

# Human Rights Budgeting: Making Governments Accountable for Economic, Social and Cultural Rights

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## Abstract

Making governments accountable for economic, social and cultural rights (ESCR) has been a major challenge. This article proposes the use of human right budgeting (HRB) as a tool to overcome this problem. It highlights the tight connection between national budgets and governments' obligations for ESCR, which demonstrates the importance of HRB to be a legal requirement. Since the legal status of HRB is not explicitly stipulated in international instruments, HRB is a legal requirement based on the rules of interpretation of international law as well as the law-making function of the general comments by the ICESCR Committee. Accordingly, HRB's legal status is protected under different legal frameworks, ranging from the ICESCR to the ICCPR. To strengthen HRB's legal position, alternatives to track governments' accountability are also examined. Since each of the alternatives contains weaknesses which can be repaired by HRB, HRB as a legal requirement is not only effective on its own but supplemental to other existing tools.

## Keywords

Human Rights Budgets - Public Policies - National Budget Allocation - Accountability - Economic, Social and Cultural Rights - Progressive Realization - Minimum Core - Obligation to Fulfil - Freedom of Expression.

## 1. Introduction

International interest in economic, social and cultural rights (ESCR) has grown substantially in recent years.<sup>1</sup> As a result, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted with the intention to set up a legal framework for these rights. One of the most disputed topics relating to the interpretation of the content of the Covenant is the issue of making governments accountable for ESCR.<sup>2</sup> To define criteria of measurements for governments' accountability towards ESCR, ICESCR sets out immediate and progressive duties.<sup>3</sup> However, measurements for the duties remain vague.<sup>4</sup> Therefore,

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<sup>1</sup> Colin Harvey and Eoin Rooney, 'Integrating Human Rights? Socio-Economic Rights and Budget Analysis' (2010) 3 *EHRLR* 266, 266.

<sup>2</sup> Michael Dennis and David Steward, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be An International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' [2004] 98 *AJIL* 462, 464.

<sup>3</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 *UNTS* 781, Article 2.

it has been a challenge to justify whether or not governments have been fulfilling their obligations.

This paper proposes the use of human rights budgeting (HRB) as a tool to track governments' accountability toward ESCR. HRB is the practice of states using human rights as standards in allocating national budgets in order to ensure that they are fulfilling their duties towards ESCR.<sup>5</sup> Furthermore, HRB would provide concrete evidence for tracking governments' performances before judicial and non-judicial mechanisms for protecting ESCR. This paper focuses exclusively on ESCR for two reasons. Firstly, ESCR require a major commitment of resources compared to civil and political rights.<sup>6</sup> Secondly, among all the fundamental human rights as recognized in the Universal Declaration of Human Rights (UDHR)<sup>7</sup>, ICESCR has received significant criticism regarding the 'nature, status and characteristics' of these rights in identifying states' obligations.<sup>8</sup>

In order to support the proposal of using HRB to make governments accountable for ESCR, the paper poses three main research questions and is structured in the order of these questions. First, why do we need HRB? To answer this question, the article will focus on the role national budgets play in public-policy making and their link to states' obligations for ESCR. It highlights the fact that national budget allocation as a policy-making function of governments is able to reflect governments' performance in realizing ESCR.

The second research question, which is the key focus of this paper, is whether or not HRB is a legal requirement. The paper presents the background arguments for the legality of HRB under two main pillars, one pillar being the rules on interpreting treaty provisions provided in the Vienna Conventions on the Law of Treaties,<sup>9</sup> the other pillar being the 'law-making' function of General Comments by the Committee.<sup>10</sup> The paper then consolidates the legal status of HRB by analyzing the extent to which HRB is a legal requirement. The extent is based on article 2.1 of ICESCR, the 'obligation to fulfill' as well as the 'minimum core' obligation of state parties. Beyond ESCR related frameworks, the article also looks at the rights to freedom of information under the International Covenant on Civil and Political Rights (ICCPR)<sup>11</sup> to argue for the legal status of HRB.

The last part of this paper aims to identify the necessity of HRB. This covers the last research question: what are the alternative ways of making governments accountable for ESCR? In responding to the question, current tools and mechanisms that are widely used in tracking governments' performances in the field of ESCR will be evaluated. They include, but are not limited to, indicators and benchmarks, special procedure and states' reports, as well as litigation. From this evaluation, the article will indicate the weaknesses of the current tools and argue that HRB as a legal requirement can compensate for the weaknesses and become a concrete and powerful tool to protect ESCR.

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<sup>4</sup> Christian Courtis, *Courts and the Legal Enforcement of ESC Rights* (2008) International Commission of Jurists, 15, para 1.

<sup>5</sup> Jim Shultz, 'Promise to Keep Using Public Budgets as a Tool to Advance Economic, Social And Cultural Rights' (2002) Fundar-Center for Analysis and Research 1, 30.

<sup>6</sup> Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under The International Covenant on Economic Social and Cultural Rights' [1987] 9 HRQ 156, 161.

<sup>7</sup> UN General Assembly, Universal Declaration of Human Rights (10 December 1948, 217 A (III)).

<sup>8</sup> See Dennis and Steward (n 2), 466.

<sup>9</sup> United Nations, Vienna Convention on the Law of Treaty (adopted in 1969) United Nations, Treaty Series, vol. 1155, p. 331,

<sup>10</sup> Conway Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comments' (2008) Center for Human Rights and Global Justice Working Paper Number 17, NYU School of Law, 13.

<sup>11</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

## 2. Why Do We Need Human Rights Budgeting?: Background Information on National Budgets and their Roles in Public Policies

Public budgets are the blueprints for how governments raise and spend public funds needed for the policies and programs which will translate their priorities into action.<sup>12</sup> According to the civil society organization International Budget Partnership, Disha is the first civil society organization that put forth the idea of gathering budget data to persuade the Indian government to improve the lives of the poor.<sup>13</sup> Before this initiative, Disha submitted all possible arguments to the Indian government to force them to change their policies, but none of their efforts were successful.<sup>14</sup>

So far, civil society has played an important role in promoting the connection between rights and public budgets.<sup>15</sup> They have been advocating as well as putting pressure on governments through campaigns, research and litigation. Some of the most prominent organizations advocating the issue are the Human Rights Budget Work (IHRIP),<sup>16</sup> the International Budget Partnership (IBP)<sup>17</sup> and the International Network of Economic, Social and Culture Rights (ESCR-net).<sup>18</sup>

Despite the important work that civil society has put into pursuing ESCR budgeting,<sup>19</sup> it is important to not look upon HRB solely as the work of civil society, but also as an obligation of states under international law. The reason for this, as Kamminga has argued, is that the status of civil society makes it questionable how effective it can be in positively changing human rights legislation.<sup>20</sup> The implication of this argument is that no matter how much civil society does, the effect on ESCR will never be as direct and effective as scenarios where state parties actively implement HRB.<sup>21</sup> Robert Blitt poses another concern relating to the tension between civil society and governments. He suggests that if HRB is conducted and claimed only by civil society, governments might be put in passive positions.<sup>22</sup> In other words, governments would rely on civil society to do the work. Therefore, rather than only from civil society, the importance of budgeting national finance should be seen also from the legal perspective.

Expanding on the risk of viewing HRB as the responsibility of civil society, it is important to remember that human rights and public finance have had a close relationship even before campaigns and actions by these organizations. In fact, the role of public finance existed in earlier understandings of human rights.<sup>23</sup> Rory O'Connell has pointed out that discussions about national revenue and expenditure were often attached to talks about human rights.<sup>24</sup> According to O'Connell, the two famous rights advocates, Thomas Paine

<sup>12</sup> See <<http://internationalbudget.org/who-we-are/history/>>, accessed 1 March 2014.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ann Blyberg, *Government Budgets and Rights Implementation: Experience from Around the World* (CUP 2014) 21.

<sup>16</sup> See <http://www.humanrightsbudgetwork.org/> accessed 1 March 2014.

<sup>17</sup> See <http://internationalbudget.org/> accessed 1 March 2014.

<sup>18</sup> See <http://www.escr-net.org/cat/i/1313> accessed 1 March 2014.

<sup>19</sup> Andy Norton and Diane Elson, 'What's Behind The Budget? Politics, Rights and Accountability in the Budget Process' (2002) Overseas Development Institute, 60.

<sup>20</sup> Menno Kamminga, 'The Evolving Status of NGOs under International Law: A Threat to an Inter-State System' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP, Oxford 2005) 94.

<sup>21</sup> See Dennis and Steward (n 2) 486.

<sup>22</sup> Robert Charles Blitt, 'Who Will Watch the Watchdogs? Human Rights Nongovernmental Organization and the Case for Regulation' (2005) *Buffalo Human Rights Law Review*, Vol 10, 261.

<sup>23</sup> Aoife Nolan, Rory O'Connell, Colin Harvey, *Human Rights And Public Finance* (Hart Publishing, 2013) 7.

