The OPERA Framework

Assessing compliance with the obligation to fulfill economic, social and cultural rights

ECONOMIC AND SOCIAL RIGHTS MONITORING








CENTER FOR ECONOMIC AND SOCIAL RIGHTS
SOCIAL JUSTICE THROUGH HUMAN RIGHTS

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Summary

To increase accountability for failures to fulfill economic, social and cultural rights (ESC rights), it is necessary to uncover the shortcomings in a state's social and economic policies that lead to large-scale deprivations. This serves to expose as a preventable injustice what may otherwise be seen as an inevitable consequence of under-development. Holding institutions to account for these failures, through both judicial and non-judicial processes, is an essential step towards providing remedies to those affected. Accountability processes can, in turn, allow policy-makers to know what works so that it can be repeated and what does not, so that it can be adjusted.

Yet human rights practitioners and activists face significant challenges in clearly demonstrating the complex causal links between poor human rights outcomes and shortcomings in states' policy efforts. Such shortcomings are often systemic and entrenched, arising from institutional failures rather than the wrongdoings of individual officials. Attributing state responsibility for chronic problems, such as high rates of maternal death, involves more complex analysis of the link between conduct and result than establishing state accountability in acute cases, such as torture or forced eviction. Relevant international standards against which to judge the adequacy of states' actions are themselves multifaceted and not always clearly defined and easily measurable.

Nevertheless, significant progress has been made in recent years. On the conceptual side, understanding of the nature and scope of the rights and obligations enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) has been increasingly elaborated, particularly through interpretations by the Committee on Economic, Social and Cultural Rights; jurisprudence of national courts and regional adjudication bodies; and increasing engagement between human rights and development experts. On the methodological side, a variety of different actors have developed or adapted tools and techniques to monitor ESC rights fulfillment, moving beyond conventional 'events-based' monitoring towards new qualitative and quantitative methods, including analyses employing statistics, indicators, indices, etc. While these tools and techniques offer considerable advances, they have tended to be developed in a fragmented way, by different actors, and in isolation from each other. Accordingly, they have generally demonstrated strengths in measuring a specific element of the obligation to fulfill, but used on their own do not fully capture the range of human rights principles and standards that underpin the obligation.

This paper presents a practical framework for integrating different tools and techniques in order to provide a more comprehensive assessment of how public policies comply with the obligation to fulfill ESC rights. The OPERA framework (so called because it triangulates Outcomes, Policy Efforts and Resources to make an overall Assessment) articulates relevant human rights standards and

principles to take into account when monitoring ESC rights fulfillment and offers practical guidance on which tools and techniques might be employed to evaluate them. These range from simple descriptive statistics that summarize data to more complex fiscal policy and budget analysis that assess the availability and allocation of resources. By making explicit this crucial link between the various human rights standards and principles that underpin the obligation to fulfill and the different assessment methods available to monitor them, the framework enables a systematic approach to building evidence of failures to fulfill ESC rights. This framework has been developed by the Center for Economic and Social Rights (CESR), an international non-governmental organization, as part of its work to promote greater accountability for breaches of this duty, which underlie many of the most widespread and pervasive deprivations of ESC rights.

By providing an overarching framework to integrate multiple tools and methods, the OPERA framework enables advocates and activists to build up a well-evidenced argument about a state's compliance with its obligation to fulfill ESC rights. This can be very powerful for advocacy, whether focused on securing remedies for current violations or on advancing reforms for preventing them in the future. On the one hand, providing quantitative, cross-disciplinary evidence demonstrating the link between poor development outcomes and breaches of the obligation to fulfill economic and social rights can prompt 'decision-makers' to be more responsive to, or at least less dismissive of, human rights arguments. At the same time, supporting rights-holders to expose and articulate the injustices they face using robust, credible methods anchored in the human rights framework can help give their demands for justice renewed force.

Introduction

Despite the fact that more than 160 governments around the world are now party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and have committed to the progressive realization of these rights, millions of people worldwide continue to suffer from poverty, hunger, homelessness, illiteracy and early mortality. Poverty and deprivation are an assault on human dignity, but are all too often deemed to be unavoidable outcomes of 'under-development'. A human rights perspective challenges this complacency by showing that, when they are the consequence of government policy or are caused by the failure of governments to act, poverty-related deprivations can also reflect a violation of human rights. Over the last two decades, these deprivations have increasingly begun to be addressed as failures to fulfill economic, social and cultural rights (ESC rights). But to increase accountability for such failures, it is necessary to uncover the shortcomings in the state's social and economic policies that lead to large-scale deprivations. This serves to expose as a preventable injustice what may otherwise be seen as an inevitable tragedy. Holding institutions to account for these failures, through both judicial and non-judicial processes, is an essential step towards providing remedies to those affected. Accountability processes can, in turn, allow policy-makers to know what works so that it can be repeated and what does not, so that it can be adjusted.[1]

The obligation to fulfill entails obligations of *conduct*, as well as obligations of *result*. As such, assessing compliance requires looking not only at the extent of deprivation of a particular right, but also at trends in public policies and resource allocations, in order to fully understand the efforts that the state has taken to fulfill it. Yet, human rights practitioners and activists face significant challenges in clearly demonstrating the complex causal links between poor human rights outcomes and shortcomings in states' policy efforts. Such shortcomings are often systemic and entrenched, arising from institutional failures rather than the wrongdoings of individual officials. Attributing state responsibility for chronic problems, such as high rates of maternal death, involves more complex analysis of the link between conduct and result than establishing state accountability in cases of torture or forced eviction, for example.

Further, relevant international standards underpinning states' obligation to fulfill ESC rights—and against which to judge the adequacy of states' actions—are themselves multifaceted and not always clearly defined. As a result, finding ways to meaningfully measure them has been difficult. Nevertheless, significant progress has been made in recent years in addressing these challenges. On the conceptual side, understanding of the nature and scope of the rights and obligations enshrined in the ICESCR has been increasingly elaborated, particularly through interpretations by the Committee on Economic, Social and Cultural Rights (the UN treaty body mandated to monitor states' progress in implementing the Covenant); jurisprudence of national courts and regional adjudication bodies; and increasing engagement between human rights and development experts. On the methodological side, a variety of different actors have developed or adapted tools and techniques to monitor states' compliance with their obligation to fulfill ESC rights, moving beyond conventional 'events-based' human rights monitoring towards new methods that combine qualitative and quantitative approaches.

While these tools and techniques offer considerable advances, they have tended to be developed in a fragmented way by different actors and in isolation from each other. Accordingly, they have generally

demonstrated strengths in measuring a specific element of the obligation to fulfill, but used on their own, do not fully capture the range of human rights principles and standards that underpin the obligation.

This briefing paper argues that, in fact, many of these tools are complementary, and, when used in combination, they can paint a more multi-dimensional picture of states' compliance. An overarching methodological framework helps to integrate the wide variety of different tools and techniques in order to provide a more comprehensive assessment of how public policies comply with the obligation to fulfill ESC rights. Building on CESR's earlier work on assessment methodologies,[2] this briefing paper introduces such a framework, which CESR has developed in the context of rights-based policy monitoring and advocacy in different settings. Adopting the acronym OPERA, CESR's framework sets out a four-step process for an integrated analysis of: Outcomes, Policy Efforts, and Resources ending with an overall Assessment of compliance with the state's human rights obligations. To this end, the paper first examines recent conceptual advances in understanding the nature and scope of the obligations relevant to economic, social and cultural rights—focusing on the obligation to fulfill ESC rights—as well as highlighting the key human rights principles and standards that must be examined when assessing this obligation. It then reviews important efforts that have been made to develop new techniques and tools to monitor these concepts, for example the use of indicators and benchmarks to assess 'progressive realization' or the use of budget analysis and other methods to assess 'maximum available resources'. Finally, we set out the OPERA framework, and illustrate how it might be used to eclectically combine a range of different tools and techniques, drawing on both quantitative and qualitative methods to provide a more comprehensive and integrated assessment of a government's compliance with its obligation to fulfill ESC rights.

The nature and scope of rights and obligations under the ICESCR

Economic, social and cultural rights have traditionally been referred to as 'second generation' rights, a reference to their later conceptual development. Core civil and political rights, such as freedom from slavery and equality before the law, have been advanced and clarified through hundreds of years of jurisprudence and are thus presumed to be precise and enforceable. By contrast, ESC rights, with the exception of a handful of labor-related rights, have a more recent history, having been first recognized in the Universal Declaration of Human Rights and then given greater specificity in the International Covenant on Economic, Social and Cultural Rights and other core human rights treaties.[3] A consequence of this history—fuelled further by the ideological conflict between the East and West during the Cold War, which resulted in the drafting of separate covenants for civil and political rights and ESC rights in the 1960s—has been to view ESC rights as vague, imprecise and unenforceable.[4]

The long-standing perception that ESC rights were qualitatively different from civil and political rights reflected their limited normative elaboration through the courts and international human rights bodies in comparison to civil and political rights.[5] However, much has changed over the past two decades to remedy this imbalance. The concluding observations on state reports and the general comments adopted by the Committee on Economic, Social and Cultural Rights have provided

authoritative guidance on interpreting the provisions of the Covenant. In parallel, international experts, including the UN special procedures mandates holders, have contributed to developing a more comprehensive understanding of the rights and obligations contained in the Covenant to offer a more comprehensive and nuanced understanding of them. In affirming the 'justiciability' of ESC rights in particular cases, the jurisprudence of national courts and regional and international adjudication bodies has similarly demonstrated that the concepts and obligations underpinning ESC rights can be defined with sufficient precision to form legally binding and enforceable standards. [6]

To begin with, the Maastricht Guidelines'[7] affirmation that ESC rights impose three types of obligations on states is now widely accepted. They include the obligation to respect, to refrain from interfering with the enjoyment of ESC rights; the obligation to protect, to prevent violations of such rights by third parties; and the obligation to fulfill, to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.[8] The long-standing perception that civil and political rights tend to primarily involve the negative obligation to respect while ESC rights focus more on the positive obligations to protect and fulfill—making them more resource intensive—has been gradually eroded. Both civil and political rights and ESC rights contain positive and negative elements to respect, protect and fulfill human rights, and many aspects of civil and political rights fulfillment are also heavily resource-dependent—such as creating a functioning judicial system that can ensure the right to a fair trial. Nevertheless the Covenant on Economic, Social and Cultural Rights differs from the Covenant on Civil and Political Rights in that it explicitly recognizes that fulfillment of these rights necessarily requires a significant investment of resources. Article 2(1) of the Covenant states that:

> *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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…*[9]

This formulation allows for an element of flexibility that takes into account the fact that different countries have different resource bases, but was not intended to provide an 'escape hatch' that would allow governments to ignore their ESC rights obligations.[10] Rather, this article simply provides a reasonable recognition that developing countries will necessarily make slower progress than wealthier countries. Accordingly, the realization of ESC rights will not be achieved at a uniform rate across all countries, but in ways that are consonant with different countries' levels of development and available resources.[11]

When the Committee on Economic, Social and Cultural Rights first addressed the issue of state obligations in 1990 in its General Comment No.3, it dealt with the question of progressive realization by emphasizing that states have not only 'progressive' duties, but also 'immediate duties' under the Covenant, including to uphold the principle of non-discrimination, as well as to meet the 'minimum core obligations' contained in the Covenant and the provisions 'capable of immediate application by judicial and other organs' in many legal systems.[12]

The duty of non-discrimination is one of the fundamental principles underpinning human rights law. The Committee describes it as an 'immediate and cross-cutting obligation' under the Covenant.[13] In addition to refraining from adopting discriminatory laws, policies, programs and expenditures, states

'should take concrete, deliberate and targeted measures' to eliminate discrimination.[14] However, this duty does not prevent differential treatment where this is necessary to eliminate historical injustices (known as positive discrimination or affirmative action), as the duty of non-discrimination requires eliminating both formal and substantive discrimination.[15] Numerous national courts and regional and international adjudicatory bodies have made decisions related to ESC rights on the grounds of non-discrimination and equal treatment and some have interpreted non-discrimination expansively to include situations where a combination of factors resulted in discriminatory circumstances or disproportionally affected particular social groups.[16]

