

DEVELOPING PRACTICAL GUIDANCE ON 'MAXIMUM AVAILABLE RESOURCES'

DISCUSSION PAPER

Some of the most chronic and entrenched deprivations of economic, social and cultural rights (ESCR) stem from issues related to the generation, distribution and spending of resources available to States. Nevertheless, aspects of States' obligations with respect to resources remain among the most complex in international law. To better address such deprivations, further clarification and explanation of these obligations is required. Recognizing this, the Committee on Economic, Social and Cultural Rights (the Committee) is taking steps to advance towards a more standardized and systematic approach to assessing compliance with Article 2(1) of the International Covenant on Economic, Social and Cultural Right, which commits States to take steps to the maximum of available resources (MAR) to progressively realize rights. To support the Committee, the Center for Economic and Social Rights (CESR) and Dejusticia are undertaking a collaborative project aimed at developing practical resources to assist in the monitoring and review of MAR.

This project hopes to consolidate and build on promising developments in relation to resourcing rights. The importance of ensuring policy coherence has been increasingly acknowledged by both human rights and global development actors, for example through the commitments made in the Financing for Development agenda, in connection with the Sustainable Development Goals. Better understanding how public finance management and economic policy choices affect the realization of economic, social and cultural rights is therefore timely.

This project commenced with a consultation involving a number of Committee members; CESR and Dejusticia now seek to do the same with Member States, as their reflections and inputs are considered essential by the Committee in order to further elucidate the contours of this obligation and inform how the Committee assesses it. To that end, Member States and other stakeholders are invited to a side event during the 38th Human Right Council session, on Tuesday, June 26.

This paper serves as background for that event. Based on consultation with Committee members and review of Committee documents, the first part of the paper describes the normative evolution of MAR within the Committee's doctrine. The second part maps out practical challenges identified in terms of how the Committee collects, analyzes, and uses information on MAR.

WHAT ARE THE KEY DIMENSIONS OF THE NORM?

Questions for discussion:

1. **How do States understand MAR, in terms of what actions it requires?**
2. **What are the main issues of interest or concern to States in relation to MAR?**
3. **What do States think about how the Committee's doctrine on MAR has developed?**
4. **What questions do States have about how human rights relate to economic policy?**

Important progress has been made in clarifying the content of the MAR norm over the last two decades. The overall trend has been a clearer articulation of the norm—moving from more general normative principles, towards more specific, concrete and actionable requirements.

This development has been largely driven by context, in particular, in response to and in an effort to prevent a repeat of the 2008 global financial crisis, resulting in the austerity policies, and the negative human rights consequences that followed. The Committee has brought the question of resources from

the margins to the center of its assessments. There is now generally broad agreement that MAR includes obligations related to resource allocation; resource generation; and actual resource spending. Process principles—transparency, participation and accountability—cut across these three obligations.

Resource Allocation

How public resources are allocated among competing needs has been a long-standing concern for the Committee, which has affirmed that allocations must ensure that minimum core obligations are met and that the needs of vulnerable groups are accounted for to combat discrimination. For some rights, General Comments have identified concrete investment priorities. For instance, on education, States should provide free primary education for all;¹ on social security, States should institute non-contributory benefits or other assistance for all who find themselves without resources.² Importantly, the Committee has asserted that States must demonstrate that “every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority those obligations”.³ Arguably, one of the most well established allocation-related obligations is that States must avoid budgetary cuts that are “deliberatively retrogressive”. The burden rests on the State to show cuts “can be justified by reference to the totality of the rights provided for in the Covenant and by the fact that *full use was made of available resources*” (emphasis added).⁴

Resource Generation

It is clear the MAR norm includes an obligation to mobilize resources from different sources, in line with human rights principles and standards. Taxation, international development assistance, and debt are areas related to resource mobilization that have received attention by the Committee:

- On taxation, the Committee has begun to assess the sufficiency of revenue raised;⁵ the distribution and progressivity of the tax burden;⁶ efficiency and incentives the tax system creates;⁷ and the sustainability of domestic tax systems.⁸ A number of Concluding Observations also express concerns with cross-border tax evasion, financial secrecy, illicit financial flows and global corruption.⁹
- On international development assistance, since 1999, the Committee has regularly assessed this obligation for advanced economies. It has also considered extra-territorial obligations beyond development assistance, e.g. General Comment 24 on human rights obligations in the context of business activities.¹⁰
- On debt, the Committee issued a Statement in 2016, which clarifies the duties on borrowing and lending States (acting alone and as members of international organizations) —as well as on international organizations such as the IMF—to ensure loan conditions do not unreasonably reduce the State’s ability to respect, protect and fulfill ESCR.

