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Donders, Y.

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Chapter 10

The Flexibility Device in the International Covenant on Economic, Social and Cultural Rights



Yvonne Donders

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Abstract To what extent does the principle of common but differentiated responsibilities resonate with human rights and in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR)? Article 2 ICESCR includes the obligation to use the maximum available resources to progressively achieve the full implementation of the rights. The UN Committee on Economic, Social and Cultural Rights has called this “a necessary flexibility device” that underscores the variety among States parties in their capacity and capability to guarantee economic, social and cultural rights, allowing for different speed and form in their implementation. States parties also have the duty to take steps through international assistance and co-operation, an obligation which, according to the Committee, is “particularly incumbent upon those States which are in a position to assist others”. These words and the work of the Committee indeed show that it broadly acknowledges that there are common and differentiated obligations; it does however not further substantiate them.

Y. Donders (✉)

Department of International and European Public Law, Amsterdam Center for International Law,
University of Amsterdam, Amsterdam, The Netherlands
e-mail: Y.M.Donders@uva.nl

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Keywords Available resources · Economic, social and cultural rights · Extra-territorial application · Human rights · International cooperation and assistance · Progressive realization

10.1 Introduction

Common but differentiated responsibilities is a concept or principle developed in various instruments related to environmental law and climate change.¹ “Common” refers to the notion that “[t]he Earth’s climate and its adverse effects are a common concern of humankind”² and reflects the idea that no State can protect the environment on its own.³ The rationale for differentiated responsibilities lies in the differences between States in their contributions to global environmental degradation, as well as in their capabilities to tackle this problem. Or, as stated in the Rio Declaration, principle 7: “...developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

The idea of differentiation between developed and developing States according to their role and capabilities was reaffirmed in the various instruments related to climate change. The UN Framework Convention on Climate Change contains in Article 3(1) that States have “common but differentiated responsibilities and respective capabilities” and that developed States should take the lead in combatting climate change.⁴ In other words, under international environmental law, not all States have to act and contribute equally; responsibility is determined by how much damage is caused and by the level of capacity and availability of technological and financial resources to take remedial action. In relation to environmental degradation and sustainable development, developed States have clearly put higher pressure on them and have higher capacities and more resources to help resolve and promote them.⁵

It has been argued that the principle of common but differentiated responsibilities could, apart from the environment or climate, also apply to other “risk related global public goods” that benefit from collective action, such as peace, cultural heritage, development and public health.⁶ The question could be raised to what extent it also applies, or is desirable to apply, to another issue of global public concern, namely human rights. To what extent can the rationales of common but differentiated

¹ Rio Declaration on Environment and Development, 1992, principle 7, as well as principles 1, 2 and 4. UN Framework Convention on Climate Change, 1994, preamble, Articles 3(1), 4(1). See also Roeben 2012, p. 120.

² UN Framework Convention on Climate Change, 1994, preamble.

³ Rio Declaration on Environment and Development, 1992, Principles 1, 2 and 4.

⁴ See also the Kyoto Protocol to the UN Framework Convention on Climate Change, 1998, Article 10.

⁵ Stone 2004, pp. 277 and 290.

⁶ Stone 2004, pp. 277 and 299.

responsibilities, namely the common global concern, but the different contributions to overall damage and different capacities and resources available, also be applied to human rights?

One of the human rights treaties that seems to be receptive to the idea of common but differentiated responsibilities is the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷ Article 2 ICESCR describes the general nature of the obligations of States parties under the treaty. Core of this provision is the obligation to use the maximum available resources to progressively achieve the full implementation of these rights. The UN Committee on Economic, Social and Cultural Rights, the independent body that monitors the implementation of and compliance with the treaty, has called this “a necessary flexibility device” that reflects the fact that not all States parties are in the same economic, political and social position to guarantee economic, social and cultural rights at the same level at the same time.⁸

Also part of the general obligations of States parties under Article 2 ICESCR is the duty to take steps “individually and through international assistance and cooperation”. According to the Committee on Economic, Social and Cultural Rights this phrase implies that “available resources” include both the resources existing within a State and those available from the international community through international cooperation and assistance. The Committee further adds that this obligation is “...particularly incumbent upon those States which are in a position to assist others...”⁹

This contribution analyses to what extent the principle of common but differentiated responsibilities can be found, explicitly or implicitly, in international human rights law, in particular in the ICESCR. First some general remarks will be made on the differences in terminology between international environmental law and international human rights law, for instance in the use of the term “responsibilities” and the vertical character of human rights treaties. Next the obligations of States parties under the ICESCR are analysed in light of the concept of common but differentiated responsibilities and its central elements of the contribution to harm and capacities and capabilities.

The analysis is based on the text of the ICESCR and its interpretation by the Covenant’s independent monitoring body, the Committee on Economic, Social and Cultural Rights (hereafter the Committee). For this research, all General Comments and statements by the Committee were analysed. Also, Concluding Observations of the reporting procedure were studied starting from July 2021 working backwards to

⁷ For instance, Margot Salomon explicitly links the concept of common but differentiated responsibilities to the advancement of economic, social and cultural rights, see Salomon 2015, pp. 377–378.

⁸ Committee on Economic, Social and Cultural Rights, General Comment 3: The Nature of States Parties’ Obligations (Article 2, Para 1, of the Covenant), 14 December 1990, contained in UN Doc. E/1991/23, para 9.

⁹ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, paras 13 and 14.

2014.¹⁰ This allowed a representative sample of Concluding Observations, encompassing a large sample size of a diverse group of States of different levels of development.¹¹ Keywords used were (in alphabetic order, not in terms of relevance): developed (country), developing (country), economic (crisis), insufficient, international (aid), issue, lack, maximum resources. The interpretation by the Committee was complemented with scholarly work on the ICESCR and State obligations.

10.2 Common but Differentiated Responsibilities and Human Rights Treaties

Before discussing the possible relevance or application of common but differentiated responsibilities to the ICESCR, several remarks need to be made on the terminology of “responsibilities” and on the vertical character of human rights treaties.

10.2.1 Terminology: Responsibilities and Obligations

The term “responsibilities”, used in “common but differentiated responsibilities” and in environmental law more broadly, seems to include legal obligations as well as broader non-legal obligations. This can be explained by the nature of international environmental law, instruments of which are often soft law instruments, such as declarations, of which some principles or norms may have developed into binding customary law.

International human rights law also includes soft law instruments, but it is largely composed of binding treaties creating international legal obligations for States parties. The fact that these obligations cannot always be enforced at national and international level, does not change the fact that States when ratifying human rights treaties accept legal obligations following from these treaties, which is stronger than responsibilities. The term “responsibility” is used for instance in relation to the concept of State responsibility, in other words, the accountability of States parties for breaches of their primary obligations under human rights treaties.¹² More recently, the term “responsibilities” is also used to distinguish between legal obligations of States parties and responsibilities of actors other than States in relation to human

¹⁰ The analysis of the reporting procedure via Concluding Observations by the Committee has its limits. The Concluding Observations may not reflect all the items discussed by the Committee in its dialogue, on paper and in person, with the State party.

¹¹ In fact, the analysis of Concluding Observations brought limited results in terms of elaboration of the different elements. It was therefore deemed appropriate to use this sample of eight years instead of continuing the research further.