The 'minimum core obligations' of each of the rights enshrined in the Covenant impose, in the Committee's view, a duty on states 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' regardless of their level of economic development.[17] Failure by the state to meet these minimum levels would lead to a *prima facie* presumption that it has violated the Covenant—a presumption that can only be discharged if the state can demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'. Over the past two decades, the Committee has adopted a number of General Comments which further define the minimum core of Covenant rights such as the right to food, water, health, housing, and education.[18] Finding consensus on the content of the minimum core concept and its application to specific states has proved difficult.[19] Courts in some countries, such as South Africa, have rejected the concept, though others, such as Germany and Switzerland, have used it to translate constitutional principles of human dignity into positive state obligations.[20] Despite its imprecision, the appeal of the minimum core concept lies in its insistence that states must give first priority to fulfilling a basic minimum of ESC rights, universally, for all those within its jurisdiction, over and above all other policy and economic objectives, thus creating a higher burden of proof on states to demonstrate they are using the maximum of their available resources to achieve these outcomes. Looking ahead, concepts from other fields may increasingly enrich the definition of the minimum core. For example, the 'Social Protection Floor Initiative' (SPF Initiative), adopted in 2009 as one of the UN's nine key strategies to cope with the global financial crisis, mandates national task forces to develop definitions of the social protection floor, which may be relevant in further defining minimum essential levels of ESC rights fulfillment.[21]

In addition to focusing on immediate obligations, the Committee has dealt with the question of progressive realization by elaborating on the duty to 'take steps'. In particular, General Comment No. 3 stressed that while the realization of relevant rights, which is an obligation of *result*—may generally be achieved progressively, the duty to take steps—which is obligation of *conduct*—is immediate:

> *[W]hile the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant's entry into force ... Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.*[22]

The means used to satisfy the obligation 'to take steps' are 'all appropriate means, including particularly the adoption of legislative measures'.[23] The delineation between obligations of conduct and of result will rarely be exact, and the policy-making process is not necessarily linear. Nevertheless, putting emphasis on the steps taken by a state appropriately recognizes that states' primary obligations should relate to their conduct, which they directly control, in contrast to results, which are often the product of a confluence of many factors.[24]

The Committee's General Comments have also set out principles to guide the steps that a state must take on specific rights. For example, policies and programs should be designed to improve the availability, accessibility, acceptability, adaptability and quality of services necessary for the realization of ESC rights (known as the 'AAAAQ' or '4A' criteria). 'Availability' requires that goods or services be available in sufficient quantities. 'Accessibility' requires that necessary goods (such as food or medicine) or services (such as healthcare or education) are both physically and economically accessible to all, without discrimination. 'Acceptability' and 'adaptability' mean that the necessary goods and services must be culturally and socially acceptable and adapted to the local context and 'quality' means that they must be appropriate and adequate in standard and safety.

Another requirement is that steps taken must not be deliberately 'retrogressive,' meaning that states must fully justify the adoption of policies that decrease people's enjoyment of a right. Such retrogressive measures are presumed to be a *prima facie* violation of the Covenant unless the state can prove they have been introduced 'after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the state party's maximum available resources'.[25] Domestic courts in a number of jurisdictions have upheld challenges to legislation and administrative regulations considered retrogressive.[26] In the context of the global economic crisis, the Committee has further emphasized that any austerity measures which threaten the progressive realization of economic and social rights must protect the minimum core content of the rights, be temporary, non-discriminatory, and necessary and proportionate in the sense that alternatives would be more detrimental to social and economic rights.[27]

Finally, states must take these steps to achieve the full realization of ESC rights employing the maximum of their available resources, a requirement that has been given greater clarity by the Committee, a number of Special Rapporteurs and other legal experts.[28] While what constitutes 'maximum available resources' is yet to be conclusively defined, analysis by economists and human rights practitioners has sought to examine the range of policy areas that need to be evaluated to assess whether a state is employing its maximum available resources to fulfill ESC rights. This requires looking beyond government expenditure and revenue (including taxation and development assistance) to economic policy issues such as debt and deficit financing, monetary policy, and financial regulation.[29]

In interpreting these concepts, courts in different jurisdictions have developed various tests to judge legislative or administrative action which they have commonly framed as either 'reasonableness', 'adequacy' or 'proportionality'. For example, the reasonableness test was most famously articulated in the South African Constitutional Court's 2001 decision in *Grootboom*. In this case, the Court determined that the state's housing policy was unreasonable as it did not take into account the basic needs of homeless people for temporary shelter. By contrast, the Court's 1998 decision in *Soobramoney* held that criteria in the state's regulations governing the provision of dialysis services were reasonable.[30]

In addition, the Committee has also emphasized that policies must be designed and implemented in accordance with the procedural rights articulated in international human rights law, including the rights to information, participation, accountability and transparency. These principles are frequently referred to using the mnemonic device PANTHER. First devised by the United Nations Food and Agriculture Organization (FAO), PANTHER stands for Participation, Accountability, Non-Discrimination, Transparency, Human dignity, Empowerment and Rule of Law.[31] These principles—which relate closely to the provisions of civil and political rights standards—have been further elaborated in the

context of recent literature on a human rights-based approach to development.[32] For example, it is widely agreed that participation channels should not be tokenistic, should ensure the participation of every member of society without discrimination and should be regular mechanisms rather than ad-hoc consultations. Furthermore, in order to meaningfully engage with these participation channels, rights holders need to be able to exercise their rights to information, to freedom of expression, and to freedom of assembly. Access to effective judicial or other appropriate remedies for victims of ESC rights violations is another precondition for ensuring human rights accountability.

Methods for measuring the fulfillment of ESC rights

Through the steps it is taking, the state is required to 'demonstrate that it is making *measurable progress* toward the full realization' of rights.[33] The clearer articulation of the nature and scope of ESC rights and obligations has made this more possible to ascertain. However, the challenge in making these norms more operational has been how to measure the extent to which social and economic policies comply with them. Traditionally, human rights groups have focused on events-based monitoring, which analyzes the facts of a particular case to determine what right was violated by whom. Where there is a clear time-bound violation, and the perpetrator and victim can be easily identified, this is a relatively straightforward exercise. Early efforts to monitor ESC rights continued to focus on identifying a specific violation in relation to a negative or immediate obligation (for example, when there has been an unlawful forced eviction).[34] However, such a 'violations approach' is less equipped to identify the multidimensional factors and multitude of actors that often determine whether social and economic policies fulfill ESC rights or lead to ESC rights deprivations.

Diagnosing these factors demands a shift away from reporting on specific, time-bound events towards analyzing trends in public policies, especially fiscal policies, given the central importance of resources for the fulfillment of ESC rights. However, the concepts against which to judge such policies, such as progressive realization and maximum use of resources, are themselves complex and evolving. In response, there has been increasing interest in developing and adapting more quantitative methodologies within the human rights field. Some of the key strands of work in this area are described below.

Human Rights Indicators

Quantitative indicators—information expressed as numbers, percentages or ratios—offer a statistical snapshot of a situation by providing a measure of 'how much', 'how many', 'to what extent' or 'what size'. They demonstrate the level something is at, the direction it is headed and how far it is from a certain goal or target. Socio-economic indicators have been used in the development field to measure human wellbeing for many years, most notably with the introduction of the groundbreaking Human Development Reports in the 1990s.[35] Reflecting a shift within the development field from an economic growth-oriented approach to a more human rights-based approach, the United Nations Development Programme (UNDP) argued in its *Human Development Report 2000* that 'information and statistics are a powerful tool for creating a culture of accountability and for realizing human

rights'.[36] This paradigm shift can also be seen in the Millennium Development Goals (MDGs), which select specific indicators, for which statistical data is regularly collected in order to measure progress over time.

Within the human rights field, the idea that indicators should play a role in monitoring progress on the implementation of human rights treaties is not new and is recognized in a number of treaty provisions, general comments and non-binding declarations.[37] Recently, there has been increasing interest in the development of standardized international human rights indicators. In 2006, at the request of the chairpersons of the treaty bodies, the UN Office of the High Commissioner for Human Rights (OHCHR) presented a background paper on how quantitative data could be used to make the assessment of states' performance more streamlined, transparent, temporally and spatially comparable, and effective.[38] The conceptual framework proposed by OHCHR centers on three types of indicators: structural, process and outcome. Structural indicators reflect treaty ratification, the adoption of legal instruments and the existence of basic institutional mechanisms to facilitate realization of the right concerned. Process indicators connect public programs and specific interventions to milestones more directly related to the realization of human rights, for example by measuring goods and services against the AAAAQ criteria. Finally, outcome indicators capture the realization, individual and collective, of human rights in a given context.[39] Since 2006, OHCHR has been validating the framework and its lists of illustrative indicators with country-level stakeholders,[40] as well as providing technical assistance on the framework and developing resource materials and tools to help disseminate and operationalize it.[41]

One of the significant breakthroughs of the OHCHR framework is its clear conceptualization of human rights indicators as indicators that specifically relate to human rights norms and standards. The framework recognizes that socio-economic indicators, which assess whether people are living with dignity and freedom (measuring outcomes or results), can be used as human rights indicators when they are applied to measure a particular human rights norm. For example, when disaggregated by gender, ethnicity, race, religion, nationality, birth, social origin and other relevant distinctions socio-economic indicators may provide pointers to uncover discrimination and inequality. But, importantly, the framework also emphasizes the need to identify further indicators that assess the state's policies and programs and the behavior of public officials (measuring conduct, as well as result) in order to capture the full spectrum of states' obligations. So while development indicators and human rights indicators may at times be indistinguishable, they differ in their purpose, use and interpretation.

The OHCHR indicator framework has been taken up and expanded on by other international monitoring mechanisms. At the regional level, the Inter-American Commission for Human Rights, for example, has followed the framework in developing guidelines for reporting under Article 19 of the Protocol of San Salvador.[42] The guidelines follow the structure, process, outcome approach, but they further categorize these indicators around three conceptual categories (incorporation of the right, state capabilities and basic financial context and budgetary commitments)[43] and around four cross-cutting issues (equality, access to justice, access to information and participation).[44] In addition, the guidelines emphasize the need to complement quantitative indicators with 'qualitative signs of progress' that allow for a deeper analysis of the policies and programs the indicators identify.[45] Similarly, the Economic and Social Rights Working Group of the African Commission on Human and Peoples' Rights is in the early stages of developing guidelines on ESC rights for states for the preparation of periodic reports.[46]

At the international level, the work of a number of special procedures mandate holders has focused on the development of more detailed indicators on specific rights, following the pioneering work by the former Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health, Paul Hunt, who first proposed the structure, process, outcome framework.[47] For example, the efforts of the former Special Rapporteur on the Right to Education, Katarina Tomasevski, have fed into the Right to Education Project, an initiative that uses the '4A criteria' to map out, develop and apply a disaggregated list of indicators on the right to education. Other UN agencies and civil society organizations have similarly developed lists of sector-specific indicators, for example on the rights to food,[48] housing,[49] and water.[50] The deliberations underway on what should replace the current Millennium Development Goals (MDG) and targets beyond 2015 have prompted renewed efforts to devise rights-based indicators and metrics of progress in relation to poverty, inequality, social protection and other ESC rights. For example, the former Independent Expert and current Special Rapporteur on access to safe drinking water and sanitation, Catarina de Albuquerque, has engaged in inter-agency efforts to employ human rights indicators to better track progress on the rights to water and sanitation and to address the gaps in the MDG framework, with a view to incorporating these indicators in the development agenda post-2015.[51]

Benchmarks

On their own, indicators are inconclusive. They say nothing without clear reference points against which to judge performance and assess the adequacy of achievements or progress over time. A simple way to identify benchmarks and reference points, used by CESR in its country fact sheets, is to compare a country's performance to other countries that have similarities, for example in terms of level of development or geographic proximity.[52] However, within the UN context, some concern has been expressed that using country comparisons may be 'politically explosive'.[53] Other more politically acceptable benchmarks come from internationally agreed development commitments, the most well-known being the MDGs, which set specific goals and targets to be achieved by 2015 in a range of areas closely connected to economic and social rights such as the rights to health, education, food, water and sanitation.

