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Taxation as a Human Rights Issue

Taxation and the Committee on Economic, Social and Cultural Rights

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Abstract

In recent years the Committee on Economic, Social and Cultural Rights has been devoting increasing attention to matters on taxation. This thesis analyses the current state of affairs of the Committee's work on taxation and departs from this. It is argued that the Committee should adopt a General Comment on taxation. Tax policy may not have an obvious relation to the realisation of economic, social and cultural rights. The fact that tax policy is human rights policy becomes clear when three characteristics are considered. First, the progressive realisation of economic, social and cultural rights depends on the extent to which financial resources are made available in order to be allocated and spent. Second, tax policies have a redistributive function with the potential to redress systemic social, economic and gender inequalities. It is through the tax system that market imbalances and historical discriminations embedded in societies can be regulated and the common good protected. Third, the state's legitimacy to levy taxes derives from a civic contract which rests on the fulfilment of the rights of the citizenry and which is strengthened by the application of the principles of participation, transparency and accountability.

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Acronyms

CEDAW	Covenant on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CSO	civil society organisation
ECOSOC	Economic and Social Council of the United Nations
GDP	gross domestic product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
NGO	non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly

1 Introduction

Fiscal policy and the distribution of resources play an essential role in the realisation of human rights. In order to analyse a state's fiscal compliance with its human rights obligations it is fundamental to look at the resource generation, resource allocation and the actual spending. The question of financial resources is particularly interesting with regards to economic, social and cultural rights (hereinafter "ESCR") and the ability of a state to finance health care, the educational system and to provide access to food and adequate housing in order to combat socioeconomic inequalities.

Analyses of a state's human rights compliance with respect to fiscal policy have laid the focus on the allocation side of resources and the question of whether desired outcomes have been fulfilled. This means that it was only scrutinised whether a state allocated and spent the available financial resources in accordance with human rights principles. However, in recent years more attention has been granted to the generation of resources: how much and how resources are mobilised. This is a reflection of the acknowledgment that states are active agents and most outcomes can be directly correlated with policy choices – an inadequacy in resource generation will restrict the possibility to allocate and can therefore hinder the progressive realisation of ESCR.

Depending on the state, public revenue is generated through taxation, import and export trade tariffs, royalty fees, exploitation of natural resources, fees on public services, debt and deficit financing and development aid.¹ In fact, in most countries taxation is the primary source of public income. However, there are differences in the composition of the tax revenue between states. Developed countries raise almost twice as much from taxation – in particular direct taxes, such as the income tax make up for the largest share. In developing countries, tax revenue is mostly levied from indirect taxes such as taxes on consumption and trade.²

Taxation is the most sustainable and predictable source of public income for the realisation of ESCR. It is said that domestic resource mobilisation from taxation favours the creation of more "responsive, accountable and capable states".³ That said, the Sustainable Development

¹ Olivier De Schutter, *Public Budget Analysis for the Realisation of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation* (10 July 2017), p 22.

² Esteban Ortiz-Ospina and Max Roser, 'Taxation' (2018) available at: <https://ourworldindata.org/taxation> (accessed on 24 June 2018). (This article provides information on the historic evolution of taxation throughout the world).

³ Overseas Development Institute, 'Supporting domestic revenue mobilisation: we must learn from the failures of the past' (16 March 2018) available at: <https://www.odi.org/comment/10626-supporting-domestic-revenue-mobilisation-we-must-learn-failures-past> (accessed on 15 May 2018).

Goals envisage guaranteeing international support to developing countries, in order to strengthen their domestic capacity for tax collection.⁴ The previously agreed Millennium Development Goals on the other hand had focused on development aid as the primary means by which to achieve the goals and had failed to improve domestic resource mobilisation to generate the required financial resources.⁵

Taxation policy may not have an obvious relation to the realisation of ESCR. The fact that “[t]ax policy is, in many respects, human rights policy”⁶ becomes clear when three characteristics are considered. First, the progressive fulfilment of ESCR depends on the extent to which resources that are made available are channelled towards the realisation of ESCR. This implies that the state is an active agent implementing policies that aim to limit the leakage of resources and lead to inclusive economic growth over time. There is a far-reaching consensus that extreme economic inequality impedes economic growth and in particular inclusive growth, which therefore has a negative impact on the realisation of ESCR. Second, tax policies have a redistributive function with the potential to redress systemic social, economic and gender inequalities. The main structure of the taxation system, taking into consideration all direct and indirect taxes, can be broadly categorised as progressive or regressive in nature and provides great insight into the priorities set by a state. It is through the tax system that market imbalances and historical discriminations embedded in societies can be regulated and the common good protected.⁷ This is essential to realise substantive equality between all individuals and to reach a society’s maximum economic and social potential. Third, the state’s legitimacy to levy taxes derives from a civic contract which rests on the fulfilment of the rights of the citizenry and which is strengthened by the implementation of a good governance concept through participation, transparency and accountability.⁸

The correlation between a state’s taxation policy and the ESCR realisation becomes clear in the consideration of the increased engagement of the Committee on Economic, Social

⁴ United Nations General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015) UN Doc A/RES/70/L.1, Goal 17.

⁵ International Bar Association’s Human Rights Institute, ‘The Obligation to Mobilise Resources: Bridging Human Rights, Sustainable Development Goals, and Economic and Fiscal Policies’ (December 2017), p 65.

⁶ Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, to the 29th session of the Human Rights Council (27 March 2015) UN Doc A/HRC/29/31, para 53.

⁷ Lima Declaration on Tax Justice and Human Rights (Outcome document of the international strategy meeting, “Advancing Tax Justice through Human Rights,” held in Lima, Peru in 2015, convened by the Center for Economic and Social Rights, the Global Alliance for Tax Justice, Oxfam, Red Latinoamericana sobre Deuda, Desarrollo y Derechos (LatinDADD), Red de Justicia Fiscal de América Latina y el Caribe and the Tax Justice Network), p 1.

⁸ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para. 36.

and Cultural Rights. In fact, the Committee has played a fundamental role in shedding light on this issue over the past six years. However, while certain elements such as the effective combat of tax avoidance and abuse to increase available resources have been developed quite thoroughly and are even incorporated in the Committee's most recent General Comment (Number 24), there are other aspects of tax policy that have so far been neglected or for which there is no coherent application in the Committee's work.

Therefore, the development of the process by which the Committee faces the matter of taxation and ESCR is still in the beginning stages. In order to improve this situation, it is argued in this thesis that the Committee should further strengthen its engagement and increase its coherence in the application of its standards. This will be the first step and this process should finally lead to the adoption of a General Comment on taxation that addresses and instructs on the potential for taxation to collect and redistribute income and wealth in a transparent, participatory and accountable manner. It must be ensured that taxation as part of the fiscal policy of a state is more conducive for the full realisation of the provision of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR").

The *objective* of this thesis is threefold:

To understand how the Committee has been tackling questions concerning taxation until now, with a view to identify the articles of the ICESCR that the Committee applies in its reasoning in the Concluding Observations of the state reports,

to provide a coherent illustration of taxation matters that have not been considered by the Committee so far,

and to provide recommendations on matters that the Committee should consider in a General Comment on taxation throughout the thesis.

The main research questions

- What is the current position of the Committee on taxation?
- What should be included in a General Comment on taxation?

Sub questions

- To what extent has the Committee interpreted legal obligations from the Covenant regarding taxation, and to what extent it has focused only on policy recommendations?
- Under which articles of the Covenant does the Committee scrutinise taxation?
- Does the Committee employ a coherent approach on taxation?

The method of the research

This research aims to provide a lucid depiction of the current state of affairs of the Committee's work on taxation. A theoretical framework of the Committee's work, the process through which a General Comment is developed and the main legal human rights principles in the Covenant will lay the foundation of this thesis. This is followed by the analysis of the Concluding Observations and List of Issues of the preceding six years in order to abstract the Committee's work on taxation. The time frame is chosen due to the fact that over the past six years the Committee has increasingly focused on taxation, in particular due to adopted policies following the aftermath of the financial crisis in 2008. The subsequent chapter departs from the current state of affairs and considers further issues that should be taken into consideration in a General Comment on taxation.

It is fundamental to highlight that the research on taxation and ESCR is still in the early stages of development. In fact, there is no academic literature but two articles published on the topic yet. One publication, which is forthcoming, is being developed on the basis of a scholarly conference held in September 2016 by the Centre for Human Rights and Global Justice - titled "Human Rights and Tax in an Unequal World". Most of the background information for this thesis is therefore taken from academic literature that addresses financial resources and ESCR realisation in general terms. In addition, the work of financial organisations and civil society organisations (hereinafter "CSOs") that are at the forefront of advocating and raising awareness in the field of taxation and ESCR like the Centre of Economic and Social Rights and the Tax Justice Network as well as UN documents and documents issued by other treaty bodies have been taken into account. Moreover, while the author of this research has a legal background, it must be born in mind that the topic of this research is approached in an interdisciplinary manner: Taxation touches upon economics, questions of inequality must be evaluated from a sociological standpoint and the Committee itself is a quasi-judicial body.

Furthermore, it was carefully decided to focus on the state of affairs and present a more coherent approach to taxation from a human rights perspective, focusing on resource

generation, wealth distribution and accountability aspects. Due to the limited scope of the thesis, the right to self-determination and taxation related to natural resources is not covered. Moreover, the recommendations will not be applied to a specific country example. Throughout the thesis however, there are country examples, particularly with respect to the Concluding Observations of the Committee or to underline certain tax developments.