¹² Roeben 2012, pp. 106–110.

rights. For instance, the business and human rights framework includes the responsibility of corporations to respect human rights and to provide remedies.¹³ Since this contribution focuses on States parties, the term obligations will be used.

10.2.2 The Character of Human Rights Treaties: Vertical Instead of Horizontal

Human rights treaties are normative treaties, whereby the vertical relationship between the duty bearer (mainly the State) and the rights holder (individuals and communities) is the core element. Human rights treaties have the *form* of contract treaties, since they are, just as other treaties, drafted, agreed upon, signed, ratified and acceded to by States. However, the *substance* of human rights treaties does not so much concern the horizontal agreement between States parties creating mutual rights and obligations between them. Instead they contain provisions that give rights to individuals and communities and define obligations of States to guarantee these rights. Human rights treaties thereby explicitly recognize individuals and communities as beneficiaries or subjects of the treaties.

Human rights treaties have a constitutional character, dealing directly with the relationship between the State and persons at the national level. At the same time, however, human rights are also seen as world values, creating so-called *erga omnes* obligations for States, owed, also, to the world community as a whole.¹⁴ These *erga omnes* obligations are not directly aimed at other individual States parties, but at the collective of States, or the world community at large.¹⁵

The fact that human rights treaties differ from the strict contractual treaty model, since they regulate States' domestic behaviour more than States' behaviour *inter se*, has important consequences as regards the concept of reciprocity between the States parties. As stated above, the obligations of States parties to human rights treaties are owed not so much to fellow States parties, but to individuals and communities as subjects or beneficiaries. The International Court of Justice (ICJ) in its Advisory Opinion on reservations to the Genocide Convention maintained that humanitarian treaties do not maintain a "...perfect contractual balance between rights and duties..." and that States do not have individual advantages or disadvantages nor

¹³ Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, UN doc. A/HRC/17/31; John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: A Framework for Business and Human Rights, 7 April 2008, UN Doc. A/HRC/8/5.

¹⁴ The concept of *erga omnes* obligations was recognized by the International Court of Justice in the cases of *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1962, ICJ Rep 3, para 33; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2012, ICJ rep, paras 68–69.

¹⁵ Craven 2000, pp. 515–516.

interests of their own, but merely a common interest.¹⁶ The Human Rights Committee (HRC), supervising the ICCPR, formulated it as follows: “Such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place.”¹⁷

Both the common and the differentiated responsibilities as developed under international environmental law are meant to apply mainly horizontally, in other words, towards other States, or to the world community at large. Of course, peoples, communities and individuals greatly benefit from these responsibilities, but they can only indirectly, and possibly with the help of human rights treaties, derive substantive rights from these responsibilities.¹⁸

10.2.3 *Common Responsibilities and Human Rights*

The idea of “common responsibilities” in international environmental law is based on the risk of environmental degradation and climate change that potentially affects all States and peoples. Common responsibilities emphasize the greater interests of humanity in tackling environmental problems over individual State concerns. To what extent can a similar argument be made for international human rights law?

International environmental law and international human rights law are similar in that the broader object of the treaties – protection of the environment and of human rights – is a common concern for the international community. As outlined above, the concrete legal obligations States take upon them by ratifying human rights treaties are owed more to individuals and communities than to other States. At the same time, human rights protection is certainly, also, of concern to the international community in its entirety. The risk of widespread and systematic violations of human rights, much like environmental damage or climate change, may have effect on other States and peoples. For instance, widespread human rights violations in one State may cause harm to other States or a region, for example in the form of instability, insecurity, or migration flows. The Committee has also established that the inability of people in developing countries to exercise and enjoy their economic, social and cultural rights is “of common concern to all countries”, thereby linking it to the idea of *erga omnes*

¹⁶ International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports (1951) 19, 28 May 1951, at 12. See also Lijnzaad 1994, at 107; Pergantis 2007, pp. 110–111.

¹⁷ Human Rights Committee, *General Comment No. 24: ‘Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant’*, Fifty-Second Session (4 November 1994), UN Doc. CCPR/C/21/Rev.1/Add.6, at 17. See also Pergantis 2007, p. 439.

¹⁸ A good example of this is the case of the State of the Netherlands v Urgenda, in which the Supreme Court of the Netherlands grounded its decision predominantly on human rights obligations in relation to the responsibilities of The Netherlands in relation to climate change and protection of the environment. See ECLI:NL:HR:2019:2006, 20 December 2019.

rights and obligations owed to all.¹⁹ The idea that human rights create *erga omnes* obligations shows similarities with the idea of common responsibilities.

10.2.4 Differentiated Responsibilities and Human Rights

The idea of “differentiated responsibilities” in international environmental law is based on the recognition of the differences between developed and developing States as regards their contribution to the problem (environmental degradation and climate change), as well as their capabilities to solve the problem. To simplify, developed States have caused much more harm and are at the same time in a much better position to do something about it. And developing States, while having caused less harm, are disproportionately affected by climate change and environmental degradation and are less capable to tackle the problems. To what extent are the dimensions of a State’s historical contribution to the problem and its capabilities to tackle it applicable to human rights treaties?

States are responsible for protecting human rights on their territory and within their jurisdiction and they are monitored individually for their human rights implementation and compliance. Whilst it can definitely be said that some States are responsible for more or more severe human rights violations than others, the “damage” or harm caused by these violations first and foremost affects the people in the State itself and not (those in) other States. While, as argued above, widespread and systematic violations of human rights may have effect on other (neighbouring) States, generally speaking human rights violations in one State do not automatically cause a deterioration in the ecological, economic, political or other situation in another State.

In international human rights law there is attention for the distinction between developed and developing States, especially in relation to economic, social and cultural rights as will be shown below, but there is no sharp division made between these two groups in terms of their obligations. There is no general idea or agreement that developed States should protect human rights more or better than developing States. At the same time, the dimension of capabilities and resources is certainly relevant in relation to human rights treaties. It is clear that human rights implementation requires resources. Traditionally, human rights, in particular civil and political rights, were seen as implying States to respect freedoms and rights and to refrain from interference and action. Focusing on States’ negative obligations it seems indeed unnecessary and undesirable to make a distinction between developed and developing States. Why would a developing State have more difficulty in respecting freedom of expression or freedom of religion?

However, it is now widely accepted that human rights treaties do not merely imply negative obligations, but that they also require States parties to act. Positive obligations imply that States should actively fulfil and promote human rights, which

¹⁹ Committee on Economic, Social and Cultural Rights, *General Comment 14, The Highest Available Standard of Health* (Article 12), UN Doc. E/C.12/2000/4 (2000), para 38.

may also require financial means. Although it is widely accepted that all human rights may require negative as well as positive obligations, the group of economic, social and cultural rights has been given special attention in this regard. The capacity to implement economic, social and cultural rights, such as the rights to health, housing, food and social security, significantly depends on the resources available in a State.

This might explain why the idea of common but differentiated responsibilities has less emerged within the context of civil and political rights, and why there is arguably more scope for differentiated obligations in the advancement of economic, social and cultural rights. Indeed the ICESCR contains several entry points for differentiation in the level of protection between States based on the availability of resources. How this differentiation in obligations is laid down in the treaty and how it has been interpreted is analysed in the next section. Different from the environmental law instruments, the ICESCR has its own international monitoring body that interprets and elaborates on the treaty provisions. The work of the Committee on Economic, Social and Cultural Rights, in particular its General Comments and its Concluding Observations to States, forms an authoritative interpretation of the treaty.