The Committee on Economic, Social and Cultural Rights has frequently requested states to set their own benchmarks in its general comments and concluding observations. More recently, one member of the Committee, Eibe Riedel, has advocated for formalizing the use of indicators and benchmarks in the Committee's reporting process through a four-step procedure that adopts the acronym 'IBSA' (Indicators, Benchmarks, Scoping and Assessment).[54] Through the IBSA process, indicators and benchmarks are selected through a 'scoping' exercise carried out in the context of the state's periodic report. This is done with input from civil society and specialized UN agencies to ensure benchmarks are realistic, but sufficiently ambitious in the context of the particular state's level of capacity. The Committee would refer to the state's performance against these benchmarks when making its subsequent 'assessments' of a state's periodic reports. However, the content of this assessment step is yet to be comprehensively articulated. As discussed further in the next section, how to interpret numbers in the context of assessing a state's compliance may be a complicated question; failure to meet a non-binding benchmark is not in itself tantamount to non-compliance with the Covenant.

Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph have argued that the reference points commonly used in human rights monitoring do not sufficiently link the performance expected of a state to its level of development. In response to this, they propose a more technical method that

estimates obligations for progressive realization by using the 'achievement possibilities frontier' (APF).[55] The APF reflects the highest level of enjoyment of a right ever historically achieved measured in reference to GDP per capita or other indicators that act as proxies for available resources. This approach provides an innovative method for setting benchmarks, which gives concrete expression to the idea that states' duty to progressively realize ESC rights to the maximum of their available resources needs to be assessed in a way that is consonant with their level of economic development.

Indices

In the development field, indices such as UNDP's Human Development Index and the more recent Gender Inequality Index and Multidimensional Poverty Index—which are formulated by calculating a composite score of several indicators—aim to provide measures of development and poverty that take into account broader elements of human well-being; responding to the 'excessive preoccupation' with statistical aggregates like GNP growth and national income figures as indicators of development.[56] Similarly, Social Watch's Basic Capabilities Index collates basic social indicators to offer an alternative non-monetary measure of poverty[57] and Transparency International's Corruption Perceptions Index combines expert assessment with opinion surveys to give an overview of transparency and openness (or lack thereof) in a country.[58]

In the human rights field, the appeal of an index that enables quick comparisons and ranking has also been felt. For example, Fukuda-Parr, Lawson-Remer and Randolph have calculated a composite score known as the Social and Economic Rights Fulfillment Index (SERF Index) comprising several indicators that are proxies for five ESC rights.[59] Another example is the Reproductive Risk Index developed by Population Action International, which draws together ten reproductive health indicators into a 'manageable set' by putting them in one single measure that can guide advocates.[60]

Budget Analysis and Resource Monitoring

Further, using human rights indicators to assess whether a state is employing the 'maximum of its available resources' in its efforts to fulfill ESC rights has proved a challenge because the Covenant itself 'is, inevitably, devoid of specific allocation benchmarks' on which such assessment might rest.[61] To overcome this limitation, a number of non-government organizations, such as the International Budget Project (IBP), Fundar (Centro de Análisis e Investigación), the International Human Rights Internship Program (IHRIP) and many others have been adapting and adopting budget analysis techniques for monitoring human rights generally, as well as the rights of specific groups, such as women and children.[62] Various techniques have been used to unpack the elements of the concept of maximum available resources, looking not only at government expenditures, but also at how governments raise revenues and the broader economic context in which they do so.

In relation to government expenditures, for example, these efforts have shown that it is possible to gain insight into how effective, fair and efficient state expenditure is in those sectors that impact most on ESC rights by:

- calculating allocation or expenditure ratios on ESC rights and comparing them to national or international benchmarks;
- conducting 'benefit incidence' analysis to identify which groups are benefiting from public expenditures; or

- using Public Expenditure Tracking Surveys (PETS) to ensure accountability for actual expenditures.

Other approaches have sought to 'cost' the level of spending a government *should* allocate to advance the necessary policies, plans and programs to realize human rights.[63] Costing initiatives have also sought to quantify, in financial terms, the immediate impact of specific ESC rights violations, as well as the more long-term consequences of failing to take action to address them.[64] In relation to budget processes, analyzing budget cycles[65] can show whether budgets (from formulation to implementation) are 'accessible, transparent and effective' and ensure the rights to participation, transparency and information.[66] In relation to government revenue, analyzing tax policy, development assistance, debt and deficit financing, monetary policy and financial regulation can give an indication of how well the government has mobilized resources. The Center for Women's Global Leadership identifies these areas as key points on the 'Maximum Available Resources (MAR) Star', a useful heuristic device that speaks to the Committee's insistence that available resources include potential as well as current resources.

More broadly, there has been an important new strand of work at the macro-economic level that goes beyond budget analysis to scrutinize broader areas of economic policy-making from a human rights perspective.[67] This challenges the approach to maximum available resources 'which takes the broad policy parameters that determine the resources available to support economic and social rights as a given',[68] and highlights that external pressures placed on governments, by international organizations, for example, must also be considered when measuring human rights compliance. This is particularly relevant in the context of the global financial crisis.[69]

Human Rights Impact Assessments

Human rights impact assessments (HRIAs) are another tool being increasingly used to evaluate programs, projects, legislation and other activities from the perspective of their compatibility with human rights standards and principles. Conducted either *ex-ante* or *ex-post*, HRIAs aim to identify, assess, prevent and/or respond to the potential or actual human rights impacts of a particular intervention. Two areas that have seen increasing use of HRIAs are in monitoring business activity[70] and assessing bilateral and multilateral trade and investment agreements.[71]

Various approaches, adopting a wide range of methodologies to show the cause-effect relationship between the activity being assessed and the enjoyment of human rights, have been proposed or piloted. Draft guiding principles for HRIAs, proposed by the Special Rapporteur on the Right to Food, Olivier de Schutter, in the context of assessing trade and investment agreements, mark a significant development in this area. From a methodological point of view, the guiding principles are important in promoting greater consistency in the area. Specifically, they affirm that HRIAs should make explicit reference to the normative content of human rights obligations and should rely on:

- Structural indicators that measure whether an agreement will make it more difficult for the state to ratify particular human rights instruments, to adapt its regulatory framework to the requirements of human rights, or to set up the institutional mechanisms;
- Process indicators that measure whether the agreement creates obstacles to the implementation of the state's policy measures and programs, or to the functioning of institutional mechanisms, that ensure effective fulfillment of the state's human rights obligations, particularly insofar as such obligations require budgetary commitments; and

- Outcome indicators that measure whether the agreement may make it more difficult to make progress in the realization of the human rights it has undertaken to comply with, from the perspective of full enjoyment of all human rights by all.[72]

Further, the draft guiding principles add that it is essential that these indicators provide information disaggregated by gender, disability, age group, region, ethnicity, or other grounds, in order to reflect the human rights principle of non-discrimination and pay due attention to the situation of the most disadvantaged groups, particularly women, based on a contextual, country-level appreciation of vulnerability.[73] Importantly, the draft guiding principles recognize that negotiating such agreements is not technocratic. It involves setting priorities and making trade-offs, the role of HRIAs being to clarify the nature of such choices and to better inform both the substance and process of agreeing on and managing such trade-offs, which must be open and democratic, ensuring the participation of civil society and potentially affected communities.[74]

Towards a comprehensive framework for monitoring ESC rights fulfillment

In response to the important conceptual progress that has been made to better understand the nature and scope of rights and obligations under the Covenant on Economic, Social and Cultural Rights, a vast array of innovative techniques and tools have been developed or adapted to measure these concepts. As highlighted in the above discussion, these represent major steps forward in the drive to operationalize the standards and principles that underpin the obligation to fulfill, and provide tremendous resources for human rights advocates in efforts to secure justice for victims of systemic ESC rights violations.

CESR's experience of applying quantitative tools in the context of socio-economic policy analysis and advocacy in specific settings has highlighted the need to use a variety of such techniques eclectically. Depending solely on one technique paints only a partial, and sometimes misleading, picture of compliance. For example, budget analysis used in isolation may not shed light on broader fiscal policy failures. Frameworks of human rights indicators, to date, capture the concept of maximum available resources less comprehensively than other human rights norms and standards. To the extent that certain tools and techniques are developed independently of, rather than complementary to, one another, opportunities for more holistic mixed-methods approaches are missed. The tendency to 'fetishize' particular techniques, especially quantitative ones, is also very tempting, with a number of unintended risks and consequences.

First, there is a risk that 'perfecting' the particular tool or technique becomes an end unto itself, the danger being that the tool becomes overly-complicated and inaccessible to the intended user. There have been relatively few attempts to take stock of the lessons learned regarding the applicability of different tools in practice and the extent to which they can assist monitoring and advocacy efforts in the challenging real-world environments faced by many human rights advocates. While there has been a lot of focus on the theory behind human rights indicators—as well as the creation of wide-ranging lists of potential indicators for various rights—the application of indicators in human rights

monitoring activities to date has been less consistent. Thus, questions abound regarding how different users can effectively interpret and practically apply indicators in different settings. Exhaustive lists of potential indicators on individual rights can be overwhelming to apply in practice, if they are not responsive to the real-life limitations of data-availability or the limited capacity of (state and non-state) human rights monitoring bodies—the ultimate users of such techniques. Complex formulas used to calculate various human rights indices can be similarly difficult for human rights advocates.

More fundamentally, a challenge that human rights advocates continue to face is how to interpret the statistical data gathered through quantitative methodologies. Indicators, for example, can be judged against benchmarks. But identifying optimal benchmarks can also be challenging and there are pros and cons for various approaches. For example, benchmarks established through international or regional development agreements may enjoy political support. However, as in the case of the MDGs, they are often compromise benchmarks that do not correspond to the full scope and nature of human rights obligations. A 'scoping' exercise with the Committee on Economic, Social and Cultural Rights might provide greater oversight in the selection of benchmarks, but it still gives states considerable discretion, which as a result may be set too low and in ways that limit the comparability of states' performance. Benchmarks calculated through the achievement possibility frontier address the concern that comparative human rights assessment may be used in a politicized manner, by avoiding the need to name countries specifically. However, a trade-off of this anonymity is that it can mask relevant contextual characteristics of the comparator countries. By using the highest performance ever achieved at a certain level of development, independent of many other factors affecting performance, the approach arguably also sets an unduly high bar in terms of the performance expected of states.