<sup>24</sup> Rory O'Connell et.al, *Applying an International Human Rights Framework to State Budget Allocations* (Routledge 2014) 9.

and Immanuel Kant, had already illustrated the historic relationship between human rights and public finance through their 'progressive arguments about finance and rights'.<sup>25</sup>

The shift from focusing on judicial to non-judicial institutions for protecting rights also suggests the use of HRB. Mira Dutschke, Eoin Rooney, Aoife Nolan, Rory O'Connell and Colin Harvey point out that, 'the implementation of ESCR needs a different approach rather than judicial protection'.<sup>26</sup> It especially requires 'political aspirations'.<sup>27</sup> The political implementation imposed here suggests the requirement of using public policies, including budget-related decisions as one of the measurements for ESCR. Traditionally, designing and distributing national budgets are often seen as purely a technical process.<sup>28</sup> But national budget allocation and expenditure, in fact, are political processes that involve both legislature (Parliament, Congress, National Assembly) and executive (Government).<sup>29</sup> It functions in the way that budget proposals produced by the executive body are approved by legislature before they can be implemented by the executive as a formal plan.<sup>30</sup> The tight relationship between executive and legislature in the national budgeting process suggests that national budgeting is a form of public policy that states use to function as nations. In reality, public policies can reflect the direction in which governments want to drive their countries.<sup>31</sup> They also reveal how governments want to implement the law decided by the legislature,<sup>32</sup> through making 'political choices'.<sup>33</sup>

The Office of the United Nations High Commissioner for Human Rights confirms this argument, stating: 'budgets are fundamental government tools for policy implementation and the best way to ascertain if national development priorities on paper are the actual ones in practice'.<sup>34</sup> Scholars also share this view, recognizing that public budgets can affect all kinds of issues in a country, including social security, health, education and so on.<sup>35</sup> Additionally, civil society acknowledges that 'a national budget reflects a government's true social and economic policy priorities' and that 'a budget is the most important economic policy instrument any government produces'.<sup>36</sup>

Therefore, in order to pursue HRB as a tool for implementing ESCR, HRB needs to be understood beyond the boundaries of civil society. It should put governments at the forefront. The governments, with their power of execution, should perform HRB themselves in cooperation with civil society and their citizens. While ESCR are legal obligations imposed on states under international laws, especially the ICESCR and other equivalent treaties, public budgets have the capacity to reflect how states implement their ESCR obligations. The details of how public finance distribution relate to governments' obligations under ESCR related legal provisions will be examined in the next section.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 9.

<sup>28</sup> See Norton and Elson (n 19), 5.

<sup>29</sup> Vivek Ramkumar and Issac Shapiro (eds), *Guide to Transparency in Government Budget Report: Why are Budget Reports Important and What should they Include?* International Budget Partnership 6.

<sup>30</sup> See O'Connell et.al (n 24) 14.

<sup>31</sup> See O'Connell et.al (n 24) 14.

<sup>32</sup> See Shultz (n 5), 30.

<sup>33</sup> See O'Connell et al (n 24) preface. xv.

<sup>34</sup> Office of the United Nations High Commissioner for Human Rights, 'Human Rights Budget Monitoring, Analysis and Advocacy (2010), OHCHR, 4, para 1.

<sup>35</sup> See Schultz (n7) 10, and O'Connell et al (n 24) preface, xv-xvi.

<sup>36</sup> Fundar, IBP and IHRIP, 'Dignity Counts' (2004) 29.

### 3. Is Human Rights Budgeting a Legal Requirement?

'Human rights cannot be realized without resources'.<sup>37</sup> A crucial question is what role HRB plays in the international law system. To answer this question, it is important to look at different frameworks for defining the legal obligations imposed by ESCR.<sup>38</sup>

Before each framework is examined we should be realistic from the onset by acknowledging that HRB is not explicitly mentioned in the wordings of any legal provision under international law on ESCR. Because HRB does not appear in writing, one might cast doubt on its legal status as well as its legal enforcing ability. In her discussion of the relationship between governments' budgets and the implementation of rights, Ann Blyberg admits that the non-legal status of budget work is an unfortunate fact that prevents budget work from being implemented and enforced as a legal obligation of governments.<sup>39</sup> Likewise, efforts of scholars so far in claiming the use of HRB for ESCR have been limited to recommendations and encouragements.<sup>40</sup> Unfortunately, the views of Blyberg and others fail to take into consideration the legal status of HRB.<sup>41</sup>

Even though HRB is not specifically mentioned in the ICESCR, the arguments for the legality of HRB can be placed under two main pillars. The first is the rules on interpreting treaty provisions provided in the Vienna Convention on the Law of Treaties. The second pillar is the function of General Comments from the Committee on Economic, Social and Cultural Rights (the Committee or CESCR).

#### A. Rules of Interpretation of Human Rights Treaties

Under the first pillar, the legal status for extended requirements like HRB can be established through the use of Article 31 of the Vienna Convention on the Law of Treaties which legally opens the doors for interpreting treaty provisions.<sup>42</sup> It grants legal status for interpretation requirements attached to legal obligations as long as they are 'interpreted in good faith'.<sup>43</sup> In detail, the Convention stipulates the supplementary means of interpretation, namely that, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object* and *purpose*'.<sup>44</sup>

Alston and Quinn have raised a concern that the principle of 'good faith' is not strong enough to provide a ground for legal interpretation; they argue that '[the] acceptance of the principle of good faith ... renders such an interpretation impossible'.<sup>45</sup> Nevertheless, the 'good faith' principle in this case can be measured by two conditions that are also set out in the article. The conditions are: (i) suitability to the original meaning of the treaty in terms of its *objects*, and (ii) accordance to the original meaning of the treaty in terms of its *purposes*. If one takes the two conditions to test whether HRB is a legal obligation from interpreting ICESCR, HRB arguably satisfies these two conditions. Related to the purpose of ICESCR, the use of HRB is to protect and promote ESCR of human beings.<sup>46</sup> Hence its purpose is compatible with that of its original treaty. HRB also directs towards state parties' obligations in complementing the duties set out in ICESCR (Article 2.1). In this case, HRB especially

<sup>37</sup> See Nolan et al (n 23) 13.

<sup>38</sup> See O'Connell et al (n 24) 63.

<sup>39</sup> See Blyberg (n 15) 23.

<sup>40</sup> See for example O'Connell et.al (n 24); Ramkumar and Shapiro (n 29); Norton and Elson (n 19); Harvey and Rooney (n 1); Shultz (n 5).

<sup>41</sup> See Harvey and Rooney (n 1), O'Connell et al (n 24), and Fundar (n 33).

<sup>42</sup> Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2002) 74.

<sup>43</sup> Vienna Convention on the Law of Treaties 1969, Article 31.1.

<sup>44</sup> Vienna Convention on the Law of Treaties 1969. Emphasis added

<sup>45</sup> See Alston and Quinn (n 6) 163.

<sup>46</sup> See Preamble, ICESCR 1966.

focuses on the duty of the states to make national budgets comply with realizing ESCR. Since HRB can meet all the conditions set out in the rules on interpreting treaty provisions provided in the Vienna Convention it is arguable that HRB should be understood as a legal requirement.

Besides the ICESCR, the legal status of HRB can be promoted using the General Comments by the Committee. Unlike courts' decisions or treaty provisions, comments issued by the Committee are not legally binding upon states.<sup>47</sup> Accordingly, one might argue that what the Committee requires from state parties (through the Comments) is not to be imposed as states' obligations. On this point, Magdalena Sepulveda argues that 'although the interpretations of [the Committee] may not have legally binding status, it is beyond doubt that they do carry considerable legal weight'.<sup>48</sup> Conway Blake, Mira Dutschke, Eoin Rooney, Aoife Nolan, Rory O'Connell and Colin Harvey go even further than Sepulveda when they argue that the General Comments by the CESCR have 'law-making' functions.<sup>49</sup> Blake states that '[The General Comment] is widely considered as authoritative interpretative statements, and a device through which treaty bodies articulate their understanding of human rights norms'.<sup>50</sup> Mira Dutschke, Eoin Rooney, Aoife Nolan, Rory O'Connell and Colin Harvey also justify this statement by recognizing that the General Comments have an important 'law-making' function by providing extensive interpretations of the provisions in ICESCR.<sup>51</sup> Their arguments can be understood as implying that General Comments by the Committee can impose legal requirements towards state parties in order to ensure the protection and promotion of ESCR. Therefore, if HRB is proven to be suggested in the General Comments, HRB should not be seen as just a recommendation, but as a legal obligation of states. The details on this point will be presented in the following sections, which focus on specific legal frameworks where HRB is protected as a legal requirement.

### ***B. Human Rights Budgeting as a Legal Requirement through the International Covenant on Economic, Social and Cultural Rights***

The link between HRB and states' ESCR has also been examined by a number of scholars, including United Nations Special Rapporteurs.<sup>52</sup> However, there have been few arguments for the consideration of HRB as a legal requirement to be imposed by the legal provisions above. In other words, the arguments so far seem limited to the forms of suggestions and recommendations. In order to understand the provisions under ICESCR and its implications for HRB, the paper will refer to supporting documents such as General Comments, reporting guidelines, the work of UN special rapporteurs and case law references.

The first condition for HRB as a legal requirement lies under the ICESCR, specifically Article 2(1), which states that:

[E]ach State Party to the present Covenant undertakes to take steps ... 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.<sup>53</sup>

<sup>47</sup> See Sepulveda (n 42), 1.

<sup>48</sup> Ibid.

<sup>49</sup> See Blake (n 10) 13; and O'Connell (n 24) 62.

<sup>50</sup> Ibid.

<sup>51</sup> O'Connell (n 24) 62.

<sup>52</sup> See Sepulveda (n 42), Kishore Singh, Report of the Special Rapporteur on The Right to Education, A/HRC/23/35, paras 59-62, and Olivier De Schutter, Report of The Special Rapporteur on the Right to Food, A/HRC/22/50/Add.1, paras 39-40.

<sup>53</sup> See ICESCR.

