintaining system of indicators and benchmarks).⁵⁶⁰

4.3.1. Minimum essential levels

During the financial crisis, organisations have documented rising homelessness, rent arrears malnutrition rates and use of food banks, all attributed to cuts in social security.⁵⁶¹ While these indicate that some people do not have enough to survive, is it enough to conclude that states have violated their obligations to ensure minimum essential levels? As with many other rights, there has only been limited work in establishing the minimum essential levels of the right to social security, and so far, the CESCR has rarely found violations of the minimum essential levels even when people are starving.⁵⁶²

The first key question is how much should the benefits should be to meet the minimum essential level. As Chapter 3 demonstrated, adequacy is a key part of the content of the right to social security, and states should do clear needs-assessments based on the work of relevant social organisations and the decisions of relevant judicial bodies. However, what is the difference between adequate levels as part of the full implementation of human rights, and minimum essential levels? To determine this, it is useful to look at the work of Bilchitz. He identified “two different thresholds of urgency”; the first one being free from threats to survival, which would essentially be the minimum essential level, and the second being in a situation that allows people to flourish and achieve their goals.⁵⁶³ In illustrating this Bilchitz, notes the ruling of the Indian Supreme Court in *Shantistar Builders v. Narayan Khimalal Totame* “that the human being requires ‘suitable accommodation which would allow him to grow in

⁵⁵⁸ International Commission of Jurists *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (adopted 26 January 1997) <www.refworld.org/docid/48abd5730.html> accessed 10 February 2010.

⁵⁵⁹ CESCR ‘An evaluation of the obligation to take steps to the maximum of available resources under an optional protocol to the covenant’ (2007) UN Doc. E/C.12/2007/1, para 4.

⁵⁶⁰ CESCR ‘General Comment 14: Right to Health’ (2000) UN Doc. E/C.12/2000/4, para 43f

⁵⁶¹ Rachel Loopstra et al ‘Austerity, sanctions, and the rise of food banks in the UK’ (2015) *British Medical Journal*.

⁵⁶² *Mueller* (n 305), p. 79

⁵⁶³ *Bilchitz* (n 439), p. 187-8.

every aspect – physical, moral and intellectual.’ ”⁵⁶⁴ Bilchitz observed that "this in turn would naturally involve providing a much more extensive form of housing than that required to meet the minimum interest"... although he also notes that “the Indian supreme court has not draw(n) the distinction between minimal and maximal interests.”⁵⁶⁵

This chapter builds on Bilchitz’s analogy, and references several court decisions, to suggest that the minimum essential level should allow for survival with dignity. On this basis there could be two levels of adequacy with the right to social security: one preventing deprivation and guaranteeing dignity, and the second going further and allowing people to move out of poverty. In part reinforcing this, several courts have ruled that depriving people of the basic assistance to cover essential needs such as food and shelter violates civil and political rights including the right to be free from inhuman and degrading treatment.⁵⁶⁶ To prevent such deprivation and protect dignity, there must be security that all basic needs will be met over time. However there may be differing views over what constitutes basic needs, especially those that go beyond survival and cover socially determined needs that help ensure dignity such as access to the Internet and cultural participation. Full implementation of the right to social security would include measures that allow people to graduate from poverty (allowing people to achieve their goals) such as access to training and further education facilities, and enabling them to live in housing in prosperous areas with good employment rates.

The CESCR has rarely gone beyond recognizing that governments must ensure that the amount of social security provided covers basic survival needs. It stipulates that the minimum essential level of the right to social security must enable individuals and families to acquire at least essential health care, basic shelter and housing, water and

⁵⁶⁴ *Shantistar Builders v. Narayan Khimalal Totame* [1990] 1 SCC 520 (Supreme Court of India, Civil Appeal No. 2598/1989).

⁵⁶⁵ *Bilchitz* (n 439), p. 188.

⁵⁶⁶ In 2005 the UK House of Lords for instance noted that since asylum seekers were prevented from working while their application was being processed, a failure to provide support could therefore expose the claimants to the risk of being homeless or without access to adequate food, thus creating an Article 3 violation. *R (Limbuella) v. Secretary of State for the Home Department* [2006] 1 AC 396 (UKHL 66).

sanitation, food stuffs and the basic forms of education.⁵⁶⁷ To further concretely determine the minimum essential amount of benefit to be awarded, governments must examine at a local level what is considered as essential. In some areas minimally acceptable housing will differ from country to country. Similarly with regards to food, there may be differences about what is viewed as adequate. What quality of food should people be able to access? Again governments can draw on the work of local and national organisations as well as data such as price indexes that accurately reflect the price of essential goods and services. Several organisations have observed how a healthy diet can be expensive and that therefore cuts in social benefits and rises in the price of health foods risks resulting in many people, particularly in industrialised countries, eating cheaper unhealthy food.⁵⁶⁸ This causes health problems and further worsens their poverty, marginalization and stigmatisation.

Since many of these basic survival needs are met by publicly available services such as health and education either through universal or targeted schemes. Such services must also be accessible to those in poverty, enshrined as a right in law, and accompanied by appropriate monitoring and accountability mechanism.⁵⁶⁹ Any change in these services or difficulties accessing them would significantly undermine the level of social security received. The German Federal Constitutional Court (GFCC) recognized that “a person in need of assistance may not be referred to voluntary benefits of the state or of third parties whose provision is not guaranteed by a subjective right of the person in need of assistance.”⁵⁷⁰ This means that the existence of non-guaranteed services such as food banks cannot be regarded as part of the fulfillment of the right to social security. There are also many examples of universal services not being accessible to those in poverty. In India, for instance, hospitals have been noted for refusing to treat women living in poverty despite relevant legislation

⁵⁶⁷ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19. para 59a.

⁵⁶⁸ Wiggins, Steve and Sharada Keats ‘The rising cost of a healthy diet: changing relative prices of foods in high-income and emerging economies’ (Overseas Development Institute London, 2015) <www.odi.org/publications/8877-rising-cost-healthy-diet-changing-relative-prices-foods-high-income-emerging-economies> accessed 10 January 2017.

⁵⁶⁹ The ILO protection floor recognises that access to social security must include universal access to essential affordable social services in the areas of health, water and sanitation, education, housing and others defined according to national priorities.

⁵⁷⁰ German Federal Constitutional Court (BVerfG) Judgment of the First Senate of 18 July 2012 – 1 BvL 10/10 – paras (1-110), para 67. See also German Federal Constitutional Court (BVerfG), Judgment of the First Senate of 9 February 2010 – 1 BvL 1/09 – paras. 1-220, para 136.

protecting their right to free healthcare, often because of administrative challenges and a lack of relevant identification.⁵⁷¹ To address this, in 2010 the Delhi High Court called on the Indian Government to expand the scope of entitlement schemes and immediately improve its referral system.⁵⁷² It also required the Government to regularly report on this to help ensure accountability for its actions.⁵⁷³

The minimum essential levels of social security must also go beyond meeting basic survival needs to ensuring access to justice and covering socially determined needs such as minimal cultural, religious and social participation. Many courts, including the GFCC have considered this as vital to survive in dignity.⁵⁷⁴ While the GFCC did not go further to fully define the content of a subsistence minimum, other courts have provided more details. As noted in Chapter 3, in 2014 the UK High Court ruled that the Government's decision to freeze the level of support for destitute asylum seekers in the UK was irrational for failing to take into account amongst other things the cost of maintaining interpersonal relationships and a minimum level of participation in social, cultural and religious life.⁵⁷⁵ It also noted that the Government failed to consider whether the following were essential living needs: Travel by public transport to attend appointments with legal advisors, where this is not covered by legal aid; telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress their asylum claims, such as with legal representatives, witnesses and others who may be able to assist with obtaining evidence in relation to the claim; and writing materials where necessary for communication and for the education of children.⁵⁷⁶

⁵⁷¹ Shivani Chaudhry, Amita Joseph, Indu Prakesh and Singh, 'Violence and Violations: The Reality of Homelessness Women in India' (New Delhi, 2014) <http://hrn.org.in/documents/Violence_and_Violations_Homeless_Women_in_India_2014.pdf> accessed 4 May 2016), p. 14.

⁵⁷² *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital & Ors.* [2010] INDLHC 2983 (High Court of Delhi, WP (C) 8853/2008).

⁵⁷³ *Ibid.*

⁵⁷⁴ When examining the constitutionality of a reduction in social security for the unemployed and their dependents, the German Constitutional Court in 2010 held that under Articles 1(1) (human dignity) and 20(1) (the principle of the social welfare state) of the Basic Law, persons cannot be reduced to an economically demeaning existence by the provision of inadequate welfare. Welfare must therefore cover the necessities of a dignified life "to each person in need of assistance the material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life. See German Federal Constitutional Court (BVerfG), Judgment of the First Senate of 9 February 2010 – 1 BvL 1/09 – paras. 1-220

⁵⁷⁵ *R. (Refugee Action) v. Secretary of State for the Home Department* [2014] D WLR 089 (EWHC 1033 (Admin)).

⁵⁷⁶ *Ibid.*

Again this would differ according to context. For instance in some societies access to e-mail and the internet would be vital and prevent disproportionate disadvantage or marginalization, in other societies where coverage is low there is no disadvantage in not having it. Building on both the jurisprudence of courts and work of social organisations (as explained in Chapter 3), there is no reason why the CESCR can provide guidance both on the type of things that should be included and in calling on states to employ methodology such as public consultations on items that may be less straightforward.

There is also confusion about what contingencies (circumstances) the minimum essential levels must cover. While the CESCR initially stipulates that states must cover all nine contingencies as specified in ILO Convention 102,⁵⁷⁷ (health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and survivors and orphans), when ensuring minimum essential levels, it specified that if this is not possible, “after a wide process of consultation” the state must “select a core group of social risks and contingencies.”⁵⁷⁸ This in part echoes ILO Convention 102 that obligates states to just cover three contingencies and a certain percentage of the population before ratification. As has been discussed in Chapter 3, the CESCR’s emphasis on these nine contingencies fails to incorporate the social assistance function of social security. It suggests that entitlement is based on the contingency incurred rather than need, and would leave many people without protection, and risks violating both the right to social security and other human rights. This is further exacerbated by the CESCR’s proposal that states could start with just cover “a core group of social risks and contingencies”.⁵⁷⁹ This also now runs counter to the position of the ILO with its endorsement of the universal social protection floor that calls on states to ensure for all basic social security over the life cycle.

4.3.2. Non-discrimination and substantive equality

Ensuring non-discrimination and equality is often perceived as an immediate

⁵⁷⁷ ILO Convention 102: Social Security (Minimum Standards) (35th session of the International Labour Conference 28 June 1952, entered into force on 27 April 1955).

⁵⁷⁸ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 4(b).

⁵⁷⁹ Ibid.

obligation focusing on guaranteeing it in law.⁵⁸⁰ However, this is an oversimplification. It requires states to go beyond ensuring equality and non-discrimination ‘in law’ to ensuring it ‘in fact’. As noted in Chapter 3 this requires states to remedy the causes of “unequal outcomes” that can run deep⁵⁸¹ and address the real impediments preventing certain persons from accessing and enjoying their human rights, which in turn requires positive obligations and resources. As Freeman notes

“... where discrimination is deeply embedded in society, which is in the case almost everywhere in the world, it is hard to see how there could be a realistic alternative to progressive realization, even if it is reasonable to demand that progress be an urgent policy priority.”⁵⁸²

More recently Ratjen and Stija observed “these tensions (between immediate and progressive) warrant consideration when defining the scope of obligations under Article 2(2).”⁵⁸³

The CESCR’s General Comment 20 on non-discrimination and its concluding observations implicitly recognise that resources and time are needed to realize substantive non-discrimination and equality as it calls on states to immediately “adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause and perpetuate substantive or de-facto discrimination.”⁵⁸⁴ This differs to states’ obligations to immediately ensure *de-jure* equality. Sepulveda similarly concludes “that the principle of non-discrimination... include the duty to take immediate steps to eliminate de facto discrimination in the enjoyment of economic,

⁵⁸⁰ Fredman notes that the USA, Canada and UK also understand equality as preventing discrimination on the grounds of race, gender or other status, rather than addressing structural inequalities. See Fredman (n 510), p. 427.

⁵⁸¹ Langford, (n 476), p. 30.

⁵⁸² Michael Freeman, ‘Conclusion: Reflections on the Theory and Practice of Economic and Social Rights’ in Lanse Minkler (ed) *The State of Economic and Social Human Rights: Global Overview*. (Cambridge University Press 2013), pp. 365-389, p. 380.

⁵⁸³ Sandra Ratjen and Manav Satuja ‘Realising Economic, Social and Cultural Rights for All’ in Eibe Riedal, Gilles Giacca, and Christophe Golay, (eds.) *Economic, Social and Cultural Rights in International Law Contemporary issues and challenges* (Oxford University Press 2014), pp. 111-131, p. 115

⁵⁸⁴ CESCR ‘General Comment 20: Non-discrimination in Economic, Social and Cultural Rights’ (2009) UN Doc. E/C.12/GC/20, para 8.

social and cultural rights.”⁵⁸⁵ However there has been no further clarification on what this means with regards to maximum available resources, and again domestic litigation provide little guidance. Most of the few cases requiring positive measures and programmes to meet the needs of disadvantaged groups and to ensure substantive equality have tended to be cases where the breach is severe or has only involved small proportion of the budget such as in the *Eldridge v. British Columbia* case.⁵⁸⁶

This relationship is particularly pertinent for the right to social security. Unlike most other rights, ensuring the right to social security for all, both *de facto* and *de jure*, requires positive measures and resources. Guaranteeing *de jure* non-discrimination and equality usually requires increasing coverage and therefore expenditure yet leaving people without not only violates the right to social security but can also violate other human rights such as the right to life and the right to be free from degrading treatment.⁵⁸⁷ Moreover, the right to social security is also a means of implementing ensuring equality through income redistribution.⁵⁸⁸ This was noted earlier in Chapter 3, which observed that an adequate social security helps people “graduate from poverty, as part of states’ obligations to ensure substantive equality.” Furthermore, as Craven notes “efforts to maximise equality of opportunity have commonly involved the imposition of redistributionist taxation policies for the advancement of vulnerable and disadvantaged groups in society.”⁵⁸⁹

The financial crisis of 2008 demonstrates the need to further elucidate the relationship between the maximum available resources and the obligation to ensure substantive non-discrimination. Human rights mechanisms clearly stipulate that “... scarcity of resources in times of economic hardship is not an acceptable justification for discriminatory measures or failing to implement anti-discrimination policies”.⁵⁹⁰ However since 2008, states claiming a lack of resources, have not only failed to implement anti-discrimination policies that compensate for the disproportionate

⁵⁸⁵ *Sepulveda* (n 117), p. 397.

⁵⁸⁶ *Langford* (n 188), p. 106.

⁵⁸⁷ *R (Limbuella) v. Secretary of State for the Home Department* [2006] 1 AC 396 (UKHL 66).

⁵⁸⁸ Thandika Mkandawire, ‘Social Policy in a Development Context’ (Social Policy and Development Programme Paper No 7, UNRISD 2001).

⁵⁸⁹ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development* (Oxford University Press 1995), p. 157.

⁵⁹⁰ UNHRC (Independent Expert on the question of human rights and extreme poverty) (n 10), paras 21, 22, 23 and 24.

effects of the crisis on different groups and ensure substantive equality, they have also implemented directly and indirectly discriminatory measures.⁵⁹¹ Coverage has been reduced with certain groups being directly discriminated against such as migrants, refugees and asylum seekers.⁵⁹² People have also been indirectly discriminated against by *inter alia* harsher conditionality requirements making it difficult for those with limited education, access to computers and IT skills amongst other things to comply. Through discrimination certain groups (such as women, racial and ethnic minorities, and unskilled workers) are also more likely to suffer from unemployment and therefore be particularly targeted by social security cuts. They are also more likely to be experiencing lower and/or irregular wages and may be unable to contribute to social insurance schemes. As noted by several leading social organisations these austerity measures taken during the financial crisis have resulted in considerably exacerbating inequality.⁵⁹³ Despite a person's socio-economic status being a prohibited grounds for discrimination, be it direct or indirect, Governments are yet to see these measures taken as a discrimination issue. As Ratjen and Satija note

“While it is reasonably well accepted that one should not treat someone differently because of the colour of his or her skin, it is still beyond most States and many societies... to recognize the same acceptable character of discrimination against people who have been forced to live on the street or work in insecure workplaces.”⁵⁹⁴

Building on previous analysis, it is clear that everyone must have minimum essential levels of social security, without which people would be left without to such a degree it could constitute degrading treatment. This would mostly be met through the state providing social assistance to all those in need. States must also immediately take the necessary measures directed towards realising full equality both through improving the level of social security (including assistance) to an amount that allows those in poverty to escape their situation, and taking positive measures to improve access particularly to social insurance. This can include improving wages to enable everyone,

⁵⁹¹ *Way and Stanton* (n 2),

⁵⁹² As discussed in Chapter 5, the UK Coalition Government changed eligibility requirements for migrants.

⁵⁹³ *Oxfam* (n 75).

⁵⁹⁴ *Ratjen and Satija* (n 583), p. 112.

without discrimination, to contribute to insurance schemes, as well as specific measures to ensure that women in particular can afford their own regulated social insurance schemes.

4.3.3. Protection of the most vulnerable: determining those in need

‘Protection of the vulnerable’ is a well-established principle under human rights law particularly linked to ensuring full equality.⁵⁹⁵ This remains even when resources are apparently limited. The CESCR clearly states that “in times of resource constraints”, the most vulnerable and disadvantaged members of society must be protected.⁵⁹⁶ However despite being recognised by the High Commissioner for Human Rights, as one of the main means of protecting the most vulnerable during such times as the 2008 financial crisis,⁵⁹⁷ government cutbacks in social security and retrogressive taxation have disproportionately affected the most marginalised and excluded. Ratjen and Stija note

“in a time where the scarcity of resources is used to justify all manners of policies, states have been quick to cut public spending and social expenditure, rather than concentrating resources on the protection of those most at risk.”⁵⁹⁸

While states are claiming they are targeting their social security/assistance to ensure that the vulnerable receive what they need, people can fall through the gaps causing exclusion errors.⁵⁹⁹

In times of financial crisis, governments have typically emphasised the need to improve targeting to ensure that social security (usually social assistance) goes to those most in need. Already before the financial crisis governments were targeting

⁵⁹⁵ CESCR ‘General Comment 4: The Right to Adequate Housing’ (1991) UN Doc. E/1992/23, para 11. The Guiding Principles on Extreme Poverty and Human Rights urges states “When designing and implementing public policies and allocating resources, ... accord due priority to the human rights of the most disadvantaged groups, especially persons living in extreme poverty”. See *UNHRC (Special Rapporteur on the question of extreme poverty and human rights)* (n 273), para 51.

⁵⁹⁶ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 12.

⁵⁹⁷ UNHRC ‘Report of the Office of the United Nations High Commissioner for Human Rights on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it’ (2010) UN Doc. A/HRC/13/38.

⁵⁹⁸ *Ratjen and Satuja* (n 583).

⁵⁹⁹ *UNHRC (Independent Expert on the question of human rights and extreme poverty)* (n 435).

most forms of social security, determining who was in need either by means testing people (test of income, though some also include tests of assets or capital) or seeing if people meet certain criteria such as being unemployed and thus receiving unemployment benefit or being elderly and receiving pensions. During the financial crisis, however, states have increased this targeting by introducing stricter criteria including for those with disabilities and/or unemployed receiving benefits. In other cases, Governments have started introducing new eligibility rules to benefits that had before been universally provided such as the move to means test child-benefit in the UK.⁶⁰⁰

However this increased targeting will most likely lead to more and more exclusion errors, and thereby discrimination. Despite seeming counter-intuitive increased targeting may not always be the best use of resources. The more targeting there is the more expensive it can be and the more likely it will result in the exclusion of people in need. As the former Independent Expert on human rights and extreme poverty has warned while targeting mechanisms may be seen as way of reaching the most vulnerable and disadvantaged groups, implementing an income- or poverty-targeted system introduces exclusion errors' due to the complexity of selecting beneficiaries.⁶⁰¹ Moreover, as already discussed, those excluded are often the most vulnerable as they will find it the most difficult to claim for their inclusion and challenge adverse decisions.⁶⁰²

It is difficult to determine who is in need. They are not usually a coherent, uniform group. There are varying degrees of need and vulnerability with blurred lines between them, and it is also not always easy to identify those experiencing the most extreme poverty and deprivation. There are persons that do not fit these situations (or contingencies) yet still in need. For instance, increasingly those working in both formal and informal sectors require assistance.⁶⁰³ Regarding means testing, questions include where you draw the line; wherever you draw it those people earning just

⁶⁰⁰ In January 2013 the UK started means-testing to determine eligibility for child-benefit. This was previously provided universally for people with children. This is further discussed in Chapter 5.

⁶⁰¹ UNHRC (Independent Expert on the question of human rights and extreme poverty) (n 435), para 66.

⁶⁰² Ibid.

⁶⁰³ Gwyn Topsham 'Record numbers of working families in poverty due to low-paid jobs' *The Guardian*, (London, 24 November 2014) <www.theguardian.com/society/2014/nov/24/record-numbers-working-families-poverty-joseph-rowntree-foundation> accessed 30 November 2014.

above it will lose out despite being only very marginally better off.⁶⁰⁴ Minimum income criteria also affects households and individuals differently. Those with more children are particularly affected, this in turn affects families and individuals belonging to different religious groups where larger families are more common. Increasing targeting when more and more people are in need due to rising unemployment results in more people falling through the net, and increasing exclusion errors.

Despite making frequent reference to vulnerable groups such as migrants, asylum seekers, persons with disabilities, and more recently socio-economic status including those living in poverty, the CESCR “has not as yet provided a coherent rational or framework for conceptualising vulnerability, nor has it provided criteria for identifying which individuals or groups may be considered disadvantaged or vulnerable in general or specific contexts.”⁶⁰⁵ While this could vary, depending on the particular domestic context,⁶⁰⁶ in practice a lack of guidance can allow states to evade their responsibilities. In justifying cutbacks, many governments for instance are deliberately confusing who is vulnerable, using phrases such as the deserving poor (thereby suggesting there are undeserving poor), and/or benefit tourism (suggesting that citizens from relatively new EU countries will move to richer ones to claim benefits). Reinforcing this, governments are imposing increasingly tougher conditions such as requiring people to attend more interviews with the job centre and/or apply for a minimum number of jobs each week with heavy sanctions for non-compliance to “assure the public that only the ‘deserving’ poor are receiving support.”⁶⁰⁷ However, those in poverty are more likely to have problems in complying with such conditionalities. Many have limited IT skills, education and access to internet, and be disadvantaged in finding employment.⁶⁰⁸

⁶⁰⁴ This is illustrated by the discussions in the UK on the new development of means testing to determine eligibility for child benefit. This is discussed further in Chapter 5. See also Fawcett Society ‘The Impact of Austerity on Women’ Fawcett Society Policy Briefing (London 2012) <www.fawcettsociety.org.uk/wp-content/uploads/2013/02/The-Impact-of-Austerity-on-Women-19th-March-2012.pdf> accessed 1 April 2013.

⁶⁰⁵ *Ratjen and Satuja* (n 583), p. 116.

⁶⁰⁶ Aoife Nolan and Mira Dutschke ‘Article 2(1) ICESCR and states parties’ obligations: whither the budget?’ (2010) 3 *European Human Rights Law Review*.

⁶⁰⁷ General Assembly ‘Report of the Independent Expert on the question of human rights and extreme poverty (Magdalena Sepúlveda)’ (2011) UN Doc. A/66/265, para 53.

⁶⁰⁸ CAB Scotland ‘Offline and left behind, digital exclusion amongst Scotland’s CAB clients’ (Edinburgh 2013)

The protection of the vulnerable must not be used as an excuse for increased targeting which can result in ever-decreasing circles that substantially raise the risk of exclusion errors. To ensure the protection of the vulnerable, governments need to take as much of an inclusive approach as possible including reducing targeting even if this is politically unpopular or disadvantageous. This is even more necessary during a financial crisis when people are more likely to be in need.

4.3.4. Take deliberate and targeted steps including programme of action

As discussed in Chapter 2, Article 2(1) stipulates that states are immediately obligated to take steps to progressively realize the right to social security. As an initial step they must develop a Programme or Plan of Action that elucidates how the state will achieve this over time. Again the CESCR has reiterated that this is an immediate obligation, irrespective of resources,⁶⁰⁹ yet also clarifies that the type of steps to be taken are resource dependent. Given this Ssenyonjo notes “it is clear that the Covenant does not make an absurd demand – a state is not required to take steps beyond what its available resources permit.”⁶¹⁰ As noted in Chapter 2 this approach ignores the role of states in determining resources/fiscal space.⁶¹¹

Like with other rights, CESCR has gone little beyond telling states to draw up a Programme or Plan of Action on realizing the right to social security. The General Comment on the right to social security recognises that “The duty to take steps clearly imposes on States Parties an obligation to adopt a national strategy and plan of action to realize the right to social security, unless the State Party can clearly show that it has a comprehensive social security system in place and that it “reviews it regularly to ensure that it is consistent with the right to social security”.”⁶¹² While it is not up to the CESCR to elucidate all steps, it can provide more guidance on what is expected, including raising the necessary revenue.

<www.cas.org.uk/system/files/publications/OFFLINE%20AND%20LEFT%20BEHIND%20INDESIGN.pdf> accessed 5 June 2014.

⁶⁰⁹ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN Doc. E/1991/23, para 11.

⁶¹⁰ *Ssenyonjo* (n 287), p. 980.

⁶¹¹ *UNCTAD* (n 77).

⁶¹² CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 68.

CESCR should firstly clarify what full implementation of the right to social security looks like, i.e. everyone in need having access to adequate social security that provides for a life in dignity and allows people to graduate from poverty, and the main stages to achieving this. In the past, one key component of the progressive implementation was continually increasing the number contingencies covered. ILO Convention 102 for instance contains flexibility clauses that allowed states to gradually achieve universal coverage by increasing the contingencies covered.⁶¹³ Upon ratifying states must accept as a minimum to cover three out of the nine branches of social security, with at least one of those three branches covering a long-term contingency or unemployment and with a view to extending coverage to other contingencies at a further stage (Article 2).⁶¹⁴ This approach is also implicitly suggested by the CESCR, by its stipulation that states, if unable to immediately provide for all contingencies, “after a wide process of consultation” must “select a core group of social risks and contingencies.”⁶¹⁵ However this would leave many without, and would violate both the right to social security and other rights.

Instead, as has already been recognised in this Chapter particularly regarding states’ obligations to ensure substantive non-discrimination, states should first ensure a minimum essential level for all in need, and then move to full implementation. This is supported by the ILO’s new approach. While the ILO’s instruments do not refer to taking steps, they have specified a hierarchy of action to be taken to ensure compliance with the Social Protection Floor. The ILO has developed the horizontal and vertical progression, likening it to a staircase.⁶¹⁶ The first horizontal dimension is concerned with extending income security and access to health care to the entire population, with the second dimension (vertical), being to provide higher levels of income security and access to higher quality health care at levels that protect the standard of living of individuals and families, even when faced with fundamental life contingencies such as unemployment, ill health, invalidity, loss of breadwinner and old age.⁶¹⁷

⁶¹³ ILO ‘Setting Social Security Standards in a Global Society’ (International Labour Office Geneva 2008), p. 10.

⁶¹⁴ Ibid., p. 10.

⁶¹⁵ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 59 (a).

⁶¹⁶ *ILO* (n 9), p.18.

⁶¹⁷ Ibid, p. 46.

As established in Chapter 2, the Programme of Action must also incorporate details about how this progression towards full implementation will be funded. The ILO suggests that a checklist of components for a national strategy may include: (1) tax reforms to increase fiscal resources including, in particular, enhancing the effectiveness and efficiency of tax collection; (2) gradual increase in social spending as a proportion of GDP and as a proportion of total spending; (3) redistribution between social policy areas to refocus expenditure on most urgent needs; (4) refocusing spending within social sectors and policy areas to make certain spending more progressive and more effective in combating poverty and vulnerability.⁶¹⁸ While the CESCR has already asked questions such as whether states can maintain effective social security systems,⁶¹⁹ it should go further and ask states how they are funding the progressive realization of the right to social security. Both Chapters 2 and 3, in particular the latter's section on sustainability, can provide further guidance in this regard.