10.3 Common but Differentiated Obligations under the ICESCR?

The general basis for State obligations under the ICESCR is Article 2 of this treaty. In its first paragraph it is stated 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 provision is strikingly different from Article 2 of the International Covenant on Civil and Political Rights (ICCPR), which states that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...” without making any reference to available resources or international cooperation. This difference was caused by the then widely shared understanding that civil and political rights would mostly imply negative obligations, which could be implemented immediately and did not necessarily require many resources.

Economic, social and cultural rights on the other hand were considered as implying positive obligations and more resources and therefore the concept of “progressive realization” was introduced. As the Committee stated in its General Comment 3 on State obligations, this concept “...constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time...”²⁰

²⁰ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 9.

The Committee called the fact that these rights could be achieved progressively “...a necessary flexibility device, reflecting...the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.” However, the Committee also warned against too much flexibility by stating that “...the phrase must be read in the light of the overall objective...of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights...”²¹

Progressive realization prescribes the speed and the direction in which States parties have to move towards full realization of the rights in the treaty. Flexibility based on progressive realization is thereby different from the more broadly established principle that States parties have a large amount of freedom to decide how or in which forms they implement the treaty in their national legal orders.²² Human rights treaties do not prescribe in detail how States have to implement their obligations at national level. The Committee has reaffirmed that the implementation of the ICESCR does neither require nor preclude any particular form of government, political or economic system.²³ In its General Comment on the implementation of the treaty at the domestic level, the Committee again used the term flexibility in relation to the meaning of “all appropriate means” in Article 2 ICESCR. While recognizing the general obligation of States parties to give effect to the rights in the Covenant, “...[b]y requiring Governments to do so “by all appropriate means”, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.”²⁴ This form of flexibility is rather common in international law and will not be further discussed here.

The “flexibility device” of the progressive achievement of economic, social and cultural rights linked to the availability of resources seems to show most similarities with the principle of differentiated responsibilities based on capacity. This will therefore be explored further, based on the work of the Committee. How has the Committee dealt with this “flexibility device” in its monitoring of States parties implementation of the treaty, for instance in its Concluding Observations on State reports? Has the Committee further elaborated the flexibility device in its General Comments on specific provisions and has it established some kind of standard to measure the available resources?

Another entry point for differentiated responsibilities is the reference to international cooperation and assistance in Article 2 ICESCR. Such cooperation and assistance must be sought by States parties if they are not capable of implementing their obligations themselves. Below it is analysed, mainly on the basis of the work of the Committee but also of several authoritative academic sources, when and how

²¹ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 9.

²² Stone 2004, p. 278.

²³ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 8.

²⁴ Committee on Economic, Social and Cultural Rights, General Comment 9, 1998, para 1.

States parties are obliged to provide international cooperation and assistance to other States, and to what extent all States parties have the same or different obligations in this regard.

10.3.1 Progressive Realization and Use of the Maximum of Available Resources

The concept of the *progressive realization* of economic, social and cultural rights has since the adoption of the ICESCR been topic of diplomatic and scholarly debate. While the Committee has emphasized that progressive realization allows flexibility in the level of implementation of the treaty it has also maintained that this does not mean that implementation can be postponed indefinitely or that not taking any measures would be acceptable.²⁵ On the contrary, according to the Committee, States have the obligation to “move as expeditiously and effectively as possible” towards realization of the ICESCR.²⁶

Making progress in the realization of these rights also implies, according to the Committee, that “deliberately *retrogressive measures*... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”²⁷ In other words, once a certain level of protection has been reached, a State party can only under exceptional circumstances, for instance a situation of armed conflict, economic crisis or natural disaster, lower the level of protection. If a State invokes lack of resources as justification of retrogressive measures, the Committee will assess this on the basis of several criteria, including the State’s level of development and current economic situation, the severity of the breach, and whether the State has sought international cooperation and assistance or, oppositely, has rejected support from the international community.²⁸

The Committee has further established the concept of *minimum core obligations*, which should “...ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.²⁹ Minimum core obligations are incumbent upon every State party. However, the Committee has also noted that in its assessment of the fulfilment of minimum core obligations it will still “...take account of resource constraints applying within the country concerned.”³⁰ States parties can invoke lack of resources, but the Committee requires it then to show that “...every effort has been

²⁵ Committee on Economic, Social and Cultural Rights, *Statement on an evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the Covenant*, UN Doc. E/C.12/2007/1, 21 September 2007, para 3.

²⁶ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 9.

²⁷ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 9.

²⁸ Committee on Economic, Social and Cultural Rights, Statement 2007, para 10.

²⁹ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 10.

³⁰ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 10.

made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”³¹ It seems that, albeit under stricter scrutiny, the Committee finds that the flexibility device as regards the available resources also applies to minimum core obligations. Scholars have however emphasized that minimum core obligations should apply irrespective of the availability of resources or other factors and difficulties.³²

How can it be determined what the “*available resources*” are? Which resources are included under this concept? And how can the availability and maximum use of resources be determined? A substantial amount of academic analysis has been done on this topic³³ and the Committee has also elaborated on these concepts in its monitoring role.

The concept of “availability” is very complex, because it relates to the totality of available resources, as well as to the distribution of resources to different policy areas. As has been well stated: “Maximum stands for idealism; “available” stands for reality. Maximum is the sword of human rights rhetoric; “available” is the wiggle room for the state.”³⁴ The Committee monitors whether a State party has shown that it has made maximum use of the resources available. A proper assessment of this requires that Committee receives sufficient and reliable information on the sort and amount of resources available and on the choices that have been made by the State on how these resources were distributed and used.³⁵

When a State invokes lack of resources as a justification for not fulfilling its obligations, the Committee will assess whether this is indeed a justified position.³⁶ The Committee sees the availability of resources as an important qualifier to the obligation to take steps. It does, however, emphasize that resource constraints alone do not justify inaction by States parties.³⁷ In other words, lack of available resources is not an automatic justification for not implementing a certain norm. Moreover, a States party’s sincere efforts to use available resources, “...entitles it to receive resources offered by the international community.”³⁸ As stated above, the Committee considers resources to include both those existing within a State as well as those available from the international community through international cooperation and assistance.³⁹ This will be further discussed below.

³¹ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990. para 10; Statement 2007, para 6.

³² Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) Principle 25; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (January 1997) Guideline 9 and 10.

³³ For instance, Alston and Quinn 1987, pp. 157–229; Kendrick 2017, pp. 657–679; Chenwi 2013, pp. 742–769; Skogly 2012, pp. 393–420; Robertson 1994, pp. 693–714; Limburg Principles on the Implementation of the ICESCR, UN Doc. E/CN.4/1987/17, Annex.

³⁴ Robertson 1994, pp. 694.

³⁵ Skogly 2012, p. 402.

³⁶ Committee on Economic, Social and Cultural Rights, Statement, 2007, paras 8–10.

³⁷ Committee on Economic, Social and Cultural Rights, Statement, 2007, para 4.

³⁸ Committee on Economic, Social and Cultural Rights, Statement, 2007, para 5.

