**Informal Consultation on the State of the UN Human Rights Treaty Body System**

***Submission on how treaty bodies assess the obligation to take steps***

***to realize rights to the maximum of available resources***

**July 2020**

Some of the most chronic and entrenched deprivations of human rights—particularly economic, social and cultural rights—stem from issues related to how States generate, distribute, and spend available resources. Nevertheless, aspects of States’ obligations with respect to resources remain among the most complex in international law. To better address such deprivations, further clarification and explanation of these obligations is required.

Recognizing this, a number of treaty bodies—in particular CESCR, as well as CRC, CEDAW, and CRPWD—are taking steps to advance towards a more standardized and systematic approach to how they monitor the commitments States have made to take steps to the maximum of available resources (MAR) to progressively realize rights.[[1]](#footnote-1) Nevertheless, gaps and challenges remain in relation to various guidelines, procedures, and practices. In 2018, the Center for Economic and Social Rights and Dejusticia undertook a collaborative project to further thinking about how to advance the way MAR is monitored.[[2]](#footnote-2) This involved a number of consultations with members of CESCR and State representatives, in order to share observations and reflect collectively on ways to address these gaps and challenges.

While the consultations focused primarily on CESCR, a number of insights emerged that are of relevance for the treaty body strengthening agenda. These relate to several issues outlined in the call for inputs. In particular:

* methodologies, including harmonization and alignment of working methods;
* dialogue between States and treaty bodies both in preparation for and during States reviews as well as in follow-up to the review;
* concluding observations and recommendations;
* strengthening the engagement with civil society and other relevant stakeholders; and
* overall coherence of the treaty body system and the collaboration among treaty bodies as well as within the UN system and with regional monitoring bodies.

This submission summarizes the key practical challenges associated with monitoring MAR—and ideas for how to address them—that emerged from the consultations.[[3]](#footnote-3)

***Identifying and collecting relevant information***

Primary sources of information on MAR are a State’s common core document and treaty-specific report; responses to the list of issues; and information submitted by civil society. However, guidance to both States and civil society on how their submissions should address MAR remains fairly limited:

* Discussion of MAR in the harmonized guidelines on State reporting is focused primarily on resource allocation. For example, the common core document advises that States “may offer information on…allocation of budgetary resources”. The guidelines do suggest a set of resource-related indicators that should be reported on in the common core document. However, these are relatively basic – related to, among other things, gross domestic product and levels of social expenditures.
* Guidance on treaty-specific reports are similarly focused on resource allocation and international assistance. For example, CESCR asks the State to identify the resources available for each Covenant right and “the most cost-effective ways of using such resources”. CRC asks States to provide information “on the amount and percentage of the national budget (at central and local levels) devoted annually to children, including, where appropriate, the percentage of external financing (through donors, international financial institutions and private banking) of the national budget”.
* Guidance offered to civil society does not provide clear suggestion in relation to MAR – advising only that information be specific, relevant, well-sourced, concise, and reliable.
* CESCR has been asking for more information on MAR in its “lists of issues” (LOIs). In particular, the LOIs have increasingly asked about how States mobilize resources. The LOIs have also increasingly standardized requests for data, beyond the indicators in the common core document. For example, the LOIs for some countries include a list of indicators on outcomes (on poverty and economic inequality), revenue sources, and resource allocations—asking for data from the past 10 years to get sufficient information to conduct a comprehensive assessment on the issue.

A particular benefit of standardizing the information requested on MAR is that treaty bodies can communicate expectations for States and simplify and systematize the kinds of information they receive. This allows the treaty bodies to set clearer parameters for their interactive dialogues, making it easier to unpack what are otherwise complex and potentially unfamiliar economic policy issues, in human rights terms.

***Analyzing and interpreting information***

Working methods used by treaty bodies to interpret information received on MAR, in order to assess whether economic policy choices are in line with the norm, are not entirely formalized and guidance on these methods for stakeholders is scarce. That said, it is clear the purpose of their analysis is to provide a basis for constructive, evidence-based dialogue with States on the reasonableness of their economic policies and on the alternatives available. For example, the indicators used by CESCR in its 64th session (as indicated in the pre-sessional document) “establish certain presumptions, and shall shift on the State, in certain cases, the burden of justifying its policy choices”.

One factor that makes the interpretation of information difficult is that there is no standardized approach concerning the benchmarks against which information will be compared. It is difficult to assess MAR without benchmarks. For example, without knowing what expenditure levels are appropriate, per pupil, to meet basic core requirements of the right to education, it may be hard to assess whether a State has met this obligation.

Treaty bodies may compare data to other countries or to certain established standards. For example, CESCR and CRC have long been using the benchmark for overseas development assistance of 0.7% of GNI as a proxy measure for whether countries are meeting their obligations in terms of international cooperation. There is, however, no regularity or standardization of this approach.

That said, standardization is not straightforward because treaty bodies must account for and appropriately reflect the particularities of each State, including its internal administrative and financing structures. In some General Comments, CESCR has indicated that it will “scope” benchmarks with the State under review. This would involve “the joint consideration” of national benchmarks by the State and the Committee. This approach does not seem to have been applied in the context of MAR as of yet, but may be worth exploring.

Concerns arising from unfamiliarity with the subject matter and limited technical expertise also contribute to make analyzing data related to MAR difficult. Traditionally, treaty bodies have been composed of members with legal backgrounds, not necessarily familiar with economics. Building up capacity regarding economic policy for all treaty body members may be a helpful way to strengthen analysis and identify appropriate benchmarks.

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

***Making contextually appropriate, concrete and actionable recommendations***

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

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

***Suggestions for strengthening how treaty bodies assess MAR***

Establishing clearer guidance will be helpful not only to treaty bodies in making recommendations, but also to States as they endeavor to implement them. A number of ideas emerged in the consultations that may help reduce the complexity of the reporting process, in terms of information on MAR, while also increasing a treaty body’s access to relevant data on the norm. These included:

* Updating guidelines for States and civil society organizations to report on MAR.
* Providing more detailed guidance regarding the information on MAR the treaty bodies would like to receive in treaty-specific reports, if not in the common core document.
* Identifying standard questions for the Lists of Issues.
* Defining relevant indicators and benchmarks, given different contexts.
* Exploring capacity building on economic policy and on methodologies to interpret data.
* Encouraging participation of representatives from Finance ministries in interactive dialogues.
* Developing standardized language for recommendations on MAR.

As the world faces the devastating economic fallout of the global COVID-19 pandemic, the need to deepen understanding how public finance management and economic policy choices affect the realization of rights could not be more urgent. The importance of ensuring policy coherence has been increasingly acknowledged by both human rights and global development actors. This includes through the commitments made in the Financing for Development agenda, in connection with the Sustainable Development Goals. The treaty body review process is an opportunity to consolidate and build on promising developments for both guiding and holding States accountable for how they resource rights.

1. See International Covenant on Economic, Social and Cultural Rights (Article 2.1); Convention on the Rights of the Child (Article 4); Convention on the Rights of Persons with Disabilities (Article 4.2). [↑](#footnote-ref-1)
2. See Center for Economic and Social Rights and Dejusticia (2018), ‘Developing Practical Guidance On ‘Maximum Available Resources’, Discussion Paper, available at: <https://www.cesr.org/developing-practical-guidance-maximum-available-resources> [↑](#footnote-ref-2)
3. It is important to note the progress that has been made in clarifying the content of the MAR norm over the last two decades. The discussion paper cited above also traces the normative evolution of States’ obligations related to resourcing rights within the jurisprudence of CESCR. [↑](#footnote-ref-3)