During the financial crisis, however, governments appear to have focused predominantly on developing programmes/plans of action to address the national deficit.⁶²⁰ Instead they should be identifying how and planning to secure social security for those in need despite the financial crisis and the budget deficit.

4.3.5. Non - retrogression

The duty to progressively fulfil economic, social and cultural rights implies a prohibition of deliberately retrogressive measures except when justified by certain strict criteria. As section 4.2 of this chapter discusses further, such measures are rarely permissible even during times of financial crisis.

As determined in Chapter 2, a retrogression in the right to social security is any action that has a sustained impact on, or jeopardise, the realization of the right to social security; and/or lead to an unreasonable impact on already acquired social security rights. As noted in Chapter 2 the inclusion of jeopardise reflects the CESCR's

⁶¹⁸ Ibid., p. 30.

⁶¹⁹ CESCR 'Summary Records on Belgium' (2007) UN Doc. E/C.12/2007/SR.41.

⁶²⁰ Peter Guest 'Cameron Insists on Sticking to 'Plan A' Cuts For Deficit Reduction' *The Huffington Post* (31 October 2011) <www.huffingtonpost.co.uk/2011/10/31/cameron-government-will-s_n_1066768.html> accessed 21 March 2016.

concluding observations and some national court decisions, and helps address the grey area between a violation of a right and actions jeopardising its realisation. It also ensures forward-looking policies that do not just stop at the minimum essential levels, and reinforces the obligation of states to ensure an enabling environment for the progressive realization of human rights.

As highlighted previously, the CESCR appears very reluctant to regard anything as retrogressive. Nolan, Lusiani and Courtis have noted that “this has included situations in which states have engaged in extensive cutbacks to their social and economic programmes in the context of financial or economic crisis.”⁶²¹ One example regarding the right to social security that the CESCR deliberately labelled as retrogressive was regarding measures taken by the Canadian Government in 1995 when it replaced the Canada Assistance Plan (Plan) with the Canada Health and Social Transfer (CHST). This eliminated the national standards set by the Plan for social welfare, and reduced the amount of cash transfer payments provided to the provinces to cover social assistance.⁶²² In reaching its conclusion, the CESCR discussed whether the Plan constituted a standard before being replaced by the CHST, and therefore whether the CHST represented a lowering of standards.⁶²³ According to the CESCR, it could only be regarded as a retrogression if there had been a lowering of standards.⁶²⁴

The example above does meet the criteria of having had a sustained impact on the enjoyment of the right to social security. However, the CESCR can regard other measures as regressive, such as reductions in budgets for welfare and social programmes, or labour reforms making it harder for people to contribute to insurance schemes, if they threaten the right to social security and alternative or mitigating measures have not been taken. This approach allows the CESCR or other judicial bodies to expand its dialogue to ask for justifications and more explanations regarding the change or deviation from the Plan or Programme of Action. Using the due diligence principle, it can ask what efforts a government has taken to avoid taking

⁶²¹ Nolan, Lusiani and Courtis (n 320), p. 126.

⁶²² CESCR ‘Concluding Observations on Canada’ (1999) UN Doc. E/1999/22, para 394.

⁶²³ Sepulveda (n 117), p. 326.

⁶²⁴ Ibid. As Sepulveda notes, the Canadian representative defended its policy change by arguing that the Plan did not establish a certain level of financial assistance, and since it had not established any standards then the CHST could not be considered retrogressive as it did not constitute a loss of standards.

these measures in the first place, how their likely impact has been estimated, such as conducting full human rights impact assessments, and subsequently mitigated. The last part is key since, as Liebenburg notes, “The key consideration in this context is likely to be the adequacy of any alternative systems of social support which the government may put in place in the context of the scaling down of a particular social security programme.”⁶²⁵ As discussed in Chapter 2 using the programme or plan of action as a guide in this regard helps determine state responsibility and the ‘deliberateness’ of measures.

4.4. The financial crisis and general obligations under the ICESCR: Can states escape their obligations to implement the right to social security?

With governments cutting social security coverage and levels, that could include violations of core obligations and certainly non-compliance with the progressive realisation obligation, it is apparent states are trying to avoid their obligations. They often claim that it is not possible to do more so in the current economic climate, or likening the situation to a war thereby implicitly suggesting that derogation from core principles and standards may be needed.⁶²⁶ Given this, human rights advocates must determine whether the measures are legal or legitimate under the ICESCR rather than just focusing on how decisions about the cuts should be made and their transparency.

4.4.1. The financial crisis and non-derogation of rights

With many governments using language of an emergency such as announcing ‘war on excessive spending’ to justify austerity measures jeopardize and violate full implementation, and in some cases even minimum essential levels of the right to social security, it is necessary to examine the extent to which states can derogate, i.e. suspend substantive guarantees for rights under the ICESCR. UK Prime Minister Cameron for instance has stated

⁶²⁵ Sandra Liebenberg, ‘The judicial enforcement of social security rights in South Africa: Enhancing accountability for the basic needs of the poor’ in Eibe Riedal, (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer-Verlag 2006), pp. 69–90, p. 80.

⁶²⁶ BBC ‘PM to crack down on ‘time-wasting’ appeals’ *BBC*, (London, 19 November 2012) <www.bbc.com/news/uk-politics-20389297> accessed 21 March 2015. See also Adam Wagner ‘A War on Judicial Review? [updated]’ *UK Human Rights Blog* (London, 19 November 2012) <<https://ukhumanrightsblog.com/2012/11/19/a-war-on-judicial-review/>> accessed 3 May 2016.

“When this country was at war in the 40s, Whitehall underwent a revolution. ... everything was thrown at ‘the overriding purpose’ of beating Hitler. ... this country is in the economic equivalent of war today – and we need the same spirit. We need to forget about crossing every ‘t’ and dotting every ‘i’ – and we need to throw everything we’ve got at winning in this global race.”⁶²⁷

In this regard, he also committed to ending "equality impact assessments" that must be carried out when new policy or legislation is introduced, contending that this "bureaucratic nonsense" was not necessary to ensuring the rights of different sexes, races and religions were upheld.⁶²⁸ While this was made in respect to judicial review, it was clear from the statement that he likened economic recession to a war and argued that it warrants suspension of normal guarantees.

Under the ICCPR, states can derogate from their obligations i.e. suspend the current substantive guarantees for the rights under the Covenant.⁶²⁹ Any derogation must be temporary (life of the emergency), strictly necessary, non-discriminatory, and proportional, i.e. stands in a reasonable relationship to the gravity of the emergency threatening the life of the nation.⁶³⁰ However under ICESCR there is no explicit provision for derogation. Article 4 focuses solely on limitations, and under Article 2(1) the CESCR has focused on examining when a state may take retrogressive measures (steps backward) when facing resource constraints.⁶³¹

This lack of an explicit derogations clause clouds the issue of whether and the extent to which states are legally allowed to deviate from their obligations under the ICESCR both regarding what actions are justified under a state of emergency and whether a financial crisis constitutes an emergency. While the lack of clause has led some

⁶²⁷ Ibid.

⁶²⁸ Ibid.

⁶²⁹ Article 4 of the ICCPR states: “in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the Present Covenant (ICCPR) may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

⁶³⁰ The ECtHR defined a “public emergency threatening the life of a nation” as an “exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state party is composed.” See *Lawless v. Ireland* (No 3) (1961) 1 EHRR 15.

⁶³¹ *Mueller* (n 302).

commentators to assert that economic and social rights are *non-derogable*,⁶³² in practice the CESCR has been far from conclusive on this matter. As already noted, it uses the word *non-derogable* for states' obligations to ensure minimum core obligations,⁶³³ yet also stipulates conditions under which states can excuse implementation such as level of development and the country's current economic situation, in particular whether the country was undergoing a period of economic recession. This suggests that under some circumstances the obligation to ensure minimum essential levels is *derogable*.⁶³⁴ Moreover by only referring to the *non-derogability* of minimum essential levels, does this mean that full implementation is in fact *derogable*? This question does not apply to civil and political rights since the ICCPR only distinguishes between compliance and a failure to do so which is a violation. There is no partial implementation as the CESCR seems to suggest with economic and social rights. The CESCR also implicitly suggest the *non-derogability* of other obligations (such as to take steps, non-discrimination) using language such as 'immediately' and/or 'regardless of resources'. Does this mean they too are *non-derogable*?

One question to consider is whether a state can claim a *force majeure* or exceptional threat when experiencing an economic crisis. Does a recession represent an existential threat i.e. does it threaten the survival of the state itself? Since if it surely relates to the level of resources in a country it should be covered by Article 2(1) since this was drafted to allow for flexibility and to take into account state capability when assessing compliance with ICESCR.⁶³⁵ Sepulveda notes

“Although it [CESCR] is clear that it takes into account these situations (such as natural disasters) in its evaluation of the implementation of the Covenant and is

⁶³² OHCHR 'Frequently Asked Questions on Economic, Social and Cultural Rights - Fact Sheet 33' (Geneva, 2008).

⁶³³ CESCR 'General Comment 14: The Right to the Highest Attainable Standard of Health' (2000) UN Doc. E/C.12/2000/4, para 47; and CESCR 'Statement on poverty and the ICESCR' (2001) UN Doc. E/C.12/2001/10, para 16; and CESCR 'General Comment 15: The Right to Water' (2002) UN Doc. E/C.12/2002/11. The General Comment on the Right to Water stipulates "Under no circumstances shall an individual be deprived of the minimum essential level of water" (para 56).

⁶³⁴ *Sepulveda* (n 117), p. 281.

⁶³⁵ ECOSOC 'Report of the High Commissioner for Human Rights on the concept of 'Progressive Realisation of economic, social and cultural rights in international human rights law' (2007) UN Doc. E/2007/82, para 24. This has also been acknowledged by Ssenyonjo. See *Ssenyonjo* (n 254), p. 990.

more sympathetic to the State in its Concluding Observations, it has not even acknowledged the possibility of derogation from the Covenant's obligations."⁶³⁶

One can also argue that ensuring the right to social security can play a key role in preventing a possible *force majeure* such as internal violence, unrest and conflict by reducing inequality and competition over resources. As the ILO notes "inequality and insecurity go hand in hand with social instability."⁶³⁷ Interestingly economists found that government expenditure cuts carry a significant risk of increasing the frequency of riots, anti-government demonstrations and general strikes amongst other things. While these are low-probability events in normal years, they found that they become much more common as austerity measures are implemented, and that high levels of instability show a particularly clear connection with fiscal consolidation with the harsher the austerity measures, the more intense the disturbance. The risk of turmoil rises for every additional percentage point of GDP in spending reductions. When budget cuts hit 5% or more, incidents of unrest were twice as high as when spending increased.⁶³⁸

Moreover, even if you could argue it was a *force majeure* that would undermine the very existence of the state, any derogation must still have the purpose of helping overcome a grave situation and working towards "the restoration of a state of normalcy where full respect for the Covenant can again be secured".⁶³⁹ Sepulveda similarly recognizes the importance of acknowledging the need to protect people's rights. She observes "...that the rationale for derogation provisions is to strike a balance between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the rights of the individual from abuse by the State."⁶⁴⁰ As she further observed this would be difficult for subsistence rights; she states "It is difficult to see how derogation from the right to food or the right to the enjoyment of the highest attainable standard of health would assist in

⁶³⁶ *Sepulveda* (n 117), p. 302.

⁶³⁷ ILO 'Social Protection Floor for a fair and inclusive globalisation' (International Labour Office Geneva 2011), p. 2.

⁶³⁸ Jacopo Ponticelli and Hans-Joachim Voth, 'Austerity and Anarchy: Budget Cuts and Social Unrest In Europe, 1919-2009' (Discussion Paper No. 8513, Center for Economic Policy Research 2011) <<http://voxeu.org/sites/default/files/file/DP8513.pdf>> accessed 3 July 2015.

⁶³⁹ Human Rights Committee 'General Comment 29: States of Emergency (Article 4)' (2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para 1.

⁶⁴⁰ *Sepulveda* (n 117), p. 295.

resolving a conflict situation rather than worsening it.”⁶⁴¹ This is particularly relevant given the link between inequality, social spending cuts and political instability, as mentioned in previous paragraphs.⁶⁴²

Derogations from the right to social security would also put at risk *non-derogable* civil and political rights including the right to life, with which the right to an adequate standard of living, social security and health is intrinsically linked. The India Supreme Court has articulated the relationship between the right to food and the right to life.⁶⁴³ In its General Comment on the right to life, the Human Rights Committee found that states are obligated to “take all possible measures to... increase life expectancy” including eliminating malnutrition.⁶⁴⁴ Social security is a key means of preventing malnutrition. Moreover, as already noted in Chapter 3, the ECtHR has also established a link between the right to social security and the right to be free from inhumane and degrading treatment.⁶⁴⁵ Since inhumane treatment is *non-derogable* under the ICCPR and the ECHR, this strongly strengthens the argument for the right to social security to be *non-derogable*.

There are, however, some non-subsistence economic, social and cultural rights that could be considered *derogable* if the country faced an existential threat. As Sepulveda notes derogations from Article 8 of the ICESCR (the right to form and join trade unions and the right to strike) could possibly be justified to maintain peace.⁶⁴⁶ In fact this has already been provided for in the article 8 of the ICESCR, which stipulates that states are allowed to place restrictions on the enjoyment of article 8 ICESCR if it is “necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.” However since an economic recession cannot for the most part be considered an existential threat, these rights also cannot be derogated from during this financial crisis.

⁶⁴¹ Ibid., p. 295.

⁶⁴² *Ponticelli and Voth* (n 638).

⁶⁴³ *People's Union for Civil Liberties v. Union of India & Ors* [2001] 1 SCC 39 (Supreme Court of India, Writ petition (Civil) No.196).

⁶⁴⁴ CESCR ‘General Comment 6: The Economic, Social and Cultural Rights of Older Persons’ (1995) UN Doc. E/1996/22.

⁶⁴⁵ *Larioshina v. Russia* (decision on admissibility) [2002] 35 EHRR (ECtHR 56869/00).

⁶⁴⁶ *Sepulveda* (n 117), p. 295.

While one can conclude subsistence rights are *non-derogable* in times of financial crisis, given the nature of economic and social rights, it remains questionable whether it is their full implementation that is *non-derogable* or just minimum essential levels. This question does not arise for civil and political rights since they have only two alternatives: full implementation or failure to do so which is then regarded as a violation.⁶⁴⁷ As already stated, CESCR has reiterated the *non-derogability* of minimum essential levels, and certainly this would cover some of the arguments against the *derogability* of subsistence economic and social rights. For instance ensuring minimum essential levels by definition would be enough to ensure having enough to live in dignity (right to life) free from degrading and inhumane treatment (*non-derogable* rights under ICCPR). However, given that recessions can hardly or rarely be said to threaten the existence of a state, other obligations under the ICESCR also cannot be derogated from. This includes the obligation to take steps to progressively achieve full implementation. Non-compliance with this obligation, and any steps backward would then be judged under Article 2(1). Retrogressive measures are not derogations *per se* but a failure by the state to ensure progressive realization. Whether or not these are justifiable is then a question of judging their necessity given the understanding of maximum available resources.

4.4.2. The financial crisis and maximum available resources: human rights and austerity economics

With states justifying non-implementation of their obligations, and/or retrogression, on a lack of resources, any discussion of the legitimacy and necessity of austerity measures that negatively impact human rights requires an analysis of what maximum available resources means in times of financial crisis and national debt.

As Chapter 2 showed, rather than allowing states to avoid their obligations, the ‘maximum of available resources’ clause in the ICESCR can be used further to hold States accountable for their economic policies. By establishing that resources available to implement human rights largely depends on economic policies adopted by

⁶⁴⁷ Audrey Chapman, ‘The Status of Efforts to Monitor Economic, Social and Cultural Rights’ in Shareen Hertel and Lanse Minkler (eds.), *Economic Rights Conceptual, Measurement, and Policy Issues* (Cambridge University Press 2007), p. 143.

the government, as recognized by UNCTAD amongst others,⁶⁴⁸ it establishes how human rights activists should move from a more traditional quantifying approach to examining how to judge economic policy decisions in solving the issue of maximum available resources clause. This then shifts States from bearing the burden of proving their incapacity to proving the validity of their economic choices with clear and convincing evidence, and in some cases beyond reasonable doubt. Any economic policies must also be in line with key human rights principles. As this section demonstrates, this remains valid in times of financial crisis despite what some politicians are claiming.

In 2008, following the initial expansive response to the financial crisis, many governments presented their financial resources as fixed or at the very least highly rigid, justified austerity measures by arguing that essentially there is not enough pie to go around. Many used the increased national debt following the bailout of the banks to emphasise this point. Comparing it to a household, they promoted national debt as a static balance sheet or snapshot indicating that a country has reduced resources and must curb spending despite for many countries the debt levels having resulted from the bailout of the banks rather than uncontrollable spending.⁶⁴⁹ Konzelmann similarly notes that often “austerity measures have been presented not only as an economic necessity but also as moral obligation, with the message being framed by the unassailable logic that – having lived beyond our means for too long – it is now the time for frugality and restraint.”⁶⁵⁰

As Chapter 2 has already stated national debt is an inaccurate indicator of resources and this approach is inaccurate. While there are different views amongst economists about how to treat national debt, viewing it the same as household debt in this simplistic way is misleading. When a household is in debt, it has to reduce spending as its income is relatively fixed. States, unlike most households, can for instance increase their financial resources by increasing taxation or introducing new forms of taxation. Also, unlike households, by reducing spending states do not automatically increase income available to pay off debt. In fact some economists argue it has the

⁶⁴⁸ UNCTAD (n 77).

⁶⁴⁹ Lusiani (n 94), p. 15.

⁶⁵⁰ Suzanne Konzelmann, ‘The Economics of Austerity’ (Working Paper No.434, University of Cambridge 2012).

opposite effect and by decreasing aggregate demand, reducing government spending in times of recession can actually decrease economic growth and therefore income to pay for social goods.⁶⁵¹ They argue that government spending during a recession, even when there is a national debt, can actually help stimulate the economy.⁶⁵²

If a government wants to justify expenditure cuts that jeopardise and/or violate human rights it must do so with clear and convincing evidence that it is necessary for 'general welfare',⁶⁵³ and that all other measures or a failure to act, would worsen the enjoyment of economic, social and cultural rights.⁶⁵⁴ If its actions breach core obligations, the standard of proof increases to proving 'beyond reasonable doubt'. While numerous governments have pushed austerity measures as the *only* way forward, there are strong arguments against austerity economics that question their necessity. The CESR for instance observed that mainstream economists began in late 2011 to speak out against budget austerity measures, in favour of further economic stimulus,⁶⁵⁵ putting forward country examples to illustrate their point. One often quoted country example is Iceland, which Wade and Sigurgeirsdottir, viewed as a "rebuke to the new-classical economics prescription for bank bailouts and steep public spending cuts as the way to satisfy financial markets and create jobs."⁶⁵⁶ Several international organisations including the UN Specialised Agencies have also doubted the necessity of austerity measures. At the opening of the ILO's annual conference in Geneva in May 2012 the ILO Director General said "The austerity-only course to fiscal consolidation is leading to economic stagnation, job loss, reduced protection, and huge human costs."⁶⁵⁷ In December 2011, UNCTAD argued fiscal tightening could be self-defeating.⁶⁵⁸ A UNICEF report notes "fiscal consolidation is likely to have a more negative short term

⁶⁵¹ *Buttonwood* (n 92).

⁶⁵² Joseph Stiglitz 'Stimulating the Economy in an Era of Debt and Deficit' (2012 9(2) *The Economists' Voice*).

⁶⁵³ CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 9. See also *Mueller* (n 305), p. 133.

⁶⁵⁴ CESCR 'Open Letter to State Parties to the ICESCR' (4 June 2012).

⁶⁵⁵ These include Douglas Elmendorf (the Director of the US Congressional Budget Office), Cornell University economist Robert Frank and Laurence Summers (Harvard Economist and former director of the White House National Economic Council). See *Lusiani* (n 94), p. 4.

⁶⁵⁶ Robert Wade and Silla Sigurgeirsdottir 'Iceland's Rise, Fall, Stabilization and Beyond' (2012) 36(1) *Cambridge Journal of Economics*, pp. 127-44.

⁶⁵⁷ Juan Somavia, ILO Director-General, 'ILO Director-General's opening address to the 101st International Labour Conference' (Speech at the 101st International Labour Conference, 30 May 2012) <[www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_181894/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_181894/lang-en/index.htm)> accessed 4 May 2016.

⁶⁵⁸ UNCTAD 'On the brink: Fiscal austerity threatens a global recession' Policy Brief 24 (2011).

effects on growth and employment than usual”.⁶⁵⁹

Equating national debt with a country’s level of resources also ignores the fact that deficit spending can be used to invest in a country, develop its assets, and therefore its resources, and spur an economy. CESR notes that it is in fact (in moderation) "a standard and important economic policy tool which has allowed governments worldwide the ability to maximize resources and invest in current and future human and economic potential."⁶⁶⁰ This includes investing in human capital through training and education, and promoting good health. As UNCTAD specified in a policy brief “instead asking whether their fiscal deficit is too big, they (countries) should ask whether it is being used in the best way to stimulate the economy.”⁶⁶¹ Is it for instance being invested in developing states’ assets?

This remains true for social security; expenditure in social security is not ‘dead-money’. Social security is an investment in society, and importantly for the economy, human capital. The ILO notes that “social security represents an investment in a country’s ‘human infrastructure’ no less important than investments in its physical infrastructure.”⁶⁶² The High Level Panel of Experts on Food Security and Nutrition, Committee on World Food Security similarly notes “social protection systems should not be seen as “dead weight’ burdens on fiscal systems”, and that they can in fact, if well-designed, help promote economic growth and prevent the depletion of assets.⁶⁶³ Several other organisations have similarly established positive correlations between social security and education, nutrition levels and reduced sickness all of which are essential for developing a country’s assets and productivity, and therefore its resources.⁶⁶⁴

The above analysis illustrates that the governments have economic choices, even during a financial crisis. In a nutshell, things are not as black and white as often

⁶⁵⁹ Isabel Ortiz, et al ‘Prioritising expenditure for a recovery for all: a rapid review of public expenditure in 126 developing countries’ (UNICEF 2010), p. 1.

⁶⁶⁰ *Lusiani* (n 94), p. 6.

⁶⁶¹ *UNCTAD* (n 658)

⁶⁶² *ILO* (n 9).

⁶⁶³ FAO ‘Social Protection for Food Security: a Report by the High Level Panel of Experts on Food Security and Nutrition, Committee on World Food Security’ (Rome 2012) p. 11.

⁶⁶⁴ UNICEF ‘Multi-sectoral Approaches to Nutrition: The case for investment in social protection programmes’ <www.unicef.org/eapro/Brief_Social_Transfer.pdf> accessed 4 May 2016.

portrayed by many governments. This analysis is clearly not an extensive economic analysis evaluating one model over another; but instead demonstrates the lack of conclusiveness about the situation of resources as portrayed by governments, and the necessity of austerity measures. Some commentators have argued “A debate about the necessity of austerity measures will inevitably include an assessment of the economic consequences of these measures”, and that human rights “cannot determine the outcome of such debates.”⁶⁶⁵ But this is not necessarily true. Human rights professionals do not need to judge the economic outcomes. Given the impact austerity measures have had on human rights, they must instead judge whether the state has provided ‘clear and convincing evidence’, or in the case of violations of minimum essential levels evidence that demonstrates ‘without reasonable doubt’, that there are no alternatives. As noted in Chapter 2 courts are used to having obtain specialist expertise and knowledge in “every area of law” and have “responded to the challenge of information by using specialist bodies an expert witnesses as well as submitting submissions from *amicus curiae* interventions...”⁶⁶⁶

State’s arguments in justifying their choices i.e. cutbacks, that have resulted either in violations or and/or retrogressive measurers such as jeopardising peoples’ economic and social rights, are therefore not “so clear as to leave no substantial doubt” and are in fact insufficiently “strong to command the unhesitating assent of every reasonable mind.”⁶⁶⁷ Given this, it seems clear that courts and other human rights bodies should be able to consider the evidence and conclude that these austerity measures are far from necessary, that is that there are alternatives with less harmful effects on general welfare and human rights.

4.4.3. The financial crisis and progressive implementation

While many have contended that the obligation to ensure progressive realisation provides states with an excuse to continually postpone implementation, as noted in Chapter 2 it can be used to obligate states to ensure a facilitating environment to secure full implementation over time with the obligation to take steps elucidating the

⁶⁶⁵ Markus Krajewski ‘Human Rights and Austerity Programmes’ (Social Science Research Network 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199625> accessed 5 June 2014.

⁶⁶⁶ Langford (n 147).

⁶⁶⁷ See *Angelia P., a Minor. Department of Social Services, (Petitioner and Respondent) v. Ronald P. et al.* [1981] 28 Cal. 3d 908 (Supreme Court of California SF 24184).

measures needing to be taken. As this chapter has already illustrated, states still have choices, and austerity measures are not the only option during a financial crisis, even when there is considerable national debt. Demonstrating the validity of this approach, the afore mentioned ECSR collective complaints (*Pensioners' Union of the Agricultural Bank of Greece v. Greece* (No. 80/2012) and *Panhellenic Federation of pensioners v. Greece* (No. 79/2012) amongst others), demonstrated that an economic crisis does not invalidate states' obligation under Article 12(3) of European Social Charter to progressively raise the level of social security.⁶⁶⁸ The state in question (Greece) had modified both modifying both public and private pension schemes, and the ECSR ruled that it had violated Article 12(3) to endeavour to raise progressively the system of social security to a higher level.⁶⁶⁹ While the ECSR also ruled that this in part due to the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, it is interesting to note that it ruled a violation of Article 12(3) rather than Article 12(1) and (2), which calls on states to maintain a social security system at a satisfactory level.⁶⁷⁰

Moreover, as discussed in Chapter 2, states are **still** obligated to not jeopardise the realisation and enjoyment of human rights in the future. This could include undermining states resources including human capital, and promoting inequality. As already highlighted social security helps ensure equality by redistributing income to those worse off. This also improves a state's economy that in turn can help assure the implementation of human rights in the long term. The OECD for instance has reported that inequality reduces economic growth⁶⁷¹ This Chapter has also already noted that spending on social security also helps develop a state's human capital through a positive correlation with nutrition rates, and improved health and educational performances. Moreover, a 2002 report by the USA Congressional Budget Office notes the expansionary impact social protection including tax cuts for those in poverty on a national economy. It found that those on lower incomes are likely to spend more while those on higher incomes will save, thus suggesting that "tax cuts that are targeted towards lower income households are likely to generate more stimulus dollar

⁶⁶⁸ *Pensioners' Union of the Agricultural Bank of Greece v. Greece* [2012] (ECSR 80/2012); *Panhellenic Federation of Pensioners v. Greece* [2012] (ECSR 79/2012).

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid.*

⁶⁷¹ OECD 'Focus on Inequality and Growth' (Paris, 2014) <www.oecd.org/social/Focus-Inequality-and-Growth-2014.pdf> accessed 15 January 2015.

for dollar of revenue loss than those concentrated amongst higher income households.”⁶⁷² This suggests that investments in those with limited incomes create more rapid multipliers, lending support to social protection as a fiscal expansionary scheme. Scholars have also observed that restrictive fiscal policy can have detrimental impacts on an economy, noting that “restrictive fiscal policy during the Asian crisis financial crisis arguably led to increased job and income losses affecting people in a myriad of ways.”⁶⁷³

Principles such as due diligence in conjunction with progressive realisation further obligates states to proactively assess the risks and learn from previous experiences both positive and negative over the long term. This includes taking note of studies such as those mentioned above. States must be aware of events in the past and show evidence that they have taken steps to mitigate possible adverse impacts.

4.5. Concluding remarks

It is clear from the above analysis that governments have core obligations to realise the right to social security regardless of the level of resources in a country. In particular they must provide minimum essential levels to all that allow a life in dignity to all in need. However, they also cannot derogate from their broader obligations, including their obligation to progressively realize the full implementation of the right to social security, since recessions can hardly or rarely threaten the existence of a state.