³⁹ Committee on Economic, Social and Cultural Rights, Statement, 2007, para 5.

Article 14 ICESCR can illustrate these points. This provision contains an obligation upon States parties to “...work out and adopt a detailed plan of action for the progressive implementation...of the principle of compulsory education free of charge for all.” In its General Comment on this provision the Committee has argued that lack of available resources is no excuse not to draft and adopt such a plan. The Committee argues that Article 14 applies, “...almost by definition, to situations characterized by inadequate financial resources.”⁴⁰ It further adds the “clear” obligation of other States to assist in such situations where a State clearly lacks financial resources and/or expertise.⁴¹

The Committee has used several methodologies to assess whether a State party has fulfilled its obligations under the Covenant, including impact assessment, indicators and benchmarks, budget and expenditure analysis, and the violations approach.⁴² For the assessment of available resources, the budget and expenditure analysis is most directly relevant. The budget of a State is “...the instrument that determines the extent of the State’s resources, their allocation and prospective expenditures...” and it “...provides a demonstration of the State’s preferences, priorities and trade-offs in spending.”⁴³ It can show gaps in implementation instigated by insufficient resources, which could be caused by absolute deficiency, or by inadequate prioritization or insufficient estimation of funds required.⁴⁴

The Committee therefore looks not merely at the budget spent on the realization of economic, social and cultural rights, but also at the State’s total financial resources.⁴⁵ It conducts a static analysis of the budget at a moment in time, as well as a dynamic analysis, whereby it compares the evolution of budgets over time and looks at variations in allocations and spending over different periods. It also looks at macro-budget information and priorities in terms of resource allocation to different areas such as health, education, social security or food.⁴⁶ Finally, the Committee looks at whether and how States create conditions for private resources that it may use to fulfil economic, social and cultural rights. Private resources can be crucial for the realization of for instance the rights to health, education or housing.⁴⁷

The term “resources” has to be interpreted broadly, meaning more than merely financial resources. It includes also human resources, including knowledge, skills and experience; natural resources, which can be used for production or consumption;

⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment 11, para 9.

⁴¹ Committee on Economic, Social and Cultural Rights, General Comment 11, para 9.

⁴² Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc. E/2009/90, 8 June 2009, section 3 Monitoring approaches and methods, pp. 9–18; Chenwi 2013, pp. 758–759.

⁴³ Report of the High Commissioner, 2009, para 46.

⁴⁴ Report of the High Commissioner, 2009, para 46.

⁴⁵ Kendrick 2017, p. 666; Alston and Quinn 1987, pp. 178–180.

⁴⁶ Report of the High Commissioner, 2009, para 48.

⁴⁷ Robertson 1994, pp. 704–707; Skogly 2012, pp. 401–402, and 410.

and scientific resources, including information and technology.⁴⁸ While financial resources can, to a large extent, be quantified, this is more complex for human, natural, scientific and technological resources, where a more qualitative approach is needed. Many of these resources are, for instance, dependent upon or can be enhanced through education, health care and poverty reduction, which are also rights in themselves. And overall, economic development and financial resources are positively affected by general policy principles of transparency, participation and accountability.⁴⁹

In its dialogue with States parties and its Concluding Observations under the reporting procedure, the Committee has emphasized that it respects "...the margin of appreciation of the State party to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others."⁵⁰ The Committee has, however, been critical to States parties about the choices they made in terms of the budget, for instance when growth in gross domestic product (GDP) was not commensurate with increased budgetary allocations to economic, social and cultural rights.⁵¹ The Committee appears to be ready to acknowledge difficult financial circumstances that exist in certain States, for instance as a result of a financial crisis and necessary austerity measures, natural disaster or effects of climate change.⁵² It does however not explicitly conclude that such a State party has less obligations, or reduced thresholds of obligations under the Covenant. Rather, the Committee analyses the situation and identifies specific suggestions for improvement that would bring the State in compliance with the Covenant, for instance by offering suggestions for how the taxation system could change to bring more revenue, or how the budget could be better balanced.⁵³

⁴⁸ Kendrick 2017, pp. 669–671; Robertson 1994, pp. 704–713; Skogly 2012, pp. 405–409; Felner 2009, pp. 414–430.

⁴⁹ Skogly proposes such a qualitative approach to resources: Skogly 2012, pp. 404–411.

⁵⁰ Committee on Economic, Social and Cultural Rights, Statement, 2007, para 12.

⁵¹ Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Bulgaria, 29 March 2019, UN Doc. E/C.12/BGR/CO/6, paras 8–9; Concluding observations on the sixth periodic report of Canada, 23 March 2016, UN Doc. E/C.12/CAN/CO/6, para 9; Concluding observations on the initial report of Guinea, 30 March 2020, UN Doc. E/C.12/GIN/CO/1, paras 12–13; Concluding observations on the third periodic report of Ireland, 8 July 2015, UN Doc. E/C.12/IRL/CO/3, para 11; Concluding observations on the second periodic report of the Sudan, 27 October 2015, UN Doc. E/C.12/SDN/CO/2, para 15; Concluding observations on the combined third to fifth periodic reports of Romania, 9 December 2014, UN Doc. E/C.12/ROU/CO/3-5, para 7; Concluding observations on the sixth periodic report of Bulgaria, 29 March 2019, UN Doc. E/C.12/BGR/CO/6, paras 8–9.

⁵² See, for example, Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Cyprus, 28 October 2016, UN Doc. E/C.12/CYP/CO/6, para 11; Concluding observations on the fourth periodic report of Cameroon, 25 March 2019, UN Doc. E/C.12/CMR/CO/4, para 14; Concluding observations on the third periodic report of Ireland, 8 July 2015, UN Doc. E/C.12/IRL/CO/3, para 11;

⁵³ See, for instance, Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of Cabo Verde, 27 November 2018, UN Doc. E/C.12/CPV/CO/1, paras 12–13; Concluding observations on the initial report of South Africa, 29 November 2018, UN Doc. E/C.12/ZAF/CO/1, para 16; Concluding observations on the fourth periodic report of Cameroon, 25

Budget analysis is a complex issue and the question is to what extent the Committee, composed of experts in the field of human rights, can do such assessment properly in order to evaluate whether the State party concerned has fulfilled its (differentiated) obligations. Apart from the necessity of sufficient and reliable information from the State, it is questionable whether Committee members, who are not necessarily experts in budget analysis or (macro-) economics, have sufficient knowledge and expertise in this regard. In the literature even more complex assessment methods have been proposed,⁵⁴ which require extensive economic and econometric knowledge and expertise. This is something that does not seem feasible for a human rights experts body, supported by very limited staff at the Office of the High Commissioner for Human Rights.