In the above provision, there are different concepts that are worth considering as they carry direct links to HRB as a legal requirement.<sup>54</sup> First and foremost is the requirement of using 'economic' resources in order to fulfill ESCR. Quite clearly, the wording of this provision does not just refer to 'resources' in general but goes further to emphasize 'economic' and 'technical' resources. The implication of this emphasis is that economic information is needed in order to prove that states are realizing ESCR. 'Economic resources' of a state are managed by fiscal policies.<sup>55</sup> Therefore, the term 'economic resources' already expresses the link with national budget in the wording of article 2.1. Even though the emphasis on 'economic resources' links HRB and states' ESCR obligations, there are still a number of related issues raised by the above provision, relating to the definition of 'maximum', 'resources' as well as 'taking steps':

The term 'maximum available resources' suggests the use of HRB as a legal requirement. Norton and Elson criticize the vague format of responsibilities imposed on state parties in ICESCR. They state that, 'no criteria have been developed for defining 'maximum available resources'.<sup>56</sup> This is a valid critique as there is no further explanation when defining the terms – not even in General Comment No. 3.<sup>57</sup> However, the lack of clarity in the law can be viewed as an advantage because it opens doors for other legalizing requirements that are not explicitly stated in the wording of the legal provision. As the Bangalore Declaration and Plan of Action verifies:

Specifying those aspects of economic, social and cultural rights, which are more readily susceptible to legal enforcements, requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation ...<sup>58</sup>

What can be understood by this declaration is that the need for legal skills and 'imagination' should also be seen in light of a need to define legal obligations. It suggests that even though HRB is not explicit in the wording of article 2.1, HRB is seen as a legal obligation because it is needed in order to clarify other obligations that are more obvious. In this case, the other obligations would be the responsibility to 'use maximum available resources', and 'progressively realize' ESCR.

Furthermore, some argue that the focus on public finance does not fully reveal a government's attitude toward the realization of human rights.<sup>59</sup> Sigrun Skogly provides one particular example. According to Skogly, there are other ways of addressing people's rights and needs besides merely looking at budgets.<sup>60</sup> These alternatives include, 'the application of natural, human, educational and regulatory resources'.<sup>61</sup> In other words, she suggests that the use of other resources, such as human and regulatory resources, is sufficient. At a conference held by the Committee on the Rights of the Child, Mr Kamal Siddiqua – the keynote speaker of the conference, shared this view, arguing that, 'available resources refer

<sup>54</sup> See Harvey and Rooney (n 1) 270.

<sup>55</sup> See OHCHR (n 34) 32.

<sup>56</sup> See Norton and Elson (n 19) 21.

<sup>57</sup> CESCR, General Comment No. 3, Natures of States' Obligations, UN Doc E/1991/23.

<sup>58</sup> Bangalore Declaration and Plan of Action 1995, para 18(2).

<sup>59</sup> See Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realization: A Question of Quality as Well as Quantity?' [2012] HRLR 12:3, 393:420 See also Radhika Balakrishnan et al, *Maximum Available Resources and Human Rights: Analytical Report* (2011) Center for Women's Global Leadership - Rutgers, The State University of New Jersey, 1; Norton and Elson (n 19).

<sup>60</sup> See Skogly (n 59) 393-420.

<sup>61</sup> See Balakrishnan et al (n 59) 1.

not only to financial resources, but also to human and organizational resources'.<sup>62</sup>

The utility of these alternatives is undeniable. However, the alternative methods to replace budget analysis are, in fact, direct components of national budgets distribution. In other words, they do not mean anything without allocation in national budgets. Based on Skogly's view, one might argue that it is enough to examine the way governments use human resources for children's rights, for example. This is an accurate point, but not a comprehensive one, because even human resources need financial support from national budgets to pay for the labor of personnel. And this financial expenditure, as any other national expense, will be revealed in a public budget.

Scholars Andy Norton and Diane Elson disagree with the argument that national budgets can accurately reflect governments' performances towards ESCR. Even though they acknowledge the difficulties of not having criteria developed for defining 'maximum available resources', they believe that, 'the principle of progressive realization [...] cannot be regarded as simple justiciable claims for all on the public budget'.<sup>63</sup> However, the authors do not explain what the claims might rely upon if not the public budget.

In addition to the concept of maximum available economic resources, there is another point that supports the legal status of HRB through article 2.1. This is based on the legal obligation upon state parties to make use of, 'all appropriate means, including the adoption of legislative measures'. There are two interrelated layers of the obligation that must be explored here. First, for a means (HRB) to be proven appropriate it would have to constitute a legal requirement according to the provision in 2.1. Second, the emphasis on adopting 'legislative measures' as one of the 'appropriate means' would also include HRB. This is because HRB can, itself, be categorized as a legislative measure. An understanding of the above obligation from either of the layers grants an international legal status for HRB.

In the first layer, which focuses on the appropriateness of HRB for ESCR realization, the clarification of General Comments should be considered. According to the General Comments, 'appropriate measures' for the purposes of article 2.1 can be various as long as the measures support governments in conducting their duties. They state that, 'while each state party must decide for itself which means are the most appropriate under different circumstances with respect to each of the rights, the 'appropriateness' of the means chosen will not always be self-evident'.<sup>64</sup>

Although the Committee did not try to limit which measures would constitute legal requirements attached to the obligations in Article 2.1, they did highlight 'administrative, financial, educational and social measures'.<sup>65</sup> While public budgets are defined as mechanisms for allocating public financial resources,<sup>66</sup> it is obvious that HRB can be categorized, at least, as a financial measure as highlighted by the Committee. According to Norton and Elson, HRB or public finance can, beyond the financial matters, be seen as social and administrative functions of government.<sup>67</sup>

Because both the purpose and functions of HRB fit perfectly with the measurement identification of the Committee outlined in General Comment No. 3, it is arguable that HRB is a legal requirement for the purpose of the obligations under Article 2.1.

The legal status of HRB is not only suggested through the first layer of the obligation as discussed above, but also lies under the requirement of adopting legislative measures. This requirement is further stressed by the Committee as, 'highly desirable and in some cases ... indispensable' in regard to ESCR duties of state parties.<sup>68</sup> On the surface, HRB

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<sup>62</sup> Committee on the Rights of the Child, Day of General Discussion – Resources for the Rights of The Child: Responsibility of States, 46th Session' (2007), para 6, also cited in Nolan et.al (n 23) 15.

<sup>63</sup> See Norton and Elson (n 19) 31.

<sup>64</sup> CESCR, General Comment No. 4, The right to adequate housing, UN Doc E/1992/23, para 4.

<sup>65</sup> CESCR, General Comment No. 3, Natures of States' Obligations, UN Doc E/1991/23, para 7.

<sup>66</sup> See Shultz (n 5) 7.

<sup>67</sup> See Norton and Elson (n 19) 5.

<sup>68</sup> See CESCR (n 57), para 3.



seems to fall completely within the executive's authority. However, on scrutinizing the national budgeting circle,<sup>69</sup> HRB is actually a legislative matter before it is used as an executive means of government. This argument is widely shared by scholars.<sup>70</sup> For example, Ramkumar and Shapiro point out that even though it is the government that puts a budget plan together, it then has to go through legislature for approval before the government can distribute it.<sup>71</sup> Or as Norton and Elson explain: 'the legislature [...] is responsible for officially enacting the budget – or approving it at the formal legal level.'<sup>72</sup> This stage begins when the executive formally proposes the budget to the legislature'.<sup>73</sup> Hence, it is arguable that HRB should be considered as a legislative measure and should be treated as a legal requirement just like other 'legislative measures' as stressed in article 2.1.

Occasionally, courts successfully impose HRB as a legal requirement regardless of the fact that ICESCR does not explicitly stipulate this requirement. The case *Paschim banga Khet Samity v. State of West Bengal* (India) is an example.<sup>74</sup> In this case, Hakim Sheikh, a member of the Paschim banga Khet Samity, fell off a train and suffered serious head injuries. He was brought to seven state hospitals but none of them were able to provide emergency treatment for him due to a lack of bed space and trauma and neurological services.<sup>75</sup> In its judgment, the Indian Supreme Court found that public funds were needed for providing these facilities. More importantly, the court insisted that, 'the matter of allocation of funds for medical services' is an unavoidable state obligation.<sup>76</sup> However the courts will not be able to impose the obligation of HRB on states in every case. Section C will discuss this issue in greater detail.

### **C. Obligation to fulfill: Human Rights Budgeting requirements.**

As discussed in the previous section, the legal obligation for HRB is derived from Article 2.1 of ICESCR, which imposes obligations for state parties. This Article is not the only framework that one can rely on in order to strengthen the argument for HRB as a legal requirement. There is another important framework that outlines obligations for states to implement ESCR: the so-called 'tripartite typology'.<sup>77</sup> According to this tripartite typology, state parties carry three levels of duties: obligations 'to respect', 'to protect' and 'to fulfill'.<sup>78</sup> Based on this framework and in particular the obligation to fulfill, HRB can be understood as a legal requirement imposed on states.

The first official document to show the development of the typology in the field of ESCR is the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997.<sup>79</sup> This document explains the concept of the obligation to fulfill imposed on state parties: 'The obligation to fulfill requires states to take appropriate legislature, administrative,

<sup>69</sup> See Ramkumar and Shapiro (n 29), 4.

<sup>70</sup> See Ian Lienert, Role of the Legislature in Budget Processes (2010) International Monetary Fund, 3-5; Office Of The high commissioner for Human Rights, Human Rights in Budget Monitoring, Analysis and Advocacy (2010) 73; and Ramkumar and Shapiro (n 29) 4-5.

<sup>71</sup> See Ramkumar and Shapiro (n 29), 50.

<sup>72</sup> See Norton and Elson (n 19) 22.

<sup>73</sup> Ibid.

<sup>74</sup> Indian Supreme Court, *Paschim banga Khet Samity v. State of West Bengal* (1996) AIR SC 2426.

<sup>75</sup> Ibid, para 2-3.

<sup>76</sup> Ibid, para 16.

<sup>77</sup> See Ida Elisabeth Koch, *Human Rights as Indivisible Rights The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 14-17.

<sup>78</sup> See Sepulveda (n 42) 161; Office of the United Nations High Commissioner for Human Rights, The Rights to Adequate Food – Fact Sheet Number 34, 17-19.