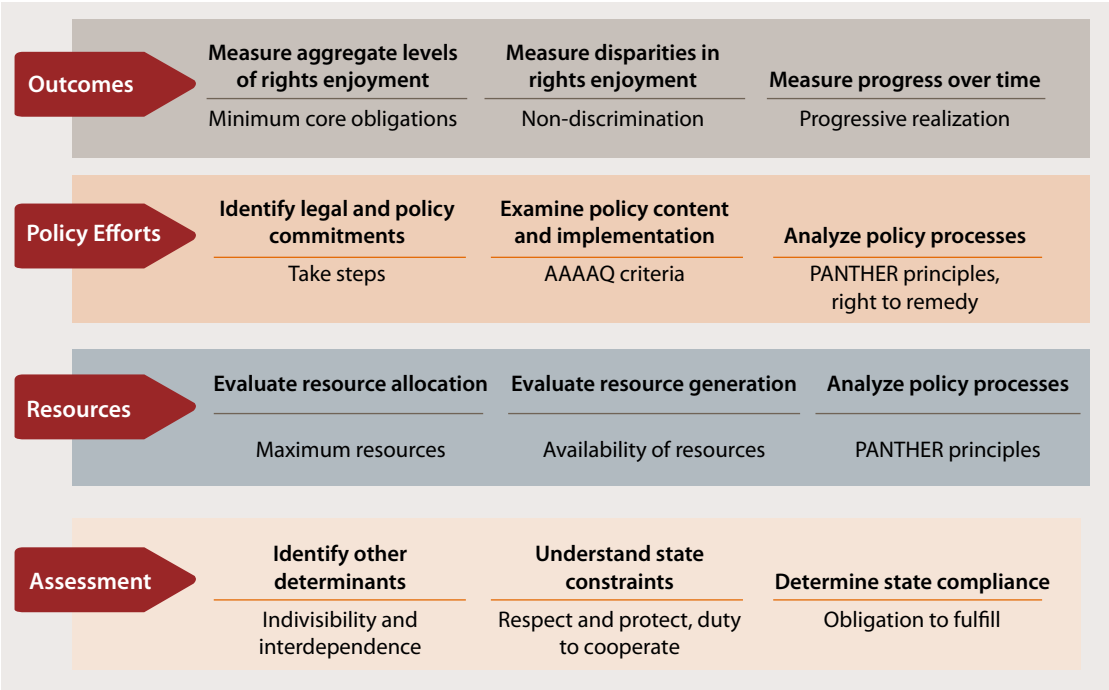
Another risk of fetishizing quantitative tools and techniques, therefore, is that these tools can narrow the lens of analysis, reducing a complex reality to simple, verifiable numbers, and thereby making invisible relevant factors. The multi-dimensional territory under view, in other words, can be too easily confused with the two-dimensional map attempting to represent it. While various quantitative approaches are complementary, and using them in combination strengthens their impact by providing a clearer picture of a state's compliance with its obligations to fulfill ESC rights, the use of quantitative tools and techniques 'does not replace the normative analysis of a human rights situation'.[75] Ultimately, no single set of quantitative measures, however comprehensive, can conclusively diagnose whether a state is meeting its obligation to fulfill ESC rights. As OHCHR rightly points out, failure to meet a benchmark is not in and of itself a breach of an obligation; further investigation and analysis is required.[76] Similarly, a state's ranking on a particular index can draw attention to apparent under-performance in relation to its resources, and quickly illustrate any deterioration or improvement from one period to the next, making such indices useful advocacy tools. However, seeing such measures as conclusive risks reducing human rights assessment to a technocratic exercise that analyzes the trees while missing the forest, and masks the value judgments that are inherent in choosing particular indicators and collecting specific data.[77]

In practice, both qualitative and quantitative data are required to build evidence of violations as neither, alone, is enough to fully assess a state's level of compliance. To push for concrete change, human rights advocates still need to articulate why a situation is the way it is. Indicators and indices need to be complemented with more detailed analysis of a range of relevant factors to offer more prescriptive recommendations to improve law and policies. Bringing together *both* quantitative and qualitative analysis can ensure better corroboration between a broad selection of evidence. In CESR's

experience, it has been useful to group these various approaches under an overarching structure to more methodically capture the full range of human rights standards and principles against which states' performance with regard to their obligation to fulfill ESC rights can be assessed.

OPERA: A step by step framework for assessing compliance

The Center's experiences in monitoring states' fulfillment of ESC rights in varying contexts over the last two decades have reinforced the importance of adopting a holistic approach to monitoring. CESR has sought to do this by developing a methodological framework within which various quantitative and qualitative tools and techniques can be deployed. This multidisciplinary, mixed-methods approach draws on valuable work from the legal, social science, statistics, public policy and economic fields. The OPERA framework developed by CESR articulates relevant human rights standards and principles to take into account when monitoring ESC rights fulfillment and offers practical guidance on which tools and techniques might be employed to evaluate them. These range from simple descriptive statistics that summarize data to more complex fiscal policy and budget analyses that assess the availability and allocation of resources. By making explicit this crucial link between the various human rights standards and principles that underpin the obligation to fulfill and the different assessment methods available to monitor them, the framework enables a systematic approach to building evidence of failures to fulfill ESC rights.



The OPERA framework examines both obligations of conduct and result—and, importantly, makes the link between the two. As outlined further below, the framework looks at different dimensions of the obligation to fulfill, grouped around Outcomes, Policy Efforts and Resources. It then triangulates

the findings from each step to make an Assessment of a state's compliance with its obligation to fulfill human rights. To assess obligations of result, the 'outcomes' step gives a snapshot of enjoyment of the right(s) under review in a country. However, outcomes alone cannot give a full understanding of a state's compliance. The 'policy efforts' step analyzes obligations of conduct by exploring whether the laws and policies that give effect to the right(s) under review have been designed and implemented in line with human rights standards and principles. The 'resources' step looks at the generation, allocation and expenditure of resources, as well as the larger macro-economic policy context that determines the availability of resources for the right(s) under review. The 'assessment' step looks at the broader constraints facing the government, before making a judgment about the level of compliance or non-compliance of a state with its human rights obligations based on a cumulative assessment of the findings from the prior three steps.

The step-by-step approach adopted in the OPERA framework is not a rigid one-size-fits-all formula. CESR has used it as a dynamic and flexible structure to frame different monitoring activities with differing objectives in a range of countries in recent years: from reproductive health in Kenya, to the economic and social dimensions of Liberia's transition from conflict, to the impact of the economic crisis in Ireland and Spain. The steps represent four broad dimensions, within which an inventory of potential issues is listed. Accordingly, the steps need not be carried out in a strict or sequential order, but can be adapted to the context under review, with points of departure starting in any one of the steps, not necessarily with outcomes. In some cases it may be appropriate to focus on one step or sub-step over another. In other cases, some sub-steps may not be necessary or feasible to carry out at all. The framework can be applied to a particular right or a number of rights, depending on the objectives, scope and complexity of the monitoring activity. By relying on both quantitative and qualitative data that is usually readily available, the framework aims to be practical and relatively simple to apply, allowing for flexibility and adaptability to the particular context of the monitoring activity and possible data availability constraints.

In CESR's experience, the framework's interdisciplinary nature and its eclectic employment of tools and techniques from different fields make it well suited for collaborative partnership across different areas of expertise. In the case of the *Rights or Privileges?* project in Guatemala, for example, CESR joined forces with fiscal policy analysts from the Central American Institute of Fiscal Studies (ICEFI) in order to assess the link between tax and budget policies and the realization of the rights to health, food and education in the country.[78] Applying the OPERA framework, CESR and ICEFI were able to combine statistical and econometric methods with human rights techniques of legal analysis, fact-finding and personal testimony.

The OPERA framework is as much about the selection of the right types of tools and techniques for monitoring as it is about cultivating the right types of relationships. For this reason, it holds much potential to be used in an inclusive and empowering way. Exclusion and disempowerment often breed bias against certain types of knowledge, especially the 'experiential expertise' of rights holders themselves. Rights holders should be recognized as integral in all steps of the framework by giving precedence to the views of the most vulnerable on what indicators are important to them. This helps the framework to adopt the most inclusive tools and techniques through which they can amplify their demands for concrete improvements in their own lives.

The breadth and flexibility of the OPERA framework allows for a range of potential uses and users. It has been designed primarily as a framework suitable for civil society groups to strengthen their

efforts to hold governments to account for systemic deprivations of ESC rights; but its utility goes beyond this. For example, the OPERA framework may assist in building evidence for specific cases before national courts, national human rights institutions, or other quasi-judicial mechanisms. For policy-makers, it may be used to integrate a human rights-based approach in policy monitoring and evaluation methods, such as results-based management or performance contracting. It could be adapted in ways that are relevant to assessing complaints that may come before the Committee on Economic, Social and Cultural Rights under the new complaints mechanism established by the Optional Protocol to the Covenant.

Step 1 – Outcomes: Assessing the level of enjoyment of rights

Summary of Step

Step 1	Human Rights Standards	Types of Assessment Techniques
Measure levels of enjoyment of the right	*Minimum core obligations*	Identify relevant outcome indicators that show the extent to which the right, including its minimum essential levels, is enjoyed in the country.
	Non-discrimination	Disaggregate indicators by social groups to identify disparities in levels of enjoyment of the right.
	Progressive realization	Examine variations of indicators over time to assess progress, backsliding and change in disparities.

As discussed earlier, monitoring the fulfillment of ESC rights requires looking beyond individual violations. Quantitative socioeconomic indicators are well suited to analyzing levels of rights deprivations affecting large numbers of the population. By providing a standardized and comparable measure, indicators can uncover patterns and trends within and across demographic groups. While there are dangers in drawing conclusions or generalizations from descriptive statistics alone, they offer a concise snapshot of the situation facing population groups. Collecting and assessing information on outcome indicators can signal the extent to which a state is achieving the realization of a particular right, though information reflecting rights holders' own perceptions about their rights enjoyment will also be important. It is important to flag that this step is by no means an overall conclusion about a state's compliance; further investigation about the state's conduct is needed, as it is necessary to analyze not only what is occurring, but why.

The step begins by collecting data that gives an overview of the current levels of enjoyment of the right(s) under review. The data collected at this step corresponds to the category of 'outcome' indicators under the OHCHR framework. This step requires first choosing appropriate indicators that act as proxies for the right(s) under review, accommodating practical limitations of data availability and reliability. For example, primary school enrollment and completion rates, as well as youth literacy rates, can give an initial overview of the extent to which the right to education is being realized for a given population.

There are various ways to select indicators. The list of illustrative outcome indicators developed by OHCHR can be a useful starting point. In most cases, quantitative data for these kinds of indicators is readily available from several sources, including national statistics offices, country Human Development

Reports, or multilateral agency databases, such as the UN and World Bank. As a guiding principle, however, affected communities should play a central role in the selection of indicators so as to ensure that indicators meaningfully reflect their concerns, assessment needs and priorities.

Importantly, what makes this a human rights-based analysis is that the information is then interrogated in light of human rights principles and standards. As discussed above, in monitoring the level of enjoyment of economic, social and cultural rights through the use of indicators, it is necessary to judge this information against a benchmark that can give guidance on the *adequacy* of a state's performance or where a state *should* be in its fulfillment of the rights in question given its capacity. Specifically, indicators should be assessed against benchmarks that reflect human rights principles and standards. Relevant standards for judging outcome indicators include (a) minimum core obligations, (b) non-discrimination, and (c) progressive realization or, conversely, non-retrogression.

In some cases, it may be possible to identify indicators that reflect the content of minimum core obligations, which have been defined and elaborated for many rights. For example, Article 13 of the Covenant provides that 'primary education shall be compulsory and available free to all'. Ensuring the satisfaction of this 'minimum essential level' of education is a minimum core obligation according to the Committee. So an indicator to monitor this obligation could be primary completion rates in a country. To satisfy this minimum core obligation, a state should ideally have a completion rate of 100%, though for states with limited resources this benchmark is often unattainable. Thus, in order to judge the gap between such a benchmark and a state's actual performance in practice, CESR has often used regional comparisons as reference points. In this approach, a country's performance on a particular indicator is assessed vis-à-vis its neighbors, regional averages, or other countries with similar characteristics, such as available resources. Comparing the enjoyment of these minimum essential levels to countries at similar levels of development can help evaluate the reasonableness of variations from 100% attainment of these minimum essential levels, demonstrating the importance of the prioritization of resources for meeting minimum core obligations, and exposing outlier governments.