2 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights is the main treaty of universal character that includes economic, social and cultural rights. It was adopted in 1966 and came into force on January 3rd 1976⁹ after 35 ratifications were reached.¹⁰ A state that has ratified it must comply with the obligations in good faith according to the principle of *pacta sunt servanda*.¹¹ The Covenant itself does not prescribe a framework on the tax structure. However, it is incumbent that more attention is paid to the internationally agreed upon human rights principles to scrutinise taxation policy. In fact, these principles serve as a guide in the development of a tax regime with a view to generate sufficient resources in a predictable and sustainable manner, and with the goal to curb extreme inequality, poverty and discrimination and strengthen the civic bond between the people and the state.

2.1 The Committee on Economic, Social and Cultural Rights

According to Part IV of the Covenant, the Economic and Social Council (hereinafter “ECOSOC”) which is an organ of the United Nations, is provided with the monitoring function of the Covenant.¹² This means that the Covenant is the only international human rights treaty that does not establish an own supervisory body in its text. In 1985, the Committee on Economic, Social and Cultural Rights was established on the basis of the ECOSOC Resolution 1985/17, which sets forth that the Committee assists the ECOSOC in the monitoring function of the Covenant. The Committee consists of 18 experts who are selected by the ECOSOC for

⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘International Covenant on Economic, Social and Cultural Rights’ available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed on 24 June 2018).

¹⁰ Article 27 ICESCR.

¹¹ Vienna Convention on the law of the treaties concluded in Vienna on 23 May 1969, preamble.

¹² See articles 16 until 25 ICESCR.

a renewable term of four years. The resolution sets out that the membership of the Committee must reflect an equitable geographical distribution. Besides this, the members should represent different social as well as legal systems. They serve in their personal capacity and must be experts in the field of human rights but are not required to come from a legal background¹³, a stipulation that has elicited some criticism.¹⁴ On the other hand, in one of the first sessions of the Committee, it has been mentioned by Craven that a broad range of knowledge from different disciplines and backgrounds is required and is in fact the reason for further developments in the area of ESCR.¹⁵ This is especially important with respect to the emergence of taxation considerations; persons with an economic background, for example, can contribute to policy recommendations that lie beyond the current realm of the rights and obligations based on the Covenant and interpreted by the Committee.¹⁶

The Committee has four main functions under the ICESCR and the 2008 Optional Protocol: the examination of periodic reports of State parties, the adoption of General Comments, the consideration of an individual communication and the consideration of an inter-State communication. The Committee is the body in charge of the interpretation of the Covenant and the scope and content of ESCR. The main tools for interpretation of the Covenant are the General Comments, Statements and Concluding Observations.

State parties to the ICESCR are required to submit “reports on the measures which they have adopted and the progress made in achieving the observance of the rights”.¹⁷ States have to report within two years after the ratification of the Covenant and thereafter every five years. One of the main purposes for the reporting process is to have states demonstrate that their laws, policies and practices are informed by the principles and priorities that reflect the provisions set out by the Covenant.¹⁸

States are required to compile their report on the basis of the compilation of the “Guidelines on the Form and Content of the Reports to Be Submitted by States Parties to the International Human Rights Treaties”.¹⁹ These include one section for each human rights treaty

¹³ ECOSOC, Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights 22nd plenary meeting, (28 May 1985) UN Doc 1985/17.

¹⁴ Kerstin Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) VOL. 42:905 Vanderbilt Journal of Transitional Law, p 917.

¹⁵ Ibid.

¹⁶ Ibid, p 918.

¹⁷ Article 16 ICESCR.

¹⁸ CESCR, General Comment No. 1 on Reporting by States Parties (27 July 1989) UN Doc E/1989/22, para 4.

¹⁹ United Nations Secretary General, Compilation of Guidelines on the Form and Content of the Reports to Be Submitted by States Parties to the International Human Rights Treaties (June 2009) UN Doc HRI/GEN/2/Rev.63.

and they require states to include particular information on each right stipulated in the Covenant. For each substantive right in the Covenant, the guidelines require specific information on the basis of which the Committee analyses the state's compliance. This required information serves as first guideline for the scope and content of the rights in the Covenant.²⁰ After the preliminary examination of the report by the Committee's Pre-session Working Group a List of Issues is drafted, which is based on information made available to the Committee by other sources, including from non-governmental organisations (hereinafter "NGOs") and national human rights institutions.²¹ The List of Issues is a list of questions for the government in addition to the required information of the abovementioned guidelines. The report and the List of Issues are then considered in the constructive dialogue between representatives of the state government and the Committee members. This dialogue is substantively prepared by a Committee's task force that includes a country rapporteur and three members. Subsequently, at a private meeting, the country task force proposes draft Concluding Observations for the consideration and adoption by the Committee. The Concluding Observations include concerns and recommendations made on the basis of the entirety of information compiled.²² While these are not legally binding, they comprise the Committee's evaluation of a given state's apparent success or failure in realising the rights stipulated by the Covenant.²³ Since 2002, the Concluding Observations have become more sophisticated, and the Committee goes into substantive detail in some cases.²⁴ The Concluding Observations can provide a practical illustration of the content of the Covenant and are therefore of particular importance to the emergence and development of a new doctrine.²⁵

The involvement of NGOs – in both observatory and participatory capacities – is encouraged by the Committee throughout the entire reporting cycle. NGOs can provide written information in all relevant phases of the cycle – receipt of the state report and drafting of the List of Issues by the pre-session working group – as well as monitor the state's implementation of the recommendations outlined in the Concluding Observations. The

²⁰ United Nations Secretary General, *Compilation of Guidelines on the Form and Content of the Reports to Be Submitted by States Parties to the International Human Rights Treaties* (June 2009) UN Doc HRI/GEN/2/Rev.63.

²¹ Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights. The Law, Process and Practice* (Routledge 2013), p 113.

²² CESCR, Provisional rules of procedure adopted by the Committee at its third session (1989) (Embodying amendments adopted by the Committee at its fourth (1990) and eighth (1993) sessions) (1 September 1993) UN Doc E/C.12/1990/4/Rev.1, Rule 65.

²³ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publisher 2009), p 28.

²⁴ Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, (Oxford University Press, Sydney 2013), p 5.

²⁵ Mechlem 'Treaty Bodies and the Interpretation of Human Rights', p 924.

Committee recommends that NGOs collectively submit coordinated observations in order to avoid duplications and to ensure credibility.²⁶ Besides that, NGOs can participate in the session in which a state report is considered. There is a special hearing reserved for NGOs in which they present their concerns and recommendations and they are permitted to be present during the constructive dialogue between the Committee and the state representatives.²⁷

While the Concluding Observations serve as an important source of information on the Committee's interpretation of the Covenant, the General Comments are comprehensive, in-depth documents that impart the Committee's opinion on the provisions of the Covenant. Philip Alston noted that General Comments are a "means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance."²⁸

The Committee has thus far adopted 24 General Comments.²⁹ General Comments deal with the provisions of the Covenant and can be dedicated to the interpretation of substantive rights, but can also provide guidance and information on procedural methods for the implementation of the Covenant or other specific issues. Due to the Committee's status, standing and its expertise, the General Comments are accepted as the authoritative interpretation of the Covenant. However, some states contest the legal relevance of the General Comments.³⁰ Even if this is the case, in the consideration of state reports, the Committee is guided by its own interpretation and makes recommendations in accordance with its General Comments.

Furthermore, as the Covenant is a living instrument, they have an important function in the continuous protection and promotion of ESCR in the face of emerging global phenomena that may threaten its realisation. The General Comments shed light on these difficulties and provide guidance to the states in their efforts to fulfil the rights laid out in the Covenant.³¹

²⁶ ECOSOC, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights' (7 July 2000) UN Doc E/C.12/2000/6, p 3ff.

²⁷ Ibid, p 4.

²⁸ quoted from Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', p 926f.

²⁹ United Nations Office of the High Commissioner for Human Rights, 'Committee on Economic, Social and Cultural Rights. List of General Comments' available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (accessed on 24 June 2018).

³⁰ Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', p 929f.

³¹ Odello and Seatzu, *The UN Committee on Economic, Social and Cultural Rights. The Law, Process and Practice*, p 186.

If the Committee wants to react to international developments or on the basis of its own developing practice in the Concluding Observations, the Committee can adopt statements. This is done when the Committee comes to the conclusion that its own analytical material does not yet permit the adoption of a General Comment. Statements can be seen as initial attempts interpreting the Covenant and dealing with issues that are important for the implementation of the Covenant.³²

2.2 The Process of the Development of a General Comment

In this thesis, it is argued that the Committee must further evolve and elaborate its work on taxation in order to be able to adopt a General Comment. The Covenant is a living instrument and can therefore serve to scrutinise new problems that hinder the full realisation of the rights stipulated within. In order to understand at which stage the process of consideration of taxation under the supervision of the Committee currently stands, this section presents the process of the development of a General Comment.

There are several sources from which this process can be initiated. The Committee generally becomes aware of the issues that result in an impediment of ESCR realisation via information presented by state reports, the delivery of information by external organisations concerned with ESCR, or alternatively from within – brought forth by an elected member of the Committee with the relevant competencies and expertise. In the process of determination whether there is in fact a correlation between an issue at stake – a policy for instance – and the realisation of ESCR and if the Committee is not able to draw a conclusion using only the submitted reports, it may identify questions and request further information in the List of Issues. Then it will raise concerns and make recommendations to specific states. The analysis of these documents – List of Issues and Concluding Observations – gives insight in the Committee's evolving interpretation.