The role of the Committee to assess budget allocations and potentially criticize choices and priorities in resource allocation has furthermore not always been warmly received by States parties, which emphasize that they have a wide margin of discretion to make policy and budget allocation choices. The Committee can indeed not make such choices for them and can also not set clear and definite common standards for the minimum amount or allocation of resources for rights in the ICESCR. The variety between States parties in terms of economic, social, political and cultural situation and between the different norms are far too large to do this. Its monitoring role should therefore be limited to mainly ascertain whether the decision-making process shows sufficient responsiveness to the obligations under the ICESCR.⁵⁵

The obligation of progressive realization, with use of the maximum of available resources, allows for differentiation in the level and form of the protection and promotion of economic, social and cultural rights. Indeed the capabilities and capacities of a State are factors in determining the scope of obligation in the evaluation by the Committee to what extent obligations have been fulfilled. At the same time, it should be noted that the Committee has not clearly defined or demarcated the "flexibility device", leaving the scope and content of differentiated obligations quite vague. As shown above, the Committee mainly acknowledges that a certain State party has difficult financial circumstances, but it does not explicitly state that such a State has less or different obligations under the Covenant. The Committee sees its role more in offering suggestions for improvement. This is also in line with the spirit of the reporting procedure, which is not a procedure to establish a violation in a concrete case. Instead it is a dialogue with the State party, evaluating its laws, policies and practices and providing it with recommendations. In the reporting procedure, the Committee evaluates each State party individually; it does not make links, let alone comparisons, between different States parties. In its General Comments it provides

March 2019, UN Doc. E/C.12/CMR/CO/4, para 14; Concluding observations on the third periodic report of Ireland, 8 July 2015, UN Doc. E/C.12/IRL/CO/3, para 11.

⁵⁴ See, for instance, Kendrick 2017, pp. 671–677; Felner 2009, pp. 414–430; Chenwi 2013, pp. 763–765; Harvey and Rooney 2010, p. 260.

⁵⁵ Robertson 1994, p. 702.

more general guidance on obligations of States parties. In these General Comments it broadly refers to possible differentiated obligations, but does not make them more specific or concrete, since the General Comments apply to all States parties.

10.3.2 *International Cooperation and Assistance*

Article 2 ICESCR further obliges States “to take steps, individually and through international assistance and co-operation”. Several other provisions, for instance on the right to food, also point at international cooperation.⁵⁶ There has been much debate about the meaning of “international assistance and cooperation” in terms of rights and obligations of States parties. Here, also, the principle of common and differentiated obligations seems to be applicable.

Broadly speaking the notion of “international assistance and cooperation” includes obligations related to two international dimensions of State conduct. Firstly, it includes obligations that States have to assist other States parties in their implementation of economic, social and cultural rights. Secondly, it refers to obligations that States parties may have under the ICESCR when they, or non-State actors based on their territory, act or fail to act extra-territorially. Such extra-territorial obligations of a State party relate to measures taken by that State that may have effect on economic, social and cultural rights in another State, but that are not necessarily meant to *assist* that other State in implementing these rights. It is thereby different from the obligations following from Article 2 ICESCR to request or provide assistance and cooperation to other State parties in relation to the fulfilment of their (domestic) obligations under the ICESCR.

The Maastricht Principles on the Extra-Territorial Application of Economic, Social and Cultural Rights,⁵⁷ a non-binding but authoritative document elaborated by experts, also refers to both dimensions. Its definition of extra-territorial obligations includes “obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory” as well as “obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.”⁵⁸

⁵⁶ Article 11(2) ICESCR provides that State Parties shall take measures through international cooperation that are necessary to improve methods of food production, conservation and distribution of food.

⁵⁷ The *Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights* were elaborated in 2009–2011 and adopted by human rights experts at a meeting in September 2011 convened by Maastricht University and the International Commission of Jurists. They were published together with an extensive commentary in *Human Rights Quarterly* 34 (2012) 1084–1169.

⁵⁸ *Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights*, principle 8.

The Committee has recently also used both dimensions under the general term of extra-territorial obligations in its statement on COVID-19 and economic, social and cultural rights. In this statement the Committee argues that “States parties have extraterritorial obligations related to global efforts to combat COVID-19. In particular, developed States should avoid taking decisions, such as imposing limits on the export of medical equipment, that result in obstructing access to vital equipment for the world’s poorest victims of the pandemic.” This implies extra-territorial obligations in relation to measures that have effect abroad, but it could also link to possible assistance provided to other States parties.⁵⁹

Under both dimensions of international cooperation and assistance, common as well as differentiated obligations may apply. The Committee, basing itself on Articles 55 and 56 of the UN Charter and the ICESCR itself, has described international cooperation and assistance for the realization of economic, social and cultural rights as a general obligation of all States. The Committee however notes that this obligation “...is particularly incumbent upon those States *which are in a position to assist others* in this regard.”⁶⁰ Below under both dimensions the common and differentiated obligations are further elaborated, mostly based on the work of the Committee.

10.3.2.1 Obligations of States Acting Extra-Territorially

The last decades show increasing attention for obligations deriving from various human rights treaties that States may have when acting, or failing to act, outside their own territory. Here an interesting difference can be seen between the ICESCR and the ICCPR. Article 2 ICCPR includes that States parties undertake “...to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. The ICCPR does not include a reference to international assistance and cooperation. The term “subject to its jurisdiction” has been elaborated by the HRC as covering situations where a States party has power or effective control over territory or over persons beyond its own borders.⁶¹ Accordingly, it is the level of power or effective control that may lead to differentiation

⁵⁹ Committee on Economic, Social and Cultural Rights, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, UN Doc. E/C.12/2020/1, 17 April 2020, para 20.

⁶⁰ Committee on Economic, Social and Cultural Rights, *General Comment 3*, 1990, para 14. Emphasis added YD.

⁶¹ Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40) at 176 (1981), para 12.2 (“...is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”); Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 1326, May 2004, para 10 (“This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”).

in extra-territorial obligations between States parties.⁶² The ICESCR does not include a jurisdiction clause. It is however generally assumed that many of its provisions could also imply extra-territorial obligations.⁶³ Here, also, the general criteria for triggering these obligations are overall or effective control over territory or over persons.⁶⁴ Power or effective control in relation to economic, social and cultural rights is, however, closely linked to resources.

The Maastricht Principles reaffirm that States have extra-territorial obligations when they exercise authority or effective control.⁶⁵ The Principles add, however, that States also have extra-territorial obligations “when acts or omissions by a State bring about *foreseeable effects* on the enjoyment of economic, social and cultural rights”.⁶⁶ Commentators have stated that the criterion of foreseeability implies that obligations may be triggered when States “know or should have known” that their acts or omissions will cause “substantial human rights effects”.⁶⁷ The possibility of such effects is more likely for States that are more active internationally and/or are more powerful. There is, however, no general agreement among States parties to the ICESCR how this should be further interpreted and thereby when precisely these obligations are triggered.

When the threshold for extra-territorial duties is met, the question remains what kind of duties a State party has and to what extent these are similar or different for different States parties. The Committee has confirmed in several General Comments that all States parties have all three types of duties, to respect, protect and fulfil, outside their territory. In its General Comment on the right to food, for instance, the Committee states that States parties should “...comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access

⁶² See Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Italy*, 27 January 2021, UN Doc. CCPR/C/130/D/3042/2017 and Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Malta*, 28 April 2021, UN Doc. CCPR/C/128/D/3043/2017.

⁶³ See on the extra-territorial application of the ICESCR: “The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights and A Commentary on the Maastricht Principles”, reproduced in *Human Rights Quarterly*, 34 (2012), 1084–1169; Coomans 2011, pp. 1–35; Coomans and Künnemann 2012; Khalfan 2013, pp. 299–331.