Assessing Outcomes in the 'Rights or Privileges?' Project

*As the first step in the study, CESR and ICEFI selected appropriate **outcome indicators** to act as proxies for the rights to food, health and education, focusing on child chronic malnutrition, maternal mortality and primary education completion for reasons of data availability, political/MDG relevance and research manageability. We compared this data to that of countries in the region with comparable levels of GDP per capita; we sought disaggregated data on grounds of gender, ethnicity, socio-economic status, region and urban/rural location; and traced progress on the indicators over time, at the aggregate level and between groups.*

*We found Guatemala was still very far from satisfying what could reasonably be considered **minimum essential levels** of these rights for the entire population: half the population under five suffered from chronic malnutrition; over 60% of children did not complete primary school at the appropriate age; and maternal mortality rates were comparable to some of the poorest countries in the region such as Bolivia. Disaggregation revealed persistent **disparities in the enjoyment of rights**. Comparing these indicators over time showed that Guatemala had made **slower progress** in these indicators than similarly situated countries and that **disparities had increased** in some cases as progress was slowest among disadvantaged groups.*

To measure the human rights principle of non-discrimination it is necessary to capture disparities in the enjoyment of the right(s) under review. Again, socioeconomic indicators are well suited to do this, as they are often disaggregated by characteristics such as sex, age, educational attainment, ethnicity and race, location, income quintile, and other relevant social groups, although availability and comparability of disaggregated data on these and other grounds of relevance to human rights can be a significant problem. Nevertheless, disaggregated data is a powerful tool to highlight inequalities across population groups, as well as to identify possible determinants of the right under assessment. Furthermore, disaggregating indicators by multiple demographic characteristics may permit analysis of intersecting or compound forms of discrimination. CESR's Factsheets on Egypt, Guatemala, Spain and the USA, for example, have represented multiple disaggregated data in the form of statistical tree diagrams to graphically visualize intersecting disparities and highlight the relative weight of factors such as gender, ethnicity and geographical location in shaping educational outcomes.

Examining outcome indicators over time and calculating their rates of change can help uncover whether adequate progress has been made, if there has been any stagnation or backsliding in outcomes, and when the state can be expected to reach a particular benchmark. Of course, this sort of time series analysis is dependent on the regular collection of longitudinal and disaggregated data, which, in practice, is not always readily available. Again, country comparisons may be used to judge the reasonableness of a state's rate of progress, while disaggregated data can highlight whether or not progress is equitable and disparities are being reduced.

The analysis in this first step interprets descriptive statistics in light of relevant human rights standards to measure the extent of the realization of the right in the country. By highlighting patterns and trends in the experiences of individuals or groups, this analysis helps judge the reasonableness of outcomes achieved by the state. This provides a significant amount of initial information, however examining outcomes alone is not determinative of the state's compliance with its obligation to fulfill. As we highlighted above, poor outcomes might constitute prima facie non-compliance. However, given their contingency on resources and the fact that the results of policies and programs are not always wholly within the state's control, it is also necessary to analyze the state's conduct. For example, although there might be disparities among population groups, governments may be making genuine efforts to close these gaps and eliminate historic discrimination. Thus, the next step in the OPERA framework assesses the commitments and efforts that have been made by the state to realize the right(s) under review.

Step 2 – Policy Efforts: Assessing state commitment and efforts to fulfill ESC rights

Summary of Step 2

Element	Human Rights Principles	Types of Assessment Techniques
Identify legal and policy commitments	*Obligation to take steps*	Identify international commitments and national constitutional and legislative provisions that give effect to them. Verify the existence of specific laws and policies on the right and compare their provisions to international standards.

Examine policy content and implementation	*AAAAQ criteria*	Identify the goods and services needed to give effect to the right. Measure the availability, accessibility, acceptability and quality of these goods and services (e.g. assessing quantitative and qualitative data, community score cards).
Analyze policy processes	*Participation, Transparency, Accountability, Right to a remedy*	Analyze relevant national laws and policies (e.g. on access to information, local participation, complaints mechanisms etc.). Collect feedback on the extent to which those principles are applied in practice (e.g. through interviews or other qualitative methods and quantitative indicators if available).

As outlined above, the obligation of conduct requires that states take 'action reasonably calculated to realize the enjoyment of a particular right', including legislative, judicial, administrative, financial, budgetary, fiscal, educational, social and other measures. This step therefore starts by identifying the human rights commitments made by the state at the domestic, regional and international levels and evaluating the legal framework that gives effect to them. It then analyzes the way public policies and programs translate these commitments into the goods and services needed to realize the right(s) under review. Relevant systems, goods and services are judged against the AAAAQ criteria. The process of adopting and implementing policies and programs is also judged against the principles of participation, non-discrimination, accountability, and transparency. In this step, qualitative policy analysis plays a particularly important role in complementing quantitative indicators.

a) *Identifying legal and policy commitments*

This step first identifies the regional and international human rights commitments the state has agreed to adhere to. For example, it examines whether the state in question has signed or ratified relevant international covenants or treaties, and if there have been any reservations to these. International agreements, declarations, outcome documents of political summits, programs of action, etc. may also be taken into consideration. Although these are not legally binding, they may elaborate on the content of particular rights, such as the Cairo Declaration on Population and Development, which articulates reproductive health-related rights. Furthermore, by signing on to such agreements, states may pledge to achieve specific goals or targets, providing further evidence of the commitment of a state to the right in question.

The second question to consider is whether these international commitments have been internalized in the domestic legal order in ways that meet the object and purpose of these commitments, whether or not their specific terms are invoked. As at the international level, political campaign promises, statements or speeches made by leaders may also contain specific commitments related to the right(s) under review. It is also important to identify any laws that run contrary to or inhibit the state in fulfilling its human rights obligations. In states where governance structures have been decentralized, examining the consistency of sub-national laws or interpretations of national laws with the human rights obligations made at the national level will also be relevant.

These questions on legal and political commitments broadly reflect the 'structural indicators' in the OHCHR framework. Focusing on the adoption of legal instruments and the existence of institutional mechanisms conducive to realizing the right(s) under review,

indicators used in this step tend to be categorical in nature. Rather than being a numerical value, as with many outcome indicators, the questions asked at this step, such as whether a state has ratified a treaty or made any reservations, require a yes or no answer. Information to answer questions on regional and international treaty ratification can be found in the United Nations Treaty Series Online Collection. The Toronto Initiative for Economic and Social Rights' TIER Dataset on the constitutional status of ESC rights in developing countries can also serve as a source of information. To evaluate the extent to which a state has domesticated its international commitments, it is necessary to study the nature and content of legal and political commitments and compare them to international human rights standards, which is necessarily a qualitative exercise.

b) *Examining policy content and implementation*

While a state may commit formally to their obligation to fulfill ESC rights, this may not translate to improvements on the ground at all in practice. So the next question to consider in this step is how such commitments move from paper to reality. This question can be answered by identifying the public policies in the sector(s) relevant to the right(s) under review and assessing whether they are designed to give effect to the state's human rights commitments.

These policies can be identified by referring to the general comments of the treaty monitoring bodies, which broadly define the characteristics of goods and services needed to fulfill the particular right, but should be guided by expertise and best practice from the relevant sector with regard to the most effective policy interventions. In relation to the right to food for example, the Committee has held that food should be available either directly from productive land or through 'well-functioning distribution, processing and market systems'. Literature from the agricultural field can provide guidance on the key interventions needed to ensure such systems are effective. In identifying relevant policies, it is important to look across multiple sectors, given that various factors influence the enjoyment of a particular right. For example, poor roads may limit access to hospitals or school nutrition programs may enhance education.

The goods and services facilitated through such policies are in turn analyzed according to the human rights criteria of availability, accessibility, acceptability, adaptability and quality (AAAAQ). To measure compliance with the AAAAQ criteria, quantitative indicators are important, in order to illustrate what kinds of goods and services are available, where they are available, and who is accessing them. Qualitative information complements this analysis by highlighting the perceptions of these services by the individuals and groups they are designed to reach. These questions on the delivery of goods and services broadly reflect the 'process indicators' in the OHCHR framework.

As in step one, the specific indicators identified for the right(s) under review need to be judged against benchmarks or reference points that reflect the human rights principles of minimum core obligations, non-discrimination and progressive realization. In relation to availability, for example, internationally accepted recommendations or guidelines can provide guidance to judge the reasonableness of available goods and services. For example, joint UN agency guidelines on the availability of emergency obstetric care, a critical intervention for the prevention of maternal mortality and morbidity, provide that for every 500,000 members of the population, a minimum of five emergency obstetric facilities should be available, at least one of which should provide comprehensive care. Carefully chosen country comparisons or any existing national policy commitments can also offer quantitative benchmarks or reference points for measuring efforts to make services available, accessible, acceptable, affordable and of adequate quality.

OPERA | A FOUR STEP FRAMEWORK FOR MONITORING ECONOMIC, SOCIAL AND CULTURAL RIGHTS FULFILLMENT

OUTCOMES

This step interprets socio-economic outcome indicators in light of relevant human rights standards to uncover patterns and trends in rights deprivations experienced by different groups.

Measure aggregate levels of rights enjoyment

Measure disparities in rights enjoyment

Measure progress over time

WHAT CONCEPTS ARE WE MEASURING?

HOW CAN WE MEASURE THEM?

Minimum core obligations: Widespread deprivations suggest obligations of result (e.g. to reach minimum essential levels of a right) are not being met.

Compare socio-economic outcome indicators to relevant benchmarks and/or analogous countries. Deviations can point to whether or not a country's performance is reasonable.

Non-discrimination and equality: Differences in the enjoyment of a right raise concerns about possible discrimination or failure to address disadvantage.

Disaggregate socio-economic indicators by relevant social groups (e.g. ethnicity, religion, gender, region, income, etc.) to uncover any particular or intersecting disparities.

Progressive realization and non-retrogression: Identifying trends in the enjoyment of a right over time indicates whether there is progress or backsliding and whether disparities are growing or reducing.

Compare the same socio-economic indicators over time (aggregate or disaggregated).

POLICY EFFORTS

This step assesses the laws and policies that give effect to the state's human rights commitments. It seeks to determine the extent to which they have translated into adequate goods and services on the ground and to identify the capacity gaps that have led to shortcomings in their implementation.

Identify legal and policy commitments

Examine policy content and implemen-tation

Analyze policy processes

WHAT CONCEPTS ARE WE MEASURING?

HOW CAN WE MEASURE THEM?

Obligation to take steps: Whether the government is taking adequate legislative, judicial, administrative, social and other measures towards the full realization of rights.

Identify indicators that demonstrate commitments made and analyze the provisions of relevant laws and policies against international standards, guidelines, etc.

AAAAQ: Whether the goods and services needed to fulfill a right are increasingly available, accessible, acceptable and of adequate quality, without discrimination.

A range of techniques can be used to gather primary or secondary data that measure these criteria. Cross-country comparisons, disaggregated and temporal data all help in judging the reasonableness of the state's performance.

Participation, transparency, right to a remedy: Whether rights holders can actively participate in the design, implementation and oversight of policies and have avenues to hold government to account or seek redress when they are negatively affected by them.

Qualitative techniques (e.g. focus groups, interviews) can gather feedback from particular rights holders. Quantifiable studies (e.g. perception surveys and governance indicators) may provide a general overview.

The steps of the framework represent four broad dimensions, within which an inventory of relevant issues is grouped. They need not be carried out in a strict sequential order and can be adapted to focus on one step or sub-step over another, depending on the context. For more information visit **www.cesr.org.**

RESOURCES

Drawing on tools of budget and economic policy analysis, this step evaluates the state's fiscal policies to uncover cases where underfunding is related to a failure to efficiently and equitably generate and distribute resources.

WHAT CONCEPTS ARE WE MEASURING?	HOW CAN WE MEASURE THEM?	
Progressive realization according to maximum available resources: Whether expenditures (planned and actual) in relevant sectors are a transparent, equitable and effective use of available resources.	Allocation ratios, judged against relevant reference points and over time, show reasonableness of amounts earmarked for key sectors and population groups. Various governance tools (e.g. social audits) review the disbursement of funds.	Analyze resource allocation and expenditure
Progressive realization according to maximum available resources: Whether sufficient revenue is being mobilized transparently, equitably and effectively from different sources.	Identify the state's main revenue sources (e.g. taxation, borrowing, international assistance). Evaluate relevant fiscal, monetary, and macro-economic policies against human rights principles.	Analyze resource generation
Participation, accountability and transparency: Whether the budget process is open and accessible to citizens and whether they have avenues for review of budget decisions or redress.	Evaluate channels for participation in budgeting. Assess to what degree people have access to budgetary information. Evaluate administrative, judicial or other avenues for review of budget decisions and redress.	Analyze policy processes

ASSESSMENT

This step provides a broader analysis of contextual factors impacting on rights holders' ability to claim their rights and the state's capacity to meet its obligations, which is synthesized with the findings from the previous three steps to make a final assessment.