Furthermore, the Committee can convene a day of general discussion on a specific right or issue. This provides an opportunity for a broader discussion and input from various interested actors: States parties and other UN member states, UN specialised agencies, other treaty bodies, academics and NGOs are all able to deliver in depth analyses of the relevant

³² CESCR, Report on the Forty-Fourth and Forty-Fifth Sessions (3–21 May 2010, 1–19 November 2010) UN Doc E/2011/22, UN Doc E/C.12/2010/3, para 59.

issues.³³ These discussions can serve as the basis for the further elaboration of a General Comment in the future.³⁴

Before the process of developing a General Comment has begun the Committee holds internal discussions in private. Following this, the Committee chooses one member who serves as a rapporteur to draft the General Comment. If the Committee agrees on the draft which can take a couple of sessions, the draft is put on its website for a consultation process. After several months, the day of general discussion is convened, and the draft of the General Comment is its subject. As mentioned above, attendance at this meeting is open to any interested actor. If the general resonance is positive, the draft is open for the Committee's decision of approval. The final step is the formal adoption of the draft in the plenary session of the Committee.³⁵

As the process of the adoption of General Comment 24³⁶ on states' obligations in the context of business activities shows, the Committee follows a long process. In fact, until the adoption of General Comment 24, the Committee referred to certain aspects in this regard more than 100 times between 2004 and 2011 in its Concluding Observations, issued the "Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights"³⁷. This finally culminated in the adoption in August 2017.³⁸

In 2012, the Committee engaged with the issue of taxation in the case of Iceland as a consequence of policy choices and the adoption of austerity measures after the financial crisis for the first time with respect to taxation as a tool for resource generation.³⁹ Before that, it made recommendations on tax measures with regards to substantive rights only and on an incremental basis. In fact, it was not until August 2017 that a more coherent approach was taken which is depicted in the Lists of Issues that include a question on taxation since then. However, as will be presented, there is still a lack of coherence which should be overcome. In particular, for the work of NGOs and individuals that can hold governments to account, it is of fundamental importance that there are clear guidelines to scrutinise taxation from a human

³³ CESCR, Report on the Forty-Fourth and Forty-Fifth Sessions (3–21 May 2010, 1–19 November 2010) UN Doc E/2011/22, UN Doc E/C.12/2010/3, para 49.

³⁴ CESCR, Report on the Tenth and Eleventh Sessions (1 January 1995) UN Doc E/1995/22, para 44.

³⁵ Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', p 928.

³⁶ CESCR, General Comment No. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (10 August 2017) UN Doc E/C.12/GC/24.

³⁷ CESCR, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights' (20 May 2011) UN Doc E/C.12/2011/1.

³⁸ Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, p 142.

³⁹ CESCR, Concluding Observation on the fourth periodic report of Iceland (11 December 2012) UN Doc E/C.12/ISL/CO/4, para 6.

rights perspective at the international level and the Committee is an important player in this respect.

2.3 Main Principles Regarding States' Obligations under the ICESCR

This section will provide an overview of the principles that apply throughout the entire Covenant. Article 2⁴⁰ has a “dynamic relationship with all of the other provisions of the Covenant” and entails the nature and extent of the obligations for the implementation of the substantive rights in the Covenant. These are obligations of conduct and obligations of result.⁴¹ The Committee has clarified that states’ obligations are threefold. States have the obligation to *respect*, which means they have to abstain from interfering with the rights of a rights holder. States have the obligation to *protect*, which requires states to prevent others from interfering with the rights and the obligation to *fulfil*, entailing the obligations to facilitate and provide the necessary measures to ensure the realisation of ESCR.⁴²

In the realisation of rights, states have a margin of discretion to achieve the full realisation of the rights with the adoption of “appropriate means, including particularly the adoption of legislative measures”.⁴³ In addition, these can be of administrative, financial, educational or of social nature.⁴⁴ The state decides what this may entail, however, the Committee remains the one to scrutinise the appropriateness of measures taken.⁴⁵ In the assessment of the appropriateness, the inability will be distinguished from the unwillingness of a state.⁴⁶ The Covenant is silent regarding the form of the political and economic system, as long as it is “democratic and that all human rights are thereby respected”, reaffirming the interdependence and indivisibility of all human rights and the relevance of the right to development.⁴⁷

⁴⁰ Article 2(1) ICESCR states that “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to achieving *progressively the full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” (Emphasise added by the author)

⁴¹ CESCR, General Comment No. 3 adopted at the Fifth Session of the CESCR (14 December 1990) UN Doc E/1991/23, para 1.

⁴² Emphasise added by the author. See for instance CESCR, General Comment No. 14 on the right to the highest attainable standard of health (article 12) (11 August 2000) UN Doc E/C.12/2000/4, para 33.

⁴³ Article 2 ICESCR.

⁴⁴ CESCR, General Comment 3, para 7.

⁴⁵ *Ibid*, para 4.

⁴⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997) UN Doc E/C.12/2000/13, para 13.

⁴⁷ CESCR, General Comment 3, para 8.

The obligation to utilise the maximum of available resources

According to article 2 ICESCR, states have to fulfil their obligations to the maximum of available resources which are defined as the resources at their disposition. One might primarily think of financial resources which are the focus of this thesis, but it is not restricted to these and further includes natural and human resources for instance. The Committee has not quantified what the maximum is. However, it was clarified that it includes the resources existing within a state and those that are available from the international community through international cooperation and assistance.⁴⁸

The Committee highlights that if the “available resources are demonstrably inadequate”, states are under the obligation to “strive to ensure the widest possible enjoyment [of ESCR]”.⁴⁹ Even in times of severe resource constraints, states remain with the obligation to adopt low-cost targeted programmes and protect the most marginalised groups.⁵⁰ In fact, the Committee has pointed out that states have minimum core obligations that have to be fulfilled. On one hand, this entails that states have certain obligations of immediate character and on the other hand, states are required to set priorities and make policy changes, in order to fulfil the Covenant’s provisions. If a state justifies the failure to meet this minimum core obligation with resource constraints, it has to demonstrate that it made every effort to use all resources that are at its disposition “to satisfy, as a matter of priority, those minimum obligations”.⁵¹ Furthermore, the Committee notes that even in states where the resources are inadequate, the obligation “to ensure the widest possible enjoyment of the relevant rights” prevails.⁵² For instance, a state has the burden of proof to demonstrate that it is unable to redirect resources that are allocated for the military sector to the realisation of ESCR.⁵³

The Committee’s focus used to be on the expenditure side only, scrutinising whether a state allocated and executed its budget with the goal to fulfil ESCR. However, this gradually changed and the “maximum available resource” doctrine with respect to the generation side and in particular taxation has received more attention by the Committee. This will be presented in depth in chapter 3.

⁴⁸ CESCR, Statement on an evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant, (10 May 2007) UN Doc E/C.12/2007/1, para 5.

⁴⁹ CESCR, General Comment 3, para 12.

⁵⁰ Ibid.

⁵¹ CESCR, General Comment 3, para 10.

⁵² Ibid, para 11.

⁵³ Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, p 147.

The obligation to progressively realise

States are required to take steps to progressively fulfil the rights in the Covenant. The Committee recognises that the full realisation of ESCR will “generally not be achieved in a short period”.⁵⁴ However, while the obligation to progressively realise has been seen as a weak element of the Covenant, it is in fact a “necessary flexibility device”⁵⁵ that reflects the reality of the world with respect to the difference in the economic development of the respective state parties. If this had not been introduced an international treaty could not have been agreed upon for such a diversity of states. It is clarified that “steps towards [the full realisation] must be taken within a reasonably short time after the Covenant’s entry into force”.⁵⁶

The obligation to “to take steps” is of immediate character. While it does not prescribe which conduct is required, states have the obligation to take steps that are “deliberate, concrete and targeted” and have to move as expeditiously and effectively as possible in order to achieve the full realisation of ESCR.⁵⁷ The Committee clarified that this obligation with respect to the right to adequate living entails that living conditions are *continuously improved*.⁵⁸

Principle of non-discrimination and substantive equality

According to the Committee, the principle of non-discrimination⁵⁹ is of immediate effect which means it is not subject to progressive realisation or dependant on the availability of resources.⁶⁰ In fact, states are required to eliminate formal and substantive forms of discrimination which also entails the prohibition of discrimination by non-state actors.⁶¹

The Committee understands discrimination as “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the

⁵⁴ CESCR, General Comment 3, para 9.

⁵⁵ Ibid.

⁵⁶ Ibid, para 2.

⁵⁷ Ibid, para 2, 9.

⁵⁸ Emphasis added by the author. CESCR, General Comment No. 4 on the right to adequate housing (13 December 1991) UN Doc E/1992/23, para 11.

⁵⁹ Article 2(2) ICESCR: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁶⁰ CESCR, General Comment 3, para 1.

⁶¹ CESCR, General Comment No. 20 on non-discrimination in economic, social and cultural rights (article 2(2)) (2 July 2009) UN Doc E/C.12/GC/20, para 7f, 11.

recognition, enjoyment or exercise, on an equal footing, of Covenant rights.”⁶² However, different treatment is in compliance with the Covenant if it is based on reasonable grounds, is objective, pursues a legitimate goal and if there is proportionality between the means chosen and the pursued aim.⁶³ While the obligation of respect is of immediate character where the state should refrain from discriminatory conduct, the obligation to protect and in particular the obligation to fulfil may require positive budgetary measures.⁶⁴ Apart from that, the Covenant stipulates the equal right of men and women to the enjoyment of the rights in article 3.⁶⁵ In the General Comment to this article, the Committee clarifies that guarantees of non-discrimination and equality entail *de facto* (formal) and *de jure* (substantive) equality. This means that, *de jure* and *de facto* equality have to be achieved. While formal equality requires that laws and policies are prescribed in a neutral manner, substantive equality means that laws, policies and practices alleviate “the inherent disadvantage that particular groups experience.”⁶⁶ In order to achieve substantive equality, states might have the obligation to implement affirmative or special measures to eliminate structural discrimination. Temporary measures and measures that are designed to eliminate persisting discrimination like subsidies or exemptions are not discriminatory.⁶⁷

The obligation of the minimum core content of substantive rights

States have minimum core obligations which are of immediate character. This entails for instance that states are required to ensure the satisfaction of the minimum essential levels of each substantive right laid down in the Covenant. A state under which a “significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant”.⁶⁸

⁶² CESCR, General Comment 20, para 1.