⁶⁴ The International Court of Justice confirmed that states have obligations under the ICESCR also on territories over which they exercise territorial control and jurisdiction, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ Rep. 136, para 109 (for ICCPR) and 112 (for ICESCR). The ICJ broadened the extra-territorial obligations for States in relation to acts done in the exercise of jurisdiction outside their territory in the case of *Armed Activity on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, 2005, ICJ Rep. 168, para 216.

⁶⁵ Principle 9 of the Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights and Commentary to the Maastricht Principles, 2012, p. 1109, para 8.

⁶⁶ Principle 9 of the Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2012 (emphasis added YD).

⁶⁷ Commentary to the Maastricht Principles, 2012, p. 1109, para 8.

to food and to provide the necessary aid when required.”⁶⁸ In its General Comments on the rights to health and water, the Committee reaffirms these obligations, albeit in somewhat vaguer terms.⁶⁹

The Maastricht Principles reaffirm that, in principle, all States have extra-territorial obligations to respect, protect and fulfil economic, social and cultural rights.⁷⁰ For instance all States have a general obligation to refrain from activities that would harm or have a negative impact on the advancement of economic, social and cultural rights in another country.⁷¹ This implies, for instance, that States should not destroy crops in another State or conclude trade agreements that have negative impacts on the food production and distribution of food.⁷² States should also not conclude investment treaties to, for instance, support privatization programmes or the construction of a dam, when these have large negative impact on land and water supplies in another State.⁷³ States should further refrain from imposing conditionalities on foreign aid that have a negative impact on, for instance, sexual and reproductive rights, especially when the receiving State is heavily dependent on foreign aid for its health system.⁷⁴

The obligations to protect and fulfil may, however, differ between States according to their capacities. For instance, the obligation to protect in other States is the obligation to prevent violations of economic, social and cultural rights by private actors, in particular companies, based on the State’s territory but acting abroad. In its General Comment on the right to water, the Committee maintains that States parties should prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.⁷⁵ The General Comment on the right to health also includes that States parties should “prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal

⁶⁸ Committee on Economic, Social and Cultural Rights, *General Comment 12, The Right to Adequate Food* (Article 11), UN Doc. E/C.12/1999/5, 12 May 1999, para 36.

⁶⁹ Committee on Economic, Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health* (Article 14) para 39; *General Comment 15, The right to water*, para 31.

⁷⁰ See also the Maastricht Principles and Commentary, pp. 1126–1159.

⁷¹ Salomon 2015, p. 368; Sepulveda 2006, p. 280.

⁷² Concrete examples can be found in Coomans and Künnemann 2012, section 1.2 The Ghana Chicken Case: EU Exports Destroying Local Markets; section 1.3, The Kenyan Farmers Case: European Partnership Agreement Threatens the Right to Food; section 3.5, The Zambian Social Cash Transfers Case: the Duty to Cooperate with Zambia to Guarantee Freedom from Hunger Through Social Programmes.

⁷³ *Idem*, section 1.6 The Botnia Pulp Mill Case: Foreign Direct Investment Impacts on the Uruguay River and Adjacent Communities; section 1.7, The Ilisu Dam Case: Export Credit Agencies Support Firms in Controversial Dam Construction.

⁷⁴ *Idem*, section 3.4 The Mexico City Policy Case: US Conditionalities on Aid Impact on the Right to Health and Reproductive Rights in Kenya.

⁷⁵ Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 20 January 2003, UN. Doc. E/C.12/2002/11, para 33.

or political means.”⁷⁶ The Guiding Principles on Business and Human Rights, elaborated by Special Representative John Ruggie, also include that States are obliged to regulate extra-territorial activities of businesses domiciled in their territory or under their jurisdiction.⁷⁷ While all States may have obligations to protect, developed States are more likely to be implied in such obligations.

The extra-territorial obligation to fulfil relates mostly to providing international assistance. This is the other dimension discussed in more detail below.

10.3.2.2 Obligations to Assist Other States in the Implementation of ESC Rights

Article 2(1) contains a general obligation for all States parties to request or to provide international cooperation and assistance in order to advance economic, social and cultural rights.

When are such duties triggered? As stated above, the Committee uses the concept of “being in a position to assist”. The Maastricht Principles seem to go somewhat further by stating that States have obligations when they act, separately or jointly, and they are *in a position to exercise decisive influence or to take measures* to realize economic, social, and cultural rights.⁷⁸ It is further maintained that States must separately and jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially, “commensurate with, inter alia, its economic, technical and technological capacities, available resources, and influence in international decision-making processes.”⁷⁹ This implies that States may have different obligations depending on their resources as well as on their power to influence and take action. In other words, the relative power of States in international affairs, be it economic, political and/or geographical, determines the scope of obligations.⁸⁰ The exact parameters of these duties are, however, difficult to determine. A concept such as “influence” is difficult to define and can have different entries, including economic wealth, political power,

⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health* (Article 14) para 39.

⁷⁷ 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, UN Doc. A/HRC/17/31, 21 March 2011, principle 2. See for example Coomans and Künnemann 2012, section 5.3, The Marlin Case: Home State of a TNC Tries to Avoid Taking Action Against Abuses in Gold Mine Abroad; section 5.4 The Mubende Case: Forced Evictions Pave the Way for a TNC’s Coffee Plantation.

⁷⁸ Principle 9 of the Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights and Commentary to the Maastricht Principles, 2012, p. 1109, para 8. Emphasis added YD.

⁷⁹ Principle 31 of the Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights.

⁸⁰ Salomon 2015, p. 373.

but also geographical distance. Also, capacities, resources and influence are not easy to assess as foundation for levels of obligations under the ICESCR. The Committee has, however, given some guidance on the different obligations of States parties, according to their level of development.

Article 2 ICESCR links international cooperation and assistance to the use of the maximum available resources. According to the Committee, the original intention of the drafters of the treaty was that the maximum available resources would include "...both the resources existing within a State and those available from the international community through international cooperation and assistance."⁸¹ The drafting process shows a significant amount of consensus, including among developed States, on the general idea that States with insufficient resources should be able to obtain assistance to implement economic, social and cultural rights. Whether the duty was on the part of the poorer States to *request* such assistance or whether the duty was on the part of the wealthier States to *provide* assistance, or both, remained undecided. During the drafting of the treaty, some States emphasized the voluntary nature of international cooperation, while others saw it as mandatory, based on the commitments assumed by States in the UN in general and in the ICESCR in particular. In other words, at the time of the adoption of the treaty, Article 2 was not considered to imply a legally binding obligation upon any particular State to provide any particular form of assistance. And, also, developing States were entitled to ask for assistance, but they could not claim it as a legal right. This does not mean that this obligation is meaningless, but it implies that it should be seen more as a moral right and obligation.⁸²

Still, nowadays, while there may be general agreement on the importance of international assistance and cooperation for the promotion and protection of economic, social and cultural rights, it is less clear which States should request or provide assistance and what kind of assistance this should be. At the same time, there seems to be broad agreement that States that face difficulties in the implementation of these rights should at least actively seek assistance, and that wealthier States should at least be receptive to such requests.⁸³ The Committee has however also warned States parties on the receiving end not to remain too dependent on international assistance and cooperation "to the detriment of the mobilization of domestic resources".⁸⁴

Financial assistance seems to be a primary way to help other States to advance economic, social and cultural rights. However, there may also be other forms of cooperation and assistance, including technical assistance, development cooperation, exchange of knowledge and expertise. Not all sorts of resources that should be employed domestically to protect and promote economic, social and cultural rights can also be made available to assist other States. Natural resources are for instance

⁸¹ Committee on Economic, Social and Cultural Rights, General Comment 3, 1990, para 13.