WHAT CONCEPTS ARE WE MEASURING?	HOW CAN WE MEASURE THEM?	
Indivisibility and interdependence: Socio-economic, political and cultural factors may inhibit people's ability to enjoy their rights or seek redress if they are violated.	Although sophisticated quantitative methods, such as econometrics, can be used, qualitative approaches, such as capacity gaps analysis, can help facilitate the participation of rights holders.	Identify other determinants
Obligations to respect and protect: The capacity of the government (influenced by third parties and structural limitations) is also relevant to explain why its efforts have not been more successful.	Again, these constraints can be uncovered through qualitative approaches or quantitative methods from various fields, e.g. political economy analysis.	Understand state constraints
Obligation to fulfill: To make a conclusion about a government's compliance with its obligation to fulfill economic, social and cultural rights.	By triangulating the findings from the first three steps, a picture should emerge from which to judge the state's efforts to progressively fulfill rights and the results of those efforts on the ground.	Determine state compliance

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SOCIAL JUSTICE THROUGH HUMAN RIGHTS

Quantitative indicators are also vital for determining if there are inequalities in the accessibility of these goods and services that affect particular groups. Disaggregated indicators on the use and distribution of services can point to issues of accessibility, when certain groups fall behind national averages. For example the proportion of births assisted by skilled attendants, which is an MDG indicator, is often disaggregated in national demographic health surveys by income quintile, education level, location and age group. Indicators on levels of the use of goods and services should be complemented with indicators that show geographic and economic accessibility. Water collection time, for example, is a strong indicator on water accessibility. Similarly, enrollment fees and indirect costs such as school supplies and transportation highlight economic barriers to accessing education.

Quantitative indicators can also highlight concerns in the quality of goods and services. For example, poor performance on standardized tests might raise concerns regarding the quality of education. Similarly, a water source classified as 'improved' but showing high levels of contaminants will not be satisfactory to give effect to the right to water. Finally, comparing indicators over time can illustrate whether policies are translating into practical improvements in the availability, accessibility and quality of goods and services on the ground and are reducing disparities in terms of access to services.

Nonetheless, qualitative information is also crucial, particularly related to questions of quality, adaptability and acceptability, which reflect a population group's perceived experience. In particular, it helps to get a fuller understanding of people's daily experiences and self-identified challenges in enjoying the right(s) under review. Some of these findings may point to other rights violations that may require further interrogation (as provided for in step four). This kind of information is often less readily available and primary data might need to be collected through surveys, interviews and individual testimonies with affected communities. A more systematic approach to analyzing qualitative information is to categorize it through coding techniques frequently employed for qualitative research in the social sciences. For example, showing that a certain percentage of a particular group are satisfied or dissatisfied with waiting times at health care facilities speaks to the quality of care they provide. Further, looking at disaggregated information on quality of services may show that conditions are worse in areas whose populations are particularly marginalized, which might point to possible patterns of discrimination or failure to prioritize minimum essential levels of the right(s) under review; a possibility that may be affirmed or challenged by consultations with affected communities.

c) *Analyzing policy processes*

In addition to analyzing the content of policies and the way they have translated into the provision of goods and services, the step considers whether the policy cycle upholds the human rights principles of participation, accountability and transparency. As noted above, participation in decision-making throughout all stages of the policy cycle—design, implementation, monitoring and evaluation—is a procedural right, underpinned by a number of civil and political rights such as access to information, as well as freedom of speech and of assembly. Understanding the relationship between ESC rights and civil and political rights is also important in this analysis. For example, if a person is illiterate, their ability to gather the necessary information to actively participate in public life is limited, further worsening their chance to claim their ESC rights.

In order to assess a state's compliance with these procedural human rights principles, the step identifies indicators on the forms of participation mechanisms available; the community's awareness

of them; their regularity; their attendance rate and composition; the extent to which their recommendations are then acted on by governments; as well as perceptions of satisfaction with these mechanisms by the affected community. Information on the availability of effective, appropriate and accessible avenues of redress through administrative and judicial remedies is also important to collect, in accordance with the principle of accountability for cases where policies are not implemented, do not work properly or do not achieve their objectives.

This element of the step could draw on tools such as perceptions surveys, some of the most well-known and regular of which include the World Values Survey, Afrobarometer, Eurobarometre, and Latinobarometro, for example. The international NGO, Transparency International, has developed a Corruption Perceptions Index. These indices broadly profile people's ability to engage in their country's governance structures. However, where possible, a richer analysis would look specifically at whether the communities affected by particular policies or programs and relevant civil society organizations: (a) actively participated in their design and implementation, and (b) had avenues at their disposal (either sector-specific or general) to seek remedies for any violations of the right(s) under review. Primary data might need to be collected to fully analyze participation and accountability channels in a particular context, for example, through a survey of involved civil society actors.

The analysis in this step combines quantitative and qualitative indicators and uses a variety of tools and techniques to identify the legal commitments of the state to fulfilling the right(s) under review and to judge the adequacy of policies that have been put in place to give effect to these commitments. In reviewing public policies, the objective is to determine the extent to which they have translated into goods and services on the ground that meet the AAAAQ criteria and through a process that complies with the principles of participation, transparency and accountability. This analysis is incomplete however without explaining why there are disparities between the policies on paper and the delivery of goods and services in practice.

Assessing Policy Efforts in the 'Rights or Privileges?' Project

*For this step we first observed to what extent the national framework was incorporating the content of international obligations and found that the **legal and policy commitments** formulated by successive governments in the sphere of food, health and education had generally (with some exceptions) been **framed in exemplary terms**. However, the reality in practice was very different. A selected range of **critical policy interventions** in each area (such as the provision of emergency obstetric care to prevent maternal death, or school meal programs to address both educational attendance and malnutrition) were assessed against the criteria of availability, accessibility, acceptability and quality, using a number of quantitative indicators and methods.*

*These were **found to be grossly inadequate** in all three areas, largely due to **inadequate coverage, inequitable distribution and underfunding**. In relation to maternal health, for example, statistical mapping showed that in the regions where maternal mortality rates were highest emergency obstetric services were least available. Qualitative data from structured interviews revealed that high transport costs and culturally inadequate birthing practices were major obstacles preventing poor women in rural areas accessing the reproductive and sexual health services they needed. Community interviews also revealed that mechanisms for participation and accountability were seen as existing only on paper.*

It is therefore also necessary to identify the capacity gaps that often account for shortcomings in the implementation of laws and policies. Capacity, defined broadly, means having sufficient knowledge, organizational abilities, motivation, authority, and importantly resources, including human, technical and financial.[79] Gaps in some of these areas will have been highlighted during the analysis in this step. However, it is important to explain further why more resources have not been made available or why organizational dysfunctions (within or between different government bodies, for example) have not been addressed. The following steps seek to do this. Specifically, the next step offers a more detailed assessment of the resources that have been made available to put the policies into effect.

Step 3 – Resources: Assessing the use and generation of adequate resources

Summary of Step Three

Element	Human Rights Principles	Types of Assessment Techniques
Evaluate planned and actual resource expenditures	*Core obligations* *Non-discrimination* *Progressive realization according to maximum available resources*	Calculate the percentage of the state's budget allocated to social spending relevant to the specific right, comparing to relevant benchmarks. Identify which population groups are benefitting from spending; contrasting spending disparities with disparities in human rights outcomes. Compare allocations to previous budgets to see how spending has evolved over time, taking into account economic growth over the period. Track public expenditure (e.g. using PETS, QSDS, or social audits).
Evaluate resource generation	*Progressive realization according to maximum available resources* *Non-discrimination*	Calculate the state budget as a percentage of the overall economy and compare to similar countries. Identify and assess the adequacy and fairness of the state's main revenue sources (e.g. taxation, borrowing, international assistance). Evaluate the state's fiscal and/or monetary policies governing the raising of revenue (e.g. identify tax base as % of GDP and track its evolution over time, taking into account economic growth over the period).
Analyze relevant policy processes	*Participation, accountability, transparency, right to a remedy*	Collect feedback on public participation in the design, implementation and evaluation of fiscal and monetary policies (e.g. through interviews or other qualitative methods and quantitative data, if available). Analyze indicators related to transparency of economic policy process.

The previous step on policy efforts sought to identify gaps that hinder the translation of policies and programs into the efficient and equitable delivery of quality goods and services on the ground. Such gaps commonly stem from under-resourcing of these policies. Frequently, government authorities attribute underfunding to a lack of sufficient resources. However, this claim needs to be interrogated, as often it is instead due to a failure to efficiently and equitably generate and distribute resources.

This step assesses the resources devoted by the state to meeting its human rights commitments. The focus of this step is therefore the budgetary and other fiscal efforts by the state to generate and deploy the maximum of available resources, in line with its human rights obligations. Specifically, the step uses budget analysis techniques at a more macro-level, beyond the specific interventions assessed in the previous step. Identifying larger fiscal policy trends enables us to determine whether maximum available resources are being mobilized and used to prioritize minimum core obligations, reduce inequalities in and progressively realize the right(s) under review. This step also examines the budget cycle process from the perspective of the human rights principles of participation, non-discrimination, transparency and accountability. This broader analysis considers not only the expenditure side of the budget (how funds are spent), but also the revenue side (how these funds are generated), as well as the broader macro-economic policy context within which budget decisions are made. Budget analysis can be carried out at varying levels of technical and analytical detail – and can therefore be adapted for different uses and types of actors.

a) *Evaluating planned and actual resource expenditures*

This step first gathers budgetary information to determine how much the state allocates to the social sectors relevant to the right(s) under review and who benefits. Resource allocations can be assessed against the principles of minimum core obligations, non-discrimination and progressive realization in order to identify what areas are prioritized in the budget, what groups are prioritized and how prioritizations have evolved over time.

Using allocation ratios that show how much is being earmarked for key sectors, as a percentage of total government expenditure or GDP, helps to identify which areas are being prioritized. Sometimes these indicators are already calculated and can be accessed on online databases, but such ratios can be easily calculated directly from the budget. UNDP suggests the use of four overarching ratios that can be used to monitor public spending on human development: the public expenditure ratio (government share of GNP), the social allocation ratio (social services share of government spending), the social priority ratio (the human priority share of social sector spending) and the human expenditure ratio (the human priority share of GNP). Benchmarks help to judge the reasonableness of these ratios. These might include:

- Comparisons to neighboring countries or countries with similar GDP.
- Comparisons to national, regional or international targets or commitments agreed to by the government. These might be found in development plans or political accords. In the Abuja Declaration, for example, African governments committed to allocating 15% of their budgets to the health sector.
- Guidelines from international agencies (e.g. WHO global target of minimum 5% of GNP for health expenditures or UNICEF's Innocenti Report Card 8, which sets a benchmark for a minimum level of public spending on early childhood education and care as 1% of GDP).

- Comparisons to spending on other 'non-priority' sectors within the budget or non-priority projects within a sector. For example, human rights advocates have raised concerns when states allocate considerable resources to build up the military during peacetime or construct infrastructure for hosting 'mega events' when large numbers of their population do not have adequate housing.
- Comparisons to costing estimates on what the state would need to spend to achieve a particular policy outcome.

This analysis might uncover that resource allocations do not give priority to achieving the minimum essential levels of the right(s) under review.

Analyzing patterns of expenditure to see how resources are distributed across regions and population groups can determine whether resource allocations prioritize reducing disparities or whether they aggravate existing inequalities by benefiting already better-off groups. The inequitable distribution of resources suggests that the state is not meeting its obligation of non-discrimination. Ideally, this analysis would be done by gathering, or calculating, indicators of per capita spending, disaggregated by geographic region and social group. However, if the data needed to do this is not available, it may be possible to *infer* who is benefiting from budgetary allocations, by looking at the classification of budget lines. For example, allocations in the education sector that prioritize building of universities in wealthy urban areas, when there is a shortage of primary schools in poor rural areas, could be considered discriminatory spending. Benefit incidence analysis is a quantitative technique that can be used to identify which groups have benefitted most from public spending, which can be adapted for human rights analysis.