Academics and other treaty bodies have also begun to explore how areas such as monetary policy, trade and investment agreements, financial regulation, and public private partnerships (PPPs) affect resource mobilization. However, to date, this has been less of a focus for the Committee.

Resource Spending

In recent Concluding Observations, the Committee has developed a set of standardized recommendations to States on intensifying efforts to combat corruption.¹¹ Even though the Committee is addressing this issue on a regular basis, there is room for improvement. Suggestions for more strategic and meaningful recommendations include ensuring that the additional revenue recouped due to successful efforts in tackling corruption are reinvested in ESCR, for example.

Process principles

Finally, there have been important normative developments related to process principles as they apply to the MAR norm. For example, in its statement on austerity measures and ESCR, and in General Comment 19 on the right to social security, the Committee stressed the importance of procedural criteria to assess whether retrogressive measures are justified, including whether there was genuine participation of affected groups and whether there was an independent review of the measures.¹² In Concluding Observations, the Committee has also found regrettable that States do not provide

disaggregated data on social spending, a specific step that would strengthen transparency and participation in economic policy reform processes.¹³

HOW DOES THE COMMITTEE ASSESS THE NORM AND WHAT PRACTICAL CHALLENGES DOES IT FACE?

Questions for discussion:

1. **What are States' expectations as to the role of the Committee on MAR?**
2. **What challenges have States experienced when engaging with the Committee on MAR—e.g. in providing requested information?**
3. **How can the Committee facilitate productive dialogue about resources with States?**
4. **Are there ways the Committee's existing processes and procedures to assess MAR could be complemented and expanded?**

While the Committee has undertaken an increasingly sophisticated assessment of MAR in recent years, areas requiring further development remain, including:

Identifying and collecting relevant information

The Committee's primary sources of information on MAR are the State's common core document and treaty-specific report; responses to the list of issues; and information submitted by civil society. Guidance provided to both States and civil society on how their submissions should address MAR remains fairly limited, however. That said, since the 59th session, the Committee has been asking for more information on MAR in its "lists of issues" (LOIs). In particular, the LOIs have increasingly asked about how States mobilize resources. The LOIs have also increasingly standardized requests for data, beyond the indicators in the common core document in order to facilitate reporting. For example, the LOIs for some countries being reviewed at the 64th session include a list of indicators on outcomes (on poverty and economic inequality), revenue sources, and resource allocations—asking for data from the past 10 years to get sufficient information to conduct a comprehensive assessment on the issue. Increased standardization of information requested can help set expectations for States and simplify and systematize the kinds of information the Committee receives, making it easier to parse or unpack what are otherwise complex and potentially unfamiliar economic policy issues, in human rights terms.

Analyzing and interpreting information

Working methods used by the Committee to interpret information received on MAR, in order to assess whether economic policy choices are in line with the norm, are not entirely formalized and guidance on these methods for stakeholders is scarce. That said, the Committee has made clear that it wants to use its analysis as the basis for constructive, evidence-based dialogue with States on the reasonableness of their economic policies and on the alternatives available. For example, the indicators being used in the 64th session seek to trigger such a dialogue.

One factor that makes the interpretation of information difficult is that there is no standardized approach concerning the benchmarks against which information will be compared. However, standardization is difficult because the Committee must account for and appropriately reflect the particularities of each State, including its internal administrative and financing structures. In some General Comments, the Committee has indicated that it will "scope" benchmarks with the State, which involves "the joint consideration" of national benchmarks by the State and the Committee.¹⁴ This approach does not seem to have been applied in the context of MAR as of yet, but may be worth exploring.