⁸² Skogly 2012, pp. 414–415; Alston and Quinn 1987, pp. 187–192; Craven 1995, p. 149; Salomon 2015, p. 368; Sepulveda 2006, p. 273.

⁸³ Salomon 2015, pp. 370–371.

⁸⁴ Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of Cameroon, 25 March 2019, UN Doc. E/C.12/CMR/CO/4, para 14.

linked to a State's territory. Human resources may be available for international cooperation, but they may be more limited abroad. There is also increasing attention for the fact that foreign aid should not be conducted merely by foreigners, but as much as possible with the active involvement of the local people and communities.⁸⁵ The Committee does not specify the kind of assistance further in its General Comments, and it does not go into this kind of detail in its Concluding Observations. The Committee might not feel positioned to be more specific. This may have to do with the continuing controversy over the nature of economic, social and cultural rights, as well as the ambiguity of Article 2 ICESCR and in particular the notion of international assistance. If the Committee would be more specific in identifying extra-territorial obligations, it would probably do so only in relation to the guaranteeing of core obligations. Beyond that it leaves the interpretation of the specific form of cooperation and assistance to States parties.

The question of *which* States should request or provide international cooperation and assistance is addressed in several General Comments and statements by the Committee. For instance, in its General Comments on the right to health and the right to sexual and reproductive health, the Committee reaffirms its position that providing international assistance and cooperation to developing countries in order to enable them to fulfil their obligations is particularly incumbent on States parties in a position to assist, or economically developed States. Especially in relation to humanitarian assistance and disaster relief, the Committee notes that "...economically developed States parties have a special responsibility and interest to assist the poorer developing States."⁸⁶

Similar language is used in the General Comment on just and favourable conditions of work, which the Committee stated that States parties that do not have sufficient national resources have an obligation to seek international cooperation and assistance and that other States should, their resources permitting, respond to this request, whereby economically developed States parties have a special responsibility for assisting developing countries.⁸⁷ In its more recent General Comment on science and economic, social and cultural rights, the Committee reaffirms that developing States are under an obligation to resort to international cooperation and assistance and that developed States have the obligation to contribute to the development of science and technology in developing countries.⁸⁸ The basis for these obligations is

⁸⁵ Kendrick 2017, p. 668; Skogly 2012, pp. 403 and 416–417.

⁸⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Article 12), August 2000, UN Doc. E/C.12/2000/4, paras 40 and 45; Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/22, 2 May 2016, para 50. These are earlier General Comments on the right to education and the right to food, no such references to the position to assist can be found.

⁸⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work* (Article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/23, 27 April 2016, paras 52 and 67.

⁸⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on science and economic, social and cultural rights* (Articles 15(1)(b), (2), (3) and (4) of the International

“...the deep international disparities among States in science and technology”.⁸⁹ Its General Comment on the right to reproductive health the Committee includes a more concrete figure of contributing at a minimum 0.7 per cent of States’ gross national product (GNP) for international cooperation and assistance.⁹⁰ This benchmark was agreed upon by States in various international fora and was therefore a logical one for the Committee to use. This does however not mean that there is general agreement that Article 2(1) ICESCR imposes a general obligation to provide 0.7 per cent of the GNP to development assistance. The Committee has recommended it as a target, and has shown concern when a State party fell below this percentage, but it does not seem to do so as a legally binding obligation following directly from the ICESCR.⁹¹

In its statement on poverty, the Committee further elaborates that “...core obligations give rise to national responsibilities for all States and international responsibilities for developed States”.⁹² Although the Committee does not specify how developed and developing States should be distinguished, it does seem to suggest that developed States are co-responsible for ensuring that developing states meet their core obligations under the ICESCR. In a statement on climate change, adopted by the Committee jointly with several other treaty bodies, it speaks of high-income States that should support adaptation and mitigation efforts in developing countries.⁹³

These General Comments and statements show that according to the Committee developing and developed States have different obligations as regards international cooperation and assistance. The difference in capacities and capabilities determines whether a State is under an obligation to request or to provide assistance. How capacities and capabilities are assessed is not further explicated, although as described above, the Committee pays attention to this in its reporting procedure. The Committee seems to rely on GDP growth as a measure of a state’s level of development.⁹⁴

Overall it is clear that the Committee considers developed States as “being in a position to assist others”. Such developed States most likely are also the ones in a position to exercise decisive influence or to take measures, as the Maastricht

Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/25, 30 April 2020, para 79.

⁸⁹ Committee on Economic, Social and Cultural Rights, *General Comment 25 on science*, para 79.

⁹⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/22, 2 May 2016, para 50.

⁹¹ Khalfan 2013, pp. 326–327; Sepulveda 2006, pp. 286–288.

⁹² Committee on Economic, Social and Cultural Rights, *Statement on Poverty*, UN Doc. E/C.12/2001/10, 10 May 2001, para 16.

⁹³ Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on human rights and climate change*, UN Doc. HRI/2019/1, 14 May 2020, para 17.

⁹⁴ See, for instance, Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Bulgaria, 29 March 2019, UN Doc. E/C.12/BGR/CO/6, paras 8–9; Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, 23 March 2016, UN Doc. E/C.12/CAN/CO/6, para 9.

Principles prescribe. Being in a position to assist others could, apart from being in a financial position, also refer to geographical distance or political, economic or diplomatic relations. A State may be in a better position to assist and to have influence on its neighbouring State(s) or a State with which it has close political or historical ties. For instance, it can be argued that States with more historical responsibility for past exploitation could have more obligations to remedy past injustices. Indeed several former colonial powers “tend to direct international assistance to their former colonies, in particular based on a moral sense of historical responsibility.”⁹⁵ This remains a political contentious issue, which is likely why the Committee has not explicitly addressed it. This historical dimension could, however, be seen as similar to the dimension of “contribution to the damaged caused” as part of the principle of common but differentiated responsibilities.

From the above it can be concluded that States parties to the ICESCR have, apart from national obligations, also international obligations to cooperate and to request or to provide assistance to other States in order to advance economic, social and cultural rights worldwide. Although the precise trigger, scope and content of these obligations is not clear, it seems that the idea of differentiated obligations, based on capacity and capability, does apply here.

10.4 Concluding Remarks: Common *and* Differentiated Obligations under the ICESCR

This contribution aimed to evaluate how the principle of common but differentiated responsibilities developed under international environmental law works in relation to international human rights law, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR). The nature of this treaty, being of fundamental importance for development, which is, just as the environment, a global public good, makes it very suitable for such an evaluation. The provisions of the ICESCR moreover provide several concrete entry points for the possible application of this principle. The famous, or perhaps infamous, wording of Article 2(1) ICESCR includes progressive realization with the use of the maximum available resources, as well as the obligation of international assistance and cooperation, all of which could be linked to the principle of common but differentiated responsibilities. The independent monitoring body of the ICESCR, the Committee on Economic, Social and Cultural Rights, has called this provision a necessary flexibility device that underscores the variety among States parties in their capacity and capability to guarantee economic, social and cultural rights, allowing for different speed and form in their implementation.