Analyzing how allocations have evolved over time, in comparison to available resources, can give an indication of whether resources are being employed to progressively realize the right(s) under review. Inflation-adjusted comparisons between budgets over a particular time period can be useful to highlight trends and patterns in how a particular right or particular population group has been prioritized. For example, if allocations to the water sector have decreased, in real terms, while performance on water-related outcomes has deteriorated or stagnated, it may be possible to argue that the state is not complying with its obligation of non-retrogression. In line with the Committee's criteria outlined above, this analysis is particularly crucial for ascertaining whether or not fiscal austerity measures which cut back in key areas are duly justifiable in light of available resources, when such cuts undermine previous gains made in progressively realizing the right(s) under review.

Furthermore, it is important to make a distinction between planned and actual expenditure, as resources that are earmarked for spending on programs and sectors related to the right(s) under review are not always spent effectively or for their originally intended purpose and beneficiaries. Looking at audited financial reports, for example, might show discrepancies between money allocated and actually spent—resulting in either over-spending or under-spending—that raise concerns about inefficient use or wasting of resources if these resources have not translated into an improvement in the enjoyment of human rights. Governance assessment tools, such as social audits, public expenditure tracking surveys (PETS) and quantitative service delivery surveys (QSDS), which focus on the operational impacts of budgets, are useful in this step. By uncovering weaknesses related to the planning and management capacities of ministries, delays in disbursements, leakage of re-

sources, bureaucratic capture, corruption and accountability mechanisms, they capture the human rights principles of accountability and transparency in practice in allocating resources within sectors.

b) *Evaluating resource generation*

In addition to understanding how governments allocate funds, another component of this step considers how these resources are generated. The objective here is to assess whether sufficient revenue is being raised and to evaluate the human rights implications that arise from how revenue is being raised from different sources. Major sources of government revenue are taxation, borrowing and, in some cases, international development assistance, including official development assistance (ODA). A starting point is to look at the size of the government's budget vis-à-vis the overall size of the economy (often depicted as government spending as a percentage of GDP). Seeing how this indicator compares over time or to similar countries can help judge how effective the state has been in harnessing available resources in the country. However, to analyze why more revenue is not being raised, it is necessary to look beyond the budget, to evaluate relevant fiscal and macroeconomic policies to determine their compliance with human rights principles.

Tax policy, for example, can be assessed against the human rights principles of non-discrimination and progressive realization. Taxation is a major source of revenue for states. It is also the principle policy tool at states' disposal for lifting people out of poverty and reducing inequality. However, many governments face serious challenges due to weak and under-resourced revenue authorities, large informal sectors, pressure to offer overly-generous tax breaks, and tax avoidance and evasion. Determining whether a tax system is progressive, flat or regressive by using incidence analysis, for example, can uncover whether it is effectively discriminating against the poor and other vulnerable groups. Common examples of regressive taxes include indirect taxes imposed on the consumption of essential goods and services, such as the Value-Added Tax (VAT) which typically comprise a larger share of the income of poorer households compared to wealthier households. Determining how much tax revenue the state collects, for example by looking at the ratio of tax revenue to GDP over time, and establishing the amount of tax revenue foregone in tax concessions, exemptions, evasion, holidays, and privileges benefiting certain sectors can indicate whether the state is making progress towards addressing the constraints that deprive it of resources for ESC rights fulfillment. Countries that generate significant resources through development assistance may face different issues. In some cases, donors attach policy conditionalities to their aid, such as trade liberalization, and an increasing role for the private sector in service provisions, or ceilings on public sector pay that negatively affect human rights. In other cases, donors tie aid to the purchase of imports from the donor countries that cost more than goods and services available locally. In addition, ODA is not always channeled through a country's treasury, making it more difficult to track, manage and coordinate resources sustainably, at times creating a parallel set of development priorities and a group of actors with little oversight or accountability.

Furthermore, analysis of whether a state is spending and generating funds to the maximum of its available resources to meet its human rights obligations can go beyond evaluating fiscal policy alone. Further investigation can examine many other variables that influence the pool of resources that a state makes available for the fulfillment of economic and social rights outside of budget and tax policy analysis. These factors might include debt and deficit financing, international development assistance, government borrowing, monetary policy and financial regulation.

Assessing Resources in the 'Rights or Privileges?' project

Firstly, CESR and ICEFI compared the percentage allocated to social spending generally, and on the rights to health, education and food specifically, to neighboring countries and over time, finding that ***Guatemala spent significantly less on the social sector*** *and on the relevant sub-sectors. Second, we calculated that* ***the distribution of spending was inequitable,*** *with allocations being skewed away from the most disadvantaged regions or socio-economic sectors of the population. For example, per capita health spending in 2006 was three times higher in the metropolitan area of Guatemala than in Quiché, the department with highest percentage of people living in poverty, one of the largest indigenous populations and among the highest rates of maternal mortality. Education spending was shown to benefit the poorest sector of the population least. Thirdly, the study identified* ***inequities in the raising of revenue*** *that had left the state without the resources needed to progressively realize ESC rights. Despite 10 years of economic growth, the public budget remained one of the smallest in the region. This was due to the country´s* ***extremely low tax burden*** *(one of the lowest in the region) and to a tax system that granted generous exemptions and privileges to the profitable business sector while placing a disproportionate burden on the poor through consumption taxes.*

c) Analyzing relevant policy processes

Just as in step two, process principles such as transparency, access to information, participation, and accountability should also be assessed in the context of the budget and broader fiscal policy. The budget formulation process should be judged on the extent to which information on budgets is available and accessible to citizens through the principles of participation, non-discrimination, transparency and accountability. It is still the case in some countries that governments draw up budgets in secrecy with no public participation and no proper approval process from the legislature. A useful tool in this exercise is the Open Budget Survey, produced every two years by the International Budget Partnership, which scores countries on the extent to which their national budgets meet standards of transparency and accountability. Similarly, evaluating efforts the state has made to address constraints that hinder the collection of tax revenue, such as closing financial loopholes or prosecuting tax evaders, is essential in giving force to the principles of accountability and transparency. The Tax Justice Network's financial secrecy index is a useful source of information about countries whose systems encourage legal and financial secrecy.

Integrating the analysis of policy efforts in step two, with the analysis in this step on the adequacy of the state's efforts to generate, allocate and use resources, gives a more comprehensive view of a state's compliance with its obligations of conduct than an analysis that ends with examining public policies alone. The principle of 'maximum available resources' is an essential dimension to assess when considering the steps taken by the state to meet its ESC rights obligations. As discussed above, persuasively countering a state's claim that lack of means prevents it from taking more action to fulfill ESC rights is one of the biggest challenges for human rights advocates. Drawing on tools of budget and economic policy analysis, this step evaluates the state's fiscal policies to uncover cases where underfunding in social sectors is instead due to a failure to efficiently and equitably generate and distribute resources. Nevertheless, it is still necessary to explore why such failures arise. Domestic constraints, such as lack of infrastructure, elite capture, endemic corruption, or external pressures, such as aid conditionalities, or competition to attract foreign investment among others, may constrain the state's decision making. These factors are considered in more detail as part of the following step.

Step 4 – Assessment: Understanding constraints before assessing compliance

Summary of Step Four

Element	Human Rights Principles	Types of Assessment Techniques
Identify contextual factors that limit the enjoyment of the right	*Indivisibility and interdependence of rights* *Right to a remedy*	Identify the social, economic, political or cultural conditions that prevent people from enjoying the right or seeking redress for violations of the right (e.g. through capacity gap assessment).
Understand the state's constraints	*Obligation to respect and protect rights against abuse by third parties* *Extraterritorial obligations of other states to respect, protect and fulfill ESC rights*	Identify how the acts or omissions of third parties or structural dysfunctions impact on the state's ability to fulfill the right.
Determine state compliance	*Obligation to fulfill*	Draw together findings from previous steps, in light of above elements.

The final step draws together and synthesizes all the findings from the previous steps, in order to make a final assessment of a state's compliance with its obligation to fulfill the right(s) under review. Before addressing the findings, however, this step provides a contextual analysis to reflect on the broader factors bearing an impact on (a) the rights holders' ability to claim the right(s) under review; and (b) the duty-bearers' capacity to meet their obligations—beyond shortcomings in the efforts analyzed in the previous two steps. Many of these issues will have been foreshadowed in the previous steps. But they are addressed more comprehensively here by carrying out a political economy analysis, which seeks to 'reveal the underlying interests, incentives and institutions that enable or frustrate change'. In effect, this kind of analysis attempts to uncover *why* government efforts have not been more successful. This ensures that the broader context in which the state is operating is taken into account as part of the overall assessment, so that recommendations stemming from the analysis are constructive and well-targeted. This final step is indispensible and represents the crux of the analysis: distinguishing deprivations that might be the result of factors genuinely beyond the control of the state from those for which the state should be held accountable.

a) *Identifying contextual factors*

There are often many factors that influence human rights enjoyment reflecting the principle that rights are indivisible and interdependent. Often one right serves as a requisite for the enjoyment of another, and thus denials of one can foster multiple levels of deprivation. Poor and socially excluded groups are less likely to be able to access information, organize, participate in policy debates and obtain redress, for example. Identifying other rights deprivations or socio-economic, political or cultural factors inhibiting people's ability to enjoy the right(s) under review or to seek redress when they are the victims of a rights violation can help pinpoint the responses reasonably expected of the state. For example, socio-cultural norms can disempower women, limiting their ability to freely make decisions regarding their reproductive health. In the health sector, these underlying factors have often been described as 'social determinants'—the economic and social conditions

under which people live, which affect their health and have an impact on health inequalities. Qualitative approaches, such as conducting a capacity gaps analysis with rights holders can uncover some of these barriers.

b) *Understanding state constraints*

The capacity of the state, as the primary duty bearer, is also relevant to consider. This involves identifying constraints on the state from domestic or international sources that influence or constrain its capacity to fulfill the right(s) under review. This requires reflecting on the features that are particularly important in the context under review. Although such constraints will vary greatly depending on the context, they may broadly relate to:

- The conduct of third parties, such as corruption, business misconduct, elite capture, donor influence, aid conditionality, etc.
- Structural dysfunctions or conditions relating, for example, to decentralization, electoral processes, parliamentary procedures, political instability, environmental and climate volatility, international trade, investment, finance, monetary and debt policies, etc.

In relation to the conduct of third parties, for example, systemic corruption and elite capture might reduce the efficiency of institutions and result in inequitable outcomes most detrimental to the poorest. A least-developed country that is severely debt-burdened might not be able to prioritize the allocation of its resources for economic and social rights fulfillment in light of repayments. The political and economic structures that dictate aid, trade, tax and debt policies might reduce the maneuver room that a state has for its own decision-making on the right in question. Competition to attract foreign investment may lead to weak regulatory frameworks that fail to effectively control harmful corporate activity. Human rights deprivations resulting from the actions of third parties may show a failure of the state to protect against rights violations. In some cases, they may show a failure by other states to meet their extraterritorial obligations (ETOs) to respect, protect and fulfill ESC rights beyond their borders, which in an era of increasing globalization, is all the more important to factor in through this step. As noted before, the components of steps in the OPERA framework do not necessarily need to be followed in strict sequence. In some contexts, such constraints may be so central that they merit a more central focus of the analysis.

The factors identified in this step should not be seen as necessarily exonerating the state, as evidence must be found as to whether the state is making adequate and committed efforts to address the identified constraints to the best of its ability. For example in the case of corruption, the state might criminalize these acts through anti-corruption measures and promote greater transparency. What this analysis shows is how the actions or omissions of other actors impact on the state's capacity to implement the right in question and how effectively the state is responding to these in line with its duty to protect ESC rights.

c) *Determining state compliance*

After taking adequate consideration of constraints faced by the state, an overall examination of the information collected in the previous three steps can be made to reach a comprehensive assessment of compliance with the obligation to fulfill the human right(s) under review. By linking to the various human rights principles and standards, the different steps provide a guide to the elements—or pieces of the puzzle—that must be taken into consideration when judging a state's performance.