⁶³ *Ibid*, para 7.

⁶⁴ CESCR. Statement on an evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant, (10 May 2007) UN Doc E/C.12/2007/1, para 7.

⁶⁵ Article 3 ICESCR: “The States undertake to ensure the equal right of men and women to the enjoyment of all rights in this treaty.”

⁶⁶ CESCR, General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3) (11 August 2005) UN Doc E/C.12/2005/4, para 6f.

⁶⁷ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 15.

⁶⁸ CESCR, General Comment 3, para 10f.

In the General Comments on specific substantive rights, the Committee clarifies the minimum core content concerning the right in question. In this regard it has interpreted, for instance, the core content of the right to adequate food, the right to health, the right to education, etcetera.⁶⁹ The minimum core content of the right to food is interpreted to entail: “[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture [and t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”⁷⁰

The Committee also emphasises the importance that courts can adjudicate violations of the minimum core content of the right at stake.⁷¹

The obligation to justify deliberate non-retrogressive steps

In the light of the *raison d’être* of the Covenant, which is the full realisation of ESCR, states have to move as expeditiously and effectively as possible towards the full realisation of ESCR. For this reason, the Committee has clarified that “[t]here is a strong presumption of impermissibility of any retrogressive measures” taken by the state.⁷² Any such deliberate retrogressive measure has to be justified in the light of the totality of the Covenant rights “and in the context of the full use of the maximum available resources”.⁷³

The Committee has established that any deliberate retrogressive step has to be necessary and proportionate. This means that it has to be assessed whether the adoption of alternative measures “would be more detrimental to [the fulfilment of ESCR]”.⁷⁴ Retrogressive steps must not be discriminatory and in fact “should mitigate inequalities that can grow in times of crisis” and ensure that marginalised groups are not affected disproportionately and should guarantee the protection of the minimum core content of the rights stipulated in the Covenant.⁷⁵ With respect to the right to social security, the Committee stated that it assesses whether “(a) there was reasonable justification for the action; (b) alternatives were comprehensively

⁶⁹ See for instance, CESCR, General Comment No. 12 on the right to adequate food (article 11) (12 May 1999) UN Doc E/C.12/1999/5, para 8

⁷⁰ Ibid.

⁷¹ Ibid, para 33.

⁷² CESCR, General Comment No. 13 on the right to education (article 13) (8 December 1999) UN Doc E/C.12/1999/10, para 45.

⁷³ CESCR, General Comment 3, para 9.

⁷⁴ CESCR, Statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (22 July 2016) UN Doc E/C.12/2016/1, para 4.

⁷⁵ Ibid.

examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level”.⁷⁶

If a state’s justification of such measures is “resource constraints”, the Committee takes a country’s level of development, and the economic situation, as well as the severity of the breach in the light of the fulfilment of the minimum core content of substantive rights into consideration.⁷⁷

The obligation to seek and provide international assistance and cooperation

The Committee points out that “in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself”, international cooperation for development and therefore for the realisation of ESCR is an obligation of all states. It notes that this obligation lies in particular with those states that are in a position to do so.⁷⁸ In fact, states have the obligation to provide international assistance and cooperation, with their capacities, resources and influence. It was clarified that this provision entails that states have collective responsibilities with respect to the equitable food distribution, the conservation, development and diffusion of scientific and cultural benefits.⁷⁹

It is important to note that developing and developed states do not have the same obligations in this regard. While developed states have the obligation to assist, developing countries have to actively seek assistance.⁸⁰ It is recognised that there are countries that will not be able to achieve the full realisation of ESCR if other countries in a position to assist do not do so.⁸¹ The Committee clarifies that judicial and enforcement agencies of different

⁷⁶ CESCR, General Comment No. 19 on the right to social security (article 9) (4 February 2008) UN Doc E/C.12/GC/19, para 42.

⁷⁷ CESCR. Statement on an evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant, (10 May 2007) UN Doc E/C.12/2007/1, para 10.

⁷⁸ CESCR, General Comment 3, para 14.

⁷⁹ *Ibid*, para 13.

⁸⁰ See for instance: CESCR General Comment No. 23 on the right to just and favourable conditions of work (article 7) UN Doc E/C.12/GC/23, para 66.

⁸¹ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 29.

countries have the duty to cooperate in order to share information and promote transparency to prevent the denial of justice.⁸²

Moreover, the Committee clarified that as state parties to the Covenant and as members of international financial organisations, states have the obligation to act in accordance with the principles of the Charter of the United Nations. One of these principles is the realisation of human rights and fundamental freedoms, which should be reached through international economic and social cooperation.⁸³

2.4 Specific Human Rights Principles under the ICESCR

Besides the main principles which are laid down in article 2 in the Covenant and which are further interpreted by the Committee, there are certain principles that are important to bear in mind with respect to the adoption of a General Comment on taxation. In particular the Committee's interpretation of state obligations in the context of business activities is important to note because the General Comment incorporating these is very recent and lays down principles that have strong implications for taxation.

Principles of participation, transparency and accountability

The Committee stresses that states and international organisations must be held to account for their conduct with respect to human rights. It notes that "rights and obligations demand accountability".⁸⁴ Accountability mechanisms have to be accessible, transparent and effective.⁸⁵ It was also highlighted that in the assessment of the reasonableness of steps to the maximum of available resources to progressively achieve the rights in the Covenant, the Committee pays particular attention to whether the decision-making process in a country is conducted in a transparent and participative manner.⁸⁶ The Committee pointed out that with respect to institutional arrangements in education for instance, the model has to be fair, just

⁸² CESCR, General Comment 24, para 45.

⁸³ CESCR, Statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (22 July 2016) UN Doc E/C.12/2016/1, para 9.

⁸⁴ CESCR, Statement on poverty and the ICESCR (10 May 2001) UN Doc E/C.12/2001/10, para 14.

⁸⁵ *Ibid.*

⁸⁶ CESCR. Statement on an evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant (10 May 2007) UN Doc E/C.12/2007/1, para 11.

and equitable and as transparent and participatory as possible.⁸⁷ The principle of participation requires that affected people participate in the decision-making process, which entails that these people are well-informed.⁸⁸ Furthermore, the Committee clarified that this in fact “must be an integral part” of any policy, programme or strategy.⁸⁹

Legal Principles of States Regarding Business Activities

According to the Committee, the prioritisation of the interests of business entities over the realisation of the Covenant rights without adequate justification it and in cases in which policies are adopted that negatively affect such rights accounts to a violation of the obligation to respect.⁹⁰ The binding character of treaties requires states to refrain from trade and investment treaties that will have a detrimental effect on the realisation of ESCR and they should conduct impact assessments prior to the adoption of such agreements.⁹¹

The obligation to protect entails that states have to prevent infringements of ESCR through business activities. Therefore, states should adopt a legal framework with due diligence requirements for businesses. In the context of business activities, the Committee explicitly states that business licenses and subsidies should be revoked, relevant tax codes should be revised, and business incentives should be aligned with human rights responsibilities.⁹²

Violations of the obligation to protect would occur if states do not prevent or counter business activities that lead to abuses of the Covenant or that have a foreseeable effect of infringing the ESCR obligations. The Committee mentions examples in this regard, which have interesting implications for tax policies. States should refrain from the exemption of the applications of a legal framework that ensures the protection of Covenant rights of projects or geographical areas which may require states from avoiding the adoption of tax-free zones. In this regard, the Committee raised concerns to India because of such an adoption that led to the eviction of people who had not been granted alternative housing.⁹³ Moreover, states should

⁸⁷ CESCR, General Comment No. 13 on the right to education (article 13) (8 December 1999) UN Doc E/C.12/1999/10, para 40.

⁸⁸ CESCR, Statement on poverty and the ICESCR (10 May 2001) UN Doc E/C.12/2001/10, para 12.

⁸⁹ See for instance, CESCR, General Comment on the right to water (articles 11 and 12) (20 January 2003) UN Doc E/C.12/2002/11, para 49.

⁹⁰ CESCR, General Comment 24, para 12.

⁹¹ *Ibid*, para 13.

⁹² *Ibid*, para 15

⁹³ CESCR, Concluding Observations on the second report on India (8 August 2008) UN Doc E/C.12/IND/CO/5, para 31.

regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing.⁹⁴

3 The Current State of Affairs: The Committee's Position on Taxation

The Committee has identified three main correlations between taxation and the realisation of ESCR. First, taxation allows the state to generate sufficient resources, which have to be allocated and spent to ensure the fulfilment of its ESCR obligations. Second, taxation has to be implemented in such a way that it has a redistributive effect in the resource mobilisation. Third, it is through human rights compliant taxation that the principles of good governance are upheld.

This chapter provides an analysis of the current state of affairs of the Committee's engagement in questions regarding taxation. The analysis is based on the concerns and recommendations articulated in the Concluding Observations and List of Issues, as well as the latest General Comment 24 that the Committee has published. First, this will be contextualised with rising (income and wealth) inequality and economic growth in order to draw the connection to ESCR realisation and the importance of taxation. This approach is in particular taken due to the fact that the Committee itself refers to socioeconomic inequalities and the potential of taxation in a number of analysed documents.