For this chapter, the work of the Committee on Economic, Social and Cultural Rights was used to explore how the different elements in this provision have been interpreted and applied and to what extent the principle of common but differentiated

⁹⁵ Salomon 2015, p. 375.

responsibilities can be, directly or indirectly, found there. The role of the Committee is to monitor whether States have complied with and implemented the norms in the treaty. The treaty provisions are thereby, unlike international environmental law that lacks such an independent monitoring system, further elaborated and interpreted. The work of the Committee forms an authoritative source of interpretation and is thereby a useful tool to assess whether the rationales of common but differentiated responsibilities could also apply to the ICESCR.

From the above it can be concluded that the principle of common but differentiated responsibilities resonates to a large extent with the ICESCR. Firstly it needs to be emphasized that international human rights law differs from international environmental law in several respects, some of which are crucial in relation to the principle of common but differentiated responsibilities. The fact that international human rights law is largely composed of treaties, and not soft law instruments, implies that the term “responsibilities” does not apply. Human rights treaties imply legal obligations, not responsibilities. Furthermore, these human rights treaties apply mainly vertically, and much less horizontally, which means that obligations are owed mainly to the people within the jurisdiction of the State and not, or much less, to other States. The idea that States have common obligations under the ICESCR could however flow from the idea that human rights obligations also have an *erga omnes* character. Commonality also follows from the general idea that all States that have ratified the ICESCR have obligations under this treaty, in particular minimum core obligations.

The principle of common but *differentiated* responsibilities implies that within the overall set of obligations, there is variety as to the precise scope and content of these obligations. This variety is based on the different contributions of States to the overall damage and the different capacities and resources available to States to remedy the situation. The element of the contribution to overall damage does not echo well with human rights. The “damage” in terms of human rights violations does not necessarily cross borders. Although massive violations may have an impact on other States, it does not automatically put pressure on these States or affect the living conditions of people in other States. Consequently, the idea that States that are responsible for more severe human rights violations in the past should have more human rights obligations now, does not exist, at least not where it concerns the own territory and jurisdiction. Such past performance could perhaps lead to different or more obligations extra-territorially, for instance in the advancement of economic, social and cultural rights in former colonies or other territories under influence.

The element of capacities and resources available has more direct relevance in relation to human rights obligations, in particular those related to economic, social and cultural rights. Article 2(1) ICESCR provides that States parties should take measures to progressively realize these rights with the use of the maximum available resources. The flexibility offered by this provision is however, according to the Committee, not unlimited. The Committee has also time and again indicated that non-action is incompatible with Article 2, that some obligations, such as non-discrimination, are of an immediate nature, that there are minimum core obligations, and that retrogressive measures are only allowed in exceptional circumstances. It

can therefore be concluded that the ICESCR certainly implies a set of direct and common obligations for all States parties.

Within this general framework of common obligations, there are varieties possible based on the different capabilities of the States parties. The availability of resources and the maximum use of these resources are important elements in the differentiation. The Committee assesses for each State party whether it finds that sufficient resources, including not only financial, but also human, natural and technical resources, have been allocated to the advancement of economic, social and cultural rights. Since this assessment is done periodically, changes over time can be taken into account. In other words, the flexibility device of Article 2 indeed implies common *and* differentiated obligations for States parties under the ICESCR as regards their territorial or national obligations. The precise scope of obligations remains vague, although the Committee tries to give some guidance in its General Comments and Concluding Observations.

International assistance and cooperation is another aspect of the ICESCR whereby common as well as differentiated obligations apply. All States parties have a common duty to cooperate and to promote cooperation and assistance in the advancement of economic, social and cultural rights. The obligation of international assistance and cooperation covers activities of States outside their own territory, as well the request or provision of assistance to other States in the implementation of economic, social and cultural rights. Extra-territorial obligations are triggered when a State has overall and effective control over a territory or persons abroad, but also when activities of a State have foreseeable effects on the enjoyment of economic, social and cultural rights abroad. Bearing in mind these criteria, it is likely that while all States have obligations to respect economic, social and cultural rights abroad, more powerful States, with more influence and resources, have also obligations to protect and fulfil these rights abroad.

Developing States are obliged to actively seek and request such international assistance and cooperation if they do not have sufficient resources to guarantee the rights in the ICESCR. Developed States, which are in a position to assist others, are obliged to provide such assistance and cooperation. The precise scope and content of the obligation to international assistance and cooperation remains undecided. It is thereby not completely clear which developed States should assist which developing States, how much they should contribute and with which means, financial, human, technical assistance or other.

In short, the principle of common or differentiated responsibilities, as elaborated in international environmental law, can be translated as *common and differentiated obligations* under the ICESCR. These obligations are elaborated and monitored by the Committee on Economic, Social and Cultural Rights. This elaboration does however remain somewhat abstract. The Committee acknowledges that there may be differentiated obligations, but it does not further substantiate them. It would be difficult for the Committee to elaborate a more concrete interpretation of the differentiated obligations in relation to all the different areas of economic, social and cultural rights and for all the different States parties. The Committee's tools, mainly the reporting procedure and General Comments, might also not be very suitable for such concreteness. The individual communication procedure might be another opportunity to give

more concrete meaning to these obligations, since individual cases concern more specific situations. However this procedure has not yet developed to its full potential due to its relatively recent establishment, and the fact that the cases concern specific situations may also limit their relevance for other cases. The substantiation of the notion of common and differentiated responsibilities should primarily lie in the hands of States, for instance in the UN Human Rights Council. However, such a debate may be hampered by the ongoing discussion among States on the nature of economic, social and cultural rights.

That States do not always respect their common nor their differentiated obligations under the ICESCR, and that the enforcement power of the Committee is very limited, can be illustrated by the response by States to the COVID-19 pandemic. The COVID-19 pandemic has had, just as climate change and environmental degradation, enormous effect across borders and on all people(s). Many States, developed and developing, had to reallocate resources and take retrogressive measures to fight the pandemic. Clearly many States parties struggled to respect, protect and fulfil economic, social and cultural rights, in particular the right to health. But most strikingly, the common and differentiated obligations related to international assistance and cooperation were hardly fulfilled. The Committee in vain called upon developed States to assist developing States in fighting the pandemic. It has for instance criticized the unhealthy race among States for COVID-19 vaccines, calling it “vaccine nationalism” and urging States to fulfil their obligation under the ICESCR in terms of international cooperation and assistance in order to promote universal and equitable access to vaccines for COVID-19 globally.⁹⁶ It shows that common and differentiated obligations may be a concept that can be applied to the ICESCR in theory, but that it does not guarantee that States will also respect and fulfil these obligations in practice, nor that economic, social and cultural rights are actually realized for all.

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⁹⁶ Committee on Economic, Social and Cultural Rights, *Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property*, 23 April 2021, UN Doc. E/C.12/2021/1, paras 3–5; Committee on Economic, Social and Cultural Rights, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 15 December 2020, UN Doc. E/C.12/2020/2, paras 9–11.

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Prof. Dr. Yvonne Donders is Professor International Human Rights and Head of the Department of International and European Public Law at the University of Amsterdam. She is grateful to Ms. Dominika Leitane who provided very helpful assistance in the selection and analysis of the work of the Committee on Economic, Social and Cultural Rights.