<sup>79</sup> International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997; Olivier De Schutter, *International Human Rights Law* (CUP 2010), 243, para 3.

budgetary, judicial and other measures towards the full realization of [ESCR].<sup>80</sup> The advancement of states' obligations in the Maastricht Guidelines, in comparison with ICESCR, is scrutinized by Matthew Craven and Manisuli Ssenyonjo. While the language of ICESCR seems, 'to defy any real sense of obligation' as perceived by Craven,<sup>81</sup> Ssenyonjo asserts that the language of the Guidelines is seemingly more certain in outlining the nature and scope of both legal obligations and violations conducted by states.<sup>82</sup> He rightfully argues that because the obligations under ICESCR only impose on states' an obligation to use 'all appropriate means' without realizing HRB as one of the means, the Guidelines explicitly compensate for this limitation.

From the 'violation approach', according to scholar Audrey Chapman, the Guidelines define violations of ESCR as failures of states to fulfill the rights.<sup>83</sup> From this perspective, the failure of a state to fulfill the rights can be equated to its unsuccessfulness in taking appropriate measures, including budget related manners. Accordingly, using budgetary measures is one of the legal requirements imposed on state parties.

One limitation of protecting the legal status for HRB through the Maastricht Guidelines is that the document is not legally binding.<sup>84</sup> Therefore, one might find the budgetary measure required by the Guidelines unconvincing. On this point, Ssenyonjo argues that regardless of the nonbinding nature of the Guidelines, they still provide 'a subsidiary means' for the interpretation of the Covenant as 'teachings of the most highly qualified publicists of the various nations'.<sup>85</sup> Based on this view, the Guidelines (with their legal interpretations) provide the same function as the General Comments by the Committee. While the General Comments are argued to have a 'law-making function',<sup>86</sup> the same argument can be used for the Guidelines in protecting the legal requirement to take 'budgetary measures'.

General Comments by the Committee on specific rights in the group of ESCR have repeatedly shown the role of budgetary measures in fulfilling states' duties, either explicitly or implicitly. General Comment No. 13 on the right to education is one such example. In this document, the Committee used the obligation to fulfill to ensure budgetary measures from states. Specifically, the Committee requested states to 'fulfill (provide) ... resources for curricula, build classrooms, provide materials, train teachers and pay them domestically competitive salaries'.<sup>87</sup> All of these needs require financial resources.

Other General Comments also require states to allocate financial resources in order to fulfill rights. Examples are the requirement to 'train health care staff' in General Comment No. 14 on the rights to highest standards of health,<sup>88</sup> or the requirement to provide 'free and low cost water'<sup>89</sup> in the General Comment No. 15 on the right to water. The specific budgetary requirements by the Committee through General Comments illustrate the close relationship between the obligation to fulfill and the budgetary requirements.

Even though some scholars do not explicitly state that HRB is a legal requirement

<sup>80</sup> Ibid para 6.

<sup>81</sup> Matthew Craven, 'The Justiciability of Economic, Social and Cultural Rights', in R. Burchill et al *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law* (University of Nottingham Human Rights Law Centre 1999), 1–12, cited in Manisuli Ssenyonjo, 'Reflection on States Obligation with Respect to Economic Social and Cultural Rights in International Human Rights Law' (2011) IJHR, 8.

<sup>82</sup> See Ssenyonjo (n 81) 8.

<sup>83</sup> Audrey Chapman, 'The Status of Efforts to Monitor ESCR', in Shareen Hertel and Lanse Minkler (eds), *Economic Rights, Conceptual, Measurement and Policy Issues* (CUP 2007), 155.

<sup>84</sup> See Ssenyonjo (n 81).

<sup>85</sup> See Ssenyonjo (n 81) 9.

<sup>86</sup> See Blake (n 10).

<sup>87</sup> CESCR, General Comment No.13, The Rights to Education UN Doc E/C.12/1999/10 (1999), para 50.

<sup>88</sup> CESCR, General Comment No.14, The Rights to Highest Attainable Standard of Health UN Doc E/C.12/2000/4 (2000), para 25.

<sup>89</sup> CESCR, General Comment No.15, The Rights to Water UN Doc E/C.12/2002/11 (2002), para 27.

under the obligation to fulfill as discussed above, they widely confirm the essential role of using budgetary measures in fulfilling ESCR. Ida Elisabeth Koch points out that among the three levels of duties, the obligation to fulfill tends to be 'the most resource demanding and often also the one that raises most questions regarding a precise description of the obligation'.<sup>90</sup>

Mira Dutschke, Eoin Rooney, Aoife Nolan Rory O'Connell also stress this view when writing that the obligation to fulfill is not only resource-demanding but also resource-dependent.<sup>91</sup> While acknowledging the efforts of the scholars in their arguments for the use of HRB as a legal measure to fulfill ESCR, it is important to recognize the limitation of their approaches. The problem here is that their approaches are limited to making HRB a recommended measure instead of a legal measure required by the obligation to fulfill.

Despite the limitations of the relevant literature, courts appear to interpret the budgetary measurement as a legal requirement attached to the obligation to fulfill. In *Yated and others v. the Ministry of Education* in 2002, the Supreme Court of Israel ruled that the Israeli government has to arrange its budget to pay for the services that facilitate children with disabilities (especially, children with Down's syndrome) to be able to study in an 'integrated regular educational setting'.<sup>92</sup> The Court in this case even ordered the government to fulfill the right to education of children with special needs by applying 'budget increase' mechanisms.<sup>93</sup>

Another example of how a court imposes the obligation to HRB through the obligation to fulfill is in the *Government of South Africa v. Grootboom and others*.<sup>94</sup> The Court in this case considered if the government fulfilled its obligation of the rights to housing by taking government's budgetary resources into account: 'A reasonable program ... must clearly allocate responsibilities and tasks to different spheres of government and ensure that the appropriate financial resources are available.'<sup>95</sup> What can be concluded here is that, in light of the obligation to fulfill, 'budgetary measures' can be interpreted as a legal requirement of states. As argued here, the Maastricht Guidelines and the General Comments also support this position. It is also confirmed by scholarly research and case law as discussed above.

#### **D. Looking for a Response to 'Minimum Core'**

As discussed in section C, Article 2.1 of the ICESCR lays out the obligations in the form of 'taking appropriate measures' to achieve 'progressively the full realization'. This form of obligation is a central aspect of states' obligations,<sup>96</sup> which lie under the condition of using 'maximum available resources'. Here, the reference 'available resources', in many ways, reflects a recognition that the realization of these rights essentially depends on resources being available for state parties. The formulation of Article 2.1 contains a risk that states rely on their resource constraints to violate international human rights treaties. To prevent the risk, The United Nations Committee on Economic and Social Rights articulated the concept

<sup>90</sup> Ida Elisabeth Koch, 'Justiciability Of Indivisible Rights' (2003) *Nordic Journal of International Law* 72: 3–39, 10.

<sup>91</sup> See O'Connell (n 24) 97.

<sup>92</sup> See Supreme Court of Israel, *Yated and others v. the Ministry of Education*, 2002, HCJ 2599/00, August 14, 2002, also cited in Courtis (n 4) 50, para 3.

<sup>93</sup> *Ibid*, para 10.

<sup>94</sup> See Constitutional Court of South Africa, *Government of South Africa v. Grootboom and others* (2000) CCT 11/00.

<sup>95</sup> *Ibid* para 39.

<sup>96</sup> See <http://www.ohchr.org/EN/Issues/ESCR/Pages/WhataretheobligationsofStatesonESCR.aspx>, accessed 20 March 2014.

of the minimum core with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability.<sup>97</sup>

Similar to the states' obligations set out in Article 2.1, the minimum core obligation is also unclear, controversial and open to interpretation. The main reason for this is that the concept contains no concrete definition for its core terms. For instance, how to calculate the 'maximum' and 'minimum' available resources.<sup>98</sup>

To interpret the 'minimum core', current scholars rely mostly on Article 2.1.<sup>99</sup> However, the interpretation of an unclear concept (minimum core) cannot be feasible and reasonable if based on other vague notions ('maximum available resources' and 'progressive realization'). Instead, the minimum core needs to be based on a clearer foundation. In providing this foundation, HRB will be able to justify the 'minimum core' obligation of state parties. In other words, if state parties are legally bound to do HRB, the requirement of minimum core could be both practical and justiciable. The close connection between minimum core as a legal obligation and HRB suggests that HRB is a legal requirement under international law.

In order to draw the connection between the notions of minimum core and HRB, it is important to understand what the 'minimum core' means and how it is stipulated in international human rights law. General Comment No. 3 expresses that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party'.<sup>100</sup> From the language of this article, it is clear that the Committee stays outside of state parties 'margin of discretion',<sup>101</sup> and lets the states decide what they can do to fulfill their treaty obligations. However, as mentioned earlier, the provision contains the risk that the 'margin of discretion' might allow state parties to violate ESCR based on the excuse of national resource constraints. Anticipating this issue, the General Comment stipulates that if a state fails to comply with its minimum core obligations, it has to prove that 'every effort has been made to use all resources it has to satisfy those minimum obligations' to defend itself from breaching its legal obligations.<sup>102</sup> Even though the Committee puts the 'burden of proof' on state parties, the provision is still impractical and unconvincing in preventing the risk that states will use resource constraints to avoid their obligations for ESCRs. As the 'minimum' standard of enjoyments of rights is undefined, it is difficult to justify if a state has made every effort of their resources. Therefore, it is important to use HRB as a means to define all the vague terms above.

The approach of using HRB to define 'minimum core' obligations of a state party is relatively new. So far, scholars tend to use minimum core and HRB to build their arguments mainly for the justifiability of state parties' obligations to realize ESCR.<sup>103</sup> However, in order to be justiciable, 'minimum core' obligations also need to be based on more concrete measures. HRB comes the closest to having that capacity.