3.1 Theoretical Contextualisation

In a market-based economic order certain levels of inequality are inevitable and even wanted. However, extreme forms of inequality in wealth, income and social outcomes have a detrimental effect on the society as a whole with respect to economic development and at the individual level it leaves people in situations of tremendous poverty, which leads to social and political exclusion. It has been acknowledged by scholars, as well as international financial organisations such as the IMF that extreme inequality has a slowing effect on economic growth which is directly related to a state's ability to generate resources. One of the factors is understood to be that the extreme concentration of wealth tends to be unproductive because it deprives the demand side of income for consumption. High-income earners spend a smaller share of their income than low-income earners, which allows the assumption that more equally

⁹⁴ CESCR, General Comment 24, para 18

distributed incomes would lead to a higher propensity to consume overall.⁹⁵ Moreover, there is evidence that income inequality within a country is connected to poor social outcomes, like a higher child mortality rate, lower life expectancy and worse physical and psychological well-being of the people, as well as the increasing imprisonment and crime rates in a country. In fact, it is not the economic development of a country but the level of income inequality that matters for certain social outcomes.⁹⁶

Furthermore, economic inequality is strongly related to political inequality. Those with large amounts of wealth and income have more influence in the political sphere and it is therefore more likely that policies are adopted that favour their interests.⁹⁷ There is evidence that shows that a high level of inequality in a country reinforces political decisions that undermine the realisation of ESCR.⁹⁸ In addition, economic crises are more likely to occur which hit low-income earners in particular.⁹⁹ In unequal societies there is less social cohesion which leads to an environment that is more conducive for political instability that can lead to conflict. In fact, a more equal distribution of income and political power in a country leads to more sustainable prosperity.¹⁰⁰

There are different indices that are used to measure inequality and different forms of inequality such as income, consumption, wealth, etcetera that can be reviewed. Therefore, in order to be able to make comparisons and analyse the evolution of inequality, it is incumbent to use the same index and be precise about the content of the analysis. The most common index that has been used over the past 100 years is the Gini coefficient. It indicates a number between 0 and 1, 0 representing perfect equal distribution and 1 representing that only one person owns everything. This indicator is primarily sensitive to changes in the middle-income share and does not allow insights in changes at the top or bottom of the income distribution.¹⁰¹ This means that it does not compare the upper income share to the bottom one. For this reason, the Palma

⁹⁵ Michael Doyle and Joseph Stiglitz, 'Eliminating Extreme Inequality: A Sustainable Development Goal, 2015–2030' (20 March 2014), available at <https://www.ethicsandinternationalaffairs.org/2014/eliminating-extreme-inequality-a-sustainable-development-goal-2015-2030/> (accessed on 18 June 2018).

⁹⁶ Richard Wilkinson und Kate Pickett, *Gleichheit ist Glück. Warum gerechte Gesellschaften für alle besser sind* (Tolkemitt Verlag 2009), p 33ff, 101.

⁹⁷ Gillian MacNaughton, 'Vertical inequalities: are the SDGs and human rights up to the challenges?', (2017) VOL 21:8 The International Journal of Human Rights, p 1055.

⁹⁸ Radhika Balakrishnan, James Heintz and Diane Elson, *Rethinking Economic Policy for Social Justice. The radical potential of human rights* (Routledge London and New York 2016), p 43.

⁹⁹ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 16, 37-40.

¹⁰⁰ Gillian MacNaughton, 'Vertical inequalities: are the SDGs and human rights up to the challenges?', p 1055.

¹⁰¹ Alex Cobham, Luke Schlogl and Andy Sumner, 'Inequality and the Tails: The Palma Proposition and Ratio Revisited' (July 2015) UN/DESA Working Paper No. 143 ST/ESA/2015/DWP/143, p 3.

ratio has recently received more attention. It is based on the empirical work of José Gabriel Palma who argued that changes of inequality are primarily due to changes of the richest 10 percent and the lowest 40 percent of the population because the middle continues to capture 50 percent of gross national income. Therefore, this index divides the income share of the upper 10 percent with the lowest 40 percent. Over the past years it has increasingly been applied, for instance in the OECD Income Distribution database, in the Human Development Report by the UNDP, as well as at the national level in some cases.¹⁰²

According to the common reporting guidelines for the submission of state reports on the realisation of ESCR, states are required to display the Gini Index.¹⁰³ However, since August 2017, a gradual shift can be noted in the List of Issues of the Committee, in which it started to ask for the Palma ratio on a more regular basis. This is an indication that the Committee is concerned with the high levels of inequality within countries.

3.1.1 Economic Growth for the Realisation of Economic, Social and Cultural Rights

Most countries in the world were confronted with a decline in income inequality from the 1920s to the 1970s. Joseph Stiglitz points out that in the decades after the World War II economic growth was distributed more evenly among the various segments of society. People at the bottom saw a proportionately higher increase in their income share. Stiglitz states that in order to achieve sustainable growth, wealth creation has to be shared and inclusive for all.¹⁰⁴ Quite to the contrary however, the introduction of various policies, such as the deregulation of the financial markets, the implementation of tax cuts and privatisation programmes led to the situation of today, in which according to Branko Milanovic the "lower middle classes of the rich world" have been the losers of the time span between 1988-2008. While the income of the top one percent grew by two-thirds in this period, the income of the lower middle class of the OECD countries stagnated or decreased.¹⁰⁵

Throughout the world, economic inequality between countries has been diminished. Emerging markets like China and India saw large increases in public income growth. Yet, these countries are examples that show that overall, economic growth measured in GDP is not

¹⁰² Cobham, Schlogl and Sumner, 'Inequality and the Tails: The Palma Proposition and Ratio Revisited', p 1.

¹⁰³ United Nations Secretary General, *Compilation of Guidelines on the Form and Content of the Reports to Be Submitted by States Parties to the International Human Rights Treaties* (June 2009) UN Doc HRI/GEN/2/Rev.63.

¹⁰⁴ Joseph Stiglitz, *The Great Divide. Unequal Societies and What We Can Do about Them* (W.W. Norton & Company New York and London 2015), p 125.

¹⁰⁵ Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (England 2016), p 11f.

conclusive regarding the record of the realisation of ESCR. While it is true that absolute and relative poverty was alleviated in these countries, at the same time the number of millionaires and billionaires increased rapidly. In India, the share in wealth of billionaires has grown from 1.8 percent of GDP in 2003 to 26 percent in 2008. In this period, the ratio of tax revenue to GDP has decreased as there were many tax loopholes which allow large amounts of money being kept in shell corporations to hide it from taxation.¹⁰⁶ This shows that economic growth by itself is no surety for the tackling of extreme inequality. In fact, research shows that if economic growth had been targeted to alleviate poverty, 700 million people would not be living in poverty anymore. Research shows that with existing resources and by increasing taxation, besides limiting the amount that is spent on military expenses for instance, three-quarters of extreme poverty could be eradicated.¹⁰⁷

The framework provided by the Covenant allows going beyond the analysis of mere economic growth and highlights the progressive realisation of ESCR over time and therefore stresses the social outcome.¹⁰⁸ Economic growth is a means to achieve the realisation of ESCR if sufficient revenue collection is reached in a redistributive manner and resources are allocated and spent accordingly. In the Concluding Observation to South Korea, the Committee noted that despite the high growth in GDP, the level of social spending remained low and urged the country to ensure a more redistributive fiscal policy to address social inequalities.¹⁰⁹ The Committee did not refer to taxation explicitly in this Concluding Observation. However, this would have been an important contribution to highlight that it is not only the allocation side that is essential, but also the way of generating resources in the first place. This has been highlighted by the Special Rapporteur on extreme poverty who stated that “[m]any developing countries have experienced significant economic growth in recent decades, although without a proportionate reduction in poverty or inequality, indicating that the benefits of growth have been concentrated in the hands of a few. This is in large part because the proceeds of growth have not been adequately taxed and redistributed, leading to a concentration of wealth that has

¹⁰⁶ Balakrishnan, Heintz and Elson, *Rethinking Economic Policy for Social Justice. The radical potential of human rights*, p 42.

¹⁰⁷ Oxfam, ‘An Economy for the 99 Percent: It’s time to build a human economy that benefits everyone, not just the privileged few’ (January 2017) Oxfam Briefing Paper, p 2.

¹⁰⁸ Balakrishnan, Heintz and Elson, *Rethinking Economic Policy for Social Justice. The radical potential of human rights*, 3.

¹⁰⁹ CESCR, Concluding observations on the fourth periodic report of the Republic of Korea (19 October 2017) UN Doc E/C.12/KOR/CO/4, para 11f.

considerable negative implications for human rights, social cohesion and future economic growth prospects.”¹¹⁰

3.2 Recommendations Regarding the Sufficiency of Resources

The collection of tax revenue is fundamental in order to fund public services. The sufficiency of resources depends on the ability of a state at the national level to generate resources. However, the actions or omissions of other states as well as decisions made in international financial institutions and practices by Multi-National Corporations have an impact on this likewise. Due to tax competition between states, a “race to the bottom” was introduced, which led to the situation that taxation has been shifted away from corporations, capital and wealth and towards consumption and wages. Yet, the Covenant prescribes that states have the obligation to devote the maximum of available resources for the progressive realisation of rights. The ultimate decision on what resources are mobilised and made available and what their maximum is, lies with the states. However, in recent years, the Committee has increasingly engaged with questions regarding the generation of resources.

Robert Robertson published an article in which he states “[the maximum available resources] is a difficult phrase – two warring adjectives describing an undefined noun. Maximum stands for idealism; available stands for reality. Maximum is the sword of human rights rhetoric; available is the wiggle room for the state”.¹¹¹

3.2.1 General Remarks

Throughout the preceding six years, the Committee has devoted more attention on the revenue collection side, however, it is still done on an incremental basis. In the General Comment 24, the Committee has noted that the obligation to fulfil entails the requirement that states take necessary steps to the maximum of their available resources to directly provide goods and services that are essential for the enjoyment of ESCR *in certain cases*¹¹². In order to

¹¹⁰ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 40.

¹¹¹ Robertson, Robert E. ‘Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights.’ (1994) 16(4) Human Rights Quarterly, p 703.