Using the increased understanding of maximum available resources as elaborated and discussed in Chapter 2, and avoiding the quantitative approach taken by many commentators, also allows judicial and quasi-judicial bodies to look more substantively at the issue of national debt and the legitimacy and necessity of austerity measures that threaten the right to social security. Throughout the analysis, it is demonstrated that there is credible evidence of alternatives to such measures, and that it is therefore difficult for states to prove that they are the only possible course of

⁶⁷² Congressional Budget Office *Economic Stimulus: Evaluating Proposed Changes in Tax Policy* (Congress of the United States, 2002).

⁶⁷³ *Cariari et al.* (n 555), p. 4.

action. It illustrates that there are still the choices to be made, and in addition to not threatening the right to social security states are still obligated to ensure a facilitating environment to secure full implementation over time.

Chapter 5: The situation in the UK: May 2010 – May 2015

5.1. General introduction

Following the May 2010 general elections in the UK and the failure of any political party to outright win, a coalition government was formed between the Conservative Party and the Liberal Democrat Party. They inherited what they regarded as a ‘substantial’ national debt following the bail out of the banks in 2008, and in response put welfare reform high on the agenda and implemented a series of emergency budgets and spending reviews to reportedly put the nation’s finances on a more sustainable footing,⁶⁷⁴ and gain credibility in the international markets. The reform focused on keeping tax increases as low as possible and cutting expenditure on social services. As Oxfam has noted, based on the observations of the Institute of Fiscal Studies (IFS), “The ratio of spending cuts and tax increases is roughly 85:15 – for every £100 of deficit that is reduced, £85 comes through spending cuts, while £15 is through increased taxes.”⁶⁷⁵ In particular the Coalition Government reduced the amount of social security awarded to recipients and increased sanctions for non-compliance with conditionalities such as actively looking for work.⁶⁷⁶

Following the Coalition Government’s welfare reform, many organisations documented an increase in poverty, including increases in malnutrition, food insecurity, homelessness, all of which could be argued as violating the minimum essential levels of key subsistence rights necessary for survival and a life in dignity. Oxfam for instance noted that in 2011 the IFS found that the net direct effect of the Coalition Government’s tax and benefit changes would be to increase both absolute and relative poverty.⁶⁷⁷ Several organisations also documented rising inequality throughout the Coalition Government’s tenure. In 2013, Oxfam observed that the reforms thus far:

⁶⁷⁴ DWP ‘DWP Reform: DWP’s welfare reform agenda explained’ (2015) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/484101/dwp-reform-agenda-explained-1-feb-2015.pdf> accessed 23 January 2016, p. 3. This publication has now been withdrawn.

⁶⁷⁵ Oxfam (n 75). For more information see Paul Johnson’s (Director of IFS) opening remarks at an Institute of Fiscal Studies event on 27 June 2013 in London. Available from <http://www.ifs.org.uk>.

⁶⁷⁶ Mulholland (n 549).

⁶⁷⁷ Mike Brewer, James Browne, and Robert Joyce ‘Child and Working-Age Poverty from 2010 to 2020’ (IFS, London 2011) <www.ifs.org.uk/comms/comm121.pdf> accessed 3 March 2012.

“... led to a dramatic increase in the number of people living in poverty, which almost doubled, from 7.3 million people in 1979 to 13.5 million in 2008, and inequality reached levels last seen in the 1920s, driven by a growing share of income going to the richest, in particular the top one per cent. Since 1975, income inequality among working-age people has risen faster in the UK than in any other OECD nation, including the United States, such that the UK now ranks as one of the most unequal countries in the OECD...”⁶⁷⁸

To answer whether the Coalition Government’s welfare reform complied with international human rights law, and could be justified by the country’s financial position, this chapter applies the analysis developed in Chapters 2, 3 and 4. Since it is beyond this chapter’s capacity to do a comprehensive analysis, it focuses on reviewing the main elements of welfare reform and their impact using the reports, of well-regarded national and local charities and academics that work on poverty related issues, including in both documenting cases of hardship and deprivation, and in directly assisting people in need.

5.2. The right to social security in the UK

Despite the UK having ratified the ICESCR in 1976, the right to social security is not directly enforceable in the UK. Moreover, there is no constitution or legal framework establishing economic and social rights. Instead the UK complies with its obligations under the Covenant by enacting “specific laws, policies and practices” to implicitly implement these rights.⁶⁷⁹ The right to social security has been implemented through statute and regulations such as National Assistance Act of 1948, the Social Security Act of 1986, the National Health Service and Community Care Act of 1990 and more recently the 2012 Welfare Reform Act. These have established what is to be paid to whom, addressing issues such as eligibility, the amount to be paid, and the conditions beneficiaries must fulfil in order to be able to receive benefits.

⁶⁷⁸ *Oxfam* (n 75).

⁶⁷⁹ CESCR ‘UK 4th Periodic Report on the Implementation of ICESCR’ (2001) UN Doc. E/C.12/Add.8, para 2.01

5.2.1 Post 2010 Welfare Reform

In 2010, soon after forming, the Coalition Government placed welfare reform high on the agenda, arguing it was time to make work pay, ensure fairness to the tax-payer, and reduce welfare dependency.⁶⁸⁰ It announced numerous initiatives and cuts through a series of spending reviews, emergency budgets including the June 2010 Emergency Budget, the 2010 Comprehensive Spending Review (CSR), the 2011 Autumn Financial Statement (AFS2011), and the 2011, 2012, 2013, 2014 and 2015 Budgets. Many of the earlier initiatives were then formalised in the Welfare Reform Act (2012) and the Welfare Benefits Up-rating Act (2013).

The legal framework for the welfare reform

The Welfare Reform Act and the Welfare Benefits Up-rating Act provide the main legal framework for the welfare reform imposed from 2010 onwards. When necessary, these acts were also accompanied by secondary legislation that covered the specific implementation of particular reforms such as the Personal Independent Payments (PIPs). These include the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377).

These Acts were the result of a process initiated in July 2010 when the Coalition Government produced a consultation document entitled *21st Century Welfare (Cm 7913)*. This set out a range of options for welfare reform, and over 1600 responses were received from external organisations, individual members of the public and members of staff of the Department for Work and Pensions (DWP). At the end of the consultation period, in November 2010, a White Paper *Universal Credit: Welfare That Works (Cm 7957)* was published, alongside the Government's responses to the consultation (*Consultation responses to 21st Century Welfare (Cm 7971)*). The White Paper detailed the Coalition Government's proposals for welfare reform, and became the basis for the Welfare Reform Act and the Welfare Benefits Up-rating Act.

The adoption of the Welfare Reform Act was particularly controversial. Before the draft Bill was adopted by Parliament, it passed to the House of Lords for

⁶⁸⁰ UK mission to the UN in Geneva 'Response to questionnaire by the former Independent Expert on extreme poverty and human rights on responses to the financial crisis, Note Verbale 018' (Geneva, 2011) <www.ohchr.org/Documents/Issues/EPoverty/UnitedKingdom.pdf> accessed 6 March 2012.

consideration. Normally both Houses must agree on a Bill before it can receive Royal Assent and become an Act of Parliament. However, due to its controversial nature, the Welfare Reform Bill passed back and forth between Parliament to the House of Lords seven times with the peers proposing many amendments. Eventually, on 1 February 2012, a committee of the House of Commons resolved that the Welfare Reform Bill engages the financial privilege of the Commons. This rarely used parliamentary device stipulates that only the House of Commons has the right to make decisions on bills that have large financial implications.⁶⁸¹ By convention, the Lords had to accept this determination and the Bill received Royal Assent on 8 March 2012. Regarding the Welfare Benefit Up-rating Bill, while the House of Lords were concerned about the some aspects, it was passed for Royal Assent on 26 March 2013 after the third reading at the House of Lords.⁶⁸²

Amongst the most significant changes that the welfare reforms has introduced are:

- Creating Universal Credit that will provide a single streamlined payment for those in or out of work replacing income-based Jobseeker's Allowance (JSA), Housing Benefit, Working Tax Credit, Child Tax Credit, income based ESA and Income Support. It is instead made up of: a **standard allowance**; a **child element** for each child or young person you are responsible for; a **disabled child addition** for each disabled child or young person for which you are responsible; a **housing costs element** to help with various housing costs, including rent, mortgage interest and service charges; a **limited capability for work element** if you are sick or disabled, a **carer element**, if you have certain caring responsibilities and a **childcare costs element**, if you have childcare costs. It does not replace contributory JSA, contributory Employment and Support Allowance or Child Benefit. As earnings rise, the amount received under Universal Credit will be slowly reduced. Universal Credit was slowly rolled out from April 2013 with a view to being completed in 2017.
- Introducing tougher penalties for fraud and error, coupled with increased responsibility for claimants with again tougher penalties if they fail to comply

⁶⁸¹ Patrick Wintour, 'Coalition overturns Lords amendments on welfare and bans further dissent' *The Guardian*, (London, 1 February 2012) <<https://www.theguardian.com/politics/2012/feb/01/coalition-overturns-welfare-reform-amendments>> accessed 30 June 2013.

⁶⁸² The discussions surrounding the reading at the House of Lords are available from www.publications.parliament.uk.

with these responsibilities;

- Changing the rules governing assistance with the cost of housing for low-income households in the private rented sector including basing the amount given based on the lowest 30th percentile of rents in a wide region that can include many towns. It also reduced the amount given if the house is under occupied, i.e. that there are spare bedrooms.⁶⁸³ These reforms originated in the Government's Comprehensive Spending Review in October 2010.
- Replacing the Disability Living Allowance (DLA) with Personal Independence Payments (PIP), including more stringent and frequent medical tests, as the basis for financial support to help offset the additional costs faced by individuals with disabilities.⁶⁸⁴
- Replacing the Incapacity Benefit and related benefits (Severe Disablement Allowance and Income Support) with Employment and Support Allowance (ESA). This includes more stringent medical tests, greater conditionality and time-limiting of non-means tested entitlement for all but the most severely ill or disabled.
- Freezing for three-years the level of child benefit received, together with means-testing for higher-tax rate tax payers;
- Limiting the rate at which benefits increase each year. In 2011 benefits were indexed annually to the Consumer Price Index (CPI) measure of inflation, rather than the Retail Price Index (RPI) as was previously the case. The CPI is usually lower. In 2013, these annual increases were reduced further with the Welfare Benefits Up-rating Act that legislated for most benefits to be up-rated by 1% for three years from April 2014, regardless of inflation levels. This initiative was first announced in the Chancellor's Autumn Statement in December 2012.
- Reducing payment rates and eligibility for Child Tax Credit and Working Families Tax Credit paid to lower and middle income households; Childcare costs covered by working tax credit cut from 80% to 70%. In 2013, the Child Poverty Action Group (CPAG) noted that working parents may need to pay up to £1,560 a year

⁶⁸³ If they have one 'spare' bedroom their housing benefit will be reduced by 14%, and 25% for two spare bedrooms. This is contained in Housing Benefit Amendment Regulation 2011, SI 2011/17360.

⁶⁸⁴ CPAG 'Factsheet – Personal Independence Payments' (London, 2015)

<www.cpag.org.uk/sites/default/files/CPAG-scot-factsheet-PIP-June16.pdf> accessed 5 June 2016.

extra for childcare.⁶⁸⁵

- Introducing a cap on the total amount of benefits that working-age people can receive.⁶⁸⁶

Entitlement to primary benefits usually allows you to access other benefits such as free school meals, bus-passes, prescriptions, and winter fuel payments, and legal aid. Changes in eligibility to such primary benefits will therefore also access to these ‘passport’ benefits. Moreover the Coalition Government also cut the legal aid budget and changed the entitlement rules. Those receiving benefits can no longer access legal aid for cases involving many areas of law that were previously covered under the Legal Aid Act 1949, in particular housing, welfare, medical negligence, employment, debt and immigration. This is discussed further in the following sections.

5.3 The right to social security: compliance with international standards and principles

Having ratified the ICESCR, the UK Government is obligated to ensure the right to social security for all in accordance with international standards. The following sections ascertain whether the cutbacks and welfare reform implemented by the Coalition Government (2010 to 2015) comply with UK’s human rights obligations in accordance with the criteria developed in Chapter 3.

5.3.1. Availability

Legal framework and accountability mechanisms: According to the CESCR, the principle of availability requires states to ensure a long-term social security system⁶⁸⁷ with an appropriate legal framework. This means establishing social security as a legal entitlement, accompanied by appropriate standards establishing right holders and duty bearers with appropriate accountability and enforcement mechanisms. Such a framework ensures that beneficiaries can remedy alleged violations of this right before

⁶⁸⁵ CPAG ‘Factsheet - Welfare Reform: what it means for families at risk of poverty’ (London 2013) <www.cpag.org.uk/sites/default/files/CPAG_factsheet_the%20cuts_May13.pdf> accessed 15 August 2014.

⁶⁸⁶ There are some benefits that are excluded from this cap such as Personal Independence Payments that recognise that persons with disabilities have additional needs.

⁶⁸⁷ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 11.

courts or administrative tribunals. It thus prevents a person's entitlement and access to social security from being manipulated for political means and captured by the elites groups and special interest groups amongst others.⁶⁸⁸

As already established, in the UK there is no legal framework establishing economic and social rights, including the right to social security, as rights able to be enforced by courts of law. Economic, social and cultural rights are not explicitly incorporated into UK law. This means that the ICESCR had no legal force in the UK. As the Joint Committee on Human Rights of the Houses of Lords and Commons (JCHR)⁶⁸⁹ notes the UK's dualist system means that in order to have any domestic legal force, treaties such as the ICESCR must be incorporated into domestic legislation.⁶⁹⁰ While there are some defined exceptions to this such as if the courts assume that Parliament does not intend to legislate in a manner compatible with the UK's international legal obligations, where common law is uncertain, and the requirement of courts to wherever possible exercise their discretion in a manner compatible with the international obligations, in reality this means ICESCR has limited influence on the UK's domestic law and its interpretation.⁶⁹¹

The UK Government has historically argued that the ICESCR represents "aspirational policy objectives which do not impose precise legal obligations on states".⁶⁹² This is despite the JCHR and the CESCR requesting that economic and social rights be given full effect in domestic law.⁶⁹³ Without these rights being enshrined within a legal framework, existing legislation can in fact violate economic and social rights with those affected having no real legal recourse.⁶⁹⁴

In the UK, the UK Human Rights Act (1998) is the only piece of legislation that explicitly includes human rights standards. It sets into law the rights contained the

⁶⁸⁸ *Sepulveda and Nyst*, (n 379), p. 59.

⁶⁸⁹ The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases).

⁶⁹⁰ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights: Twenty-first Report* (HL 183, HC 1188 2003-2004), para 16

⁶⁹¹ *Ibid.*

⁶⁹² Joint Committee on Human Rights *Legislative Scrutiny: Welfare Reform Bill, 21st report of Session 2010-12* (HL 233, HC 1704, 2010-12), para 45.

⁶⁹³ CESCR 'Concluding Observations on the UK' (2009) UN Doc. E/C.12/GBR/CO/5, para 13.

⁶⁹⁴ *Joint Committee on Human Rights* (n 690), para 19

ECHR thus ensuring they can be brought before a court of law. As with the ECHR, it focuses almost exclusively on civil and political rights. However following the progressive interpretation of the ECHR by the ECtHR as discussed in Chapter 3, the Human Rights Act has been used to scrutinise decisions that relate to economic and social rights including the right to social security. The UK has, for instance, accepted that welfare payments are possessions for the purpose of Article 1, Protocol 1, and that therefore any interference with or deprivation of must be “in accordance with the law”, and be for a legitimate aim and proportionate to that aim.⁶⁹⁵ Also the House of Lords, following the example of the ECtHR, has acknowledged that severe socio-economic destitution could be considered under Article 3 of the Human Rights Act (the right to be free from inhuman and degrading treatment).⁶⁹⁶ In *R. (on the application of Bernard) v. Enfield London Borough Council*, the High Court ruled that the failure by the local council to provide suitably adapted accommodation for the applicant and her family amounted to a violation of her Article 8 rights (right to a private and to family life) under the Human Rights Act 1998.⁶⁹⁷

However, there remain many shortcomings with this approach. It has been observed that the right to be free from inhuman or degrading treatment will only protect you from the most desperate levels of destitution.⁶⁹⁸ In other severe cases of destitution, the courts have not ruled in favour of the applicant. For instance in the above mention case, *R (Bernard) v. London Borough of Enfield*, while the court ruled in favour of a violation of Article 8, it held that the denial of local appropriate housing to the applicant who was reportedly living in squalor with her children did not violate Article 3.⁶⁹⁹ The Court observed that although some would describe the conditions in which the claimants were forced to live as degrading, particularly in light of the second claimant's incontinence, it was not persuaded that the minimum level of severity threshold required by that Article had been crossed. Although not conclusive, the fact that there was no intention to humiliate or debase the claimants was an

⁶⁹⁵ *Joint Committee on Human Rights* (n 692), para 1.25.

⁶⁹⁶ *R (Limbuella) v. Secretary of State for the Home Department* [2006] 1 AC 396 (UKHL 66).

⁶⁹⁷ *R. (on the application of Bernard) v. Enfield London Borough Council* [2003] HLR 27 (EWHC 2282 (Admin)).

⁶⁹⁸ Jamie Burton, ‘It’s time to enshrine socioeconomic rights in law’ *The Guardian* (London, 28 October 2011) < www.theguardian.com/commentisfree/libertycentral/2011/oct/28/socioeconomic-rights-law > accessed 29 September 2014.

⁶⁹⁹ *R. (on the application of Bernard) v. Enfield London Borough Council* [2003] HLR 27 (EWHC 2282 (Admin)).

important consideration.⁷⁰⁰ It is therefore unclear what degree of destitution is required and moreover there have so far been no steps by the ECtHR or the UK Courts to determine this. There has also been no action to further develop Article 2 on the right to life as it relates to economic and social rights, although this has been done by other judicial bodies such as the Indian Supreme Court.⁷⁰¹

Other principles have been used to address issues related to economic and social rights albeit implicitly. For instance using the principles of legitimate expectations the UK Court of Appeal reversed the decision of a local authority to close down an old people's home, arguing that the closure would frustrate the applicant's legitimate expectation, generated by a clear promise of a 'home for life'.⁷⁰² It however has not yet been used in conjunction with the right to social security, and the recent cutbacks, as has been done in Latvia. As noted in Chapter 3, in 2009 the Latvian Constitutional Court considered "The principle of protection of legitimate expectations", and upheld the rights of persons to plan with confidence their future in the context of the rights granted by this legal provision when ruling the unconstitutionality of the Government's decision to lower state pensions following an alleged reduction in available resources.⁷⁰³

Without the rights being enshrined explicitly in domestic legislation, one cannot challenge existing legislation's compliance with socio-economic rights. Courts cannot make up for any shortcomings and/or gaps in human rights protection. For instance those persons falling outside of the scope of legislation or believe they do not receive enough to cover basic living costs, cannot challenge the limitations of the legislation for undermining or jeopardizing the right to social security. They can only do it within the principles listed above and/or the rights enshrined in the ECHR with the associated shortcomings.

Moreover, within this already narrow framework the Coalition Government restricted the means with which people can hold it accountable by actively considering

⁷⁰⁰ Ibid.

⁷⁰¹ *People's Union for Civil Liberties v. Union of India & Ors* [2001] 1 SCC 39 (Supreme Court of India, Writ petition (Civil) No.196).

⁷⁰² *Regina v. North and East Devon Health Authority, Ex parte Coughlan* [2000] 2 WLR 622 (EWCA Civ 1871).

⁷⁰³ Case number 2009-43-01 [2009] Constitutional Court (Latvia).

modifications to the judicial review procedure that will reduce its accessibility. With no separate system of administrative courts to review the decisions of public bodies, the Judicial Review procedure is “one of the most important means by which the Government and other public bodies are held legally accountable for the lawfulness of their decisions and actions”⁷⁰⁴ and has often been used to challenge government policies and legislation to protect economic and social rights albeit implicitly. For instance, the Refugee Action sought a judicial review of the Home Office’s decision to leave the asylum support rates for 2013/14 unchanged.⁷⁰⁵

The Government’s proposed reforms to the judicial review were contained in Part 4 of the Criminal Justice and Courts Bill. While the House of Lords dismissed the Government’s proposed bill three times,⁷⁰⁶ in January 2015 a compromise was finally accepted and it received Royal Assent on 12 February and it became the Criminal Justice and Courts Act. 2015. Despite the objections of the House of Lords however the Act makes significant changes to the judicial review procedure.⁷⁰⁷ These include:

“a court must refuse to grant permission or relief in judicial review proceedings where it appears to the court that it is “*highly likely*” that the outcome would not have been substantially different if the impugned conduct had not occurred (the ‘**no difference**’ rule), unless it is shown that ‘exceptional public interest’ warrants the grant of such permission or relief.”⁷⁰⁸

While the expressed aim of the relevant provision was to “prevent judicial reviews being heard when they are based on relatively minor procedural defects”, it is concerning because reportedly the term “exceptional public interest” has not been

⁷⁰⁴ Joint Committee on Human Rights *The implications for access to justice of the Government’s proposals to reform judicial review* (2013-14 HL 174 HC 868), para 12.

⁷⁰⁵ Refugee Action ‘Judicial Review finds Home Secretary acted unlawfully in treatment of asylum seekers’ *Refugee Action Media Centre* (London, 9 April 2014) <www.refugee-action.org.uk/judicial-review-finds-home-secretary-acted-unlawfully-treatment-asylum-seekers/> accessed 31 April 2014.

⁷⁰⁶ Polly Toynbee, ‘For the sake of justice, this attack on judicial review must be resisted’ *The Guardian* (London, 8 December 2014 <www.theguardian.com/commentisfree/2014/dec/08/justice-judicial-review-resisted-lords-prison-book-ban> accessed 5 May 2015.

⁷⁰⁷ Hubert Smith Freehills, ‘House of Lords clears judicial review reform proposals’ *Lexology* (London, 29 January 2015) <<http://www.lexology.com/library/detail.aspx?g=877f63e2-ea97-430a-9cf9-cb3c7abea2ef>> accessed 5 May 2015.

⁷⁰⁸ *Ibid.* See Criminal Justice and Courts Act 2015, Part 4 entitled ‘Judicial Review’.

defined properly and its interpretation could be arbitrary.⁷⁰⁹ The ‘no difference clause’ also undermines the principal role of judicial review in examining the legality of government decisions and actions.⁷¹⁰ As many have noted, it also is difficult to ascertain whether “a procedural flaw made a difference to the outcome” ... “without a full understanding of the facts.”⁷¹¹

Other changes include the introduction of new financial obstacles and threats of paying costs to those wanting to hold the executive to account and deterring charities and other individuals and organisations with limited funds from intervening in litigation to assist the court in cases that raise issues of wider public interest.⁷¹² Essentially, the Act “... impose(s) greater financial penalties on unsuccessful judicial review claimants and charities and other NGOs that support test cases and other litigation.”⁷¹³

Moreover, access to justice within the scope of existing legislation is being undermined by the afore-mentioned cuts to civil legal aid that have reduced the ability of those in poverty to challenge the decisions made including regarding social security. In 2012, the Coalition Government adopted the Legal Aid, Sentencing and Punishment of Offenders Act (LAPSO) that removes financial support for cases addressing housing, welfare, medical negligence, employment, debt and immigration.⁷¹⁴ The high rate of successful appeals against decisions that curb or stop people’s benefits, particularly when people have access to legal assistance, demonstrates the need for legal aid.⁷¹⁵ During the drafting period, the Coalition

⁷⁰⁹ Ibid.

⁷¹⁰ Mark Elliot ‘Judicial review reform (again)’ *Public Law for Everyone*, (6 February 2014). <<https://publiclawforeveryone.com/2014/02/06/judicial-review-reform-again-2/>> accessed 28 February 2014.

⁷¹¹ Ibid.

⁷¹² See Criminal Justice and Courts Act 2015, Part 4 entitled ‘Judicial Review’.

⁷¹³ CPAG et al. ‘Criminal Justice & Courts Bill: Part 4 - Joint briefing on judicial review’ (2014) <www.airecentre.org/data/files/resources/36/Criminal-Justice-and-Courts-Bill-Part-4-Judicial-Review-NGO-Joint-Brief.pdf> accessed 15 February 2015.

⁷¹⁴ During its consultation period, the Coalition Government received an overwhelmingly negative response to its proposals. Yet despite this the large part of the proposals became law in the form the Legal Aid Sentencing and Punishment of Offenders Act that came into force on 1 April 2013 and replaced the Access to Justice Act 1999 as the primary legislation governing legal aid – both criminal and civil – in England and Wales. See Connor Johnston, ‘Presentation on Legal Aid: an Overview of the Recent Changes 2013-2014’ (Young Legal Aid Lawyers Meeting, 11 June 2014).

⁷¹⁵ The importance of legal aid for appeals to ensure that disabled people get the vital support they need is demonstrated by Scope research and analysis. See Scope ‘Legal aid in welfare: the tool we can’t

Government was alerted to these problems, so they could be regarded as ‘reasonably foreseeable’. The Young Legal Aid Lawyers observed that the Government received an overwhelmingly negative response to its proposals contained in its Green Paper entitled “Proposals for the Reform of Legal Aid in England and Wales” published on 15 November 2010. The Justice Select Committee amongst others warned that the impact of the proposed Act would “sit uneasily with the Government’s commitment to protect the most vulnerable in society”⁷¹⁶ Yet despite this, the majority of these proposals were incorporated into LAPSO.⁷¹⁷

As noted in Chapter 3, ensuring accountability also requires monitoring processes that “determine what is working (so it can be repeated) and what is not (so it can be adjusted).⁷¹⁸ However within the Welfare Reform Act, there are only a few monitoring mechanisms. This was noted by the JCHR in December 2011 during the consultation process prior to the Act’s adoption. It observed that the monitoring mechanisms are few, and limited to particular aspects of the Act such as the requirement for the Government to report to Parliament on the operation of the assessment process for the PIP.⁷¹⁹ In response the Coalition Government told the JCHR in 2011 that the “detailed evaluation plans for post-implementation are still being developed” and that “Administrative datasets will be used to monitor trends in the benefit caseloads for the protected groups and in the level and distribution of benefit entitlements”.⁷²⁰ However as of 2015, there is little clarification of these ‘detailed evaluation plans’. Furthermore, the JCHR further observed that:

“this data will provide robust material only for age and gender not, as a rule, for other protected groups. This will impede the ability to effectively monitor whether there are adverse consequences for the human rights of particular vulnerable groups.”⁷²¹

afford to lose’ (London 2011) <www.lag.org.uk/media/47896/legalaidinwelfarereport.pdf> accessed 4 July 2013.

⁷¹⁶ House of Commons Justice Committee ‘Government’s Proposed Reform of Legal Aid, Third Report of Session 2010–11’ HC (2010-11) 681-I.

⁷¹⁷ *Johnston* (n 714).

⁷¹⁸ *UNHRC (Special Rapporteur on the Right to Health)* (n 252), para. 46.

⁷¹⁹ *Joint Committee on Human Rights* (n 692), para 1.18.

⁷²⁰ *Ibid*, para. 1.19

⁷²¹ *Ibid*.

Moreover, with a lack of legal framework guaranteeing the right to social security, the mechanisms only monitor the Act's implementation; there are no provisions allowing for the monitoring of its impact on the right to social security.

In total there is very limited accountability, if any, for the Government in implementing the right to social security, despite being an integral part of human rights law. The importance of ensuring accountability has been emphasised both with regards to ensuring minimum essential levels and the full implementation of the right, and states are expected to guarantee this regardless of resource levels.

Sustainability: Governments are obligated to ensure the sustainability of the social security system through the principle of solidarity i.e. sharing of risk and benefits equally under which contributions or taxes for financing benefits are charged on the basis of persons' ability to pay regardless of their individual risks.⁷²² This is perceived as critical to both the sustainability of the public social security system and the securing of social justice through income redistribution. Ensuring sustainability is crucial to ensure long-term expectations. This is a key legal principle used by the Latvian Constitutional Court to protect pensions in Latvia as mentioned earlier in this thesis,⁷²³ and has been used in other cases in the UK although not explicitly in respect to the right to social security.⁷²⁴ As the OECD stated

“Irrespective of the approach chosen for the financing of social security, including pension schemes (full or partial funding, pay as you go, taxation, or a combination of these), collective financing is indispensable to ensure that the most vulnerable categories enjoy real access to the social protection they require.”⁷²⁵

In the UK this principle of solidarity is being repeatedly undermined. Instead of referencing 'fairness for all', the Coalition Government focused on being 'fair to tax payers' to justify cutbacks. The DWP's 2010 paper on 21st century welfare underscored that any reform should ensure a fairer relationship between the people

⁷²² This is discussed in Chapter 3.