Mira Dutschke, Eoin Rooney, Aoife Nolan, Rory O'Connell, in their recently published *Applying an International Human Rights Framework to State Budget Allocation*,<sup>104</sup> have commented on the link between the minimum core and HRB's ability to justify minimum obligations. They suggest that one should look at each right of the ESCR group and find minimum core provisions under specific General Comments for each right.<sup>105</sup> From the provisions, the authors draw the connection of the provision to HRB work. They believe

<sup>97</sup> Katharine Young, 'The Minimum Core of Economic Social and Cultural Rights: A Concept in Search of Content' Page 3 (2008) 33 YJIL, 113, 114.

<sup>98</sup> See Dennis and Stewart (n 2) 466.

<sup>99</sup> See O'Connell et.al (n 24), 80-86; Chapman (n 83), 152-155, and Sepulveda (n 42) 365-370.

<sup>100</sup> See ICESCR, para 10.

<sup>101</sup> Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, para 8.

<sup>102</sup> See ICESCR, para 8.

<sup>103</sup> See O'Connell (n 24) 80.

<sup>104</sup> See O'Connell (n 24).

<sup>105</sup> See CESCR, General Comment 12, The Right To Adequate Food, UN Doc E/C.12/1999/5, 12, para 14.

these provisions would provide grounds for human right budget analysis.<sup>106</sup> This view suggests the possible ability of HRB to determine a core obligation of each right. However, this approach fails to consider that the grounds set in the General Comments are also unclear. For example, the minimum core of the right to food is defined by General Comment 12, which consists of 'minimum essential food' that is sufficient, nutritionally adequate and safe.<sup>107</sup> Therefore, even if the link between minimum core and HRB was made, the suggestion of the authors would again fail because there is no practical way to justify whether or not states have made every effort possible to fulfill their obligations if HRB is not a legal requirement.

As of yet, the approach of asserting human rights budgets as a legal requirement in order to identify the minimum core obligation has not been explored by scholars. This paper takes this approach and concludes that HRB is, arguably a legal requirement based on the fact that the minimum core is a legal obligation and the decisive role HRB plays in making the minimum core meaningful and justiciable.

### ***E. Freedom of Information and Transparency***

So far, this paper has used different bases under ICESCR to argue for the legal status of HRB. In addition to all the ICESCR-based frameworks that suggest the justiciable status of HRB, there is another legal basis that is formed under the ICCPR. One might argue the irrelevance of the ICCPR to the field of economic and social rights, based on the fact that this Covenant only focuses on civil and political rights. However, such a separation and classification of rights is dangerous and no longer appropriate. Christian Tomuschat once posited that the idea of implementing rights separately is unfortunate as it leads to 'erroneous conclusions' about human rights.<sup>108</sup> In fact, civil and political rights cannot be meaningfully enjoyed in miserable economic, social and cultural conditions.<sup>109</sup>

The linkage between frameworks for ESCR and for civil and political rights is strongly emphasized in the Vienna Declaration and Program of Action 1993, which states that, 'all human rights are universal, indivisible and interdependent and interrelated'.<sup>110</sup> Therefore, no matter what right is governed by what treaty, it is important to use all available frameworks to protect the rights. In this case, the requirement for HRB as a legal means to fulfill ESCR can be interlinked with ICCPR's framework for freedom of information even though ICCPR does not directly govern ESCR and HRB. In other words, the fundamental right to freedom of information is a legal ground for states' obligations to publicize their national budgets.

The link between the HRB requirement and the obligation of governments to fulfill is translated based on the language of Article 19 of the UDHR, Article 19.2 of the ICCPR and General Comment No 34 of the Human Rights Committee which further explains the right to information.<sup>111</sup> Article 19.2 ICCPR states that:

Everyone shall have the right to freedom of expression; this right shall include freedom to *seek, receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

<sup>106</sup> See O'Connell (n 24), 83.

<sup>107</sup> See General Comment 12 (n 105), paras 9 and 14.

<sup>108</sup> Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2<sup>nd</sup> edn, OUP 2008) 25.

<sup>109</sup> EW Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law*/ 36.

<sup>110</sup> Vienna Declaration and Program of Action, A/CONF.157/23(1993), Article 5.

<sup>111</sup> UN Human Rights Committee, General Comment No.34: Article 19: Freedom of Opinion and Expression, (2011) CCPR/C/GC/34, para 18-19.

The wording of the Article highlights that the right to information is constituted under the form of seeking and receiving information. The rights to seek and receive information are equal to the obligation of states to provide the information or make it available to access. Here, the guarantee for HRB is based on two issues. First, what kind of information does the Article protect? Second, who is the duty bearer of the right? Answers to the two questions will clarify whether HRB qualifies for protection under the Covenant.

On the first question, the scope of information needs to satisfy two tests: it needs to be held by a public body; and it must relate to 'Covenant rights'.<sup>112</sup> Information related to national budgets satisfies the two tests. As for the first test, budgetary information of a nation is held by the state and it is important to justify ESCR realisation of the people.<sup>113</sup> Regarding the second test, General Comment No. 34 on freedom of opinion and expression further identifies all branches of a state including government and parliament as the duty bearers of the rights.<sup>114</sup> This means that both governments and parliaments have to 'proactively put in the public domain information ... of the public interest'.<sup>115</sup> As mentioned in Section 1 of this paper, a government governs budget allocations. Therefore, it is obligated to make this information public to its people. Based on the answers for both questions posed, HRB clearly fits into the framework as an aspect of the right to freedom of information.

In reality, the protection of HRB through the right to freedom of information is still not explicit in some jurisdictions. In the United States, for example, public finance information is not listed in the categories of any kind of public record.<sup>116</sup> The same applies for the United Kingdom.<sup>117</sup> However, this paper postulates that even though HRB is not explicit, this does not prevent the legal status of HRB from being protected through freedom of information. This is based on the fact that HRB does not cause any conflict with the grounds and limitations that scholars of freedom of information have put forth. For instance, Charles David and Sigma Splichal have argued that opening governments' information might harm national security.<sup>118</sup> In addition, Margaret Liu indicated the conflicting tension between nondisclosure of governments' information and the public interest.<sup>119</sup> However, there is no evidence that the disclosure of budgets in order to examine state's compliance with ESCR would threaten national safety or the public interest. Instead, it should be in the public interest to have people's ESCR protected through HRB. As Sir Douglas Allen has posited, 'information should be published if there is no reason for it not to be.'<sup>120</sup> HRB is exactly this type of information.

Unfortunately, not much has been written about the legal status of HRB from the angle of the right to freedom of information. Occasionally, scholars imply freedom of information through the form of transparency while talking about HRB. However, transparency and freedom of information is not mentioned as a legal basis, but only as a barrier to HRB. Ann Blyberg has indicated that the lack of transparency in governments' budgets is the most common challenge to human rights budget work.<sup>121</sup> Other scholars have gone beyond this limitation to discuss the role of transparency to HRB. Roberto Bissio calls for increased transparency in government spending to hold governments accountable for their

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<sup>112</sup> Ibid.

<sup>113</sup> See section I.

<sup>114</sup> See General Comment 34 (n 111), para 7.

<sup>115</sup> Ibid, para 19.

<sup>116</sup> Charles Davis and Sigma Splichal (eds), *Access Denied: Freedom of Information in the Information Age* (Iowa State University Press 2000) 40.

<sup>117</sup> Kelvin Smith, *Freedom of Information: A Practical Guide to Implementing the Act* (Facet 2004) 17.

<sup>118</sup> See David and Splichal (n 116), 191.

<sup>119</sup> Margaret Liu, 'Transparent Government and The Freedom of Information Act 2000' (2006) *Cov. L.J.* 18, 1.

<sup>120</sup> Ibid 89,1.

<sup>121</sup> See Blyberg (n 15) 16.

commitments on ESCR.<sup>122</sup> The group of authors including Mira Dutschke, Eoin Rooney, Aoife Nolan, Rory O'Connell also shared this idea and confirmed that transparency is an important principle of right-based budget work.<sup>123</sup>

Since transparency is defined as 'helping people to see into systems and understand why decisions are taken',<sup>124</sup> it can justifiably be claimed that the requirement of transparency is essential for HRB. But the above-mentioned scholars are limited in their approach because they solely claim the need for freedom of information instead of using the right to freedom of information to support HRB as a legal requirement.<sup>125</sup> The fact that HRB is the type of information that is protected under the protection of freedom of information makes it convincing that HRB is a legal requirement.

#### **4. Alternatives to Make Governments Accountable: Indicators and Benchmarks; States' Reporting and UN Special Procedures; and Litigation**

When discussing the legal status of HRB in making governments accountable for ESCR, it is important to pose a testing question: namely, whether HRB is absolutely necessary, and if there are any viable alternatives. In responding to these questions, this paper will evaluate the function and effectiveness of current tools and mechanisms, which are widely used in tracking governments' performance relating to ESCR. The tools and mechanisms include, but are not limited to, indicators and benchmarks; special procedures and states self-reporting; and litigation. From this evaluating perspective, weaknesses of the current tools will be analyzed. Simultaneously, HRB's capacity as a legal requirement to compensate for the weaknesses and becoming a concrete and powerful tool to protect ESCR will also be examined. This approach is unique; much scholarly research focuses on the substantive content of the law under ICESCR but not the technical and procedural measurements as mentioned above.

By indicating the weaknesses of the current tools, this paper does not suggest that HRB can replace all of the tools. Instead, it aims to prove two points. First, HRB is a necessity that cannot be replaced by any other tools. Second, HRB, if legal, can compensate for the limitations and make the existing tools more practical and powerful in tracking governments' obligations.