¹¹² Emphasise added by the author.

do so, the Committee continues that “[this] may require the mobilization of resources by the State, including by enforcing progressive taxation schemes”.¹¹³

The incorporation of this assertion into a General Comment was a very positive step, due to the standing and importance of such a document and the fact that it raises awareness of state officials but also allows actors in the position to scrutinise the actions of a state to refer to this General Comment. The Committee phrased the requirement of the adoption of progressive taxation schemes with respect to the maximum available resource doctrine as a legal obligation on one hand, but it is restricted to a kind of “in certain cases”-limitation on the other hand. Furthermore, as there is not one definition of progressivity, it remains open to the states to interpret this issue accordingly. It is only through further analysis of the Concluding Observations that it becomes clear that the Committee has in fact distilled certain aspects that have to be considered in order to comply with the Covenant obligations with respect to the tax regime. Yet, while certain characteristics are well-established by the Committee, there are other dimensions that have not received any attention. In order to understand what the Committee suggests being the maximum of available resources and *sufficient*¹¹⁴ resources, the List of Issues and the Concluding Observations will be the basis of the further analysis. The General Comment 24 was published on the 10th of August 2017, therefore, in particular, the documents issued before that adoption will be examined in this thesis because the state reports since then are yet to be considered by the Committee.

However, since the adoption of the General Comment 24, a more coherent approach can be noted in the practice of the Committee for two reasons. First, until that point, the Committee used numerous different titles under which it made recommendations on taxation, such as “allocation of public resources”, “investment in social expenditure”, “fiscal policy and investment”. It should be noted that in the case of the United Kingdom of Great Britain and Northern Ireland, there was an entire section under article 2(1) ICESCR devoted to “tax policies”.¹¹⁵ Since July 2017, in the cases in which the Committee referred to taxation, it mentioned it with the general title of “maximum of available resources”. The fact that taxation is now primarily referred to with “maximum of available resources” implies that a new doctrine is emerging.

¹¹³ CESCR, General Comment 24, para 23.

¹¹⁴ Emphasis added by the author.

¹¹⁵ CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 16.

Second, the Committee asks a more standardised set of questions in the List of Issues about certain aspects in the evolution of the tax structure as well as inequality. The List of Issues the Committee asks a state is adapted to the specific national situation and developments of ESCR realisation. Therefore, it is reasonable that the Committee does not resort to the use of one fixed set of questions to all countries. However, the approach the Committee has been taking with respect to requiring information on taxation and inequality in the new set of questions in the List of Issues, is not quite clear.

Since October 2017, two sets of questions can be identified. While there are these two sets of questions, the Committee varies in asking for the evolution over the preceding time span of five or ten years of the required information. To illustrate this: there are some cases in which the Committee asks one set of questions and the evolution over the last 5 years and in other cases, it poses the same set of questions but requires the information from the preceding 10 years. It is highly recommendable to require extensive information over a specific time span that makes comparisons possible, but it is not quite clear why the Committee takes this ambiguous approach. In the cases of Argentina, Turkmenistan, South Africa and Estonia, the Committee required information on the proportion of people below the poverty line, the Palma ratio, the tax rates on corporate profits, personal income and the value added tax, as well as the percentage from the personal income tax from the top 20 percent.¹¹⁶ In the same session, the List of Issues to Mauritius, Kazakhstan, Cameroon and Slovakia included questions only on the proportion of people below the poverty line, the proportion of public revenue that is financed through taxes and the requirement of information on levels of inequality.¹¹⁷ In the latter set of questions, the required information is rather vague, the Committee asks about the tax-to-GDP ratio and the level of inequality without requiring a specific index. It is not apparent which information the Committee deems to receive and why it does not ask the more detailed questions in general since those would answer the others but would provide more detailed information. As abovementioned, there are different ways to measure inequality and different sets of data for comparisons; it could refer to income, wealth or social outcome inequality for instance. At this point, it is important to note, that even with respect to income inequality, it can be measured after taxes and transfers or before and the answer by the state will allow completely different assumptions. Therefore, it is questionable, why the Committee did not ask

¹¹⁶ See for instance: CESCR, List of issues in relation to the third periodic report of Estonia (25 April 2018) UN Doc E/C.12/EST/Q/3, para 3.

¹¹⁷ See for instance: CESCR, List of issues in relation to the third periodic report of Slovakia (19 April 2018) UN Doc E/C.12/SVK/Q/3, para 3.

about the Palma ratio for instance, in order to have a more holistic picture and to enable itself to make conclusions or correlations for the future, on the basis of comparable data sets.

As the constructive dialogue of these countries is yet to come, it will be interesting to see how the acquired information from the List of Issues will feed in the Committee's analysis in the Concluding Observations. It would be useful to understand which indicators and assumptions the Committee has used as a basis for its concerns.

It is the author's opinion that a more coherent approach with regards to the List of Issues would allow the Committee, as well as third parties like NGOs, to further strengthen the development of the argument for the correlation between inequality, taxation and ESCR realisation. Furthermore, the high number of ratifications of the Covenant seems to be a good basis to influence and mainstream certain processes like the measurement of inequality with the Palma ratio and in general regarding data collection of the income and wealth distribution, disaggregated by different income groups and gender for instance. One of the main impediments to measure wealth inequality is the lack of data. Moreover, in most cases it is household income or wealth that is measured, however, this limits the ability to scrutinise the distribution between genders for instance.

3.2.2 A Socially Just Tax Regime

The analysed Concluding Observations show that there are certain attributes of the tax regime that the Committee deems necessary in order to fulfil the obligations under the Covenant. States have a margin of discretion in their policy choices and are the active agents that adopt fiscal policies that are shaped according to the specific national context. As presented in the chapter on the theoretical framework, states have obligations of conduct and result, and it is foremost the final rights realisation outcome that is essential and under the Committee's scrutiny. However, if the tax regime is regressive in nature burdening low-income earners excessively, it is a matter of great concern. In this regard the Special Rapporteur on the Right to Food noted in his report on Brazil in 2009 that "[t]he tax structure in Brazil remains highly regressive. Tax rates are high for goods and services and low for income and property, bringing about very inequitable outcomes. [...] [W]hile the social programmes developed under the "Zero Hunger" strategy are impressive in scope, they are essentially funded by the very persons whom they seek to benefit, as the regressive system of taxation seriously limits the redistributive aspect of the programmes. Only by introducing a tax reform that would reverse

the current situation could Brazil claim to be seeking to realize the right to adequate food by taking steps to the maximum of its available resources.”¹¹⁸

That said, the Committee recommends on a regular basis that the taxation policy should be socially just, adequate, equitable and progressive. In order to understand and shed light to what this means in practice, the following section will present the Committee’s concerns and recommendation in the Concluding Observations.

In 2013, the Committee raised concerns about the implementation of regressive indirect taxes by Egypt without assessing their potential human rights impacts. In this regard, it was highlighted to ensure that the Covenant obligations guide the negotiations with international financial institutions, in particular regarding policies that might impede the rights of vulnerable groups. Furthermore, the state party was invited to consider more equitable revenue collection alternatives.¹¹⁹ This shows that the Committee’s position on the effect of the adoption of indirect taxation on the situation of low-income earners dates back five years already. This position is related to the Committee’s interpretation of the principle of equity in some General Comments in which it stresses with respect to the right to health for instance that “[e]quity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households”.¹²⁰ The principle of equity is one of the main tax principles independent from the human rights framework. It is divided into horizontal equity, which implies that people in the same situation should pay the same taxes, whereas vertical equity refers to a concept that entails that taxpayers with more income should pay a higher percentage share. This is also known as the principle of the ability-to-pay.¹²¹

Moreover, in the General Comments on the right to work, health, and education, the Committee stressed the importance of negotiations with international financial institutions for the realisation of ESCR. It clarified that states that are members to these institutions have the responsibility to devote special attention to the protection of ESCR in the conclusion of structural adjustment programmes for other states. The Committee noted to Egypt that it should ensure that human rights principles guide the negotiations. Yet, in light of the obligation to provide international cooperation, the responsibility of other states is essential to be included

¹¹⁸ Report of the Special Rapporteur on the right to food, Mission to Brazil, Olivier De Schutter (12-18 October 2009) UN Doc A/HRC/13/33/Add.6, para 36.

¹¹⁹ CESCR, Concluding observations on the combined second to fourth periodic reports of Egypt (12 December 2013) UN Doc E/C.12/EGY/CO/2-4, para 6f.

¹²⁰ See for instance: CESCR, General Comment No. 14 on the right to the highest attainable standard of health (article 12) (11 August 2000) UN Doc E/C.12/2000/4, para 12.

¹²¹ OECD, *Addressing the Tax Challenges of the Digital Economy* Chapter: Fundamental Principles of Taxation (OECD Publishing Paris 2014), p 31.

in a General Comment on taxation. This, due to the fact that it is rather the other states that influence the outcome of these negotiations, than the recipient state.

In 2014, concerns were raised in the case of Guatemala with regards to the insufficient tax collection despite the implemented tax reform. The Committee urged the state to adopt an adequate, progressive and socially equitable tax policy that improves tax collection.¹²² In the case of El Salvador, the low tax revenue was said to negatively affect the national income, which might have restricted the resources available and the Committee urged the state to develop a satisfactory, socially fair tax policy to boost revenue.¹²³

In Paraguay's Concluding Observations, the Committee notes the low level of tax collection that limited potential public social investment and therefore recommended to implement socially just tax policies to improve tax collection.¹²⁴ Similarly, it made the recommendation to Burundi to implement a fiscal policy that is needs-based, progressive and socially just and that improves tax collection levels. In this case, it furthermore commented on the tax exemptions scheme and urged the state party to review it in order to assess whether it resulted in the reduction of tax revenue.¹²⁵ This was the first time that the Committee made reference to the exemption schemes and did not specify its recommendation with respect to which exemption schemes it viewed as potentially limiting for revenue collection.