⁷²³ Case number 2009-43-01 [2009] Constitutional Court (Latvia).

⁷²⁴ *Regina v. North and East Devon Health Authority, Ex parte Coughlan* [2000] 2 WLR 622 (EWCA Civ 1871).

⁷²⁵ *OECD* (n 426).

who receive benefits and those who pay for them.⁷²⁶ This approach creates divisions between so called ‘tax payers’ and those receiving benefits, and is misleading and undermines the solidarity principle. Taxpayers may need the social welfare system in the future. Moreover many people receive benefits although they are working full time. While this is also dealt with under the section on cultural accessibility (acceptability), undermining the solidarity principle threatens the sustainability by giving the Government more political space to reduce funding for key social entitlements.

So far the issue of sustainability has been dealt with in terms of the affordability of the national debt, and the need to reduce social expenditure rather than progressive funding.⁷²⁷ Despite its obligations to produce plans or programmes of actions that elucidate how they are going to sustainably realise fully the right to social security for all, the Coalition Government only focused on a plan to reduce the national deficit. They did not produce any plans indicating how the right to social security will be fully realised and the Government will meet its human rights obligations in both the short and long term.

5.3.2. Adequacy

Social security must be adequate to ensure both life in dignity and enable the beneficiary to escape from poverty. Chapter 3 established that the adequacy of social security should be determined through identifying and pricing the necessary goods to live in dignity, through different methodologies. The amount awarded must also be kept abreast with rising costs and prices.

In the UK however the amount to be awarded has never been “based on some regular, systematic estimate of minimum needs.”⁷²⁸ Despite a recommendation by the former National Assistance Board (NAB)⁷²⁹ that there should be regular reviews of benefit adequacy, since the 1960s and the NAB study no government has attempted any

⁷²⁶ DWP ‘21st Century Welfare’ (Cm7913, 2010), p. 6

⁷²⁷ Ibid.

⁷²⁸ Kennedy, Cracknell, and McInnes (n 456), p. 4.

⁷²⁹ The National Assistance Board was established by the National Assistance Act of 1948. This required local authorities, under the control of the Board, to provide residential accommodation for older persons and persons with disabilities in need of care and attention that is *not otherwise available to them*. It was abolished by the Supplementary Benefit Act 1966.

official empirical study of adequacy.⁷³⁰ A research paper for the House of Commons noted that the Labour Government in 1998 “rejected proposals to link benefit levels to estimates of minimum needs, arguing that there is no objective way of deciding what constitutes an adequate income.”⁷³¹ It is also worth noting that this “lack of any clear basis for current benefit rates is also mentioned regularly during annual debates on the uprating of social security benefits”.⁷³² This position of successive governments in the UK does not recognise the work being done by social organisations such as the JRF to identify what would constitute a living wage or minimum income, and UK Courts rulings on what should be included in determining adequacy. One such ruling was the decision on the amount awarded to refugees and asylum seekers that has already been discussed in Chapters 3 and 4 and will be discussed again later in this section.⁷³³

Instead the Coalition Government linked benefit adequacy with wages; repeatedly stating that people should be better off in work than on benefits, in order to ensure fairness to the tax-payer. Most significantly, it set the cap on the total amount of benefit that working-age people can receive at £500 per week for couples with children. This was reported as necessary to ensure that those on benefits will not receive more than the average weekly wage earned by working households. This is despite clear evidence that the wages in the UK are insufficient. The average wage is reduced by a low minimum wage that is less than the advised living wage.⁷³⁴ In London in 2013, the living wage was over two pounds more per hour than the minimum wage. On the basis of a 35-hour week, this was £3640 per year.⁷³⁵ Moreover while food prices rose by 30.5% in five years, the National Minimum Wage only rose

⁷³⁰ *Kennedy, Cracknell, and McInnes* (n 456), p. 5.

⁷³¹ *Ibid.*, p. 6.

⁷³² *Ibid.*, p. 7.

⁷³³ *Regina (Refugee Action) v. Secretary of State for the Home Department* [2014] D WLR 089 (EWHC 1033 (Admin)).

⁷³⁴ Donald Hirsch ‘A minimum income standard for the UK in 2013’ (JRF, York 2013) <www.jrf.org.uk/report/minimum-income-standard-uk-2013> accessed 21 June 2014.

⁷³⁵ Rafferty, S., ‘The minimum wage is not enough – we must aspire to paying a living wage’ *JRF Blog* (York, 17 April 2013) <www.jrf.org.uk/blog/minimum-wage-not-enough-%E2%80%93-we-must-aspire-pay-living-wage> accessed 25 May 2013.

by 12.1% in the same period.⁷³⁶ In February 2012 earnings growth rate was 1.2% against inflation of 3.4% measured by the CPI.⁷³⁷

Further demonstrating the inadequacy of wages in the UK, many people working full-time rely on benefits to top up their wages. In fact,

“62% of children living in poverty are living in families where at least one person has a job, indicating that wages are too low and that current Minimum Wage legislation is not adequate to lift people out of poverty through work.”⁷³⁸

The JRF similarly found that in 2010 the number of children in poverty in working families rose to 2.1m, “the highest on record.”⁷³⁹ Moreover, by linking the cap to average earnings rather than average income, the Coalition Government, did not take account the benefits paid to families who are in work when calculating benefits.⁷⁴⁰ In fact, in 2013 a paper found that over the previous five years, working-age benefits have deteriorated substantially relative to Minimum Income Standards.⁷⁴¹ A research paper for the House of Commons notes “Independent estimates of “Minimum Income Standards” suggest that current out-of-work benefit rates for people of working age are significantly lower than the amounts necessary for a minimum acceptable standard of living.”⁷⁴²

While it is difficult to get a sense of the cumulative effect of this reform with only limited material available as the changes have only been recently adopted and are being implemented gradually over time, the analysis below highlights some of the main concerns:

⁷³⁶ Oxfam ‘The Perfect Storm: Economic stagnation, the rising cost of living, public spending cuts, and the impact on UK poverty (Oxfam Briefing Paper, Oxfam, Oxford 2012) <<http://policy-practice.oxfam.org.uk/publications/the-perfect-storm-economic-stagnation-the-rising-cost-of-living-public-spending-228591>> accessed 3 February 2011, p. 3.

⁷³⁷ *Ibid.*, p. 19

⁷³⁸ Niall Cooper and Sarah Dumbleton ‘Walking the Breadline, the scandal of food poverty in 21st century Britain’ (Church Action on Poverty and Oxfam, Oxford 2013) <<http://policy-practice.oxfam.org.uk/publications/walking-the-breadline-the-scandal-of-food-poverty-in-21st-century-britain-292978>> accessed 5 May 2014.

⁷³⁹ JRF/New Policy Institute ‘Monitoring poverty and social exclusion 2010 – annual report’ (2010) <www.jrf.org.uk/report/monitoring-poverty-and-social-exclusion-2010> accessed 3 February 2011.

⁷⁴⁰ *Fawcett Society* (n 604), p. 25

⁷⁴¹ *Hirsch* (n 734).

⁷⁴² *Kennedy, Cracknell, and McInnes* (n 456), p. 2.

- a. ***The Benefit Cap***: This has been criticised on many counts. By linking the cap to wages only rather than income received, it ignores the benefits received by many people on a low income. The Children's Society criticised the Coalition Government for ignoring the contribution of tax credits and a range of benefits to many people's incomes. The cap is not linked at all to the needs and costs of those in poverty. While the Personal Independence Payment is not included when calculating the cap, this only covers the special needs of a narrow selection of people, and there are many other groups who have considerable needs that may not be addressed by the cap. The cap for instance applies regardless of the number of children in a household and will therefore disproportionately affect large families. Moreover, in some areas of the country, especially London, rents for adequate family accommodation can be as much as, or even more than, £400 per week.⁷⁴³

It is also worth noting that in July 2015, the newly elected Conservative Government announced that, despite these concerns and rising prices especially those relating to accommodation, the cap will be reduced from £26,000 a year to £23,000 a year in London, and £20,000 in the rest of the country, to take effect by 2017.⁷⁴⁴

The Cap was challenged under the Human Rights Act (1998) for discriminating unjustifiably between men and women, contrary to Article 14 of the ECHR read with Article 1 of Protocol No 1 to the ECHR ("A1P1").⁷⁴⁵ The complainants argued that the Cap primarily affected single parents (of which most are women - 92% in 2011) with several children living in high cost areas of housing. They also argued that the Cap also affects victims of domestic violence, who are predominantly women, because they may be temporarily housed in

⁷⁴³ Lisa O'Carroll, 'Average monthly London rents hit £1,500 for first time, says survey' *The Guardian*, (London, 15 June 2015) <www.theguardian.com/money/2015/jun/15/london-rents-homelet-survey-housing-crisis> accessed 10 June 2016.

⁷⁴⁴ 'Benefit changes: Who will be affected?' *BBC*, (London, 8 July 2015) <www.bbc.com/news/uk-21706978> accessed 5 January 2016.

⁷⁴⁵ *R (on the application of SG and others (previously JS and others)) (Appellants) v. Secretary of State for Work and Pensions* [2015] PTSR 471 (UKSC 16) (on appeal from: [2014] EWCA Civ 156)

accommodation that is relatively expensive.⁷⁴⁶ While the Supreme Court eventually ruled that the established indirect discrimination was a proportionate means of meeting legitimate aims, there were some interesting dissent opinions.⁷⁴⁷ Lady Hale questioned whether proper account had been taken of the best interests of the children affected, i.e. whether the Government complied with Article 3(1) of the CRC.⁷⁴⁸ She concluded that since the Cap will deprive children of their basic needs, this cannot be in their best interests and therefore the indirect sex discrimination inherent in the Cap's implementation is not a proportionate way of achieving its aims.⁷⁴⁹

- b. ***Universal credit:*** To a large degree the different components of the Universal Credit are based on what people previously received.⁷⁵⁰ This is despite the ECSR having previously, and again in 2013, classified the minimum levels of Statutory Sick Pay, Short Term Incapacity Benefits and contributory Jobseeker's Allowance for single person as manifestly inadequate.⁷⁵¹ There has been no independent analysis of needs since then. Moreover, the prices of essential goods and services including food and fuel have increased significantly.⁷⁵² The Coalition Government also had no intention of examining the issue further. This is evident from the response of the Chancellor of the Exchequer. He stated "It's lunacy for the Council of Europe to suggest welfare payments need to increase when we paid out £204 billion in benefits and pensions last year alone..."⁷⁵³ This statement illustrates the Government's failure to even try to understand the issue from a human rights perspective, and its lack of commitment to addressing the rights of those in poverty.

⁷⁴⁶ Ibid

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid.

⁷⁴⁹ Ibid.

⁷⁵⁰ Mike Brewer, James Browne and Wenchao Jin 'Universal Credit: A Preliminary Analysis' IFS Briefing Note 116 (London 2011) <www.ifs.org.uk/bns/bn116.pdf> accessed 1 April 2012.

⁷⁵¹ ECSR 'Conclusions XX-2 (Great Britain)' (CoE Strasbourg 2013).

⁷⁵² Steve Hawkes, 'Higher food prices to push annual household grocery bills up £850 by 2018' *The Telegraph* (London, 18 September 2013) <www.telegraph.co.uk/news/uknews/10316184/Higher-food-prices-to-push-annual-household-grocery-bills-up-850-by-2018.html> accessed 14 November 2013. Office for National Statistics 'Consumer Price Inflation, July 2013' (Statistical Bulletin 2013).

⁷⁵³ Asa Bennet, 'Iain Duncan Smith Blasts Council of Europe 'Lunacy' over 'Inadequate' UK Benefits Warning' *The Huffington Post* (London, 29 January 2014) <www.huffingtonpost.co.uk/2014/01/29/uk-benefits-european-council_n_4688263.html> accessed 14 October 2014.

The lack of assessment of living costs was raised during the drafting of the Welfare Reform Act. In its comments on the White Paper on Universal Credit, the Northern Ireland Welfare Reform Group for instance asked whether universal credit addresses the true cost of work, and observed the lack of detail in the Paper regarding “for example, childcare costs, carers allowance, rate rebates (in Northern Ireland), passport benefits and mortgage interest will be integrated into Universal Credit.”⁷⁵⁴

- c. **Housing benefits:** While the proportion of the universal credit allowance allocated for housing costs is still based on the cost of housing, beneficiaries now only receive an amount covering the cheapest 30% of properties in the area, rather than the median rent for local properties (a rent level typical for that area) as it was previously.⁷⁵⁵ The Government has also set a maximum limit: 250 pounds for a one bedrooomed property to 400 pounds for a four bedrooomed property. Single people under 35 are only entitled to Local Housing Allowance (LHA) at shared rate. This means that the maximum housing benefit that can be received by a single person under the age of 35 is the cost of renting a single room in a shared house.

This is not an appropriate measure of costs. It ignores the fact in many regions there is a shortage of properties within this lowest 30% with demand outstripping supply.⁷⁵⁶ This can result in people going without other essentials such as food or going into debt to pay for housing. It can also result in people moving to poorer areas where good employment opportunities are much reduced, and subsequently the ghettoization of such areas.⁷⁵⁷ This would significantly increase regional

⁷⁵⁴ Work and Pensions Committee *White Paper on Universal Credit Oral and Written Evidence* (2011 HC 743)

⁷⁵⁵ Hannah Aldridge, ‘Even renters who work should be worried about housing benefit changes’ *The Guardian* (London, 15 April 2014) <www.theguardian.com/housing-network/2014/apr/15/housing-benefit-changes-working-people> accessed 10 October 2014.

⁷⁵⁶ Hannah Aldridge and Peter Kenway ‘Can LHA reforms achieve their aims in London housing market?’ (Study) (New Policy Institute, London 2014) <http://www.npi.org.uk/files/4114/0258/6162/Can_the_changes_to_LHA_achieve_their_aims_in_London_full_report.pdf> accessed 10 June 2015.

⁷⁵⁷ Randeep Ramesh, ‘Housing benefit cuts will put 800,000 homes out of reach, according to study’ *The Guardian*, (London, 1 January 2012) <www.theguardian.com/society/2012/jan/01/housing-benefits-cuts-rents-study> accessed 10 April 2014.

inequalities and reduce further people's ability to escape poverty.

The Housing Benefit Size Criteria Rules also reduce the level of housing benefit, received by 14% if the recipient has one spare bedroom and 25% if they have two spare bedrooms. In addition to helping cut the cost of housing benefits, the Coalition Government considered that this would help address overcrowding and under occupancy and increase fairness between private and social renters. This is despite DWP admitting in its impact assessment a mismatch between household size and available of suitable homes meaning in many areas people are unable to downsize due to a lack of suitable and affordable housing.⁷⁵⁸ People therefore often have no option but to stay in their current accommodation if they want to stay in their existing area, yet the tenants will still receive the reduced housing benefit.

These Rules can also discriminate against particular groups of persons by failing to acknowledge their special needs. This includes separated parents who keep a spare bedroom for their children, and families that include adults or children with disabilities that need an additional room for a carer or medical equipment. In some instance couples and/or young children may be unable to share a room because of their disabilities. While Discretionary Housing Payments (DHPs) are available, these are at the discretion of local authorities. Research by CPAG indicates that 41% of councils have policies that only provide DHP for a short-term period, while 28% have policies where DHP can only be granted for a specified finite period, for instance three, six or 12 months.⁷⁵⁹

This has been taken up by UK Courts. In 2012, the Court of Appeal held that the Rules discriminate against persons with disabilities because they do not allow for an extra room where the person (adult) with disabilities has a carer or where two

⁷⁵⁸ DWP 'Impact Assessment on Housing Benefit: Under occupation of social housing' (2012) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/214329/social-sector-housing-under-occupation-wr2011-ia.pdf> accessed 3 June 2013. This was also emphasized by former Special Rapporteur on the right to adequate housing. See also UNHRC 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context (Raquel Rolnik), Mission to the UK' (2013) UN Doc. A/HRC/25/54/Add.2.

⁷⁵⁹ CPAG 'DHPs – principle and practice' (London, 2016) <www.cpag.org.uk/content/dhps-principle-and-practice> accessed 6 May 2016.

children cannot share a room because of disability.⁷⁶⁰ While during the case the rules were changed to cover circumstances where persons with disabilities need carers to stay overnight, the regulations did not cover the situation of a room that cannot be shared because of disability. This judgment however did not cover cases for when the claimant is one of a couple who is unable to share a bedroom. People's housing benefit continues to be restricted by having a spare bedroom if they and their partner need to sleep apart because of a medical condition.⁷⁶¹

Moreover, the afore-mentioned regulations allowing adults with disabilities to keep a spare room for overnight did not apply to children who need overnight carers. This was taken to the High Court, which in 2014 held that the bedroom tax did not unlawfully discriminate against children with disabilities since DHPs could close the gap.⁷⁶² The Complainants appealed against this decision, and in 2016 the Appeal Court found that the DHP policy was not adequate as there is no guarantee of its continued availability in the future. It therefore ruled that the failure to make provision in the regulations for overnight carers of disabled children amounted to unlawful discrimination contrary to Article 14 of the ECHR.⁷⁶³

- d. ***Asylum assistance and the decision to freeze it:*** While asylum seekers are not entitled to social security, if they are destitute, they can apply to UK Visas and Immigration for accommodation (on a 'no choice' basis in cluster areas around the country) and/or financial support. Until August 2015, the subsistence allowance was paid at different rates, depending on the claimants' ages and household compositions, but was usually approximately half of mainstream benefits, which are, as already noted, based on wages with no assessment of minimum essential needs.⁷⁶⁴ Moreover they are still unable to work to supplement their incomes unless they have waited over 12 months for a decision on their

⁷⁶⁰ *Burnip v. Birmingham City Council and another* [2012] D WLR 150 (EWCA Civ 629).

⁷⁶¹ Shelter 'Bedroom Tax: Are You Affected?' (Shelter 2016) <https://england.shelter.org.uk/housing_advice/housing_benefit/bedroom_tax_are_you_affected> accessed 6 May 2016.

⁷⁶² *R. (On the Application of Rutherford and Ors) v. Secretary of State for Work and Pensions* (2014) EWHC 1631 (Admin).

⁷⁶³ *Regina (Rutherford and others) v. Secretary of State for Work and Pensions* [2016] D WLR 036 (EWCA Civ 29).

⁷⁶⁴ John Packer, 'The UK is failing in its duty to protect vulnerable asylum seekers' *The Guardian* (London, 4 February 2013) <<https://www.theguardian.com/commentisfree/2013/feb/04/uk-failing-duty-vulnerable-refugees>> accessed 5 May 2014.

status.

This subsistence allowance was below the UK poverty measure as confirmed by main poverty campaigners and researchers.⁷⁶⁵ Research by Refugee Action observed that “nearly 40% of asylum seekers surveyed could not buy enough food to feed themselves or their families; 43% of asylum seekers were unable to buy toiletries; 88% did not have enough money to buy clothes”.⁷⁶⁶ Given the mental vulnerability of many asylum seekers often following their experiences of torture, Freedom from Torture notes how economic poverty and financial insecurity has led to “a serious deterioration” in the mental health of those that have survived torture and seeking asylum.⁷⁶⁷ Likewise, one clinician describes how the “hopelessness and vulnerability” caused by poverty often provokes “depression and anxiety” in torture victims, a group already prone to mental illness.⁷⁶⁸ There is also no additional support for people with particular health needs or those with disabilities.⁷⁶⁹ Other vulnerable groups include pregnant women only received an additional three pounds per week for the duration of their pregnancy despite their considerable health and nutritional needs.⁷⁷⁰

Nonetheless, despite these reports and evidence, on 6 June 2013 the Coalition Government announced to Parliament that the level of support provided in cash to meet the essential living needs of asylum seekers for the financial year 2013/2014 should remain frozen at the 2011 rate. On 9 April 2014, the High Court found that

⁷⁶⁵ Amanda Gray ‘Poverty: a human rights abuse in the UK’, *OpenDemocracy*, (19 August 2013) <www.opendemocracy.net/5050/amanda-gray/poverty-human-rights-abuse-in-uk> (accessed 30 September 2013).

⁷⁶⁶ Refugee Action ‘Refugee Action briefing on Early Day Motion 99 – High Court judgment on asylum support’ (Refugee Action 2014) <http://refugee-action.org.uk/wp-content/uploads/2016/10/Refugee_Action_briefing_on_Early_Day_Motion_99__High_Court_judgment_on_asylum_support_Oct2014_FINAL.pdf> accessed 17 May 2015.

⁷⁶⁷ Jo Pettitt, ‘The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK’ (Freedom from Torture, London 2013) <www.freedomfromtorture.org/sites/default/files/documents/Poverty%20report%20FINAL%20a4%20web.pdf> accessed 3 July 2014.

⁷⁶⁸ Ibid.

⁷⁶⁹ The Children’s Society ‘A briefing from the Children’s Society Highlighting the gap between asylum support and mainstream benefits’ (London 2012) <www.childrenssociety.org.uk/sites/default/files/tcs/a_briefing_from_the_childrens_society_on_asylum_support.pdf> accessed 18 April 2013.

⁷⁷⁰ Feldman, Rayah. ‘When Maternity doesn’t matter dispersing pregnant women seeking asylum’ (Refugee Council and Maternity Action 2014) <www.refugeecouncil.org.uk/assets/0002/6402/When_Maternity_Doesn_t_Matter_-_Ref_Council_Maternity_Action_report_Feb2013.pdf> accessed 4 March 2015.

this decision was irrational and did not take into account the real needs of asylum seekers: including the cost of maintaining interpersonal relationships and a minimum level of participation in social, cultural and religious life.⁷⁷¹ The Coalition Government however announced in August 2014 that it would not be changing its decision on freezing the benefits.⁷⁷² It stated that it had conducted a review and remained satisfied that the 2013/14 level of asylum support should remain unchanged.⁷⁷³

Moreover, and again despite this court decision and the findings of relevant and credible organisations, from August 2015 weekly asylum support was further reduced to a standard rate of £36.95 per person (adult or child) regardless of age and needs, although “a one-off maternity payment will remain available to women due to give birth within eight weeks or who have a baby under six weeks old”.⁷⁷⁴ Previously, asylum support was paid at different rates, depending on the claimants’ ages and household composition, and this new standard rate is the same as the amount currently paid to single adult asylum seekers.⁷⁷⁵ It therefore represents a substantial reduction in support for single parents and families with children. For example, the new weekly asylum support rate for single parents with one child is £73.90, a reduction of £23.⁷⁷⁶ The Coalition Government explained that previous rates had not taken into account the economies of scale experienced by households.⁷⁷⁷

- e. ***Uprating benefits***: For most benefits annual uprating is not mandatory under UK law, but historically governments have exercised their discretion by increasing the principal means-tested working-age benefits each April in line with prices. The

⁷⁷¹ It also noted that the Government failed to consider whether the following were essential living needs: travel by public transport to attend appointments with legal advisors; telephone calls to maintain contact with families and legal representatives, and for necessary communication to progress their asylum claims; and writing materials where necessary for communication and for the education of children. See *Regina (Refugee Action) v. Secretary of State for the Home Department* [2014] D WLR 089 (EWHC 1033 (Admin)).

⁷⁷² The Home Office’s letter explaining the decision (11 August 2014) is available from www.migrantsrights.org.uk. (accessed 14 August 2014). For more information, see www.ein.org.uk.

⁷⁷³ Ibid.

⁷⁷⁴ Melanie Gower ‘Asylum support: accommodation and financial support for asylum seekers’ (HC Briefing Paper 1909, 2015), p. 7.

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid.

June 2010 Budget announced that, from April 2011, benefits would now be indexed to the Consumer Price Index (CPI) rather than the Retail Price Index (RPI).⁷⁷⁸ The IFS has flagged the ‘up-rating benefits and tax credits by CPI rather than RPI for inflation as ‘the biggest change to welfare policy in the June 2010 budget’, “predicted to save the Government 1.2bn in 2011-12 increasing to 5.8bn in 2014-15.”⁷⁷⁹ According to the Coalition Government, the CPI was more appropriate because “it excludes the majority of housing costs faced by homeowners.”⁷⁸⁰ It argued that most low-income households are subsidised separately through Housing Benefit, and the majority of pensioners own their home outright.⁷⁸¹

Many have been concerned about this, particularly in regards to what it means for the adequacy of social security. The Economics Editor of the BBC noted that ‘The CPI is typically lower - over the past 20 years it has been higher than the RPI only three times.’⁷⁸² She further highlighted that “Research has tended to show that the cost of the basket of goods bought by poorer households often rises faster than the basket of goods included in the CPI.”⁷⁸³ Crisis has noted that since rents generally rise faster than CPI, over time the LHA rates will be eroded.⁷⁸⁴ Oxfam has similarly noted that the changes to the LHA and the “plans to increase future support by the CPI measure of inflation rather than actual rents in an area... will ultimately destroy the principle that housing support should meet housing needs.”⁷⁸⁵ The Rowntree Foundation observed “... how the price of a basket of goods needed for an acceptable living standard has risen far faster than average

⁷⁷⁸ Both indexes measure changes in the price level of a market basket (fixed list of items) of consumer goods and services purchased by households. However the fixed list of items is different. The CPI does not include housing costs and mortgage interest payments. The calculation of CPI also uses a formula that takes into account that the switch to lower priced alternatives by some people when prices rise.

⁷⁷⁹ James Browne and Peter Levell ‘The distributional effect of tax and benefit reforms to be introduced between June 2010 and April 2014: a revised assessment’ (IFS, London 2010) <www.ifs.org.uk/publications/5246> accessed 14 February 2013).

⁷⁸⁰ HM Treasury ‘Budget 2010 - Economic and Fiscal Strategy Report and Financial Statement and Budget Report’ HC (2010) 451.

⁷⁸¹ Ibid.

⁷⁸² BBC ‘Budget: Radical shake-up of benefits to cut spending’ *BBC*, (London, 22 June 2010) <www.bbc.com/news/10380692> accessed 30 June 2010.

⁷⁸³ Ibid.

⁷⁸⁴ Crisis ‘Crisis Policy Briefing Housing Benefit Cuts’ (Crisis 2012) <www.crisis.org.uk/data/files/publications/Crisis%20Briefing%20-%20Housing%20Benefit%20cuts.pdf> accessed 3 June 2013.

⁷⁸⁵ Oxfam (n 736) p. 32

inflation’.⁷⁸⁶ Oxfam similarly noted that the basic costs for food and energy have outpaced inflation over the last few years.⁷⁸⁷

In 2013 the Welfare Up-rating Act of 2013 further reduced this up-rating by limiting increases to welfare benefits and tax credits at a maximum of 1% until 2016.⁷⁸⁸ In justifying this, the former Chancellor of the Exchequer, in his Autumn Statement on 5 December 2012, said that it was not fair to working people that out of work benefits had increased by 20% since 2007 while average earnings had risen by only 10%.

The lack of statutory requirement to increase benefits in-line with inflation clearly contravenes the ICESCR. The CESCR has on several occasions stated that the amount of benefits to be paid must reflect living costs.⁷⁸⁹ Moreover, a research paper for the House of Commons observed that this decision “...to limit increases in benefits to below inflation for a sustained period is historically unprecedented.”⁷⁹⁰ The paper also noted:

“If inflation averages more than 1% over the three years, families claiming the benefits and tax credits affected will experience a permanent real terms reduction in the support they receive. Families in receipt of means-tested out-of-work benefits such as Income Support and income-based JSA will receive less than the amount social security legislation currently deems necessary to meet their needs.”⁷⁹¹

The future implications of this Up-rating Act must also be taken into account. As was noted when the Bill was being considered by the House of Lords, if you alter the baseline for an up-rating system, “you do it in perpetuity... There is no way in

⁷⁸⁶ Abigail Paul, ‘The living standards squeeze tightens as minimum cost of living soars by 25%’ <www.jrf.org.uk/press/living-standards-squeeze-tightens-minimum-cost-living-soars-25-downturn> accessed 30 June 2012.