##### **A. Indicators and Benchmarks**

Indicators are held up as a tool for monitoring the implementation of ESCR.<sup>126</sup> They aim to indicate individual enjoyment of ESCR.<sup>127</sup> In addition, they are expected to report the compliance of governments towards their treaty obligations.<sup>128</sup> Indicators have frequently been used in state party reports to the international human rights monitoring mechanisms such as the United Nations treaty bodies. They are also used in human rights special procedures and the universal periodic review of the United Nations Human Rights Council,

<sup>122</sup> Roberto Bissio, 'Budgets, Information, and Participation: Civil Society Approaches to Increasing Rights Accountability' in Jody Heymann and Adele Cassola (eds), *Making Equal Rights Real* (CUP 2014), 16.

<sup>123</sup> See O'Connell et al (n 24) 53.

<sup>124</sup> Denis Osbome, 'Transparency and Accountability Reconsidered' (2004) JFC 292, 292.

<sup>125</sup> See Blyberg (n 15), O'Connell et al (n 24), and Bissio (n 122).

<sup>126</sup> See De Schutter (n 79), 497.

<sup>127</sup> Maria Green, 'What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement' [2001] 23 HRQ 1062, 1089.

<sup>128</sup> *Ibid.*

as well as the recommendations of these bodies to the state parties.<sup>129</sup> According to the OHCHR, indicators are defined as: 'specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards, that addresses and reflects the human rights concerns and principles, and that are used to access and monitor promotion and protection of human rights'.<sup>130</sup>

In addition to indicators, benchmarks are a related and equally important indicator for monitoring ESCR. As OHCHR stated, 'benchmarks are indicators that are constrained by normative or empirical considerations to have a predetermined value'.<sup>131</sup> Benchmarks sometimes appear to coincide with indicators,<sup>132</sup> but in reality, benchmarks are generated as a result of indicators. This happens when states, based on identified indicators, build values and standards that work for their national strategies and situations.<sup>133</sup> In theory, the tools seem to be able to indicate comprehensive state data, both qualitative and quantitative.<sup>134</sup> However, in reality, the use of these tools still contains limitations. The ignorance of states parties toward their legal obligation to HRB contributes to the limitations of indicators.

The first limitation of indicators is that they are incapable of measuring human rights.<sup>135</sup> Gauthier de Beco claims that indicators for human rights could only capture a 'snapshot' of reality due to the impossibility of collecting all relevant data in the field.<sup>136</sup> Among different types of indicators, the application of outcome indicators and process indicators are problematic.<sup>137</sup> Outcome indicators are specific data that point out what has happened regarding rights violations or enjoyment while process indicators show which efforts governments have taken to combat the issues.<sup>138</sup> For example, outcome indicators show the number of homeless people during a specific period of time. They are important but not sufficient to give a comprehensive picture of states' compliance with their ESCR treaty obligations that rely on resource availability. For those obligations, the process indicators are especially needed to reflect the 'progressive realization' undertaken by governments.<sup>139</sup> According to the official guidance of human right indicators by OHCHR, unlike outcome indicators, process indicators require data based on national budget allocations.<sup>140</sup> Regarding this limitation, Christian Courtis has linked the issue to the obstacle courts face in adjudicating governments' ESCR violation.<sup>141</sup> He points out that it is difficult to prove claims based on allegations of regression by using indicators, because they do not help to identify state action or inaction that may lead to the alleged regression.<sup>142</sup>

Due to the fact that state parties generate benchmarks from indicators, the function of benchmarks appears to have similar weaknesses to those of indicators. The inter-relation

<sup>129</sup> OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation', 2012 HR/PUB/12/5, 26, para 2.

<sup>130</sup> OHCHR, 'Reports on Indicators for Monitoring Compliance with International Human Rights Instruments: A Conceptual and Methodological Framework (2006) HRI/MC/2006/7, 11, para 7.

<sup>131</sup> See OHCHR (n 129), 20.

<sup>132</sup> Eibe Riedel, Jan-Michael Arend and María Suárez Franco, 'Indicators – Benchmarks – Scoping – Assessment Background Paper (2010) Friedrich Ebert Stiftung, [http://www.fesglobalization.org/geneva/documents/HumanRights/6July10\\_BackgroundPaper\\_IBSA.pdf](http://www.fesglobalization.org/geneva/documents/HumanRights/6July10_BackgroundPaper_IBSA.pdf), accessed March 22, 2014, 22:57, 6.

<sup>133</sup> See CESCR, General Comment No. 14 (n 80) para 58.

<sup>134</sup> Judith Welling, 'International Indicators and Economic, Social and Cultural Rights' [2008] 30 Hum.Rts.Q. 933, 939.

<sup>135</sup> Gauthier de Beco, 'Measuring Human Rights: Underlying Approach' (2007) EHRLR, 4.

<sup>136</sup> Ibid.

<sup>137</sup> See OHCHR (n 129), paras 17-19: There are 3 types of indicators: structural, outcome and process.

<sup>138</sup> See Welling (n 134) 950.

<sup>139</sup> See OHCHR (n 129) 36, box 6.

<sup>140</sup> Ibid.

<sup>141</sup> See Courtis (n 4) 29.

<sup>142</sup> Ibid.



between the two tools means that benchmarks cannot be effective if they are built from incompetent indicators. Benchmarks contain another limitation that requires the use of HBR. This relates to the 'margin of discretion' of state parties that disables the ability to set effective standards for indicators.<sup>143</sup> Specifically, the 'margin of discretion' allows states to decide the resource-related benchmarks for relevant indicators. So, even though the indicators might require better benchmarks (more resources in this case), states can always use their resource constraints as reasons for not improving the benchmarks without having to provide evidence.<sup>144</sup> In these cases, HRB would be able to show what maximum available resources a state has and whether the benchmarks can be improved in order to accommodate the relevant indicators.

Another weakness of indicators that would encourage the use of HRB is the time and cost wasted by collecting data for indicators. As de Beco argues, 'attempting to [collect all of the relevant human rights data for human rights indicators] is a waste of time and would create unbearable cost'.<sup>145</sup> It is arguable that the cost spent on doing this work could be better spent on practical activities that help protect human rights for the people.

The limitation can be overcome by HRB. A national budget aligned with ESCR has the capacity to show progressive (or regressive) steps that governments take by allocating budgets for the steps (activities).<sup>146</sup> Firstly, HRB can provide data for the process indicators by indicating how much money governments allocate to realise specific rights. The data, which are comparable by year, can show if governments are taking forward steps. Secondly, budget cycles are something states have to do every year in any case<sup>147</sup> so, making a budget that reflects and realises ESCR would not take extra time and money. Therefore, the application of HRB is necessary in order to improve indicators and benchmarks.

## ***B. UN Special Procedures and States' Reporting***

Country reporting and UN special procedures are seen to be tools to track states' performance towards ESCR. While country reporting is the tool by which states evaluate themselves, the UN special procedures are more objective as the assessments are conducted by outsiders. The use of state reports and UN special procedures will be critically examined in this section. However, first, it is important to note that both of the tools require the use of benchmarks and indicators.

### **(i) States' Reporting**

According to General Comment No.1 of the Committee on ESCR, indicators and benchmarks should be used to support states' reports.<sup>148</sup> Christophe Golay, Claire Mahon and Ioana Cisma in their evaluation of the contribution of the UN special procedures to human rights, also confirmed that reports of the UN special procedures require the use of data gathered through benchmarks and indicators.<sup>149</sup> However, as indicated in the section above, the ability of indicators and benchmarks to measure states' compliance with their ESCR obligations is limited. Therefore, information built upon indicators and benchmarks

<sup>143</sup> The Maastricht Guidelines on Violations of ESCR, para 8, Eide Riedel, 'The IBSA Procedure as a Tool of Human Rights Monitoring', cited in De Schutter (n 79) 495.

<sup>144</sup> See De Schutter (n 79) 508.

<sup>145</sup> See de Beco (n 135) 3.

<sup>146</sup> See OHCHR (n 129) 121, para 2.

<sup>147</sup> See Ramkumar and Shapiro (n 29) 3.

<sup>148</sup> CESCR, 'General Comment No. 1, Reporting by States parties, U.N. Doc. E/1989/22, para 6.

<sup>149</sup> Christophe Golay et al, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15 *International Journal of Human Rights*, 299, 311.

might not be reliable.<sup>150</sup> In addition to the limitations related to the application of benchmarks and indicators, each of the tools contains other flaws for which HRB may compensate.

State reports comprise one of the means of ensuring a government's accountability with regards to human rights, including ESCR.<sup>151</sup> In addition to the limitations related to indicators and benchmarks, country reports under ICESCR have other weaknesses in reflecting accurately countries' 'progressive realization' towards ESCR.<sup>152</sup> The weaknesses stem from the lack of budgetary information in the reports from state parties. HRB, if treated as a legal requirement under ICESCR, would be able to fill these limitations and make the country reports more powerful and helpful. As Philip Alston has pointed out, countries are obliged to prove the progress they have or have not made towards of ESCR as well as if they have used 'maximum of available resources'.<sup>153</sup> Whilst spelling out what a state needs to report, Alston indicated that the resource-proving exercise is challenging because, 'budgetary questions are unquestionably a matter for the state party itself to determine'.<sup>154</sup> Here, it is undeniable that the reports would not be able to reflect how a country complies with the Article 2.1 of ICESCR without national budgetary information.

In the Manual on Human Rights Reporting, the Committee encouraged the use of this information in states' reports by stating that, 'reports should ... indicate what constraints exist as a result of unavailability of resources and provide details of efforts that have been made'.<sup>155</sup> However, this point is only delivered in the form of an encouragement, not as an obligation. Calling for HRB in the reporting procedure as an encouragement is problematic because an encouragement does not ensure the compliance of state parties. And even if states do mention budgetary information in their reports, the information can be very superficial as they are not requested to provide details. The 2013 periodic report of Cambodia illustrates this point.<sup>156</sup> In this report, even though Cambodia used an increase in its national budget for the health sector to improve its progressive realisation of the right to health, it failed to indicate how much budget allocation had been increased and how much more (or less) it was in comparison to previous years.<sup>157</sup> Since this information is essential in proving states' progressive (or regressive) realization, it is important to include detailed budgetary information into the reports.