In the case of Ireland and the adoption of austerity measures, the Committee applied its assessment of retrogressive steps. It highlighted that these policies should not have discriminatory outcomes and increase inequalities and furthermore stated that the minimum core content or a social protection floor have to be ensured. Moreover, it recommended that all alternative policies like tax measures should guarantee that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected in a negative way. The state party was requested to review the tax regime to increase public revenue to restore the pre-crisis levels of public services and social benefits.¹²⁶

The Committee raised concerns to Macedonia and Russia regarding the low tax rate of the flat taxes on personal and corporate income, which was said to be ineffective in the

¹²² CESCR, Concluding observations on the third periodic report of Guatemala (9 December 2014) UN Doc E/C.12/GTM/CO/3, para 8.

¹²³ CESCR, Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador (18 June 2014) UN Doc E/C.12/SLV/CO/3-5, para 8.

¹²⁴ CESCR, Concluding observations on the fourth periodic report of Paraguay (19 May 2015) UN Doc E/C.12/PRY/CO/4, para 10-13.

¹²⁵ CESCR, Concluding observations on the initial report of Burundi (15 October 2015) UN Doc E/C.12/BDI/CO/1, para 13f.

¹²⁶ CESCR, Concluding observations on the third periodic report of Ireland (7 July 2015) UN Doc E/C.12/IRL/CO/3, para 14f.

reduction of poverty and to lack the redistributive effect. The Committee recommended “to implement effective measures to reduce income inequality” to Macedonia and in the case of Russia to address “economic inequalities” through reforms of the tax system.¹²⁷ While the recommendation to Russia was mentioned with respect to art 2 ICESCR, in the case of Macedonia, it was with respect to article 11 ICESCR.

In the case of the Dominican Republic, the Committee raised concerns regarding the tax system which relied on indirect taxes. Furthermore, it used very clear language and identified the tax exemption scheme as unjustified.¹²⁸ While the Committee viewed the exemptions as unjustified, it did not provide an explanation or clear position on what makes a tax exemption unjustified. This case is similar to the abovementioned case of Burundi in which the Committee refrained from specifying which exemptions it refers to. It would be highly recommendable to incorporate the concerns regarding tax exemption schemes in a General Comment on taxation. This will be discussed in more depth in the following chapter of this thesis.

In the case of Costa Rica, the Committee made the recommendation to take the necessary steps to ensure that the outcome of the tax reforms were redistributive and socially fair which in effect should combat the divergence of inequalities and increase available resources.¹²⁹

In the case of the United Kingdom of Great Britain and Northern Ireland, the Committee made extensive recommendations on taxation. The Committee raised concerns regarding the increase in the threshold for the payment of the inheritance tax, as well as regarding the increase of the value added tax, and the reduction of the tax rate on corporate incomes. The Committee noted that this undermined the state’s ability to address social inequality and to collect sufficient resources “to achieve the full realization of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups”¹³⁰. It made clear recommendations that the state party should guarantee that its fiscal

¹²⁷ CESCR, Concluding observations on the combined second to fourth periodic reports of the former Yugoslav Republic of Macedonia (14 July 2016) UN Doc E/C.12/MKD/CO/2-4, para 41f; Concluding observations on the sixth periodic report of the Russian Federation (16 October 2017) UN Doc E/C.12/RUS/CO/6, para 16f.

¹²⁸ CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (20 October 2016) UN Doc E/C.12/DOM/CO/4, para 17f.

¹²⁹ CESCR, Concluding observations on the fifth periodic report of Costa Rica (20 October 2016) UN Doc E/C.12/CRI/CO/5, para 14f.

¹³⁰ CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (13 July 2016) UN Doc E/C.12/GBR/CO/6, para 16f.

policy is adequate, progressive and socially equitable and that the collection of taxes is improved.¹³¹

This was the first time that the Committee raised concerns regarding the inheritance tax. It is a case in which a state party took retrogressive steps and for this reason, it is not clear whether it is the Committee's view that the inheritance tax as such has importance in the tackling of social inequality. If this was the case, it would be an indication that the Committee deems inheritance taxes as a viable means for tax generation, implying that it will make recommendations to other states to adopt an inheritance tax. However, it could also be inferred that the Committee referred only to the loss in generated revenue which could have been allocated and spent to tackle social inequalities due to the adopted tax cut. Furthermore, the last part of the recommendation, which refers to the collection of sufficient resources to achieve the full realisation of ESCR for "the benefit of" marginalised groups is vague and not in line with the text of the Covenant. While state parties have the immediate obligation to ensure the minimum core content of rights and should prioritise marginalised groups, states additionally have to take steps to *progressively*¹³² realise all ESCR for everyone.

In 2016, the Committee examined Canada's report and came to the conclusion that the corporate tax rates remained low in comparison with other rich countries. It urged the state party to adopt and implement a tax policy that is adequate and socially equitable and that improves tax collection.¹³³ This is the only time the Committee mentioned that it had assessed the tax revenue collection in comparison to other states. It is an important development that has not been repeated since then, but it will be interesting to see whether the Committee will use this reasoning in the future and in particular with regards to other taxes, such as wealth taxes or a financial transactions tax.

In Colombia's case, the Committee positively highlighted the efforts to implement a structural redistributive tax reform but raised concerns about the increase of the value added tax. It recommended the conduction of a comprehensive analysis of the impact of the structural tax reform on the reduction of poverty and inequality.¹³⁴

Due to a non-progressive tax system and the main focus on indirect taxes, the Committee recommended Pakistan to review its tax regime. In particular, it was highlighted to

¹³¹ CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (13 July 2016) UN Doc E/C.12/GBR/CO/6, para 16f.

¹³² Emphasis added by the author.

¹³³ CESCR, Concluding observations on the sixth periodic report of Canada (22 March 2016) UN Doc E/C.12/CAN/CO/6, para 9.

¹³⁴ CESCR, Concluding observations on the sixth periodic report of Colombia (19 October 2017) UN Doc E/C.12/COL/CO/6, para 19f.

increase the tax revenue collection in a way that ensures that marginalised groups are not disproportionately affected, and which results in the redistribution of income and wealth.¹³⁵

In 2018, the Committee noted its concerns towards Spain about the increase in social inequality due to the implementation of indirect taxes. It recommended analysing the tax revenue to optimise and maximise the redistributive power of the fiscal policy.¹³⁶ In the case of Bangladesh, it raised concerns regarding the low tax-to-GDP ratio and the effects of the value added tax on poor households and the low level of tax collection. It made the recommendation to adapt the value added tax scheme so that it would not be applied to basic foodstuffs and social services.¹³⁷ In Mexico's case, it recommended to achieve a more socially equitable fiscal policy, and in particular to adopt relevant measures to increase the collection of tax arrears.¹³⁸

This section deemed to provide the reader with some insight on the Committee's process of scrutiny of taxation in regard to its sufficiency and redistribution. All the recommendations, apart from the one to Macedonia were made in the context of article 2 ICESCR, which includes the maximum available resource obligation and they were all limited to recommendations regarding the national context.

In light of the non-discrimination clause, this obligation is interpreted to entail the duty to implement non-regressive taxation policies. In many cases, the Committee notes that there are prevalent social inequalities and that the adopted tax policy does not alleviate these. It is the author's opinion that this concern is rather vague, because there is no general definition of "social inequalities" and therefore it is difficult to draw conclusions from the recommendations and decide whether economic inequality is subsumed by the former. In this regard, it would be necessary to distinguish wealth from income inequality, as well as inequality in social outcomes. As a study of the OECD shows, advanced economies in particular managed to reduce an average of one-quarter of market income inequality measured with the Gini coefficient in the time span from the mid-1980s until the mid-1990s, due to cash transfers stemming from taxes and social security contributions. It suggests that even during times of

¹³⁵ CESCR, Concluding observations on the initial report of Pakistan (20 July 2017) UN Doc E/C.12/PAK/CO/1, para 15f.

¹³⁶ CESCR, Concluding observations on the sixth periodic report of Spain (24 April 2018) UN Doc E/C.12/ESP/CO/6, para 14f.

¹³⁷ CESCR, Concluding observations on the initial report of Bangladesh (18 April 2018) UN Doc E/C.12/BGD/CO/1, para 19f.

¹³⁸ CESCR, Concluding observations on the combined fifth and sixth periodic reports of Mexico (17 April 2018) UN Doc E/C.12/MEX/CO/5-6, para 14f.

rapidly growing market-income inequalities, it is possible to achieve stabilisation through tax-benefit systems.¹³⁹

Due to the fact that these recommendations and references to taxation are still made on an incidental basis, there is a lack of a red thread in the approach of the Committee and therefore the adoption of a comprehensive General Comment on taxation is needed. Thus, until then, there are two practical developments that will be interesting to follow in the upcoming Concluding Observations. First, whether the Committee is going to approach issues regarding wealth, income and social inequality rather in the context of developing states that do not have a progressive taxation system in place at all. This would be in line with what the Committee has been setting its focus on until now.

Second, whether the Committee is going to resort to scrutinising taxation primarily in the context of retrogressive steps and scrutinising tax cuts or in contrast, whether it will interpret the obligation to progressively realise the rights in the Covenant to the maximum of *potential*¹⁴⁰ available resources in a more far-reaching way. The latter could entail that it starts analysing taxation in a holistic way, taking into consideration whether the state party for instance implements wealth taxes. In this regard, it will be interesting to see how the Committee will approach the examination of taxation policies of developed countries.

3.2.3 Tax Abusive Conduct

In the General Comment 24, the Committee made several important contributions with respect to states' obligations and taxation. The obligation to respect in the context of business activities and taxation requires states to revise tax codes and align incentives for businesses with human rights responsibilities.¹⁴¹ This is particularly important with regard to tax exemptions that businesses are granted. As has been shown above, the Committee referred to tax exemptions twice without specifying them.