⁷⁸⁷ *Oxfam* (n 75), p. 3.

⁷⁸⁸ The Welfare Benefits Up-rating Act 2013.

⁷⁸⁹ CESCR ‘Concluding Observations on China’ (2014) UN Doc. E/C.12/CHN/CO/2; CESCR ‘Concluding Observations on Bulgaria’ (2012) UN Doc. E/C.12/BGR/CO/4-5; CESCR ‘Concluding Observations on Albania’ (2013) UN Doc. E/C.12/ALB/CO/2-3.

⁷⁹⁰ *Kennedy, Cracknell, and McInnes* (n 456), p. 2.

⁷⁹¹ *Ibid.*

which the money can be won back, because the baseline is reduced and all the arithmetic is then calculated from a lower starting level.”⁷⁹² This is even more crucial given the lack of a general needs assessment to determine the initial baseline.

As noted in Chapter 3, although not ideal, the adequacy of social security can also be judged by negative indicators. Since the right to social security at the very minimum should certainly protect people against degrading conditions and be enough to ensure a life in dignity that includes access to nutritious and culturally appropriate food, and adequate and safe housing. In the case of the UK this however is not the case. Below are some of the negative indicators that have been observed by numerous charities working with those living in poverty.

- a. **Increasing use of food banks:** The UN human rights bodies, including the Human Rights Council’s special procedures,⁷⁹³ social organisations, the media, and politicians are observing and documenting the increasing levels in the use of food banks due, they argue, to the inadequacy of benefits and increased sanctions.⁷⁹⁴ In fact Church Action on Poverty and Oxfam have asserted “There is mounting evidence that the inadequacies of the welfare safety net are now directly driving the growth of hunger and reliance on charitable food hand-outs.”⁷⁹⁵ The Coalition Government denied the link between welfare reform and the rise in the use of food banks, arguing instead the increased demand is due to the increased number of food banks and opportunity to get free food.⁷⁹⁶ However a report commissioned by the Department for Environment Food and Rural Affairs (DEFRA) examining the growth of food aid directly contradicts this view, stating:

⁷⁹² This was stated by Lord Kirkwood at the Third Reading of the Welfare Up-rating Bill by the House of Lords on 25 March 2013. More information is available at www.publications.parliament.uk/.

⁷⁹³ *De Schutter*, (n 451).

⁷⁹⁴ Suzanne Moore, ‘2012 has been the year of the food bank’ *The Guardian*, (London, 19 December 2012). <www.theguardian.com/commentisfree/2012/dec/19/2012-year-of-the-food-bank> accessed 9 October 2014.

TUC ‘New foodbank figures are ‘shocking’, says TUC’ *TUC Press Release* (London, 16 October 2013) <www.tuc.org.uk/economic-issues/social-issues/poverty-social-exclusion/welfare-and-benefits/new-foodbank-figures-are> accessed 20 October 2013. See also *Cooper and Dumbleton* (n 738).

⁷⁹⁵ *Cooper and Dumbleton* (n 738).

⁷⁹⁶ Patrick Butler, ‘Food banks are thriving, much to the government's embarrassment’ *The Guardian* (London, 5 March 2013) <www.theguardian.com/society/2013/mar/05/food-banks-thriving-government-embarrassment> accessed 9 October 2014.

"We found no evidence to support the idea that increased food aid provision is driving demand. All available evidence both in the UK and international points in the opposite direction. Put simply, there is more need and informal food aid providers are trying to help."⁷⁹⁷

The report of the Scottish Government, published a month before the DEFRA report, observed that welfare reform was one of the main drivers of the increased use of food banks. The final report of the All Party Parliamentary Inquiry into Hunger and Food Poverty also echoed concerns that economic hardship, austerity measures, and government sanctions could underlie the rise in emergency food aid.⁷⁹⁸ Similarly, research by Oxford University published in 2015, found that the rise in food banks is related to the cuts to local authority spending and central welfare spending. It also concluded that the highest levels of food bank use have occurred where there have been the highest rates of sanctioning, unemployment, and cuts in central welfare spending.⁷⁹⁹

- b. **Malnutrition rates:** In a letter to the *British Medical Journal* in December 2013, public health experts warned that the rising incidence of malnutrition was evidence of a "public health emergency" linked to welfare reforms.⁸⁰⁰ This has been echoed by various social organisations. Church Action on Poverty noted: "The figures show just over 5,500 people were treated in hospital between 2012 and 2013 for malnutrition." While the organization did not "place all of that down to food poverty", he believes, "it's a symptom of the fact that increasing numbers of people in this country simply don't have enough money to feed themselves healthily."⁸⁰¹ Other documentation hospitals reporting a rise in malnutrition related

⁷⁹⁷ Hannah Lambie-Mumford, et al 'Household Food Security in the UK: A Review of Food Aid, Final Report' (University of Warwick and Food Ethics Council, 2014).

⁷⁹⁸ All-Party Parliamentary Inquiry into Hunger in the United Kingdom 'Feeding Britain A strategy for zero hunger in England, Wales, Scotland and Northern Ireland; The report of the All-Party Parliamentary Inquiry into Hunger in the United Kingdom' (8 December 2014) <<https://feedingbritain.files.wordpress.com/2015/02/food-poverty-feeding-britain-final-2.pdf>> accessed 6 May 2015.

⁷⁹⁹ Loopstra et al (n 561).

⁸⁰⁰ David Taylor-Robinson et al 'The rise of food poverty in the UK' (2013) *British Medical Journal*.

⁸⁰¹ Gavin O'Toole 'Religious leaders blast UK welfare cuts' *Aljazeera* (3 March 2014) <www.aljazeera.com/indepth/features/2014/03/religious-leaders-blast-uk-welfare-cuts-20143210843153769.html> accessed 1 April 2014. See also University of Liverpool 'Experts warn of

illnesses such as rickets.⁸⁰² Local press in Yorkshire reported that the amount of people needing hospital treatment or malnutrition had trebled in five years (2008-2013).⁸⁰³

- c. **Rent arrears, evictions and homelessness:** Several organization have documented the link between welfare reform, including the imposition of the Housing Benefit Size Criteria Rules, and increasing rent arrears and homelessness. According to the National Housing Federation (NHF), only four weeks after the implementation of Housing Benefit Size Criteria Rules, in one of the poorest areas (Merseyside), more than 14,000 households fell into arrears with their rent.⁸⁰⁴ NHF's research also found that for nearly 6,000 of these households, this was the first time they had fallen behind with the rent.⁸⁰⁵ With limited smaller homes available, the Federation further noted that many people are forced to stay in their homes and live on less money for essentials such as food and heating.⁸⁰⁶ A Crisis report found the changes to the LHA increased recipients shortfalls between their rent and the amount of LHA received and the risk of homelessness.⁸⁰⁷

In the UK there is considerable evidence that the levels of social security are inadequate. Firstly, the Coalition Government did not properly determined the amount to be awarded in accordance with international human rights law, and secondly it is not ensuring that it is being uprated in accordance with inflation and the changing costs of the essentials for those in poverty. Numerous studies have also shown that the welfare reform clearly jeopardised access to food and adequate housing to the extent

food poverty health emergency' *University of Liverpool: News* (Liverpool, 3 December 2013) <<https://news.liverpool.ac.uk/2013/12/03/experts-warn-of-food-poverty-health-emergency/>> accessed 10 December 2013.

⁸⁰² Michael Buchanan, 'Food poverty: Experts issue malnutrition health warning' *BBC*, (London, 22 August 2014) <www.bbc.com/news/health-28883892> accessed 31 August 2014. Tracy McVeigh, 'Rickets returns as poor families find healthy diets unaffordable' *The Guardian* (London, 30 August 2014) <www.theguardian.com/society/2014/aug/30/child-poverty-link-malnutrition-rickets> accessed 5 September 2014.

⁸⁰³ 'Soaring hospital admissions for malnutrition branded 'disgrace'' *Yorkshire Evening Post* (16 November 2013). <www.newsYorkshire.co.uk/news/soaring-hospital-admissions-for-malnutrition-branded-disgrace> accessed 5 September 2014.

⁸⁰⁴ NHF 'The bedroom tax in Merseyside-100 days on' (2013) <www.pinecourt-housing.org.uk/files/2013/07/BedroomTaxNHF.pdf> accessed 21 June 2014.

⁸⁰⁵ Ibid.

⁸⁰⁶ Ibid.

⁸⁰⁷ Ligia Teixeira and Ben Sanders, 'Hitting home: access schemes and the changes to the Local Housing Allowance' (Crisis, 2012) <www.crisis.org.uk/research.php?fullitem=378> accessed 17 June 2013.

that minimum essential levels are not being met. In many instances people are in emergency inadequate accommodation without secure tenure, and being reduced to access food through the food banks.

5.3.3. Coverage/eligibility

Universality requires that all those in need, regardless of gender, status, race, sexuality amongst others, are eligible to receive social security. In the UK discussions and policies on eligibility fall into two groups: residents and non-residents with the government creating levels of eligibility requirements benefits accordingly. Moreover even within these groups it is differentiating between people on the basis of status rather than need such as distinguishing between EU migrants or those from the European Economic Area⁸⁰⁸ (EEA), and non-EU/EEA migrants, and refugees and asylum seekers.

Residents

Traditionally, the UK has universally provided a number of benefits (both social assistance and insurance) to groups of people who are in particular situations without means testing. This includes child benefit, benefits to the unemployed although this is usually conditional on actively looking for work, and DLA (provided you can satisfy eligibility requirements). It has also provided other assistance on the basis of means testing to determine whether you are in need such as income support.

From 2010 onwards, the Coalition Government implemented a number of changes to eligibility through its Welfare Reform Act including means-testing benefits that were previously provided universally such as child benefit, increasing eligibility requirements for the disability benefits.⁸⁰⁹ Although not enacted, some members of the Coalition Government also suggested making the under 25s ineligible for housing benefit.⁸¹⁰ Some of these, as the next few paragraphs discuss, opens up possibilities for discrimination and/or targeting of vulnerable groups.

⁸⁰⁸ The European Economic Area (EEA) comprises the EU Member states plus Iceland, Switzerland, Liechtenstein and Norway.

⁸⁰⁹ *Oxfam* (n 736), p. 28

⁸¹⁰ David Cameron, 'Speech by Prime Minister David Cameron on welfare' (Bluewater, Kent, Monday 25 June 2012). See also Wendy Wilson, *Housing Benefit: withdrawing entitlement from 18-21 year olds* (2015, HC Briefing Paper 06473).

- a. **Child Benefit:** From 2013, those parents earning more than £50,000 a year had their child benefits substantially reduced, and those earning over £60,000 are not entitled to any child benefit. Rather than simply stop or reduce the payments for parents earning more than £50,000, Her Majesty's Revenue and Customs (HMRC) created the High Income Child Benefit Charge to claw it back.

While in theory this sounds like the Coalition Government ensured that those in need still received Child Benefit, there is much potential for discrimination. It disproportionately affects women and single parents. It does not distinguish between single-income and double-income families, meaning a single parent on £60,000 a year will lose their child benefit entirely and a couple on £50,000 each will keep theirs. Moreover this affects women who do not work while caring for their children with partners who fall into the higher income tax bracket, by removing an important, and potentially only, guaranteed source of independent income.⁸¹¹ In many households, income is not shared equally and Child Benefit payments ensure that mothers have some independent income to help meet their children's needs

- b. **Employment and Support Allowance (ESA) eligibility:** As part of its changes, the Coalition Government introduced new eligibility rules for the *limited capability for work/related work activities* elements of Universal Credit once it comes fully into play.⁸¹² You are eligible for both contributory⁸¹³ and income related ESA if you cannot work because of sickness or disability, and you are not receiving Statutory Sick Pay. However the Coalition Government changed and increased the various points-related tests needed to confirm your limited capability for work and work related activity. They assess your ability to carry out a range of activities,⁸¹⁴ both physical and mental, cognitive and intellectual, including mobilising, standing and sitting, reaching, picking up and moving things, manual dexterity, making yourself understood and understanding communication, learning tasks,

⁸¹¹ *Fawcett Society* (n 604).

⁸¹² Disability Rights UK 'Employment and Support Allowance Overview - Factsheet F31' (2015) <www.disabilityrightsuk.org/employment-and-support-allowance-overview> accessed 5 January 2016.

⁸¹³ You are entitled to receive this if you have paid enough national insurance contributions.

⁸¹⁴ The assessment takes into account your abilities when using any aid or appliance you would normally, or could reasonably be expected to, use.

awareness of everyday hazards, initiating and completing personal action, coping with change and social engagement, and getting about.⁸¹⁵ The Coalition Government tasked a private company, ATOS Healthcare, to implement these tests.⁸¹⁶

Many organisations have criticized the way in which people are assessed, arguing it leads to people in need being excluded. Specialist disability and medical organisations including National Aids Trust and the Muscular Dystrophy Campaign reported that the guidelines given to ATOS Healthcare’s assessors were inadequate.⁸¹⁷ The Disability Benefits Consortium observed “assessors’ knowledge and understanding of conditions, particularly mental health conditions, continued to be poor.”⁸¹⁸ They failed to seek and take into account views of doctor;⁸¹⁹ to take into account variable symptoms with conditions such as Multiple Sclerosis; and recognize generalized pain and exhaustion.⁸²⁰ While there were media reports about these new assessments being helpful in “weeding out” those who are in fact able to work,⁸²¹ Citizen Advice Bureau (CAB) documented several instances of people were being found fit for work despite being seriously ill and/or having severe disabilities, and were therefore deemed as “ineligible for the support of the benefit designed to specifically help them.”⁸²² The problems in the reliability of the tests and the variability in decision making are demonstrated by a large number of appeals, According to Ministry of Justice data, 647,527 appeals were heard between 2009 and June 2013, of which 40% were decided in favour of the claimant.⁸²³ There are also delays in appeal hearings, and ESA is not paid

⁸¹⁵ *Disability Rights UK* (n 812).

⁸¹⁶ On 1 March 2015, the American firm MAXIMUS took over this task.

⁸¹⁷ Steff Benstead, S., et al. ‘Beyond the Barriers, A Spartacus Network report into Employment Support Allowance, the Work Programme and recommendations for a new style of support’ (Spartacus Network, 2014) <www.progressonline.org.uk/content/uploads/2014/04/Beyond-the-Barriers.pdf> accessed 3 March 2015).

⁸¹⁸ *Ibid.*

⁸¹⁹ *Ibid.*

⁸²⁰ Citizens Advice Bureau ‘Not working: CAB evidence on the ESA capability assessment (Citizen Advice Bureau, 2013) <www.rnib.org.uk/sites/default/files/not_working_march_2010_final.pdf> accessed 10 May 2014.

⁸²¹ Alison Little, ‘Sick benefits: 75% are faking’ *Sunday Express* (London, 27 July 2011) <<http://www.express.co.uk/news/uk/261337/Sick-benefits-75-are-faking>> accessed 14 September 2014.

⁸²² *Citizens Advice Bureau* (n 815).

⁸²³ Just Fair ‘Dignity and opportunity for all: securing the rights for disabled persons in the austerity era’ (Just Fair 2014) <www.centreforwelfarereform.org/uploads/attachment/438/dignity-and-opportunity-for-all.pdf> accessed 20 September 2015, p.112.

during the reconsideration period.⁸²⁴ There is also no requirement for DWP to comply with any time limit when reconsidering.⁸²⁵

c. Personal Independence Payment (PIP) eligibility: Adopted in 2013, the PIP replaces the Disability Living Allowance (DLA) and is a non-means tested and non-contributory tax free benefit for children and adults who have a disability and need help with personal care (care component) and/or help getting around (mobility component). The Coalition Government announced that everyone on the DLA will be reassessed from 2013 to 2018 with new criteria, and it expects that over 40% of existing DLA claimants will not qualify for this replacement benefit.⁸²⁶ There are therefore numerous concerns that the changes will result in the exclusion of people in need.

Under the PIP there are two components care and mobility, each of which can be paid at standard or enhanced rates. This compares to the DLA that had three payable rates for the care component depending on the severity of your disability. Under the PIP's care component there are ten areas of evaluation: preparing food, taking nutrition; managing therapy or monitoring a health condition, washing and bathing, managing toilet needs or incontinence, dressing and undressing, communicating verbally, reading and understanding signs, symbols and words, engaging with other people face to face and making budgeting decisions) and two for the mobility component (planning and following journeys, and moving around).⁸²⁷ Under each of these you gain points for being unable to do them reliably, that is, "safely, to an acceptable standard, repeatedly and in an acceptable time period."

This pointing and classification system has raised many concerns, For instance to qualify for the standard rate for the physical mobility test you have to be unable to stand and move unaided more than 50 metres. To qualify for the enhanced mobility component you have to be unable to stand and move 20 metres. This means claimants who can walk 20 metres reasonably well but start to struggle at

⁸²⁴ Ibid.

⁸²⁵ Ibid., p. 111.

⁸²⁶ *Disability Rights UK* (n 812).

⁸²⁷ Ibid.

30 metres will not be eligible for the Motability scheme⁸²⁸ or support to fund a private car or taxis. This and many other concerns were consistently raised during the drafting process by disability organisations.⁸²⁹ Disability organisations also raised concerns about having just two bands or rates of payment,⁸³⁰ arguing that it does not reflect the wide range of disabilities. They suggested that instead a graded system would be better.⁸³¹ Disability Rights observed that many claimants that have been receiving the lowest rate of the care component of the DLA are likely to fail to qualify for PIP, which could result in compromising their independence.⁸³² In its 23rd report, the JCHR similarly expressed concern that tightening the eligibility criteria, such that around 500,000 existing DLA claimants would fail to be eligible for PIP and a number of claimants would receive a reduced level of support, would result in fewer disabled people being able to overcome barriers to independent living.⁸³³

Non-residents

Migrants: The UK has a history of not allowing migrants to access social assistance (non-contributory benefits public funds).⁸³⁴ For the most part entitlement is governed by citizenship, and immigration status (and any conditions attached to it). It differs for EU/EEA migrants and non EU/EEA migrants. Other factors include whether they are deemed “habitually resident”, whether they are in work or looking for work, and

⁸²⁸ You are only eligible for the Motability scheme if you receive the enhanced rate. For more information see <http://www.motability.co.uk>.

⁸²⁹ S. J. Campbell, et al ‘Responsible Reform, a report on the proposed changes to Disability Living Allowance’ (2012). The report is published independently but supported and endorsed by a range of NGOs, including Ekklesia, Disability Alliance, Mind, Papworth Trust and Scope. <www.ekkleisia.co.uk/files/response_to_proposed_dla_reforms.pdf> accessed 2 May 2015.

⁸³⁰ Ibid.

⁸³¹ Ibid.

⁸³² Disability Rights UK ‘PIP assessment criteria and thresholds consultation: Response of Disabilities Rights UK’ (2012) <www.disabilityrightsuk.org/sites/default/files/pdf/pipconsult.pdf> accessed 4 May 2014.

pp. 27-28.

⁸³³ Joint Committee on Human Rights *Implementation of disabled people’s right to independent living* (2010-2012 HL 257 HC 1074), para 146.

⁸³⁴ Benefits listed under public funds include income-based Jobseeker’s Allowance, Income Support, Income-related Employment and Support Allowance, Child Tax Credit, Working Tax Credit, Universal Credit, Social Fund payments, Child Benefit, Housing Benefit, Council Tax reduction, Pension Credit, Attendance Allowance, Personal Independence Payment, Carer’s Allowance, Disability Living Allowance. More information is available at www.gov.uk/.

whether they arrived alone or with other family members.⁸³⁵ Other benefits such as contributory JSA are not counted as public funds under immigration rules and eligibility is different.⁸³⁶

The Coalition Government also tightened eligibility for EU/EEA migrants.⁸³⁷ From 1 January 2014, EU/EEA migrants coming to the UK must have been living in the UK for three months before they could claim income-based Jobseeker's Allowance, Child Benefit and Child Tax Credit. From 1 April 2014 they were also unable to access housing benefits during this period.⁸³⁸ To qualify for these benefits after this three-month waiting period they also had to satisfy eligibility rules that included a stronger, more robust Habitual Residence Test going beyond analysing family status and family ties, duration and continuity of presence, and employment situation including stability and duration and where the person pays taxes., as suggested by the EU.⁸³⁹ In 2013, the Coalition Government announced

“migrants will have to answer more individually-tailored questions, provide more detailed answers and submit more evidence before they will be allowed to make a claim. For the first time, migrants were quizzed about what efforts they have made to find work before coming to the UK and whether their English language skills will be a barrier to them finding employment.”⁸⁴⁰

However, even if they meet these eligibility conditions they were then only entitled to receive JSA, child benefit and child tax benefits for three months. Initially the

⁸³⁵ Steven Kennedy, *People from abroad: what benefits can they claim?* (2015 HC Library Note, SN/SP/6847).

⁸³⁶ Other benefits that do not form part of Public Funds include Guardian's Allowance, Incapacity benefit, Contribution-based Employment and Support Allowance (ESA), Maternity Allowance, Retirement Pension, Statutory Maternity Pay, Statutory Sickness Pay, Widow's Benefit and Bereavement Benefit. See <https://www.gov.uk> for more information.

⁸³⁷ David Cameron, 'Speech by Prime Minister David Cameron on immigration and welfare reform' (University Campus Suffolk, Ipswich, 25 March 2013).

⁸³⁸ Citizens Advice Bureau 'EEA nationals - claiming benefits as a jobseeker' <www.citizensadvice.org.uk/benefits/coming-from-abroad-and-claiming-benefits-the-habitual-residence-test/eea-nationals-and-the-habitual-residence-test/eea-nationals-claiming-benefits-as-a-jobseeker/> accessed 17 June 2015.

⁸³⁹ EC 'Commission publishes guide on application of 'Habitual Residence Test' for social security' *EC Press Release* (Brussels, 13 January 2014) <http://europa.eu/rapid/press-release_IP-14-13_en.htm> accessed 15 January 2014.

⁸⁴⁰ DWP 'Improved benefit test for migrants launched' *DWP Press Release*, (13 December, 2013). <www.gov.uk/government/news/improved-benefit-test-for-migrants-launched> accessed 20 December 2013.

Coalition Government established a period of six months; however, this was reduced to three on 10 November 2014. After this period, EEA jobseekers or former workers had to show that they have a “genuine prospect of finding work” to continue to receive JSA (and if applicable, Child Benefit and Child Tax Credit).⁸⁴¹

Access to benefits for EU/EEA migrants was further reduced on 10 March 2015 when regulations were adopted by Parliament that prevent EU/EEA jobseekers from accessing Universal Credit came into force.⁸⁴² The regulations provide that an EEA national whose right to reside is based on being an EEA/EU jobseeker, or a family member of such a person, cannot satisfy the Habitual Residence Test and will not be entitled to Universal Credit. Since Universal Credit will eventually replace most of the existing means-tested benefits and tax credits for those of working age, EU/EEA migrants will be unable to access most, if not all, benefits. While this appears to violate the EU principle of equal treatment, in 2015 the ECJ ruled that a member state may exclude EU citizens who go to that state to find work from certain non-contributory social security benefits.⁸⁴³

Those EU/EEA migrants that are working or self-employed now have to show that for the previous three months they have been earning at the level where employees start paying national insurance – equivalent to £150 a week before they are entitled to receive benefits.⁸⁴⁴ This ‘condition’ for acquiring the status of ‘worker’ differs to that understood by the EU. EU law currently requires that in order for an EU national to be considered a worker he/she must “genuine and effective” employment.⁸⁴⁵ According to the Coalition Government, this new minimum earnings threshold would help determine whether an EU/EEA national is or was in “genuine and effective” work,

⁸⁴¹ Steven Kennedy, *Measures to limit migrants’ access to benefits* (2015 HC Library Note SN06889).

⁸⁴² Universal Credit (EEA Jobseekers) Amendment Regulations 2015, SI 2015/546. See also *Kennedy* (n 835).

⁸⁴³ C-67/14 *Jobcenter Berlin Neukölln v. Nazifa, Sonita, Valentina and Valentino Alimanovic* [2015] OJC 142.

⁸⁴⁴ HM Treasury, DWP, HM Revenue and Customs ‘Further curbs to migrant access to benefits announced’ *UK Gov Press Release*, (London, 8 April 2014). Available from: <www.gov.uk/government/news/further-curbs-to-migrant-access-to-benefits-announced>, accessed 6 May 2015.

⁸⁴⁵ Don Flynn ‘New rules threaten EU migrant workers with discrimination’ *Migrants Right Blog* (London, 19 February 2014). Available from: www.migrantsrights.org.uk/blog/2014/02/new-dwp-rules-threaten-eu-migrant-workers-major-discrimination, accessed 25 February 2014.

and so has a “right to reside” as a worker or self-employed person and entitled to benefits.⁸⁴⁶

For non-EU/EEA migrants, access to publicly funded benefits (social assistance) on the same basis as nationals depends on their immigration status and whether they have settled status i.e no time limit on their right to stay in the UK. This is unless their right to remain was awarded as a result of a formal commitment by another person to maintain and accommodate them. Separately, Section 115 of the Immigration and Asylum Act 1999 provides that a “Person Subject to Immigration Control” is not entitled to public funds, except in certain limited circumstances. Since most people admitted to the UK from outside EEA have “limited leave to remain” they have “no recourse to public funds.”⁸⁴⁷ Non-EU/EEA migrants must also meet the revised Habitual Residence Test to access benefits.

Recent welfare reform has also changed the eligibility for contributory-based benefits such as contribution-based Jobseeker’s Allowance and contributory ESA for non-EU/EEA migrants. Previously entitlement only depended on National Insurance contributions, rather than immigration status.⁸⁴⁸ Eligibility for these benefits is now restricted to those who are entitled to work in the UK unless the UK has a reciprocal social security agreement with migrant’s country of origin.⁸⁴⁹ This change means that people without legal entitlement to work in the UK have no legal entitlement to contributory-based benefits and payments even if they have paid national insurance contributions during the period that they were working illegally.⁸⁵⁰ This concerns both people who have never been entitled to work in the UK or do not have a current entitlement to work in the UK, and was introduced to prevent illegal workers from receiving contributory benefits. This contravenes the CoE’s Parliamentary Assembly

⁸⁴⁶ *Kennedy* (n 835).

⁸⁴⁷ *Kennedy* (n 841)

⁸⁴⁸ Other work-related benefits including Statutory Maternity Pay, Statutory Adoption Pay, Statutory Paternity Pay, Statutory Sick Pay and Industrial Injuries benefits were also payable regardless of immigration status.

⁸⁴⁹ There are some limited exceptions to the above rules. For example, sponsored immigrants may be able to claim means-tested benefits if they have been resident for at least five years (or before then, if their sponsor has died).

⁸⁵⁰ DWP ‘Introducing an entitlement to work condition for contributory benefits and statutory payments, Equality Impact Assessment’ (London, 2011) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/220158/eia-entitlement-to-work-wr2011.pdf> accessed 5 May 2013.

Resolution 1509 that recognises that “irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed if expelled from the country....”⁸⁵¹

In the UK, migrants (both EU/EEA and non EU/EEA) are clearly denied their right to social security including social insurance. The changes to eligibility including a stronger Habitual Residence Test will discriminate against those most marginalised and disadvantaged. The stipulation of having to earn at least 150 pounds a week before you qualify for benefits is likely to deny social security to many who are employed in short-term casual labour, or seasonal work; the most prevalent form of employment amongst migrant workers as well as agency workers in retail or office administration jobs. This is regardless of how long they have lived and worked in the UK. Migrant Rights has observed that:

“Under the new system this appears to hold out the danger that this group of EU nationals, despite usually working for full weeks at decent pay rates, will have the official status of worker withheld from them indefinitely.”⁸⁵²

Asylum seekers and refugees: In 1954 the UK ratified the 1951 Refugee Convention, obligating it to ensure refugees, including asylum seekers,⁸⁵³ are entitled to benefits. However the UK distinguishes between refugees and asylum seekers, only allowing those with official refugee status to access mainstream benefits.