By triangulating the findings from the first three steps—outcomes, policy efforts and resources—it is possible to bring to light the obstacles that are preventing commitments made on paper translating into practical action that has a meaningful impact improving the situation on the ground. Much like a diagnostic chart, this approach helps to establish the often opaque causal links between these elements. The analysis may show, for example, that the problem is attributable to inadequate or discriminatory use of resources, inadequacy of policy efforts, a lack of participatory processes, or other factors. On the basis of this analysis, a picture should emerge, from which it is possible to draw conclusions about the reasonableness of the state's efforts to progressively fulfill the right(s) under review to all sectors of the population without discrimination and employing the maximum of its available resources.

By combining all of the quantitative and qualitative information gathered in the previous steps through a wide range of tools and techniques and reflecting on broader contextual factors, step four gives a comprehensive and holistic analysis of a state's compliance with its obligation to fulfill the right(s) under review. This final step is not a mechanical, formulaic exercise. Quantitative data makes an important contribution to analysis at each step, but the final judgment must be a qualitative one that necessarily relies on a considered evaluation of all the evidence, interpreted through the light of the state's obligations of conduct and result.

In essence, by providing an overarching framework to integrate multiple tools and methods, OPERA enables human rights advocates and activists to build up a well-evidenced argument about a state's compliance with its obligation to fulfill ESC rights. This can be very powerful for advocacy, whether focused on securing remedies for current violations or on advancing reforms for preventing them in the future. On the one hand, providing quantitative, cross-disciplinary evidence demonstrating the link between poor development outcomes and

Making an overall Assessment in the 'Rights or Privileges?' Project

*Overall, a **compelling picture of non-compliance** with the obligation to fulfill emerged from a triangulated analysis of outcomes, policy efforts and resources. Guatemala had among the highest and most unequal rates of child malnutrition, maternal death and school dropout in the region, despite being a low-middle income country and the largest economy in Central America. In spite of the State´s formal commitments to the rights to health, education and food in its legal and policy framework, inadequate and inequitable levels of resourcing had stunted progress in the realization of these rights, by preventing the roll out of the critical policy interventions needed to ensure the availability, accessibility, appropriateness and quality of relevant public services.*

*Fiscal policy, which plays a critical role in determining how a state puts into effect its human rights commitments, was at the root of the problem, and reflected the **capture of the state by economic elites** as a key structural constraint. For decades, Guatemala´s budget and tax policies had safeguarded the privileges of the country´s oligarchic families and business leaders, while disregarding the state´s obligations to its population, particularly the most disadvantaged, fuelling deep social inequalities and consigning more than half of the population to living in poverty. Elite capture –examined in the study by conducting secondary research and interviewing relevant actors - had resulted in weak structures for state regulation of the market and redistribution of public resources, as well as an economic and political context hostile to reform. On this basis, CESR and ICEFI were able to conclude that the widespread deprivation of the rights to health, education and food amounted to a **breach of the state´s obligation to fulfill** these rights progressively, without discrimination and to the maximum of its available resources.*

breaches of the obligation to fulfill economic and social rights can prompt decision-makers to be more responsive to – or at least less dismissive of – human rights arguments, sometimes seen as irrelevant to matters of economic and social policy. At the same time, supporting rights-holders to expose and articulate the injustices they face using robust methods anchored in the human rights framework can help give their demands for justice a tangibly renewed force.

Lessons learned and questions looking ahead

For CESR, OPERA has been a valuable framework to measure compliance with the full range of principles that underpin the obligation to fulfill ESC rights; in a variety of advocacy settings, and drawing on a range of quantitative and qualitative tools. Violations have long been difficult to prove in the context of the obligation to fulfill. By ensuring that a state's social and economic policies are methodically assessed against each of the core dimensions of outcomes, policy efforts and resources the framework systematically links obligations of result with obligations of conduct. By uncovering the shortcomings in policies that contribute to, if not cause, avoidable ESC rights deprivations, CESR has been able to make concrete, specific recommendations to policy-makers on how these shortcomings could be addressed. Nevertheless, a number of insights and questions can be drawn from CESR's experience in using OPERA to frame its analysis of socio-economic policies to inspire further reflection.

To begin with, this experience has thrown weight behind the idea that a balance of both quantitative and qualitative evidence is needed to support an argument about compliance with the obligation to fulfill ESC rights. Quantitative approaches can yield statistical data, which are inherently well suited to mapping trends and patterns in a particular situation. They can address the questions 'how much', 'how many', 'where,' or 'when', that need to be answered to substantiate an argument about compliance. However, the question 'why' needs to be answered through more qualitative, contextual analysis that can expose issues such as lack of will or political restrictions.

Data-based analysis presents its own set of challenges; it is not uncommon for required data to be unavailable, unreliable or out of date. In response, initiatives have begun to focus on identifying new data, on exploring new ways to collect traditional data, and on facilitating the sharing of existing data and knowledge across sectors and institutions.[80] Another strategy has been to bring access to information claims before courts to compel the state to make available data public, or produce data when it isn't. An increasingly central question emerging for human rights advocates relates to how to effectively harness the real-time, actionable information being generated through these innovative initiatives to practically improve monitoring efforts.

As discussed earlier, however, the conclusions about human rights compliance that can be drawn from statistical data alone should not be overstated. Rarely will human rights advocates and activists be able to prove causality between a state's efforts and the results of those efforts, especially given the time-lag between the implementation of a particular policy decision and detectable effects on the ground. Even so, by contextualizing numbers with human knowledge—especially the lived knowledge of rights-holders themselves—it is possible to spot correlations and identify 'red flags' where improvements are needed, opening space for debate and dialogue about alternative approaches.

Nevertheless, gathering thorough quantitative and qualitative evidence to comprehensively diagnose the shortcomings in the state's efforts has the potential to become unwieldy and too demanding on advocates and activists. The application of OPERA in practice has raised questions about how to balance comprehensiveness and selectiveness; to take into account a multiplicity of factors, yet be focused and workable. Essentially, finding an appropriate emphasis will depend on the advocacy objective of a particular monitoring activity. The constraints preventing policy implementation vary from case to case. A particular lesson learned in applying OPERA has been the need to set clear parameters in the research design, to avoid overextending the assessment and losing a narrative thread. In Guatemala, for example, this meant honing in on tax policy as the thematic focus running through the study. But in other scenarios the thematic focus might be corruption, political repression, environmental fragility, transition post-conflict, or any other of a host of issues.

Another centrally important issue when considering the practicality of OPERA is who is using it, the subject of analysis and the target of advocacy. Different communities of practice reflect distinct theoretical bases and underlying assumptions on how change works, which, in turn, inspires different strategies and entry points for advocacy, be they legal, political, administrative or economic. For this reason, a grassroots group conducting participatory action research to lobby a local authority would use OPERA differently than a national human rights institution auditing a state's performance to report to a UN treaty body. Experts using econometric methods to advise policymakers on reform in a particular sector likewise would adopt OPERA in a very different manner than litigants presenting evidence of a systemic social or economic rights violation in domestic court. The contexts, targets and objectives of monitoring can differ drastically. In response, OPERA was developed as an agile, adaptable and flexible framework which can be employed by different theories of change and the communities of practice which embody them.

This in turn raises challenges in terms of keeping the tools it uses rigorous, yet at the same time accessible and user-friendly. On the one hand, OPERA should be adapted, used and eventually owned by community groups themselves to ensure the monitoring process is accurate, legitimate, serves the interests of those whose rights are at stake, and ideally becomes in time a more permanent feature of the local advocacy terrain. A central role for rights-holders should be a guiding principle of OPERA's application. On the other hand, OPERA seeks to provide a certain level of conclusiveness across different communities and constituencies so that it may be practically relevant for courts, treaty bodies and policy-makers. Nevertheless, the ability to interchange simple and complex tools at each step enables the framework to stay flexible in this regard, so that it may be used in a participatory manner. It also allows it to evolve as new, more advanced tools are developed and become more accessible down the track.

In this respect, the application of OPERA in practice has illustrated both the benefits and challenges of interdisciplinary collaboration. While working across disciplines of law, economics, anthropology, statistics and other social sciences can undoubtedly enrich the quality of analysis, the different conceptual foundations and underlying assumptions of each discipline need to be mutually understood for them to be truly effective. Experience has also illustrated the importance of meaningfully translating the concepts of rights, indicators, benchmarks etc. into the local vernacular, as well as validating research methods and findings with those affected in order to ensure they meet their priorities, objectives and needs.

Finally, further thought needs to be given to how adaptable OPERA might be when rights are fulfilled in a less centralized 'state-centric' context. In other words, what if it were to be used in a context where

the right(s) under review were less influenced by direct service provision by the state? Or where responsibility for service provision has been devolved to provincial or municipal governments? In some contexts, rights such as the rights to work, food or housing, are more market-driven. In other contexts, national-level governments retain little influence over health or education policies. When this is the case, the conduct of the private sector, lower-level governments or other states may be the more appropriate focus of analysis. To do this, it might be necessary to adjust OPERA or embed other monitoring methodologies within it to capture the state's obligations to respect and protect rights, or even the extra-territorial obligations of other states.

While these questions are not easily resolved, they can be kept in perspective by viewing OPERA, not as a one-size-fits-all mold to follow, but as a flexible overarching framework that sets out the broad categories of issues that need to be addressed when monitoring the obligation to fulfill ESC rights. Within each of these categories there is an inventory of indicative questions and suggested methods for answering them. But it will ultimately be up to each user to determine which of those questions demand greater attention for the purposes of their monitoring activity and how they can best be answered, depending on the objectives, priorities, and practical constraints in their particular context. Viewed this way, OPERA has the potential to make a unique contribution to efforts to increase accountability for some of the most systemic and intractable human rights violations of our time.

Endnotes

1 *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, presented to the United Nations Human Rights Council* (17 January 2007), UN Doc. A/HRC/4/28.

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3 Dowell-Jones, M. (2004), *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the economic deficit,* Martinus Nijhoff, at p.13.

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5 Alston, P., quoted in Baderin & McCorquodale, id., at p.11.

6 For a comprehensive compilation and summary of ESC rights jurisprudence worldwide, see International Network on Economic, Social and Cultural Rights (ESCR-Net) website 'Caselaw database', at: http://www.escr-net.org/caselaw.

7 A group of experts was convened by the International Commission of Jurists to elaborate on the Limburg Principles with regard to the nature and scope of violations of economic and social rights and to suggest appropriate responses and remedies.

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13 See CESCR, *General Comment No. 20 Non-discrimination in economic, social and cultural rights* (2 July 2009), UN Doc. E/C.12/GC/20, at para. 7. Articles 2(2) and 3 of the Covenant call for state parties to guarantee that the rights enumerated within it be 'exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' and require that states' undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth' respectively. See also, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/CN.4/1987/17 at paras. 37-38 (which affirm that these obligations include the elimination of both de jure and de facto discrimination).

14 CESCR, *General Comment No. 20, id.,* at para. 36.

15 In relation to the right to water for example, the Committee has set out the need to immediately address de facto as well as de jure discrimination, stating that 'water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds'. CESCR, *General Comment No. 15 The Right to Water* (20 January 2003), UN Doc. E/C.12/2002/11, at para. 12c(iii).

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17 CESCR, *General Comment No. 3, supra* note 12, at para. 10.

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The Center for Economic and Social Rights (CESR) was established in 1993 with the mission to work for the recognition and enforcement of economic, social and cultural rights as a powerful tool for promoting social justice and human dignity. CESR exposes violations of economic, social and cultural rights through an interdisciplinary combination of legal and socio-economic analysis. CESR advocates for changes to economic and social policy at the international, national and local levels so as to ensure these comply with international human rights standards.

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