Clearer and more consistent processes may facilitate improved examination of an area as complex as resources during States' periodic reviews. For example, the structure of the interactive dialogue with state delegations follows the Articles of the Covenant. This potentially decontextualizes the discussion because substantive discussions related to specific rights happen after the discussion about resources. Additionally, the constitution of state delegations may itself limit a robust dialogue. Government representatives tend to come from Justice or Foreign Affairs ministries, who may have limited information regarding economic policymaking in comparison to colleagues from Ministries of Finance.

Making contextually appropriate, concrete and actionable recommendations

To support States in implementation, recommendations in the Concluding Observations have become more specific and more precise over time. In the early 2000s, these recommendations were often very general, referencing Article 2(1), and recommending the State take all necessary measures to allocate the required resources. Starting in 2013, the Committee increasingly recommended that States regularly evaluate the impact of budget allocations. Since 2016, recommendations on resource mobilization have also become more concrete. For example, the Committee recommended Honduras utilize progressive tax policy "to increas[e] the funding available to be allocated for the realization of economic, social and cultural rights" in 2016.

However, ensuring an appropriate margin of discretion to States on the issue of resources remains a concern for the Committee. A related concern is how best to account for national context States of course require sufficient flexibility to govern their own economic policy and it is counterproductive to prescribe specific policy options in the abstract. As discussed above, the Committee has started incorporating regular phrasing and adopting a broad structure for recommendations on MAR, based on similarities across countries. However, as the recommendations are highly dependent on the information gathered and the methods used to analyze it, further consistency among recommendations will emerge from regularizing and streamlining these first two processes.

NEXT STEPS LOOKING AHEAD

This paper describes the normative evolution of MAR within the Committee's doctrine and maps out practical challenges related to how the Committee collects, analyzes, and uses information on MAR. The aim of the paper was to prompt reflections from Member States on these issues. From these reflections, actionable insights will be drawn. These will feed into the project CESR and Dejusticia are currently undertaking with members of the Committee, developing practical guidance that the Committee can incorporate into its working methods on how it can further elucidate the contours of this obligation, through its assessments of it.

¹ CESCR, General Comment No. 13 on the Right to Education (8 December 1999) at [6.b.3].

² CESCR, General Comment No. 19 on the Right to Social Security (4 February 2008) at [4.b].

³ CESCR, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), at [10].

⁴ CESCR (2007). An evaluation of the Obligation to take steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant, at [9].

⁵ CESCR, *Concluding Observations: Paraguay* (19 March 2015) at [10]; *Burundi* (15 October 2015) at [14].

⁶ CESCR, *Concluding Observations: Namibia* (23 March 2016) at [24]; *Republic of Macedonia* (15 July 2016) at [42].

⁷ CESCR, *Concluding Observations: Mongolia* (7 July 2015) at [16]; *Uganda* (8 July 2015) at [19].

⁸ CESCR, *Concluding observations: Venezuela* (7 July 2015) at [6].

⁹ CESCR, *Concluding Observations: Honduras* (11 July 2016) at [20]; *United Kingdom* (14 July 2016) at [16].

¹⁰ Tax competition encouraging a race to the bottom is inconsistent with the Covenant and that providing excessive protection for bank secrecy and permissive rules on corporate tax may affect compliance with the MAR norm. CESCR, General Comment No. 24 on Obligations in the Context of Business Activities (10 August 2017) at [37].

¹¹ Amongst others: (a) Raise awareness among the general public and government officials on the need to combat corruption; (b) Strengthen the enforcement of anti-corruption laws and combat impunity, particularly involving high-level officials; (c) Strengthen the capacity of the judiciary, including to ensure the effective protection of victims of corruption, their lawyers, anti-corruption activists, whistle-blowers and witnesses; (d) Improve public governance and ensure transparency in the conduct of public affairs. See, for example: CESCR, *Concluding Observations: Republic of Moldova* (19 October 2017) at [17].

¹² CESCR, Public Statement on Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (22 July 2016), at [4].

¹³ CESCR, *Concluding Observations: Dominican Republic* (20 October 2016) at [17].

¹⁴ CESCR, General Comment No. 15 on The Right to Water (20 January 2003) at [54].