In the UK, asylum seekers have no right to support. They are excluded from mainstream benefits and are not allowed to work. Instead, under section 95 of the Immigration and Asylum Act 1999, individuals who submit an asylum application “as soon as reasonably practicable” after arriving in the UK can apply for accommodation and/or financial support from UK Visas and Immigration providing they are destitute, or likely to be within 14 days, while their status is being reviewed.⁸⁵⁴ To judge whether they are destitute the authorities take into account whether any other support

⁸⁵¹ *CoE Resolution 1509* (n 480)

⁸⁵² *Flynn*, (n 845).

⁸⁵³ As noted in Chapter 3 the 1951 Refugees Convention does not speak of asylum seekers but only refugees, acknowledging that asylum seekers are prospective refugees.

⁸⁵⁴ *Gower* (n 774) The assistance includes accommodation on a "no choice" basis in cluster areas around the country.

is available and whether they have any assets such as land, savings, investments, vehicles, and goods held for the purpose of trade or business.⁸⁵⁵ Under section 55 of the Nationality, Immigration and Asylum Act 2002, asylum seekers are not entitled to support whilst their asylum application is under consideration if they did not apply for asylum “as soon as reasonably practicable”. However, this can be overruled if an applicant is able to demonstrate that support is necessary to avoid a breach of their rights under the ECHR.⁸⁵⁶ In the afore mentioned Limbuela case, for instance the House of Lords ruled that the government cannot deny access to assistance for an asylum seeker because he failed to asylum application within three days as it could violate his rights under the ECHR, namely Article 3.⁸⁵⁷ However, as noted earlier this offers a very low level of protection.

If the asylum seeker’s application for refugee status has been refused, and their appeal rights exhausted, they can no longer receive this support. Instead they can apply for a basic support package⁸⁵⁸ known as “hard case” or “Section 4” support if their circumstances meet the narrow eligibility criteria, i.e. they: agree to return to their country of origin; are unable to leave the UK because of a physical impediment to travel or other medical reason; have no viable route of return; have applied for judicial review of the decision on their asylum claim and have been granted permission to proceed; or that the provision of accommodation is necessary to avoid breaching their human rights.⁸⁵⁹ Again without the right to social security (and other economic and social rights) being enshrined into the UK, this will focus on rights within the Human Rights Act/ECHR and therefore have a lower level of protection.

As Bolderson has observed in 2008, in the UK “the socio-economic rights written into the Refugee Convention appear to have had little effect in preventing the benefit exclusions and reductions to which asylum seekers were subjected.”⁸⁶⁰

⁸⁵⁵ The Asylum Support Regulations (2000).

⁸⁵⁶ UK Visas and Immigration ‘Section 55 Guidance’

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/431346/Section_55_v12.pdf> accessed 5 July 2016.

⁸⁵⁷ *R (Limbuela) v. Secretary of State for the Home Department* [2006] 1 AC 396 (UKHL 66).

⁸⁵⁸ The support consists of accommodation and food, the latter of which is accessed by an ‘Azure card’ that can only be used in specific supermarkets.

⁸⁵⁹ The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers Regulations (2005).

⁸⁶⁰ Helen Bolderson ‘Exclusion of Vulnerable Groups from Equal Access to Social Security’ in Eibe Riedal (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR* -

5.3.4. Accessibility

Under the ICESCR, the UK Government is obligated to ensure that social security is accessible for all. Even if you are entitled, you may have problems accessing the benefit due to *inter alia* conditionalities attached, remoteness, stigmatisation, and/or a lack of understanding of bureaucratic processes. As discussed in Chapter 3 problems in accessibility can often reflect and exacerbate inequalities already in society.

In the UK most of the problems with accessibility relate to excessive sanctioning for alleged fraud and non-compliance with conditionalities such as failing to attend Mandatory Work Activity or advisor interviews, take a suitable employment opportunity, or comply with other Jobseeker Directions. While not specifically a conditionality, benefits can also be withdrawn if people fail to attend a disability or work capability assessment. The sanctions imposed legally can leave people without assistance for up to three years. There is a system of hardship payments if the person can prove they are unable to buy essential items such as food, heating and accommodation, and that they have looked for help elsewhere and have cut costs as much as they can. However they are discretionary and only available within the first two weeks of a sanction if you or your partner is considered as vulnerable such as having a child, being pregnant or receiving ESA or PIP.⁸⁶¹

Such sanctions were included in the Welfare Reform Act despite several organisations, commenting during the consultation process that “removing benefits and leaving people with no income will result in extreme hardship for them and their families.”⁸⁶² Oxfam specifically argued that “it is unacceptable for the government to remove – or to threaten to remove – the basic right to social protection from anyone.”⁸⁶³ It is clear that removing vulnerable people’s means of income for whatever reason violates the right to social security including minimum essential levels. It also jeopardises their rights to be free from degrading and inhumane treatment and their right to life. In 2011, the JCHR concluded that while the

Some Challenges (Springer-Verlag 2007), pp. 129-144, p. 141.

⁸⁶¹ Welfare Reform Committee *Interim Report on the New Benefit Sanctions Regime: Tough Love or Tough Luck?* (Scottish Parliament, fourth session, SP Paper 552, 2014).

⁸⁶² *Mulholland* (n 549).

⁸⁶³ *Work and Pensions Committee* (n 754).

imposition of conditionality and sanctions would not in principle infringe Article 3 ECHR, “there is a risk that the conditionality and sanction provisions in the Bill might in some circumstances lead to destitution, such as would amount to inhuman or degrading treatment contrary to Article 3 ECHR if the individual concerned was genuinely incapable of work.”⁸⁶⁴ The Government however considers that there is no incompatibility with Article 3 because claimants have the possibility to avoid these sanctions by working “thus breaking the chain of state responsibility for the consequences.”⁸⁶⁵ Yet clearly the analysis below shows that the nature of the conditionalities penalise those living in poverty particularly those with limited education and access to internet, mental and physical health problems and other factors that the Government should be remedying as a source of inequality.

During the Bill’s consultation process, several organisations questioned “the introduction of increased conditionality in a time of economic downturn and increasing unemployment.”⁸⁶⁶ They noted that additional conditionality without targeted, effective support is not likely to lead to greater success for older jobseekers or jobseekers with disabilities in gaining and sustaining employment.⁸⁶⁷ Moreover those people who are most likely to be unable to access employment are more likely to have problems complying with the conditionalities such as those with disabilities, ill health and literacy difficulties. While the Coalition Government tried to streamline and simplify the system, there are many concerns that increasing the number of checks and tightening eligibility requirements, created confusion about the level of compliance needed. Since the majority of those receiving benefits have both limited education and access to information such as the internet, they are more likely to be unable to understand the different processes and therefore more likely to make mistakes and suffer sanctions. Without Internet access it is also very difficult to apply for the number of jobs required by the DWP.⁸⁶⁸ CAB Scotland for instance notes that the DWP has not appreciated that many people do not have the necessary IT skills to utilise the Internet, learn about the benefits system and comply with

⁸⁶⁴ *Joint Committee on Human Rights* (n 833), para 1.45.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Work and Pensions Committee* (n 754).

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Steven Armstrong and Maruxa Ruiz del Arbol ‘Unconnected and out of work: the vicious circle of having no Internet’ *The Guardian* (London, 9 April 2015) <www.theguardian.com/society/2015/apr/09/unconnected-and-out-of-work-the-vicious-circle-of-having-no-internet> accessed 10 April 2015.

conditionalities.⁸⁶⁹ Its research showed that “the majority of Scottish CAB clients with a benefits issue would struggle to apply for benefits or jobs online and that they face a number of barriers to accessing and using the Internet.”⁸⁷⁰ Scottish CAB further notes: “only 54% have an Internet connection at home, and less than a quarter (24%) feel able to apply for jobs or benefits without help.”⁸⁷¹

There are also problems surrounding the requirement of lone parents to sign on and look for employment once their youngest child is five years old. This requirement essentially changes the status of lone parents within the benefits system. After their child reaches five, they are now considered jobseekers and to claim their jobseekers allowance they have to be available for work. While there is some flexibility such as allowing lead carers with a child under 13 to work less than 40 hours per week and/or restrict their availability for work to jobs that fit around school hours,⁸⁷² this is not always being offered by job centre staff. According to One Parent Families Scotland (OPFS), lone parents are being told which jobs to apply for despite them having unsuitable hours or possible problems in arranging child-care.⁸⁷³ OPFS staff also reported a dramatic increase in numbers of lone parents who have been wrongly sanctioned.⁸⁷⁴ Oxfam highlighted that “More stringent conditions are likely to hit carers harder, especially parents bringing children up alone (mainly women).”⁸⁷⁵ Oxfam also called for work incentives for those claiming child care support to be as favourable as those without.⁸⁷⁶ These concerns were raised throughout the Act’s initial drafting and adoption process.

Disability organisations reported more persons being expected to work despite being clearly unable to comply with the conditionalities following the introduction of more stringent eligibility criteria for persons with disabilities.⁸⁷⁷ CAB for instance told the

⁸⁶⁹ *CAB Scotland* (n 608).

⁸⁷⁰ *Ibid.*, p. 4

⁸⁷¹ *Ibid.*

⁸⁷² DWP ‘Universal Credit and families: questions and answers’ (2016)

<www.corby.gov.uk/sites/default/files/files/1.%20uc-families-questions-answers.pdf> accessed 23 June 2016.

⁸⁷³ Welfare Reform Committee ‘Written Submission on Universal Credit from One Parent Families Scotland’ (Scottish Parliament, 2014).

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Work and Pensions Committee* (n 754)

⁸⁷⁶ *Ibid.*

⁸⁷⁷ *Welfare Reform Committee* (n 873).

House of Commons they had examples of cases "where there was never a hope that someone could comply with the conditionality but it was not picked up early enough and they were penalised subsequently".⁸⁷⁸ It recommended that DWP should be obligated to make sure that claimants had the ability to comply with the actions in their agreement.⁸⁷⁹ There have also been physical accessibility problems for compliance with conditionalities and/or assessments. Many disability/work capability assessment centres have been reported as having problems in accessibility such as a lack of lifts and ramps.⁸⁸⁰ Often people are required to go further afield and subsequently incur increased travel costs and stress that can often worsen medical conditions.

These issues and problems have been worsened by the reported inflexibility and the automatic imposition of sanctions: The Welfare Reform Committee of the Scottish Parliament (Welfare Reform Committee) "received a wealth of examples of cases where sanctions have been misapplied or where insufficient flexibility has been shown."⁸⁸¹ People reported that it is impossible to change appointments with jobcentre staff regardless of circumstances.⁸⁸² Sanctions are also imposed through an automated process. While, when sanctions are imposed, claimants have 28 days to challenge in writing, this has been reported as poorly administrated. CAB reported that many claimants were not given notice of the sanction being applied, and were only aware when they withdrew cash.⁸⁸³ They can, therefore, not challenge it within the allotted time frame. They also are often not informed why the sanction has been imposed.⁸⁸⁴ For some sanctions it is not even necessary for the DWP to inform them in writing.⁸⁸⁵

There are also only limited opportunities to challenge unfair decisions regarding compliance with conditionalities. In 2010 Oxfam noted in its comments on the White Paper on Universal Credit that the "proposed sanctions are, to a large extent, at the

⁸⁷⁸ Work and Pensions Committee, *Third Report: Universal Credit implementation: meeting the needs of vulnerable claimants* (2012-13, HC 576), para 171.

⁸⁷⁹ *Ibid.*

⁸⁸⁰ BBC 'Norwich disabled assessment centre 'inaccessible' *BBC* (London, 24 Sept 2012)

<www.bbc.com/news/uk-england-norfolk-19700635> accessed 30 November.

⁸⁸¹ *Welfare Reform Committee* (n 873)

⁸⁸² *Ibid.*

⁸⁸³ *Ibid.*

⁸⁸⁴ *Ibid.*

⁸⁸⁵ *Ibid.*

discretion of personal advisors” and asked how it plans to ensure the rights of complainants are upheld?⁸⁸⁶ These questions remain unaddressed and are becoming increasingly important given the changes to legal aid that have significantly limited the ability of people to challenge the decisions of job centre staff.

Accessibility has also been undermined by delays and inefficiencies in bureaucracy. In 2014, the Refugee Council observed that administrative delays and errors in the transition from using the National Asylum Support Service to accessing full state benefit entitlement had resulted in newly granted refugees facing homelessness and destitution.⁸⁸⁷ Already in 2012, the media reported that a child asylum seeker had starved to death due to these delays and inefficiencies.⁸⁸⁸ There have also been similar observations regarding the payment of other benefits. A DWP report found that new PIP claim could take six months to process as opposed to the expected 74 days.⁸⁸⁹ A report on PIPs by the House of Commons Committee of Public Accounts similarly expressed concern about the “long and unacceptable delay” experienced by many persons with disabilities in the assessment and granting of their Personal Independent Payments.⁸⁹⁰ It stated that:

“The Department significantly misjudged the number of face-to-face assessments that providers would need to carry out, and the time these assessments would take. This has resulted in significant delays to benefit decisions and a growing backlog of claims. The unacceptable level of service provided has created uncertainty, stress and financial costs for claimants, and put additional financial and other pressures on disability organisations, and on other public services, that support claimants.”⁸⁹¹

⁸⁸⁶ *Work and Pensions Committee* (n 754)

⁸⁸⁷ Lisa Doyle ‘28 days later: experiences of new refugees in the UK’ (Refugee Council, London, 2014) <www.refugeecouncil.org.uk/assets/0003/1769/28_days_later.pdf> accessed 5 October 2015.

⁸⁸⁸ Amelia Gentleman, ‘Double death in asylum seeker family reveals gap in state benefits’ *The Guardian* (London 5 October 2012) <www.theguardian.com/uk/2012/oct/05/immigration-children> accessed 14 September 2013.

⁸⁸⁹ Disability Rights UK ‘Personal independence payment: A guide to making a claim - Factsheet F60’ (London) <www.disabilityrightsuk.org/personal-independence-payment-pip> accessed 5 January 2016.

⁸⁹⁰ Committee of Public Accounts ‘Personal Independence Payment, First Report of Session 2014-15’ (HC 280 2014-15), p. 3.

⁸⁹¹ *Ibid.*

There are also concerns about the accessibility of individuals within households. Despite the right to social security being an individual right, Universal Credit is paid according to household rather than the individual, in one single household payment on the basis that resources are distributed equally within household. This ignores the possible marginalisation of some members of the household. During the consultation process on the then draft bill, the Women's Budget Group and Oxfam for instance observed that one single payment made to one member of the household could lead to the exclusion of women and girls within the household.⁸⁹² The JCHR similarly noted this would reduce the financial autonomy of women in the household and other vulnerable members such as persons with disabilities.⁸⁹³ This approach could also reduce the ability of women to leave abusive partners and can help facilitate the control of financial resources as a form of abuse. In research by Refuge, 89% of respondents reported economic and financial abuse as part of their experience of domestic violence.⁸⁹⁴ Moreover other organisations have noted concerns over the household impact of one member failing to comply with the conditionalities.⁸⁹⁵

These accessibility issues, especially the severe sanctions, can credibly leave claimants without any means of feeding themselves or securing safe and secure shelter. The Welfare Reform Committee has noted that the loss of income through sanctions is twice the maximum of fines that can be imposed by courts,⁸⁹⁶ and many organisations have recognised these severe sanctions as one of the causes of the increase in the use food banks. Given this, they hardly comply with the CESCR's and the ECSR's stipulation that conditionalities must be reasonable and not lead to destitution.⁸⁹⁷ They violate both the rights to social security and food, including the minimum essential levels of each right. These violations of the minimum essential levels of right to food and social security, also compromise physical and mental integrity and can violate the rights to life and freedom from degrading treatment.

⁸⁹² *Work and Pensions Committee* (n 754)

⁸⁹³ *Joint Committee on Human Rights* (n 692).

⁸⁹⁴ Nicola Sharp 'What's yours is mine' The different forms of economic abuse and its impact on women and children experiencing domestic violence' (Refuge, London 2008) <www.refuge.org.uk/files/Whats-yours-is-mine-Full-Report.pdf> accessed 3 April 2013, p. 2.

⁸⁹⁵ *Work and Pensions Committee* (n 878).

⁸⁹⁶ *Welfare Reform Committee* (n 873).

⁸⁹⁷ The ECSR for instance recognizes that where contracting states parties link social assistance to an individual willingness to seek employment or undergo vocational training, conditions must be reasonable and contribute to finding a lasting solution to the individual's needs. Individuals must also not be deprived of their source of subsistence. See *Khaliq and Churchill* (n 504), p. 441.

5.3.5. Cultural accessibility (Acceptability): Stigmatisation and discrimination

The question of individual responsibilities has always been part of UK's approach to social security benefits. However this has increased rapidly since the financial crisis and the formation of the coalition government. In particular, Prime Minister Cameron made repeated statements alleging a culture of entitlement to justify welfare reform. He frequently implicitly suggested that those receiving benefits are lazy and do not work or contribute to society.⁸⁹⁸ Similarly, George Osborne, as the former Chancellor of the Exchequer, frequently argued "Fairness is about being fair to the person who leaves home every morning to go out to work and sees their neighbour still asleep, living a life on benefits."⁸⁹⁹

Further reinforcing and promoting the view that those on benefits cannot be trusted and are irresponsible, politicians have discussed introducing benefit cards that are acceptable instead of cash in certain shops to allegedly prevent those on benefits spending money on alcohol and cigarettes.⁹⁰⁰ The Coalition Government also reiterated the need to address fraud, using strong language such as "cracking down" or "declaring war on benefit cheats." This is despite some estimates suggesting less than 0.9% of the welfare budget is lost in fraud.⁹⁰¹ In fact it is worth noting "if everyone claimed and was paid correctly, the welfare system would cost around £18 billion more."⁹⁰²

It is clear that the Coalition Government's approach was misleading. As the Northern Ireland Welfare Group stated "large numbers of claimants are in receipt of benefit due

⁸⁹⁸ Hélène Mulholland and Patrick Wintour, 'Cameron announces Tory plan to slash benefits' *The Guardian* (London 25 June 2012) < <https://www.theguardian.com/politics/2012/jun/25/cameron-tories-slash-benefits>> accessed 14 September 2014.

⁸⁹⁹ Rowena Mason, 'Will the benefit squeeze hit the 'strivers' or the 'skivers with their blinds down'?' *The Telegraph*, (London, 8 January 2013) <www.telegraph.co.uk/news/politics/9787734/Will-the-benefit-squeeze-hit-the-strivers-or-the-skivers-with-their-blinds-down.html> accessed 14 September 2014. See also George Osborne 'Autumn Statement 2012 to the House of Commons by the Rt Hon George Osborne, MP, Chancellor of the Exchequer' (Parliament, 5 December 2012).

⁹⁰⁰ Ally Fogg, 'The dubious benefits of welfare payment cards' *The Guardian* (London, 29 January 2013). <<https://www.theguardian.com/commentisfree/2013/jan/29/welfare-payment-cards-dubious-benefits>> accessed 14 March 2014.

⁹⁰¹ Baptist Union of Great Britain, Methodist Church, Church of Scotland and the United Reformed Church 'The lies we tell ourselves: ending comfortable myths about poverty' (Methodist Publishing, 2013) <http://csc.ceceurope.org/fileadmin/filer/csc/Social_Economic_Issues/Truth-And-Lies-Report.pdf> accessed 10 February 2014, p. 5

⁹⁰² *Ibid.*

to full time caring responsibilities, disability, chronic ill health, recent unemployment, age and an array of additional circumstances.”⁹⁰³ It also observed that “The use of such language fails to recognise the various needs and complexities being met within the benefit system and negatively portrays claimants in a way that is neither helpful nor warranted.”⁹⁰⁴

This approach impacted the daily lives of those in need. Numerous studies suggested that many of those in need were dissuaded from claiming social security. Analysis by researchers, led by the University of Kent's social policy team, said polls and focus groups revealed a quarter of claimants "delayed or avoided asking for" vital welfare payments because of "misleading news coverage driven by [government] policy".⁹⁰⁵ There are also reports of those receiving benefits being denied access to housing.⁹⁰⁶ Moreover, many charities, including Scope, Mencap, Leonard Cheshire Disability, the National Autistic Society, Royal National Institute of Blind People, and Disability Alliance, have reported that the Government's approach, especially its focus on fraud, resulted in violence and discrimination against those on benefits and/or vulnerable groups, in particular persons with disabilities. Disability charities observed that they have been regularly taunted on the street with passers-by accusing them of faking their disability. The organisations attribute this primarily to the ministers and civil servants role in repeatedly highlighting the supposed mass abuse of the disability benefits system.⁹⁰⁷

5.4. Are these austerity measures justified?

As Chapter 4 demonstrated, the right to social security is non-derogable, even during a financial crisis. This includes both minimum essential levels and the obligation to build on this and progressively realise full implementation. While retrogressive

⁹⁰³ *Work and Pensions Committee* (n 754)

⁹⁰⁴ *Ibid.*

⁹⁰⁵ Turn2Us ‘Benefits stigma in Britain’ (Turn2Us 2012) <www.turn2us-2938.cdn.hybridcloudspan.com/T2UWebsite/media/Documents/Benefits-Stigma-in-Britain.pdf> accessed 9 July 2013.

⁹⁰⁶ Patrick Butler, ‘Welfare cuts: housing benefit claimants not welcome here’ *The Guardian* (London, 5 July 2012) <<https://www.theguardian.com/society/patrick-butler-cuts-blog/2012/jul/05/welfare-cuts-housing-benefit-claimants-not-welcome-rent>> accessed 10 August 2014.

⁹⁰⁷ Peter Walker, ‘Benefit cuts are fuelling abuse of disabled people, say charities’ *The Guardian* (London, 5 February 2012) <www.theguardian.com/society/2012/feb/05/benefit-cuts-fuelling-abuse-disabled-people> accessed 17 March 2014.

measures can be justified by a lack of resources, they must be absolutely necessary with no alternatives, and must never violate the obligation to ensure minimum essential levels, and other core obligations such as non-discrimination and the protection of the vulnerable.⁹⁰⁸ They must also be necessary to protect ‘general welfare’⁹⁰⁹, and all other measures, or a lack of action would have to worsen the enjoyment of economic, social and cultural rights.⁹¹⁰

In this regard it is unclear how the Coalition Government’s actions could be justified under international human rights law. Firstly it is hard to establish that the measures taken by the Government were necessary to protect the ‘totality of rights’ contained in ICESCR and ‘general welfare’.⁹¹¹ In addition to violating the right to social security including core obligations to ensure minimum essential levels, non-discrimination, and the protection of the vulnerable, its actions have resulted in violations of other rights such as the right to food that has in turn threatened the right to health and even the right to life. While the term ‘totality of rights’ has received little clarification, surely actions that threaten and even violate the minimum essential levels of subsistence rights could hardly be regarded as necessary to protect the ‘totality of rights’.

Secondly as illustrated in Chapter 4, just having a national debt does not in itself justify the necessity of such actions. As explained earlier the issue of necessity is part of the proportionality principle; the measure taken must be necessary to achieve the aim and that there cannot be any less harmful ways of doing it. This section examines this further with regards to the analysis of the term ‘maximum available resources’ developed in previous sections, and the analysis of well-regarded economists and research institutions that question the necessity of austerity measures. While it is not for the CESCR or other judicial bodies to determine economic policy, it can examine whether sufficient evidence has been provided to substantiate the lack of alternatives and the need for such measures. As has been noted in Chapters 2 and 4, it is not a question of determining which solution is best but, given the impact the cutbacks have

⁹⁰⁸ Nolan, Lusiani and Courtis (n 320), p. 134

⁹⁰⁹ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 9. See also Mueller (n 305), p. 133.

⁹¹⁰ CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

⁹¹¹ See also Mueller (n 305) p. 133.

had on the enjoyment of economic and social rights particularly the right to social security, a question of whether the state is providing ‘clear and convincing’ evidence that the austerity measures were necessary, and that all alternatives measures such as higher tax rates, introducing new methods of taxation, cutting down on tax evasion and avoidance or other means of raising revenue would have to worsen the enjoyment of economic, social and cultural rights.⁹¹²

The Coalition Government justified austerity measures that particularly targeted social security on having a large national debt. Likening it to a household debt Prime Minister Cameron frequently suggested that it has no option but to cut back on social expenditure. In 2009 his keynote speech to the Conservative Party forum committed to ending “years of excessive government spending”.⁹¹³ Since then he continued to argue that the country must live within its means.⁹¹⁴ Nobel laureate economist Krugman notes that Cameron’s supporters similarly equated “the debt problems of a national economy with the debt problems of an individual family. A family that has run up too much debt, the story goes, must tighten its belt.”⁹¹⁵ This is misleading. As already discussed in Chapters 2 and 4, a country’s resources are not fixed and while the debt may be considerable it cannot be likened to a household debt. This again questions the necessity of the austerity measures taken.

Highly regarded economists have strongly argued that expansion in times of recession is crucial in stimulating demand, and thus productivity and output and employment/generating income. As Krugman has noted, because of interdependence, one person’s spending is another person’s income, and if all spending is reduced then all incomes will plunge and indebtedness will increase.⁹¹⁶ This remains the case for the UK. In 2015, just prior to the General Election, Krugman reiterated that harsh

⁹¹² CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

⁹¹³ Deborah Summers, ‘David Cameron warns of ‘new age of austerity’’ *The Guardian* (London, 26 April 2009) < www.theguardian.com/politics/2009/apr/26/david-cameron-conservative-economic-policy1> accessed 16 June 2013.

⁹¹⁴ Cameron, (n 200).

⁹¹⁵ Paul Krugman, ‘The Austerity Agenda’ *The New York Times* (New York, 31 May 2012) <<http://www.nytimes.com/2012/06/01/opinion/krugman-the-austerity-agenda.html>> accessed 10 June 2012.

⁹¹⁶ Paul Krugman, ‘How the Case for Austerity Has Crumbled’ *The New York Review of Books* (New York, 6 June 2013) < www.nybooks.com/articles/2013/06/06/how-case-austerity-has-crumbled/> accessed 6 January 2014.

austerity in depressed economies is not necessary.⁹¹⁷ Also just prior to the 2015 General Election, two-thirds of the 33 economists surveyed by the Centre for Macroeconomics disagreed with the proposition that the Government's austerity policies since 2010 have had a "positive effect" on the economy.⁹¹⁸ Several institutions including the IMF, UK Treasury and the National Institute of Economic and Social Research have also concluded that the focus on deficit reduction will both act as a drag on growth and raise unemployment, with the result that, even if the Government reaches its targets for spending reduction, it will not meet its borrowing targets.⁹¹⁹ The degree of documentation and analysis on this strictly suggests again that the evidence of the necessity of austerity is not 'clear and convincing evidence', much less 'beyond reasonable doubt' as needed for cases where core obligations have been violated.

The Coalition Government also ignored the role of social security in debt-funded stimulus. As has already noted, there is significant evidence that spending on social security has an expansionary impact on the economy.⁹²⁰ Those in poverty typically spend a higher proportion of their income than their wealthier counterparts and thereby have a greater expansionary impact than tax cuts.⁹²¹ Spending on social security also ensures environment for implementing human rights in the long term by developing a state's assets especially its human capital, as already highlighted, through improving educational and nutritional levels. Despite these studies, the Coalition Government frequently suggested that spending on social security has no economic return.⁹²²

⁹¹⁷ Paul Krugman, 'The Case for Cuts Was a Lie. Why Does Britain Still believe it? The Austerity Delusion' *The Guardian*, (London, 29 April 2015) <www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion> accessed 1 June 2015.

⁹¹⁸ Ben Chu, 'Two Thirds of Economists Say Coalition Austerity Harmed the Economy' *The Independent*, (London, 1 April 2015) <www.independent.co.uk/news/business/news/two-thirds-of-economists-say-coalition-austerity-harmed-the-economy-10149410.html> accessed 1 May 2015.

⁹¹⁹ This was particularly noted by Oxfam. See *Oxfam* (n 736).

⁹²⁰ *FAO* (n 663).

⁹²¹ *Ibid.*

⁹²² In August 2014, George Osborne for instance favoured money being made available for infrastructure over welfare implicitly suggesting that spending money on social security was dead money since it does not generate 'a real economic return'. Steven Swinford, 'George Osborne: spend welfare budget on roads and rail' *The Telegraph* (London 5 August 2014) <www.telegraph.co.uk/news/politics/conservative/11013001/George-Osborne-spend-welfare-budget-on-roads-and-rail.html> accessed 15 August 2014.