## (ii) UN Special Procedures

As they are defined, 'the UN special procedures on human rights are independent experts mandated by the Human Rights Council to promote and protect human rights'.<sup>158</sup> In his evaluation on the UN special procedure mechanism, Ted Piccone refers to this mechanism as a catalyst for rights and asserts that, 'Special Procedures mechanism represents the

<sup>150</sup> See section 4A above.

<sup>151</sup> Kofi Quashigah, 'The African Charter on Human and People's Rights: Towards a more Effective Reporting Mechanism', [2002] 2 Afr Hum Rts LJ.261, 262.

<sup>152</sup> Philip Alston, 'The International Covenant on ESCR', United Nations Center for Human Rights and United Nations Institute for Training and Research, Manual on Human Rights Reporting under Six Major International Human Rights Instruments', 1997, HR/PUB/91/1 (Rev.1), page 46, para 4.

<sup>153</sup> Ibid para 5.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Cambodia, National Report Submitted in Accordance with paragraph 5 of the Annex to Human Rights Council Resolution 16/21

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/KHSession18.aspx>, access April 1, 2014.

<sup>157</sup> Ibid, para 77.

<sup>158</sup> Ibid.

most effective tools of the international human rights system.<sup>159</sup> Many scholars share this view of allocating the role of UN special procedure for human rights protection.<sup>160</sup> The UN special procedures include special rapporteurs, independent experts, and special representatives of the Secretary General and working groups.<sup>161</sup> Their mandates can be thematic or cover all human rights in a specific country.<sup>162</sup> From this job description, it can be understood that, besides their work on thematic topics, special rapporteurs can examine a particular state and give their recommendations on human rights realization as well as violations.<sup>163</sup> This mandate suggests that the fact-findings of special rapporteurs can be used to examine a country's record regarding human rights.<sup>164</sup>

In practice, do the UN special procedures truly have the ability to give adequate feedbacks on states' use of its maximum available resources in realizing specific rights? Christophe Golay, Claire Mahon and Loana Cismas argued that the special rapporteur has this capacity. They confirm that the special rapporteurs can establish 'the legal duty of a state to dispose of its available resources through offering international assistance ... to realize the right ... within its own available resources.'<sup>165</sup> However, a closer look at actual reports produced by UN special rapporteurs could challenge the mentioned praise.

An example of this is Olivier De Schutter's report on the right to food for his mission to Guatemala.<sup>166</sup> In this report, De Schutter emphasized that, 'budget analysis is a useful tool to ensure that scarce resources are used efficiently in realization of human rights'.<sup>167</sup> De Schutter applied the tool in the report. However, his report was limited in that it only provided general information on how much budgetary availability there was for the Strategic Plan for Food and Nutrition Security. The report failed to provide the whole picture of Guatemala's national budget to see if the state had adequately provided financial resources for the right to food (in this case, it is the financial resources for the Strategic Plan).<sup>168</sup> Therefore, it is arguable that the budgetary information that De Schutter pointed out can only partially answer the obligations of Article 2.1 of the ICESCR. The report only shows how much money Guatemala used to realize the right to food, while the broader question is whether Guatemala in fact used the *maximum* available resources.

In addition to this limitation, the fact that each special rapporteur on their country mission focuses solely on one specific right presents another problem. For example, observations on budget allocation for a specific right might not be accurate without taking the whole budgetary spending into consideration. As De Schutter points out, 'the allocation of resources across different areas (inter alia, health, education, housing,...) requires tradeoffs'.<sup>169</sup> Therefore, a state can only be criticized for not using its 'maximum available resources' for a specific right if the criticism is built on acknowledging how the whole budget is spent. An example of this is the Kazakhstan government's attempt to realize the right to education, which Kishore Singh, the special rapporteur, has criticized for its lack of

<sup>159</sup> Ted Piccone, 'Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights' (2010, Brookings) x.

<sup>160</sup> See Golay et al (n 149), and Christophe Golay, Irene Biglino and Ivona Truscan 'The Contribution Of The UN Special Procedures To The Human Rights And Development Dialogue' (2012) 17 SUR 15-376.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> OHCHR, Special Procedures Facts and Figures 2008 (2009) < [http://www.ohchr.org/Documents/HRBodies/SP/Facts\\_Figures2012.pdf](http://www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2012.pdf)> accessed 9 April 2014.

<sup>164</sup> See Piccone (n 159) 5.

<sup>165</sup> See Golay et al (n 149).

<sup>166</sup> Olivier De Schutter, 'Report of the Special Rapporteur on the right to food- Mission to Guatemala' (2010) A/HRC/13/33/Add.4.

<sup>167</sup> Ibid para 83.

<sup>168</sup> Ibid, para 82.

<sup>169</sup> See De Schutter (n 79) 512.

budgetary allocation (only 0.2 per cent of GDP) to technical and vocational education.<sup>170</sup> However, the special rapporteur did not put this percentage in the bigger picture of the whole national budget of Kazakhstan so as to compare the amount to those of other rights or for non-human rights purposes.

Regarding both limitations presented above, this paper suggests that the special procedures can be more comprehensive if special rapporteurs place their suggestions in the larger frame of states' budgetary capacity. HRB, as a legal requirement for state parties, offers this solution by imposing on states the duty to make their public finance based on human rights and make it accessible for public scrutiny, including through the special procedures.

### ***C. Human Rights Budgeting: Making Government Accountable through Litigation***

In the previous section, this paper discussed the necessity of HRB in making governments accountable for its ESCR duties through the use of non-judicial techniques, namely state reporting and the UN special procedures. Whilst indicating the flaws caused by the lack of HRB in the non-judicial techniques, the importance of acknowledging HRB as a legal requirement is acknowledged. In this section, the same approach is applied in examining judicial mechanisms through courts or similar bodies to hold governments accountable for ESCR.

As mentioned earlier in the paper, in the relations between litigants in ESCR cases, governments are often identified as duty bearers according to Article 2.1 of the ICESCR. Specifically, under the Covenant, the government is obliged to take steps to realize ESCR progressively by using its maximum available resources. What can be understood from the obligation is that violations would be established if a government fails to take all possible measures with the use of all the resources it can afford.<sup>171</sup> Accordingly, a government often appears before courts as one of the litigants. However, the effectiveness of litigating ESCR is controversial.

The requirement for judicial remedies for rights violation is a characteristic of the great majority of international human rights law treaties.<sup>172</sup> As H. Kelsen argues, '[t]he essential element [of a right] is the legal power bestowed upon the [individual] by the legal order to bring about, by a law suit, the execution of a sanction as a reaction against the nonfulfillment of the obligation'.<sup>173</sup> According to this view, a legal right would be meaningless without the ability to reach judicial remedies for violations. Neier confirms the importance of adjudication in ensuring rights is meaningful and enforceable.<sup>174</sup> The Committee also elaborates this approach:

Any person or group who is a victim of a violation ... should have access to effective judicial remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.<sup>175</sup>

Theoretically, judicial mechanisms and remedies prove to be important in making ESCR justiciable. However, in practice, there have been challenges that undermine enforceability and justifiability of ESCR before national and international courts and monitoring bodies.<sup>176</sup>

<sup>170</sup> Kishore Singh, Report of Special Rapporteur on the right to education – Mission of Kazakhstan (2002) A/HCR/20/21/Add.1, para 31.

<sup>171</sup> See the Maastricht Guidelines 1997 (n 80).

<sup>172</sup> See Alston and Quinn (n 6) 171.

<sup>173</sup> H Kelsen, 'Pure Theory of Law' (M. Knight's transl., Berkeley 1967).

<sup>174</sup> Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief, 2.

<sup>175</sup> See CESCR General Comment No. 12 (n 105), para 32.

<sup>176</sup> See Courtis (n 4) 73.

According to Christian Courtis, justifiability 'refers to the ability to claim a remedy before an independent and impartial body when violation of a right has occurred or is likely to occur'.<sup>177</sup> By this understanding, the issue of justifiability of ESCR implies the ability of ESCR holders to enforce their rights through legal remedies imposed on duty bearers who do not comply with their duties.<sup>178</sup> Vierdag gives a more straightforward view on this issue by identifying the common duty bearers of ESCR. He claims that a remedy for violation of an economic or social right, 'would imply the competence of a court to compel [the government] to take measures creating conditions under which a social right can be enjoyed'.<sup>179</sup> However, justifying government failures in fulfilling their ESCR obligations in litigation is not an easy issue. In fact, ESCR litigation appears to be the subject of much controversy, which unfortunately challenges courts' ability to hold governments accountable.

The barrier for ESCR to be justiciable in litigation relates to the separation of power doctrine.<sup>180</sup> Widely accepted, the separation of powers doctrine refers to a state being divided into three separate and independent powers and areas of responsibility. According to this doctrine, the legislature creates the law, the executive implements it and the judiciary adjudicates cases on the basis of the existing law.<sup>181</sup> A number of scholars have raised concerns that ESCR is not justiciable before courts because it undermines the separation of powers between the judicial body and the other elected bodies.<sup>182</sup> And because of the issue concerning the separation of powers, the courts lack of evident role to judge a government's performance on ESCR. Hence, the courts struggle to make governments accountable.

The 'separation of power' practice is explained by scholars as reliant on 'the concept of the proper distribution of functions between the judiciary and the political branches of a nation'.<sup>183</sup> So, while judges are supposed to adjudicate if the government fails in implementing their obligation to use maximum available resources to realize ESCR, they cannot make decisions relating to political issues, including budgetary allocation. This is because, according to the doctrine, the executive and legislature are the organs that are authorized to make the decisions, and not the judicial bodies.<sup>184</sup> In other words, by giving judgments on the use of resources by the governments towards ESCR, the judiciary would step over to the 'political sphere'<sup>185</sup> and become a 'political organ'.<sup>186</sup>

The Committee seems to predict this issue. In the General Comment No. 9 on substantive issues arising in the implementation of the international covenant on ESCR, the Committee explicitly states that: 'It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts'.<sup>187</sup> The Committee rightly indicated that the separation of powers between the three branches of a state would make it difficult to justify ESCR in litigation.