By presenting resources as fixed and subsequently focusing its budgets on spending cuts rather than raising progressive taxation levels, the Coalition Government also failed to recognise the role of the state in determining resource levels and fiscal space. Many prominent economists and credible research institutes have identified a number of fiscal choices for the UK that would raise revenue in a progressive manner in compliance with human rights standards and principles with limited adverse economic impact. These opportunities to increase fiscal space suggest that firstly the situation is not as black and white as the Coalition Government portrayed, and secondly again that there is not clear and convincing evidence of the necessity of the austerity measures taken, which have significantly curtailed people's rights.

- a. ***Tax avoidance and evasion:*** Chapter 2 noted that states cannot claim a lack of resources if they have not effectively addressed tax evasion and avoidance. In the UK several organisations and economists have observed that significant resources have been lost through tax evasion and avoidance (illegal evasion of taxes by individuals, corporations and trusts by inter alia deliberately misrepresenting the true state of their affairs to the tax authorities to reduce their tax liability and includes dishonest tax reporting, such as declaring less income, profits or gains than the amounts actually earned, or overstating deductions) and avoidance (ensure that less tax is paid than might be required by law). A 2008 report by the Trades Union Congress (TUC) observed that Britain loses £25bn to corporate and personal tax avoidance, and an additional 8 billion from tax planning by the UK's wealthiest individuals.⁹²³ More recently HMRC has conservatively estimated that 35bn of prospective tax revenue is lost due to non- payment, tax evasion and avoidance, this figure is still strong in comparison to figures about benefit fraud. Based on DWP's official estimates for 2010/11, the media reported that in fact only 0.7% of total benefit expenditure was overpaid due to fraud, amounting to approximately 1.2 billion.⁹²⁴

⁹²³ Richard Murphy 'The Missing Billions, the UK Tax Gap' (TUC 2008)

<www.tuc.org.uk/sites/default/files/documents/1missingbillions.pdf> accessed 12 February 2010.

⁹²⁴ James Ball 'Welfare fraud is a drop in the ocean compared to tax avoidance' *The Guardian* (London 3 February 2013 <www.theguardian.com/commentisfree/2013/feb/01/welfare-fraud-tax-avoidance> accessed 5 May 2013.

While the Coalition Government vocally criticised both those who avoid and evade tax,⁹²⁵ there are some doubts whether it adequately addressed the situation and made the necessary steps to secure the maximum possible resources. In December 2012, a report by the UK House of Commons examined the ‘immoral’ tax practices of Starbucks, Google and Amazon. It criticised the lax enforcement of HMRC with respect to abusive corporate tax structures and called on the Government to draw up laws to close loopholes, and name and shame companies that fail to pay their fair share.⁹²⁶

In response the Coalition Government developed a general anti-abuse rule (GAAR) that came into force on 17 July 2013. However this rule is narrow only applying to **abusive** arrangements rather than those that seek tax avoidance. Moreover as a rule it is more vulnerable to the creation of loopholes. A principle is more general and can cover a number of different situations if they in principle contribute to tax avoidance and/or abuse while a rule tends to cover specific scenarios. Already in 2015, it was observed that there is “evidence that accountancy firms are continuing to devise more complex tax avoidance schemes designed to get around the DOTAS (Disclosure of Tax Avoidance Schemes) rules and the new General Anti Abuse Rule.”⁹²⁷ The Association of Chartered Certified Accountants (ACCA) notes that the GAAR is unlikely to make a big difference to tax revenue in the UK.⁹²⁸

The TUC has similarly observed that the GAAR “... is likely to be wholly inadequate in tackling the tax avoidance abuse”.⁹²⁹ It has noted amongst other things that “The Rule only tackles tax abuse which is so narrowly defined that the number of occasions on which the Rule will be used will be few and far between” and that “the test for deciding when the Rule can be used is so perverse that the

⁹²⁵ ‘Jimmy Carr tax affairs “morally wrong” – Cameron’ *BBC* (London, 20 June 2012) <www.bbc.com/news/uk-politics-18521468> accessed 15 January 2013.

⁹²⁶ Committee of Public Accounts ‘Public Accounts Committee - Nineteenth Report HM Revenue and Customs: Annual Report and Accounts’ (HC 716 2012-13).

⁹²⁷ Committee of Public Accounts ‘HMRC’s Progress in Improving Tax Compliance and Preventing Tax Avoidance, Eighteenth Report of Session 2014-15’ HC 2014-15 458., p. 11.

⁹²⁸ ACCA ‘The UK General Anti-Abuse Rule’ (London, 2013) <www.accaglobal.com/content/dam/accaglobal/PDF-technical/tax-publications/tech-tp-ukgaar.pdf> accessed 13 July 2014.

⁹²⁹ TUC ‘The Deficiencies in the General Anti- Abuse Rule’ (TUC 2013) <www.tuc.org.uk/sites/default/files/GAAR.pdf> accessed 21 January 2015.

Rule will be hard to use.”⁹³⁰ The TUC has also noted that Panel of Experts that will judge compliance with the Rule are not independent since they will be drawn from the tax avoidance industry.⁹³¹ There will be also no penalty for those found guilty of tax abuse; they will only be required to pay back tax owed. The Rule therefore provides no deterrent.

Moreover, the Government’s approach does not comply with the recommendations from the EC. In December 2012, the EC published a plan to tackle tax avoidance and tax evasion that recommends that EU member states adopt a general anti-avoidance rule.

“To counteract aggressive tax planning practices which fall outside the scope of their specific anti-avoidance rules, Member States should adopt a general anti-abuse rule, adapted to domestic and cross-border situations confined to the Union and situations involving third countries.”⁹³²

- b. ***Increasing taxes:*** Several economists have suggested making incremental changes such as one-penny increases in the basic rate of personal income tax that would reportedly annually raise £5 billion by 2011-12 with only limited economic cost.⁹³³ They have similarly noted that a one-penny increase in national insurance (main employee rates) would raise 4 billion a year and a similar increase in the employer rates would raise 5 billion.⁹³⁴ With the emphasis on cuts rather than raising taxes (apart from VAT), such incremental changes have hardly been discussed by the Government. The Institute for Public Policy Research (IPPR) notes that the main problem or impediment to implementing this is political rather than economic. It has stated that tax increases, even the most incremental, that could most simply bring in the additional revenues are ruled out on political

⁹³⁰ Ibid.

⁹³¹ Ibid.

⁹³² EC ‘Recommendation on aggressive tax planning’ (6 December 2012) Doc. C(2012) 8806.

⁹³³ Paul Johnson ‘Opportunities for new taxes, Opportunities in an Age of Austerity, Smart ways of dealing with the UK’s financial deficit’ in Carey Oppenheim and Tony Dolphin (eds) *Opportunities in an Age of Austerity: Smart ways of dealing with the UK’s fiscal deficit* (IPPR 2009), pp 65-67.

⁹³⁴ Ibid.

grounds and that “the basic (tax) rate has not been increased since 1975”.⁹³⁵

- c. **New taxes:** Several economists have proposed a number of new taxes including land value taxes, environmental taxes, and a financial transaction tax as supported by the EU. In particular there have been increased calls for a tax on financial transactions of 0.05 per cent, to raise revenue and be used to dampen the most destructive financial speculation and help regulate the financial sector. There have been estimates that this could raise as much as £20bn per year, and the IMF has said that a financial transaction tax (FTT) would be “highly progressive”, falling predominantly on the richest institutions and individuals in society.⁹³⁶ Dolphin writing for IPPR similarly found that while “It is difficult to assess the ultimate distributional effects of taxes on financial institutions and financial transactions, but all the evidence suggests they would be highly progressive” unlike VAT for instance.⁹³⁷ Critics of a financial transaction tax have raised a number of objections to its introduction in the UK unilaterally or alongside other European countries. In particular, they suggest an FTT “would hurt London’s position as a leading financial centre, either because some activity would migrate to other markets (such as New York or Hong Kong) or because some companies or traders would leave the UK”.⁹³⁸ However according to IPPR the FTT can be designed to accommodate and mitigate this risk.⁹³⁹ Certainly the Government has an obligation under the maximum available resources clause to investigate this fully.

The Mirrlees review also argued that there are good reasons for taxing land and property. In addition to raising revenue it can discourage ‘asset bubbles’ (inflation in specific assets such as housing) and wealth inequality through a form of land value tax.⁹⁴⁰ Also referencing the Mirrlees Review the IPPR also noted that the Coalition Government should examine seriously the feasibility of a land value

⁹³⁵ Tony Dolphin ‘New Priorities for British Economic Policy’ (London, IPPR 2013). www.ippr.org/files/images/media/files/publication/2013/03/new-priorities-economic-policy_Mar2013_10475.pdf?noredirect=1 accessed 5 October 2014, p.11.

⁹³⁶ Thornton Matheson, ‘Taxing Financial Transactions: Issues and Evidence’ (IMF Working Paper 2010).

⁹³⁷ Tony Dolphin ‘Financial Sector Taxes’ (IPPR, London 2010) www.ippr.org/files/images/media/files/publication/2011/05/Financial%20sector%20taxes_1779.pdf?noredirect=1 accessed 5 October 2014.

⁹³⁸ Dolphin (n 935).

⁹³⁹ Ibid.

⁹⁴⁰ James Mirrlees et al *Tax by Design*. (Oxford University Press 2011), pp.368-405

tax,⁹⁴¹ It observed that “the economic case for a land value tax is ‘almost undeniable’ because it is the equivalent of taxing an economic rent and would not discourage any desirable economic activity”.⁹⁴² According to IPPR while there are practical problems they are not insurmountable, and that it “would be a very simple tax to maintain and administer.”⁹⁴³ The IPPR also states that since “Ultimately, the economic case for a land value tax is so strong that at the very least there should be an investigation into the practical hurdles to its introduction and how they might be overcome.”⁹⁴⁴ Oxfam also highlights that a land tax has advantages over other methods of tackling inequality since it is less vulnerable to global wage and tax competition.⁹⁴⁵

Under human rights law, less onerous alternatives must be considered. As noted throughout viewing resources as able to be influenced by governments, increases the number of alternatives that can be considered. Yet critically the Coalition Government did not fully consider and investigate these alternatives before implementing the cutbacks on social expenditure. The initiatives to tackle tax evasion for instance were only discussed and implemented after the initial budget deficit plan.⁹⁴⁶

5.5 Concluding remarks

There is clear evidence that the welfare reform has undermined and violated the right to social security, and that the measures were not justified under human rights law. There were certainly less harmful alternatives available. The Coalition Government also failed to apply the due diligence principle when determining its economic policy and the cutbacks following the banking crisis and the bailing out of financial institutions. In addition to failing consider less onerous alternatives, at no point has it

⁹⁴¹ *Dolphin*, (n 935)

⁹⁴² *Ibid.*

⁹⁴³ *Ibid.*

⁹⁴⁴ *Ibid.*

⁹⁴⁵ *Oxfam* (n 736)

⁹⁴⁶ Richard Murphy ‘Ed Balls tackles a major General Anti-Abuse Rule deficiency’ *Tax Research UK Blog* (London, 14 November 2014) <www.taxresearch.org.uk/Blog/2014/11/14/ed-balls-tackles-a-major-general-anti-abuse-rule-deficiency/> accessed 1 December 2014. See also Rajeev Syal, ‘UK’s tax gap rises by £1bn to £35bn’ *The Guardian* (London, 11 October 2013) <www.theguardian.com/politics/2013/oct/11/uk-tax-gap-rises-hmrc-avoidance-nonpayment> accessed 15 October 2013.

conducted a full rights base analysis of its entire austerity programme.⁹⁴⁷ In fact, the JCHR stated that the “Department of Work and Pensions declined to provide us with such a human rights memorandum in relation to this Bill (Welfare Reform Act)” despite being encouraged to do so.⁹⁴⁸ The equality impact assessments of the individual policy and legislative changes such as the LHA changes and the introduction of the Housing Benefit Size Criteria Rules are very basic. The one on the new rules on Housing Benefit and the “Under occupation of social housing” for instance denies that human rights would be affected by the proposed policy changes.⁹⁴⁹ This is despite the UK’s ratification of ICESCR. Moreover, the impact of the reform could easily be argued as foreseeable particularly since many of these issues were raised during consultations prior to the adoption of the Welfare Reform Act.

Given that the debt crisis was created in part from bailing out banks, rather than excessive social spending, a key part of the Government’s strategy should be on avoiding a repeat. This is also part of the principle of due diligence i.e. learning from mistakes to avoid situations that jeopardise human rights. The UK should therefore concentrate on creating a constructive and sustainable financial system that contributes to building the economy and promote productive investment and discourage speculation.⁹⁵⁰ Yet several commentators have highlighted that the Coalition Government showed no credible intentions of effectively regulating the financial system. In fact commentators have noted that the London City policy of giving tax concessions to hedge fund investors and private equity financiers – created distortion – encourage speculation.⁹⁵¹

⁹⁴⁷ Nolan (n 261).

⁹⁴⁸ Joint Committee on Human Rights (n 692), para 1.10.

⁹⁴⁹ DWP (n 758).

⁹⁵⁰ Oxfam (n 736), p. 47.

⁹⁵¹ John Christensen, ‘Our taxes, our lives–Britain’s failed tax consensus’ (Tax Justice Network, 2009) <www.taxjustice.net/cms/upload/pdf/Our_taxes_our_lives_14_JUL_2009.pdf> accessed 3 July 2010.

Chapter 6: Conclusion

6.1. General introduction

Entitled ‘National debt versus the right to social security: How should states’ obligations during a financial crisis be interpreted?’, this thesis specifically examines how the ICESCR, in particular its articles on maximum available resources (Article 2(1)) and the right to social security (Article 9) should and can be interpreted in light of the economic reality and core human rights principles and standards to give greater clarity to states’ obligations during a financial crisis. It essentially evaluates whether a national debt should allow states to derogate from their obligations to ensure the right to social security? It further addresses whether national debt ought to justify reduced social expenditure that threatens, or even violates, the right to social security? To demonstrate its practical relevance, the thesis applies its analysis to the situation in the UK to see whether the austerity measures imposed by the Coalition Government between May 2010 and May 2015 violated human rights law.

So far many of the human rights positions, including the one taken by the CESCR, on austerity measures have been restricted to simply stating that such measures should be temporary, proportionate and necessary, and not undermine the minimum essential levels of a particular right or be non-discriminatory.⁹⁵² This implicitly suggests that social security can be rationed providing it does not violate the obligation to ensure minimum essential levels. Given the lack of understanding of states’ obligations to realise the right to social security, this approach could run the risk of providing an open door to unnecessary cutbacks that jeopardise human rights, particular during times of economic uncertainty.

To address this and propose an alternative view of how the ICESCR should be interpreted, the thesis uses a two-pronged approach putting forward a deeper understanding of both the ‘maximum available resources’ clause, and the content of the right to social security. This provides the analytical platform on which the research questions can be answered. The thesis takes a socio-legal approach focused on

⁹⁵² CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

demonstrating how the law should and could be interpreted based on existing human rights standards and principles and the economic reality within which the law is operating. A doctrinal approach was not applied since this thesis views international law as an evolving process of authoritative decision-making that depends on and responds to context. This approach is especially important given the issues addressed by this thesis. It would be impossible to find the answer to how to judge a state's maximum available resources in law alone. It requires an interdisciplinary approach that considers the economic reality.

6.2. Relevance

The relevance of this thesis and the necessity of its approach are demonstrated by the relationship between social security, economic policy and the level of resources in a country. This has been shown clearly during the financial crisis of 2008 and beyond, and the subsequent measures adopted by states under the guise of insufficient resources, which have had a major impact on human rights, as illustrated in Chapter 4. Many governments claimed that austerity measures (spending cuts) were needed in light of their national debt.⁹⁵³ While these measures have undermined all human rights, it has particularly threatened the right to social security. The former Special Rapporteur on human rights and extreme poverty noted that states reduced funding for social protection systems as part of their recovery plans.⁹⁵⁴ Such austerity measures are all the more poignant since people are in greater need of assistance and protection during such crisis due to increased unemployment levels and other forms of insecurity. Eight years after the initial financial crisis, this issue is not going away. In the UK in 2016, following its election in 2015, the Conservative Government is continuing to reduce social welfare spending including considering proposals to further reduce the assistance received by persons with disabilities,⁹⁵⁵ and introduce more tax cuts.⁹⁵⁶

⁹⁵³ Gemma Tetlow 'Cutting the deficit: three years down, five to go?' (IFS 2013) <www.ifs.org.uk/publications/6683> accessed 4 May 2014.

⁹⁵⁴ UNHRC (*Independent Expert on the question of human rights and extreme poverty*) (n 10), para 42.

⁹⁵⁵ Jon Stone, 'Tories block plan to look at the impact of their disability benefit cuts' *The Independent* (London 3 March 2016) <www.independent.co.uk/news/uk/politics/tories-block-plan-to-look-at-the-impact-of-their-disability-benefit-cuts-a6909036.html> accessed 4 March 2016.

⁹⁵⁶ HM Treasury 'Policy Paper - Budget 2016' (2016) London: HM Treasury <www.gov.uk/government/publications/budget-2016-documents/budget-2016#contents> accessed 4 June 2016.

The relationship between social security, a country's economy and the level of resources is further illustrated by the observations of the ILO and other actors that social protection is key to economic recovery by helping to generate and maintain economic demand.⁹⁵⁷ It also helps improve human capital and therefore the level of 'assets' that governments can mobilise to raise revenue for human rights implementation. Because of their role in maintaining demand, well-designed social protection schemes can also help stabilise economies in the long term and prevent the 'boom and bust' seen over recent decades that often result in fiscal contraction during economic recessions.⁹⁵⁸ As discussed throughout the thesis, adequate social security can also help address social exclusion and reduce inequality.

This desire to reduce spending on social security is not a new phenomenon and has been seen repeatedly over recent decades with the shift from the Keynesian welfare state model "where economic and social objectives were seen as reinforcing each other" to neo-classical economic theory that focuses on minimising government intervention and allowing market forces to allocate resources.⁹⁵⁹ Instead of being seen as a central instrument for social development and stabilisation, social policy was viewed by many neo-liberalists as a cost factor and potential cause for fiscal crisis, inflation and market distortions.⁹⁶⁰ Under neoliberalism taxes are viewed as distorting markets, and there is, therefore, considerable pressure to reduce them. This in turn reduces fiscal space as discussed in Chapter 2 on the issue of resources. Policies of trade liberalisation to promote the role of the market have also led to a financial squeeze on fiscal space by restricting important sources of revenue (eg tariffs) that were previously available to governments to fund social expenditures.⁹⁶¹

⁹⁵⁷ ILO 'ILO head says social protection is key for crisis-recovery' *ILO Press Release* (Geneva, 9 May 2012). Available from: www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_180314/lang-en/index.htm, accessed 5 June 2012.

⁹⁵⁸ Eichhorst, Werner et al 'The Role of Social Protection as an Economic Stabiliser: Lessons from the Current Crisis' IZA Research Report No. 31. (European Parliament, 2010) <http://legacy.iza.org/en/webcontent/publications/reports/report_pdfs/iza_report_31.pdf> accessed 6 June 2016.

⁹⁵⁹ *Reynaud* (n 21), p. 3.

⁹⁶⁰ ILO 'Social Protection as a Productive Factor - Report of the Committee on Employment and Social Policy submitted to the 294th Session of ILO's Governing Body' (2005) ILO Doc. GB.294/ESP/4.

⁹⁶¹ ECOSOC 'Enhancing Social Protection and Reducing Vulnerability in a Globalizing World, Report of the Secretary-General' (2001) UN Doc. E/CN.5/2001, para 57.

Neoliberalism has also shaped the policies of international financial institutions and development agencies,⁹⁶² and manifested itself in the Washington Consensus, a set of 10 relatively specific economic policy prescriptions that was considered as a ‘standard’ package for developing countries such as promoting market forces and reducing the role of the state and ensuring fiscal discipline.⁹⁶³ This therefore usually means cuts to public spending.

IFIs continue today to dominate economic policy making for many states. Following the Greek debt crisis that started in 2009 for instance, in 2010 Eurozone countries and the IMF agreed to several large economic loans conditional on the implementation of austerity measures.⁹⁶⁴ Given this, the analysis developed throughout the thesis is particularly pertinent and relevant to courts and other judicial and quasi-judicial bodies who may often be the last possible recourse in protecting and enforcing welfare rights.

6.3. Answering the research question

To answer the main research question, namely: how states’ obligations during a financial crisis ought to be interpreted, and whether a national debt should allow states to violate or undermine the right to social security; a number of different issues were unpacked. The thesis first examined how human rights practitioners ought to judge a state’s compliance with the maximum available resources clause, addressing questions such as whether states’ level of resources should dictate its human rights compliance or instead their human rights obligations should dictate the resources that need to be generated and allocated. It also discussed the implications of this analysis on states’ obligations under Article 2(1) as a whole, which calls on states to take steps to progressively realize all rights contained in the ICESCR to the maximum of available

⁹⁶² General Assembly ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context (Raquel Rolnik)’ (2012) UN Doc. A/67/286, paras 1 and 2.

⁹⁶³ Alcino Camara Neto and Matias Vernengo, ‘Fiscal policy and the Washington consensus: a Post Keynesian perspective’ (2004) 27(2) *Journal of Post Keynesian Economics*, pp 333-343.

⁹⁶⁴ UNHRC ‘Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (Cephas Lumina), Mission to Greece’ (2013) UN Doc. A/HRC/25/50/Add1.

resources. The second element explored states' obligations to ensure the right to social security and the degree to which they should be derogable.

6.3.1. Maximum available resources

In proposing a new way of assessing states' compliance with the maximum available resources clause as contained in Article 2(1) of the ICESCR, the thesis uses two basic lines of reasoning. It recognises firstly that resources available to implement human rights are not static or an external constraint, but dependent on a state's own economic policy as recognised by UNCTAD.⁹⁶⁵ It differentiates between a country's stocks that provide the basis for economic activity, and can be enhanced, and the flows of income that result from government policies.⁹⁶⁶ Secondly it uses the well-established principle that states have the burden of proof in demonstrating the validity of their defence of insufficient resources. As determined in Chapter 2, the standard of proof to be used in such situations is 'clear and convincing evidence' since this is the standard of proof often used in other defences such as insanity.⁹⁶⁷ In some circumstances the thesis found it necessary to increase the standard of proof to 'beyond reasonable doubt'.

With these two factors in mind, the thesis suggests that it thus becomes a matter of determining whether states have done everything possible to raise the resources necessary to implement human rights without further undermining human rights and 'general welfare'.⁹⁶⁸ Rather than judging whether a state is capable of fulfilling rights, human rights practitioners should instead judge the 'certainty' of states' economic arguments and whether there is 'convincing' evidence that they cannot do more to secure the necessary resources. For example, states may not always be able to justify low tax rates if they have not complied with their human rights obligations. While many argue that low tax rates are expansionary and needed to stimulate the economy, this is by no means conclusive. There is considerable evidence to the contrary that suggests that higher tax rates do not harm the economy.⁹⁶⁹ It may thus be difficult for states to argue with any certainty the need for low tax rates when human rights remain unimplemented or are violated because of a lack of resources.

⁹⁶⁵ UNCTAD (n 658)

⁹⁶⁶ Parker (n 97), p.4.

⁹⁶⁷ Cooper (n 87).

⁹⁶⁸ CESCR 'Open Letter to State Parties to the ICESCR' (4 June 2012). CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 9. See also Mueller (n 301) p. 133.

⁹⁶⁹ Brooks and Hwong (n 134), p. 6.

This is not necessarily a new approach. As shown in Chapter 2, some domestic courts have already put the burden of proof on states to establish the validity of their arguments when justifying cutbacks in social goods on insufficient resources. While acknowledging that some changes might have to be made given the country's financial situation, the Latvian Court has made a ruling implicitly based on these principles. It ruled that the *Law on State Pension and State Allowance Disbursement in the Period from 2009 to 2012* stipulating a reduction in pensions from 1 July 2009 to 2012 due to an apparent decline in available resources was unconstitutional as among other things the state had not exhausted alternative possible sources of funding or less restricting means at the disposal of the legislator.⁹⁷⁰

The thesis however has gone further by concretely articulating the obligation of states to expand and mobilise the resources available to implement human rights in compliance with human rights standards and principles. The thesis thus suggests that this requires them to preserve and expand all resources (assets) including natural resources and human capital, and to extract the most revenue they can without undermining human rights and general welfare. Since economic policies that arguably expand resources can lead to human rights abuses and violations, the thesis further clarifies states obligations by demonstrating how human rights principles can be used to judge states economic policies and choices. The thesis particularly proposed that states are obligated to exercise due diligence to ensure that economic policy-making do not violate human rights.⁹⁷¹ This includes proactively analysing the projected impacts of policy changes and learning from previous experiences.

This approach to resources and the fact that they are dependent on government actions sheds considerable light on how human rights bodies and practitioners can address trade offs between competing demands. One can argue that the existence of trade-offs is intrinsically linked with the idea of a fixed level of resources. Expenditure on one item will reduce the amount available to spend on another good or service. The more elastic view of resources, projected throughout this thesis, changes this. Instead of judging one item against another and evaluating who should get what, it becomes a

⁹⁷⁰ Case number 2009-43-01 [2009] Constitutional Court (Latvia).

⁹⁷¹ This is elaborated on in Chapter 2.

question of whether states have exhausted all possibilities to expand resources available. This also better reflects the indivisibility of human rights where increased expenditure on one right will increase the enjoyment of other rights. It similarly better represents the interdependence of economic variables where government spending can improve GDP and the economy, and subsequently a government's fiscal space by improving tax revenue.⁹⁷² It also addresses the political manipulation of budget decisions, as suggested for instance by ESCAP who claimed that "budgetary decisions are not just financial but political."⁹⁷³

This approach does not allow judicial and/or quasi-judicial bodies to prescribe economic policy, and it is not about proving the conclusiveness of one economic model over another. Instead judicial and quasi-judicial bodies should be judging whether a government has complied with the 'maximum available resources' clause on the basis of expert evidence and clear legal principles. As this thesis has repeatedly asserted this is not a new task for courts. Courts often use legal principles to judge complex issues on the basis of evidence supplied by experts. In fact this is common in every area of law.⁹⁷⁴

6.3.2. Maximum available resources and Article 2(1) of the ICESCR

The thesis also examined how this view of resources as dependent on government policy helps clarify states' obligations under the rest of Article 2 (1), which has so far been regarded as weak.⁹⁷⁵ Typically resources have been viewed as an external constraint with most of the work on Article 2(1) interpreting states obligations as taking steps to progressively realise economic, social and cultural rights **within** the framework of available resources.⁹⁷⁶ However since resources are in fact dependent on government policies, they should not be seen as an external constraint but instead as an internal factor and therefore part of the obligation "to take steps to progressively realise". Rather than raising questions about how this obligation responds to changes in resources, it should become a matter of determining how the resources issue becomes part of these obligations.

⁹⁷² Aart Kraay, 'Government Spending Multipliers in Developing Countries: Evidence from Lending by Official Creditors' (Policy Research Working Paper 6099, World Bank, Washington DC 2012).

⁹⁷³ ESCAP (n 203), p. 64.

⁹⁷⁴ Langford (n 147).

⁹⁷⁵ Steiner and Alston (n 3), p. 276.

⁹⁷⁶ ECOSOC (OHCHR) (n 265), para 13.

In particular the thesis showed how the obligation to progressively realise human rights should require states to be proactive in creating economic stability and the necessary fiscal space to implement human rights. As Chapter 2 notes, the IACHR observed that governments are obligated “to ensure conditions that, according to the state’s *material* resources, will advance gradually and consistently toward the fullest achievement of rights.”⁹⁷⁷ The reference to material resources suggests that the IACHR differentiates between a country’s assets and its fiscal space in line with the earlier analysis of Chapter 2. The CESCR’s approach also implicitly supports states’ obligations to create, maintain and increase fiscal space since it has frequently expressed concern when states’ spending on key entitlements such as social security has decreased or failed to keep up with rising costs.⁹⁷⁸

Under the umbrella of progressive realisation, the obligation to take steps is the practical application of this obligation over time. Since securing the necessary resources to implement human rights is part of governments’ obligations, Programmes/Plans of Action that elucidate the steps needing to be taken must include the necessary budget allocations and how the necessary fiscal space is going to be created and finances raised.

Although not explicitly mentioned in the ICESCR, the CESCR reads Article 2(1) as establishing immediate and non-derogable obligation of states to ensure minimum essential levels. While it is supposed to add content to Article 2(1) and improve the justiciability of economic and social rights, human rights practitioners and academics have raised numerous concerns about its practicality and affordability.⁹⁷⁹ The CESCR has tried to address these concerns by suggesting states can use resource constraints to explain why minimum essential levels cannot be guaranteed.⁹⁸⁰ However, this

⁹⁷⁷ IACHR (n 274).

⁹⁷⁸ See, for example, CESCR ‘Concluding Observations on Colombia’ (2001) UN Doc. E/C.12/1/Add.74 ; CESCR ‘Concluding Observations on Jamaica’ (2001) UN Doc. E/C.12/1/Add.75, para 10; and CESCR ‘Concluding Observations on Mongolia’ (2000) UN Doc. E/C.12/Add.47, para 17.

⁹⁷⁹ Chapman and Russel (n 89).

⁹⁸⁰ The CESCR has recognised “... it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.” CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 10.

undermines the apparent “non-derogable” nature of these obligations. As demonstrated, shifting discussions from measuring a state’s capability to examining economic choices and asking states to prove that they cannot do more to create the necessary fiscal space again gives courts more room for addressing the affordability issue. Moreover, the raising of the standard of proof from requiring states to provide ‘clear and convincing’ evidence that they cannot do more to asking them to prove ‘beyond reasonable doubt’ reflects the gravity of violations of minimum essential levels and their non-derogable nature, while also improving their practicality and/or deliverability.

Finally this part of the thesis examined how this view of resources can help determine what a retrogressive measure is and whether it is justified. This is regarded as “possibly the most important obligation in terms of constraining – or critically evaluating – government action” that might undermine economic and social rights.”⁹⁸¹ To help concretise this obligation, several practitioners and human rights bodies including the CESCR have emphasised in considering when something is retrogressive, one must examine whether it has *inter alia* violated minimum essential levels.⁹⁸² As identified in Chapter 2, this approach has shortcomings. It is difficult to see the added value of including violations of minimum essential levels as retrogressive since they are already a *prima facie* violation. Moreover, this approach undermines the concept of progressive realisation by suggesting that states can stay at ensuring minimum essential levels. Given this, the thesis focused on defining measures as retrogressive if they have a sustained negative impact on the already acquired economic and social rights and/or the realization of economic and social rights. This would include those measures jeopardising the realisation of economic and social rights even if it is not possible to conclude that a violation, or a regression in the enjoyment, of a specific right has taken place. Although not included in CESCR General Comment 19, which further clarified the content of retrogressive measures, CESCR’s concluding observations have sometimes categorised measures as regressive for *jeopardising* or *threatening* economic and social rights.⁹⁸³ This could include deviations from programmes of action such as reduced budget allocations unless

⁹⁸¹ Nolan (n 7).

⁹⁸² CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 42.

⁹⁸³ CESCR ‘Concluding Observations on Spain’ (2012) UN Doc. E/C.12/ESP/CO/5, para 28.

mitigating measures had been taken. Austerity measures that curb social spending and ration social security could thus be regarded as retrogressive. This approach would also reinforce the progressive obligation and the measures needed to secure rights in the long term.

Regarding the permissibility of retrogressive measures, the CESCR clearly argues that they are only permissible when necessary to ensure the ‘totality of human rights’ and ‘general welfare’.⁹⁸⁴ The CESCR has further clarified that “the adoption of any other policy, or a failure to act, would have to be more detrimental to economic, social and cultural rights.”⁹⁸⁵ The effectiveness of this approach however is undermined by its approach of quantifying resources and using parameters such as GDP rates. This makes it more difficult to effectively examine the necessity of such measures and whether less harmful solutions are possible. The thesis noted that taking a fixed approach to resources and viewing them as largely beyond a government’s control enables governments to more easily justify retrogressive measures as it obviously limits the amount of alternative measures that can be implemented. Taking a more elastic view of resources considerably expands the number of alternatives available.

The thesis further showed that even during times of national debt governments have economic choices and alternatives to austerity measures. There is considerable evidence that a national debt does not automatically mean that retrogressive austerity measures such as cuts in social expenditure, are legitimate and/or necessary. Many prominent and well-regarded economists, and international organisations, for instance have spoken out against such measures, arguing that instead fiscal stimulus in terms of government spending rather than tax cuts was needed to help the economy recover.⁹⁸⁶ Government spending on social protection has been argued as more expansionary than tax cuts since people on lower incomes are more likely to spend any additional income they receive.⁹⁸⁷ Moreover spending on social protection also has positive correlations with raising nutrition rates, improving school attendance and thus can expand human capital, which helps secure human rights in the long term.

⁹⁸⁴ CESCR ‘General Comment 3: The nature of States parties obligations (Art. 2, para.1)’ (1990) UN. Doc. E/1991/23, para 9. See also *Mueller* (n 305) p. 133.

⁹⁸⁵ CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

⁹⁸⁶ *Krugman* (n 916).

⁹⁸⁷ *Congressional Budget Office* (n 672), p. 7.

6.3.3. The right to social security

The thesis also clarified the content of the right to social security. Rather than taking a purely doctrinal approach, the thesis reviewed the compliance of relevant judicial decisions with key human rights principles to discover how Article 9 should be read in today's world. This was imperative if the thesis were to fully identify states' obligations during a financial crisis to realise this right. It was also necessary given the on-going pressures undermining social security provision worldwide including the shrinking of the role of the state and the continuing focus on neo-liberal economic policies. The importance of clarifying the right to social security is further demonstrated by its relationship with the rights to life and being free from degrading and inhuman treatment and punishment.⁹⁸⁸

There are many challenges in defining the right to social security with an array of different terms being used such as social protection or welfare. The CESCR clearly states that the right to social security includes both social insurance (contributory schemes that cover pre-specified support for affiliated members in particular circumstances)) and social assistance (non-contributory schemes that is awarded on the basis of need). Another related challenge is the issue of universality. The principle of universality means that everyone has the right to social security, and must be entitled to, and able to access, social security if they are in need, with need usually being determined by being in a certain situation such as being unemployed or above a certain age (in such cases the recipient usually receives social insurance), or by having a less than adequate income (usually receives social assistance).

From the thesis's analysis, however there are still clear weaknesses in the application of the right to social security as interpreted through the CESCR General Comment 19 and the various judicial decisions at national and regional levels. The practical application of the law has not always respected human rights principles such as universality, non-discrimination and equality. This is despite the progress the ILO has made in moving from the formal employment approach that discriminates against

⁹⁸⁸ *Larioshina v. Russia* (decision on admissibility) [2002] 35 EHRR (ECtHR 56869/00).

informal workers to more universal approach through the endorsement of a social protection floor for all. While many judgments and decisions have recognised that migrants and refugees should have access to social security to protect them from destitution, it is often at a lower rate than citizens.⁹⁸⁹ This two-tiered approach, which bases the amount awarded on status rather than need, promotes unequal treatment and can widen inequality between different sectors of the population.

Courts have also yet to address the impact conditionalities have on accessibility. Increasingly countries are conditioning the receipt of benefits on behaviour such as actively looking for work, applying for a certain number of jobs each week, and attending work interviews with strict sanctions for non-compliance that include the suspension or termination of benefits. Such conditionalities can be difficult to comply with, particularly for those living in vulnerable situations who may have more problems in actively looking for work due to illiteracy and lack of education, limited access to and knowledge of computers, and physical distance and/or little public transport in poorer areas amongst others. Strict sanctions for non-compliance can therefore reinforce patterns of discrimination and inequality by leaving people without the assistance they need. However despite this, so far the few cases on this have focused on legal technicalities rather than accessibility issues as discussed in Chapter 3.

Other shortcomings in the application of the law include linking the amount awarded in social security with wages, for instance the ILO has traditionally measured adequacy by specifying that the benefit received must reflect a certain percentage of the wage.⁹⁹⁰ Several countries too have linked their idea of adequacy with national wages under the premise that it must “pay to work”, and “fairness to the tax-payer”.⁹⁹¹ This fails to consider whether wages themselves are fair and cover living costs. This is often not the case as illustrated by the increasing working poverty in many countries

⁹⁸⁹ ECSR ‘Conclusions XIII-4’ (CoE Strasbourg 1996).

⁹⁹⁰ ILO Convention 102: Social Security (Minimum Standards) (35th session of the International Labour Conference 28 June 1952, entered into force on 27 April 1955).

⁹⁹¹ George Osborne ‘Autumn Statement 2012 to the House of Commons by the Rt Hon George Osborne, MP, Chancellor of the Exchequer’ (Parliament, 5 December 2012).

including industrialised ones.⁹⁹² Inadequate social security can also exacerbate inequality by not providing enough to allow people escape their poverty.⁹⁹³

To comply with international human rights law, governments must ensure access to adequate social security for all those in need. To comply with universality, eligibility must not be decided on status but on need, which is usually determined by the circumstances someone may be in such as being unemployed or sick, or having one's income below a certain amount. Governments must also ensure the accessibility of social security (social insurance and social assistance). This requires positive measures to ensure that traditionally marginalised groups such as women can afford to contribute to social insurance schemes. Other measures to ensure access to social assistance can include ensuring proper documentation, better transport links, and measures to prevent the stigmatisation of those receiving assistance. Any conditionalities imposed must also not impede access. If people are left without it could not only violate the right to social security but also the rights to life and to be free from degrading and inhuman treatment.⁹⁹⁴

In determining adequacy the thesis moved beyond examining correlations with wages that can be unfair and negative indicators such as malnutrition rates to requiring states to do proactive needs assessments with some guidance on how to proceed. Despite some states such as the UK claiming that it is impossible to determine what an adequate income is or the components of a minimum consumption basket,⁹⁹⁵ increasing jurisprudence and the work of social organisations have provided significant guidance in this regard. Emerging jurisprudence on the subject shows several courts going beyond calling on states to do the needs-assessment to actually providing indications of what should be included.⁹⁹⁶ This is particularly relevant for 'technical needs'. While some needs are clearly essential for survival such as access to food, safe housing, health care, and can be regarded as subsistence/survival needs, others may be more technical such as ensuring access to justice without which

⁹⁹² Chris Belfield et al 'Nearly two-thirds of children in poverty live in working families' *IFS Press Release* (London, 16 July 2015) < <http://www.ifs.org.uk/publications/7880>> accessed 6 June 2016.

⁹⁹³ *Fredman* (n 382), p. 226 and 232.

⁹⁹⁴ *Larioshina v. Russia* (decision on admissibility) [2002] 35 EHRR (ECtHR 56869/00).

⁹⁹⁵ *Kennedy, Cracknell, and McInnes* (n 456), p. 6.

⁹⁹⁶ *Regina (Refugee Action) v. Secretary of State for the Home Department* [2014] D WLR 089 (EWHC 1033 (Admin)).

recipients “are unable to seek and obtain a remedy for breaches exacerbating their vulnerability, insecurity and isolation, and perpetuating their impoverishment.”⁹⁹⁷ Technical needs could also include access to training and education that would help facilitate the move out of poverty, and help ensure substantive equality. For ‘socially determined needs,’⁹⁹⁸ courts and/or the CESCR could call on state to use public consultations as has been done in the UK by the JRF.⁹⁹⁹

Implementation of the right to social security requires a long-term social security system.¹⁰⁰⁰ This in turn requires sustainability and long term funding. While this has been reiterated at the international level including by the CESCR and the Special Rapporteur on extreme poverty and human rights, recommendations have been limited and there is potential for the human rights community to go further in examining how states should ensure appropriate and sustainable funding. In particular, the thesis demonstrated how the CESCR and other human rights bodies could make greater reference to the solidarity principle under which contributions are based on people’s ability to pay rather than their individual risk. This has been recognised in several international standards such as Article 71 of ILO Convention 102 and the revised European Code of Social Security.

To comply with human rights law, a social security system also requires a legal framework establishing access to social security as a right rather than an act of charity, and to prevent it from being manipulated by governments. To fully hold governments accountable, this must also be accompanied by mechanisms making them answerable for their performance.¹⁰⁰¹ As well as including courts and other redress mechanisms or institutions that apportion blame and punishment, and provide remedies or action to put things right, mechanisms must also “determine what is working (so it can be repeated) and what is not (so it can be adjusted).¹⁰⁰²

⁹⁹⁷ UNHRC (*Special Rapporteur on the question of extreme poverty and human rights*) (n 273), para 67.

⁹⁹⁸ *Fabre* (n 460), p. 17.

⁹⁹⁹ Donald Hirsch, *A Minimum Income Standard for the UK in 2015* (JRF, York 2015)

<www.jrf.org.uk/sites/default/files/jrf/migrated/files/MIS-2015-full.pdf> accessed 3 June 2016.

¹⁰⁰⁰ CESCR ‘General Comment 19: The Right to Social Security’ (2008) UN Doc. E/C.12/GC/19, para 11.

¹⁰⁰¹ *Partnership for Maternal, Newborn and Child Health* (n 253), p. 5.

¹⁰⁰² UNHRC (*Special Rapporteur on the Right to Health*) (n 251), para. 46.

Again perhaps due to the well-documented failure to fully articulate states' obligations under this right, there has only been limited work in establishing the core obligations under the right to social security, in particularly its minimum essential levels.¹⁰⁰³ The thesis addressed this gap, and argued that states are obligated to ensure minimum essential levels for all without discrimination. This includes covering all contingencies and providing social assistance for those in need that fall outside of these. The obligation to ensure minimum essential levels requires states to provide social assistance that covers basic needs such as culturally appropriate food and housing, and minimal socially determined needs to prevent isolation such as access to internet.¹⁰⁰⁴ States must also ensure technical needs such as access to justice and other services.¹⁰⁰⁵ To meet the immediate obligation of protecting those most in need, states must also ensure that any targeting of social security is as broad as possible so that it does not unfairly discriminate. Regardless of resources states must also take immediate steps to ensure full (*de facto*) equality. This includes adopting measures to improve access to social insurance, and increase levels of social assistance to enable people to escape poverty such as access to training and education. As demonstrated in Chapter 4, governments must also plan how this will be funded including the necessary tax reforms.

The thesis further found that, given the relationship the right to social security has with the rights to life and to be free from inhuman and degrading treatment, the full implementation of this right is *non-derogable*. This is further substantiated by its role in addressing inequality and ensuring substantive equality. Furthermore, it is key to preventing conflict and unrest that might force a government to declare a state of emergency.¹⁰⁰⁶

6.3.4. Summary

This thesis clearly demonstrates that states cannot escape their obligations to ensure access to adequate social security for all those in need. In most cases there is not 'clear and convincing' proof of the necessity of austerity measures that threaten the enjoyment of the right to social security, even when there is national debt. It is

¹⁰⁰³ *Mueller* (n 305) p. 79.

¹⁰⁰⁴ *Regina (Refugee Action) v. Secretary of State for the Home Department* [2014] D WLR 089 (EWHC 1033 (Admin)).

¹⁰⁰⁵ *Ibid.*

¹⁰⁰⁶ *Ponticelli and Voth* (n 638).

certainly foreseeable that states have less harmful alternative measures and actions that can be taken that do not undermine economic and social rights. Moreover the right to social security is *non-derogable*.

States must therefore continue to ensure the full enjoyment of the right to social security. They must go beyond ensuring core obligations such as minimum essential levels to progressively realize the full implementation of the right to social security that includes promoting access to social insurance and ensuring the amount provided is adequate to allow people to escape poverty. They must also ensure that there is a broad definition of those in need to make sure that no one is discriminated against, including migrants and refugees, and left without the means to survive in dignity. Since the analysis has shown that states have greater control over their resources, states must continue to ensure the long-term sustainability of social security systems both politically and economically.

6.4. Applying the analysis to the situation in the UK

When applying the analysis developed to the UK, it is clear that the austerity measures taken by the Coalition Government between May 2010 and May 2015 increased inequality and significantly undermined and often violated people's rights to social security. The level of benefits awarded had never been based on any assessment of needs. The Coalition Government also reduced the amount awarded to many recipients either directly or by failing to keep it in line with inflation. It has also increased eligibility requirements and conditionalities for many parts of the population thereby exacerbating the potential for discrimination and exclusion. On numerous occasions the measures implemented have violated core obligations including minimum essential levels, non-discrimination, and the protection of the vulnerable. The evidence also suggests that on several occasions the actions have endangered people's rights to adequate standard of living, health, and life and the right to be free from inhuman and degrading treatment. Moreover, the Coalition Government could not have argued that it was unaware of the possible impact of its policies. Not only did it, in most cases, fail to take the necessary steps to secure the appropriate information, it also received many warnings about the probable impacts during the various consultation processes.

This has all been done in an environment that stigmatises those receiving benefits, further exacerbating marginalisation and discrimination. Members of the UK government, politicians and the media frequently suggested that those receiving social security payments are lazy and do not work or contribute to society.¹⁰⁰⁷ This created a hostile and accusatory environment with persons with disabilities, for instance, increasingly reporting accusations of fraud and threats of violence and abuse from the general public. Moreover, in 2016 the public have been increasingly accusing people of receiving social security fraudulently; 85% of these allegations were false.¹⁰⁰⁸ Further divisions and tensions are being created by the Coalition Government's claims that the system must be fair to the taxpayer, rather than creating a system that guarantees all citizens sufficient protection in situations of need. This also undermines the sustainability of the system by questioning the solidarity principle and creating the political space to reduce funding for key social entitlements.

In determining whether these measures are justified, the thesis has used admissible evidence from experts and credible organisations working in the field, to examine whether there are valid options to austerity measures. The Coalition Government continually equated its national debt with that of a household, and asserted the need to tighten its belt and reduce spending. However this is presented by many as an oversimplification. Many economists have argued that it has ignored the role government spending can play in stimulating the economy and increasing GDP and therefore tax revenue. The Coalition Government also failed to consider increasing taxes, arguing that lower taxes are expansionary. Again the evidence for this is less than clear, with many economists arguing they are not as expansionary as increased social spending.¹⁰⁰⁹ Many have questioned the effectiveness of the measures taken by the Government to tackle tax evasion and avoidance and thereby considerably increase tax revenue.¹⁰¹⁰ Moreover despite the bailout of the banks being a significant factor in

¹⁰⁰⁷ *Mulholland and Wintour* (n 898).

¹⁰⁰⁸ Ashley Cowburn, 'More than 85% of public tips on benefit 'frauds' are false' *The Guardian*, (London, 27 February 2016) <www.theguardian.com/society/2016/feb/27/false-benefit-fraud-allegations> accessed 28 February 2016.

¹⁰⁰⁹ *Congressional Budget Office* (n 672).

¹⁰¹⁰ *TUC* (n 929).

the current national debt levels, the Coalition Government showed no signs of effectively regulating financial institutions.¹⁰¹¹

These factors clearly question the Coalition Government's justifications of austerity measures. It appears certainly possible for courts and quasi-judicial bodies to conclude that it has not provided 'clear and convincing evidence' much less proven 'beyond reasonable doubt' that austerity measures were the only recourse of action, and that all other measures, or the lack of action, would worsen the enjoyment of economic and social rights.¹⁰¹²

6.5. Original contribution to knowledge

This thesis was motivated by the clear need to analyse the relevant human rights standards regarding maximum available resources and the right to social security. As already has been observed, both of these have received insignificant attention. Many practitioners and the ILO for instance have observed that the right to social security is a neglected human right both in terms of clarity of content and implementation.

Moreover there are significant weaknesses in many of the existing approaches to the 'maximum available resources' clause. They do not take into account the reality of resources as dependent on governments' choices in economic policy. Perhaps because of this, the scope of states obligations under Article 2(1) remains unclear.¹⁰¹³ As already observed, although invaluable in showing the array of tools that can be used by states, more recent analysis implicitly puts the emphasis on human rights practitioners to prove the validity of states' defences of insufficient resources by detailing the factors that need to be taken into account when evaluating a state's capability.¹⁰¹⁴

¹⁰¹¹ *Christensen*, (n 951).

¹⁰¹² CESCR 'Open Letter to State Parties to the ICESCR' (4 June 2012); and CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 9. See also Mueller (n 305), p. 133.

¹⁰¹³ *Nolan* (n 7), p. 8

¹⁰¹⁴ See for instance *Balakrishnan et al.* (n 80).

This has limited the ability of the human rights community to address contemporary financial and economic factors affecting human rights implementation such as where states have used national debt to justify reducing spending on social entitlements.¹⁰¹⁵ Human rights statements have rarely gone beyond the importance of respecting, protecting and guaranteeing human rights during times of crisis,¹⁰¹⁶ and that such crises do “not exempt states from complying with their human rights commitments,” or “entitle them to prioritize other issues over the realization of human rights”.¹⁰¹⁷ There has thus been little attention given to judging the necessity and legitimacy of these austerity measures within the context of the ‘maximum available resources’ and the ICESCR. As has been frequently highlighted, human rights practitioners instead have just focused on calling on states to comply with the core obligations in times of financial crisis, and how any cutbacks should be proportional, and achieved through greater transparency and participation.¹⁰¹⁸ This implicitly suggests that austerity measures are permissible providing they do not violate minimum essential levels.

Using existing human rights standards and principles, this thesis has shown how a new way of thinking with regards to resources can help judge the necessity and legitimacy of austerity measures that, has so far been lacking from current approaches. The analysis developed in this thesis, can for instance help answer critics such as Dowell-Jones who claim that “the principle of non-retrogression is an extremely crude and unsatisfactory yardstick” that “fails to capture the complexity and fluidity of the task of realising socio-economic rights” particularly in a post Keynesian environment.¹⁰¹⁹ By showing that states have considerable control over their resources and choices in the economic policy pursued, it demonstrates that states do not have to operate in a neo-liberal or post Keynesian environment. The ‘post Keynesian environment’ is not an external constraint factor as in fact implicitly suggested by Dowell-Jones but a choice made by governments. This is made clear by the different economic view points and analysis included in the thesis that demonstrate that the situation is not as black and white as may be portrayed by governments. Moreover as mentioned in Chapter 4,

¹⁰¹⁵ Nolan (n 7), p. 9

¹⁰¹⁶ UNHRC (*Independent Expert on the question of human rights and extreme poverty*) (n 10). See also Alston and Quinn (n 10).

¹⁰¹⁷ UNHRC (*Independent Expert on the question of human rights and extreme poverty*) (n 10), para 38.

¹⁰¹⁸ CESCR ‘Open Letter to State Parties to the ICESCR’ (4 June 2012).

¹⁰¹⁹ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 2004), pp. 52-54.

while states are not always fully autonomous in deciding on economic policy due to the influence of external actors such as IFIs this does not undermine the relevance of the thesis's analysis. Chapter 4 highlighted how several courts have used legal principles to counter the requirements of IFIs even in times when international assistance is both needed and being actively sought.¹⁰²⁰

Importantly, the analysis shows how the 'maximum available resources' term can strengthen the ICESCR by giving human rights practitioners tools to challenge existing neo-liberal policies that are undermining human rights enjoyment worldwide. As already demonstrated, while the ICESCR includes provisions that can be used to hold governments fully accountable for their economic choices, the CESCR has not taken full advantage of these tools.

This thesis challenges the perception of economics as an exact science, and shows how human rights law can be used to ensure that the economic policies chosen benefit all. Since economic models are based on many assumptions that do not always hold true in the real world, it is not a foregone conclusion that changing one variable or introducing a particular policy will lead to specific outcomes, despite what may be asserted by politicians. Given this, it seems self-apparent that states must justify policy changes that will jeopardise human rights with 'clear and convincing' evidence that it is necessary and that all other measures, including not taking action, would worsen the enjoyment of human rights.¹⁰²¹

Moreover the thesis clearly contributes to a better understanding of the right to social security, which is invaluable given the continued implementation challenges posed by neo-liberalism, the politicization of social protection issues and the increasing stigmatisation of those living in poverty.

¹⁰²⁰ *Uitz and Sajo* (n 537).

¹⁰²¹ CESCR 'Open Letter to State Parties to the ICESCR' (4 June 2012); CESCR 'General Comment 3: The nature of States parties obligations (Art. 2, para.1)' (1990) UN. Doc. E/1991/23, para 9. See also *Mueller* (n 305) p. 133.

6.6. Looking forward

This thesis is designed in particular to help provoke debate and open up a new perspective about the different ways of approaching ‘maximum available resources’ to improve its relevance in addressing contemporary human rights challenges and problems. It is by no means a blue print for action. It was beyond the scope to test the applicability of the analysis developed here to every situation where states have used insufficient resources to justify a denial or violation of human rights.

While it is clear that governments have a number of different ways to access financial resources in order to fulfill its obligation to use ‘maximum available resources,’¹⁰²² this thesis has focused primarily on fiscal policy both in terms of taxation and government spending to help stimulate the economy. It would certainly be valuable to develop this analysis with regards to monetary policy and financial reform and regulation. As suggested in Chapter 2, it would be useful to fully examine the compliance of states’ actions encouraging speculation in the financial market with their obligations to preserve and expand its resources (assets) as required under the ‘maximum available resources’ clause.

Another area that merits more scholarship is how this thesis’s analysis could develop further the obligations of IFIs in preserving and enhancing states’ abilities to ensure that they have the maximum available resources to implement human rights. Already in 2014 the ILO’s Committee of Experts on the Application of Conventions and Recommendations recognised that IFIs have responsibilities to help secure social security systems when considering the fiscal requirements of their lending policies.¹⁰²³ This can also be extended to individual states’ extra territorial obligations in the negotiations and financing of adjustment programmes and assistance, or in promoting tax avoidance schemes. The Independent Expert on Foreign Debt and Human Rights has recently noted how taxation policies in one country can affect another country.¹⁰²⁴

¹⁰²² Balakrishnan et al (n 80).

¹⁰²³ Greece (*Observation 2013/84*) ‘Austerity measures and the application of the Social Security (Minimum Standards) Convention 1952 (No. 102)’ Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (published 103rd ILC session 2014).

¹⁰²⁴ UNHRC ‘Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert (Juan P. Bohoslavsky) on the effects of foreign debt and other

This was elaborated on further by several NGOs who, in their joint report to the CEDAW Committee, found that the role of Switzerland in allowing financial secrecy “...deprives other states of the public resources needed to fulfill women’s rights and promote their substantive equality”.¹⁰²⁵

There is also a clear need for more research on states’ obligations under the right to social security. This thesis just touched the surface of what is required from states and more analysis is required on a number of different issues especially the role of conditionalities and their potential to exacerbate discrimination and exclusion. To help promote the need for the effective implementation of this right, increased interdisciplinary analysis of how the increased enjoyment of this right can positively impact the economy, and benefit everyone would be invaluable.

Nonetheless, this thesis is an important step. It demonstrates that states cannot use the ‘debt crisis’ as an excuse to undermine and violate the right to social security as we have seen in the UK. It also opens up a new approach of judging economic policies and states’ obligations to ensure the maximum of available resources to ensure human rights implementation. This can thus help hold governments accountable for economic policies and practices that have resulted in severe deprivation including malnutrition and homelessness, and large-scale inequality, which have to a large degree been sidestepped by the human rights community.¹⁰²⁶

related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights’ (2016) UN Doc A/HRC/31/61, para 43.

¹⁰²⁵ CESR, Global Justice Clinic, Berne Declaration and Tax Justice Network (2016) ‘State Responsibility for the Impacts of Cross-border Tax Abuse on Women’s Rights and Gender Equality’ (Submission to the CEDAW Committee 65th Pre-sessional Working Group) <www.cesr.org/downloads/Switzerland_CEDAW_Submission_TaxFinance_1mar2016.pdf> accessed 1 June 2016.

¹⁰²⁶ Felner has noted the need to adequately address the resources issue in order to better hold governments accountable for such situations of deprivation. See Eitan Felner, ‘Closing the ‘Escape Hatch’ A Toolkit to Monitor the Progressive Realisation of Economic, Social and Cultural Rights’ (2009) 1(3) *Journal of Human Rights in Practice*, pp. 402-435.

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