While respecting the competences of the three branches, the Committee argued that, 'it is appropriate to acknowledge that courts are generally already involved in a considerable

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<sup>177</sup> See Courtis (n 4) 6.

<sup>178</sup> *ibid.*

<sup>179</sup> See Vierdag (n 109) 26.; Alston and Quinn (n 6) 171.

<sup>180</sup> See Courtis (n 4), Alston and Quinn (n 6), and Sandra Fredman, 'Justiciability And The Role Of Courts', in Fredman (ed), *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford Scholarship Online 2009).

<sup>181</sup> See Courtis (n 4) 76.

<sup>182</sup> See Courtis (n 4), Alston and Quinn (n 6), and Fredman (n 180).

<sup>183</sup> See Courtis (n 4) 73.

<sup>184</sup> See Courtis (n 4) 73.

<sup>185</sup> *Ibid.*, and Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 HRQ 796, 801.

<sup>186</sup> See Vierdag (n 109) 26, para 1.

<sup>187</sup> CESCR, 'General Comment No. 9, The Domestic Application of The Covenant, E/C.12/1998/24, para 13.

range of matters which have important resource implications'.<sup>188</sup> What can be assumed here is that it would be 'arbitrary and incompatible'<sup>189</sup> to not grant a court the capacity to make judgments on how the other branches allocate the public resources in order to justify a government's failure in realizing ESCR. The limitation of this recommendation by the Committee is that it does not change the fact that courts might actually overuse their powers by interfering with the powers of the government.

On this issue, scholars present contrasting ideas. Vierdag confirms the risk of courts interfering in the executive's powers. He discourages courts' abilities to 'compel' the government to take measures for ESCR because these rights rely on political and economic priorities of the government rather than legal techniques.<sup>190</sup> On this point, he argues that this ability of the judiciary would, 'nullify the separation of powers ... and turn the judiciary into a political organ'<sup>191</sup>. What can be inferred from this argument is that judges should not scrutinize governments' measurements in order to ensure the proper authorities of each branch of a state. However, if the measures taken to realize ESCR are not examined by courts, then it is unclear how judges can verify failures of the government. As a result, the government might not be accountable for its mistakes and therefore ESCR might not be justiciable.

Vierdag's view does not provide any solution for making governments accountable for their ESCR obligations, but accepts that ESCR cannot be enforceable by a court of law.<sup>192</sup> Marius Pieterse opposes this acquiescence and proposes that the barrier caused by the 'separation of power' should be overcome by translating, 'socioeconomic guarantees into concrete legal entitlements'.<sup>193</sup> By doing this, he believes that courts will have a 'tangible effect on socioeconomic rights' without overstepping the boundaries of the separation of powers.<sup>194</sup> He underlines the necessity for judges to verify ESCR in conjunction with resources allocations:

In order for ... socioeconomic rights discourse to be effectively countered ... judges must increasingly concentrate on clarifying the concrete content of entitlements embodied by socioeconomic rights and on explicitly linking such content to the actual satisfaction of *material need*.<sup>195</sup>

Pieterse argues in favor of protecting courts' ability to examine the measures taken by governments by imposing rights with 'material needs' in order to make ESCR enforceable. This view confirms the fact that ESCR cannot be justified without 'needs' attached to them. However, the view does not provide a convincing solution that grants the court the authority to examine if the government has used all of its resources to satisfy ESCR's 'material need'. On this issue, the barrier of 'separation of powers' can only be overcome by attaching the need for resources to ESCR by imposing it as a legal requirement.

Like Pieterse and Vierdag, Sandra Fredman acknowledges the separation of power as one of the arguments that opposes the justifiability of ESCR. However, she takes the 'strengthening democracy' approach to support courts' abilities to examine governments for use of maximum available resources.<sup>196</sup> She suggests that courts do not abuse their power

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<sup>188</sup> CESCR, 'General Comment No. 10, The Domestic Application of The Covenant, E/C.12/1998/24, para 10.

<sup>189</sup> Ibid.

<sup>190</sup> See Vierdag (n 109) 93.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid 94

<sup>193</sup> See Pieterse (n 185) 802.

<sup>194</sup> Ibid 801.

<sup>195</sup> Ibid. Emphasis added.

<sup>196</sup> See Fredman (n 180), 2.

if they do not decide over 'resource commitment' for the governments,<sup>197</sup> but requests the government to justify their choices:

[Courts] should require political decision-makers to justify publicly their choices in respect of implementation of human rights. Added to this duty of accountability is a judicial role in giving a voice to those who are necessarily marginalized in the political process, in ensuring that the material and social preconditions exist for full and equal participation, and ultimately in functioning as a catalyst for deliberative democracy.<sup>198</sup>

While Fredman makes a valid claim, her argument is not without its limitations. If making national budgets in compliance with ESCR is not a legal requirement, nothing guarantees that the government will be obligated to justify its choices on resource allocation. Therefore, it is arguable that in order for courts to legally examine government's failure on their budgetary choices, HRB should be imposed as a legal requirement. Hence, governments will need to prove compliance with the requirement as a legal requirement, not merely a political decision. The issue of separation of power would no longer pose a challenge.

Imposing HRB as a legal requirement is essential in order to grant courts the capacity to verify governments' failures in fulfilling ESCR. Supporting arguments for this approach can be found in case law, such as the South African case of *Soombramoney v Minister of Health (Kwazulu-Natal)*.<sup>199</sup> In this case, the applicant claimed that his rights to life and to emergency treatment were breached. His claim was based on the fact that he was refused medical treatment urgently needed to prolong his life. In responding to this claim, the South African government used its resource constraints to excuse the 'severe shortage of dialysis machines and trained nursing staff'.<sup>200</sup> The Constitutional Court of South Africa faced the barrier of separation of powers and chose not to scrutinize the budgetary decisions of the political organ:

These choices [about the funding that should be made available for health care and how such funds should be spent] involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.<sup>201</sup>

In light of this case, the South African government failed to verify their budgetary constraint reasoning. As the result, the court was unable to see if the South Africa government complied or failed to comply with the duty to use its maximum available resources. This failure stemmed from the fact that the court did not impose HRB as a legal requirement, which the government would be obliged to satisfy.

The conclusion to be drawn from the discussion in this section is that courts need to impose HRB as a legal obligation in order to overcome the barrier of separation of powers. This approach will help make ESCR justiciable, and thereby make governments accountable for their ESCR obligations.

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<sup>197</sup> Ibid 2.

<sup>198</sup> Ibid 1.

<sup>199</sup> Constitutional Court of South Africa, *Soombramoney v Minister of Health (Kwazulu-Natal)* (1997) CCT 32/97.

<sup>200</sup> Ibid, para 2 and 40.

<sup>201</sup> Ibid, para 29.

## 5. Conclusion

Making governments accountable has been a challenge in the field of ESCR. In order to overcome this challenge, one important task is to identify the duties imposed on state parties. Or, as Marius Pieterse suggests, ESCR should be translated into concrete legal entitlements.<sup>202</sup> In order to put governments' obligations in a more 'concrete legal entitlement', this paper has proposed the use of HRB as a tool that arguably has the ability to make governments accountable for ESCR.

In support of the proposal, a close relationship between national budgets and governments' obligations for ESCR has been drawn in order to determine the decisive role budgets play in fulfilling ESCR. In addition, reasons why HRB should not be considered only as a civil society initiative but a legal requirement have also been explained. Failure to do so may put governments in a passive position of relying on civil society. More importantly, by seeing HRB as a non-legal condition, governments are not obliged to comply with it and therefore, they might not be held accountable for ESCR.

One of the biggest challenges facing HRB in becoming a legal requirement is that this requirement is not stipulated explicitly in ICESCR or any ESCR related international instruments. However, not being mentioned in the wording of the treaties does not mean that the requirement of HRB is not legal. This argument is based on the rules of interpretation of international law under the Vienna Convention on the Law of Treaties, as well as the law-making function of the General Comments by the Committee.

The legal status for HRB has consolidated by analyzing different legal frameworks. They include the ICESCR; the obligation to fulfill under the 'tripartite typology';<sup>203</sup> the minimum core obligation; and freedom of information under ICCPR. For each framework, the links between implementation and HRB have also been explored. HRB is essential in making a government accountable for its duties under each framework and therefore, HRB should be considered a legal requirement rather than just a recommendation.

To strengthen the legal status for HRB as well as apply HRB practically, the paper explored beyond substantive laws to examine the common technical tools and mechanisms used to track governments' accountability for ESCR, namely: indicators and benchmarks; states' reporting and UN special procedures; and, litigation. The fact that each of the tools and mechanisms contains weaknesses as a result of excluding HRB information convincingly furthers the case for HRB to be a legal requirement. This position is underlined by demonstrating how HRB can repair and complete the various tools in order to make implementation of ESCR meaningful.

While much of scholarly research focuses on recommending HRB as what is needed for ESCR implementation as opposed to a legal requirement, this paper aims to contribute a different and supplemental approach to make governments accountable for ESCR.

In conclusion, the fact that HRB is a legal requirement under international law is undeniable. The tool is so crucial that it cannot be replaced. Indeed, it supplements other tools or mechanisms in tracking governments' accountability. Therefore, it is convincing that HRB has the capacity to hold governments accountable for ESCR.

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<sup>202</sup> See Pieterse (n 185), 797.

<sup>203</sup> See Eide (n 143).