Moreover, the General Comment clarifies that tax conduct can invoke the extraterritorial obligations of states in various ways. The extraterritorial obligation to respect entails that a state must refrain from interfering directly or indirectly with the enjoyment of ESCR by people outside its territory. In this regard, the Committee noted that this duty has to

¹³⁹ OECD, *Divided We Stand: Why Inequality Keeps Rising* (OECD Publishing Paris 2011), p 268f.

¹⁴⁰ Emphasise added by the author.

¹⁴¹ CESCR, General Comment 24, para 15

be considered in particular in the negotiation and conclusion of trade and investment agreements or of financial and tax treaties and in judicial cooperation.¹⁴²

Furthermore, the Committee states that article 2(1) ICESCR “sets out the expectation” that states take collective action, in order to fulfil the realisation of ESCR of persons outside their territories.¹⁴³ The Committee refers to article 28 of the Universal Declaration of Human Rights¹⁴⁴ and notes that states have the duty to take the necessary steps to regulate the conduct of business actors to stop the use of tax avoidance and tax evasion strategies. The Committee highlights, in particular, that transfer pricing practices should be combatted, and states should strengthen international tax cooperation and explore unitary taxation within one company, “with developed countries imposing a minimum corporate income tax rate during a period of transition”.¹⁴⁵

Moreover, the Committee makes clear that the adoption of low corporate tax rates for the purpose of attracting foreign investors creates an environment that leads to a “race to the bottom” which undermines the ability of all states to mobilise resources and is therefore “inconsistent with the duties of the States Parties to the Covenant”.¹⁴⁶ The Committee further explains that excessive protection to bank secrecy and permissive rules on corporate tax may affect the ability of states where economic activity takes place to mobilise the maximum of available resources.¹⁴⁷

These contributions in the General Comment as the authoritative interpretation of the Covenant are a major step in the right direction. It plays a fundamental role that abusive tax conduct by Multi-National-Corporations is framed in human rights language.

That said, there are two points that have to be considered if the Committee adopts a General Comment on taxation. The reference to tax abusive conduct falls short due to the fact, that this General Comment sets forth the obligations of states in the context of business activities only. Yet, tax abusive behaviour is equally relevant in the context of individuals which has been recognised by the Committee in the Concluding Observations that will be presented further below.

An estimate finds that 85 to 90 percent of offshore wealth belongs to fewer than 10 million people. The concentration is even higher at the top: A third of the global offshore wealth

¹⁴² CESCR, General Comment 24, para 29.

¹⁴³ Ibid, para 36.

¹⁴⁴ Article 28 UDHR: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

¹⁴⁵ CESCR, General Comment 24, para 36f.

¹⁴⁶ Ibid, para 37.

¹⁴⁷ Ibid.

belongs to 100,000 families with each a net worth of at least 30 million dollars. It was found that on average three percent of personal taxes are evaded in Scandinavia which consists of countries that in general show high tax compliance. The same study however shows that tax evasion even increases at the upper 0.01 percent of the wealth distribution from 25 percent to 30 percent.¹⁴⁸

Furthermore, as mentioned above, the Committee refers to tax abusive conduct with respect to the extraterritorial obligation of a state. It is true that perhaps the largest amount of resources is lost due to the abusive cross-border behaviour of Multi-National-Corporations. However, tax abuse and avoidance take place in the national context alone as well, which is essential to highlight. In the following, the concerns and recommendations from the Concluding Observations in the context of tax abusive conduct will be presented.

The Committee urged the Dominican Republic as well as Honduras to tackle tax evasion and fraud and noted in the Concluding Observations to Kenya that the state should implement measures to combat illicit financial flows and tax avoidance in order to raise national revenues and increase the reliance on domestic resources.¹⁴⁹ In the case of Spain, it recommended that the state party should take effective measures against tax fraud of large inheritances.¹⁵⁰

The Committee went into more detail in the Concluding Observations to the United Kingdom of Great Britain and Northern Ireland and scrutinised the financial secrecy legislation and the permissive rules on the corporate tax that were said to affect the ability of the state, as well as other states, to mobilise the maximum of available resources. The Committee recommended implementing strict measures to tackle tax abuse, “in particular by corporations and high - net-worth individuals” and that measures in coordination with its Overseas Territories and Crown Dependencies should be taken. Moreover, it was highlighted that global tax abuse should be addressed.¹⁵¹ The recommendations made in this case have various dimensions; they range from the national to the international context and concerns were raised regarding the tax abuse of individuals and corporations, without limiting them only to Multi-

¹⁴⁸ Alstadsæter, Annette and Johannesen, Niels and Zucman, Gabriel, Tax Evasion and Inequality (24 August 2017) CEBI Working Paper No. 03/17, p 1.

¹⁴⁹ CESCR, Concluding observations on the second periodic report of Honduras (10 July 2016) UN Doc E/C.12/HND/CO/2, para 19-20; Concluding observations on the fourth periodic report of the Dominican Republic (20 October 2016) UN Doc E/C.12/DOM/CO/4, para 17f; Concluding observations on the combined second to fifth periodic reports of Kenya (5 April 2016) UN Doc E/C.12/KEN/CO/2-5, para 17.

¹⁵⁰ CESCR, Concluding observations on the sixth periodic report of Spain (24 April 2018) UN Doc E/C.12/ESP/CO/6, para 14f.

¹⁵¹ CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 16f.

National-Corporations. Furthermore, the recommendation to combat global tax abuse, could be understood in a way that the state should initiate or take part in collective actions to combat tax abuse in line with the obligation to cooperate internationally.

A further development can be noted in the case of Liechtenstein. The Committee shed light on the potential negative impact on the ability of other state parties to meet their obligation to mobilise the maximum available resources due to private foundations that are based in Liechtenstein. It made the recommendation to further strengthen the combat of tax evasion and tax abuse, especially by ensuring that there is a legal framework that regulates private foundations. For this reason, Liechtenstein was requested to provide information on the impact of such measures and on related investigations launched and their outcomes.¹⁵² The fact that the Committee makes recommendations regarding the laws on foundations is very important and it is essential to include this issue in a General Comment on taxation. In this case, it is however not clear for which reason the Committee only highlights the ability of other states to mobilise resources. In fact, it would imply that the Committee acknowledges that Liechtenstein mobilises enough resources or that the laws on foundations do not have negative impacts on Liechtenstein and therefore it refers only to the extraterritorial obligations. However, in light of the obligation to progressively realise all rights in the Covenant, there remains doubt whether this was actually intended.

The Committee noted with respect to Spain that the lack of an adequate strategy to combat tax fraud is limiting the state's capacity to mobilise resources. It recommended Spain to analyse the redistributive power of the fiscal policy, to optimise and maximise the tax revenue and to take effective measures against tax fraud of Multi-National-Corporations and large inheritances.¹⁵³

The Committee has taken a strong position with respect to the loss of resources due to tax abusive conduct. However, it is the author's opinion that there are certain points that have to be included in a further General Comment as has been discussed throughout this section.

There are several issues that will be interesting to analyse in the future Concluding Observations related to the recently adopted General Comment 24. Therein, the Committee calls on the states to end tax avoidance, tax abuse and fraud. This is a very positive contribution, due to the fact that it implies that states have to take measures to close legal loopholes that

¹⁵² CESCR, Concluding observations on the combined second and third periodic reports of Liechtenstein (3 July 2017) UN Doc E/C.12/LIE/CO/2-3, para 9f, 3.

¹⁵³ CESCR, Concluding observations on the fourth periodic report of Spain (24 April 2018) UN Doc E/C.12/ESP/CO/6, para 14f.

allow the avoidance of taxes through aggressive tax planning strategies. It is desirable that the Committee takes a strong stand on ending this since fighting tax evasion increases the available resources on the one hand and puts an end to practices that create tremendous inequalities on the other hand. The latter, as the possibility to make use of these legal grey zones is reserved for big corporations and individuals who have the financial capacity to pay for the best tax firms. Furthermore, the Committee requires states to take effective action to tackle illegal tax conduct.

Moreover, it is important to note that the Committee highlighted that business entities have a responsibility to uphold ESCR regardless of whether domestic laws exist or whether they are fully enforced in practice.¹⁵⁴ This is strongly related to the due diligence of businesses. In the General Comment 24, the Committee did not refer to taxation and due diligence. This should be done in a General Comment on taxation, so that pressure is increased on corporations to include tax-related matters in their due diligence strategy.

3.3 Recommendations Regarding Substantive Rights

The Committee has been focusing on taxation for resource generation and made recommendations regarding substantive rights realisation to a limited extent only. In a number of times, the Committee recommended the implementation of tax benefits to employers, other incentives and in general to adopt targeted tax measures in order to combat unemployment of disadvantaged and marginalised groups, in particular in rural areas.¹⁵⁵ On the other hand, it raised concerns in the case of Montenegro regarding a package of tax exemptions and other benefits for companies where more than 30 per cent of employees were persons with disabilities, which in the opinion of the Committee favoured the creation of segregated enterprises.¹⁵⁶ These two examples show that while tax benefits might be recommendable to a certain extent, it is fundamental to have a holistic approach that does not lead to negative outcomes. In a General Comment on taxation, it would be important to highlight this fine line,

¹⁵⁴ CESCR, General Comment 24, para 5.

¹⁵⁵ CESCR, Concluding Observation on the combined second to third report of Albania (17 December 2013) UN Doc E/C.12/ALB/CO/2-3, para 17; Concluding observations on the second periodic report of Bosnia and Herzegovina (15 December 2013) UN Doc E/C.12/BIH/CO/2, para 15; Concluding observations on the second periodic report of Serbia (9 July 2014) UN Doc E/C.12/SRB/CO/2, para 17; Concluding observations on the initial period report of Montenegro (14 December 2014) UN Doc E/C.12/MNE/CO/1, para 12 and Concluding observations on the sixth periodic report of Sweden (13 July 2016) UN Doc E/C.12/SWE/CO/6, para 24.

¹⁵⁶ CESCR, Concluding observations on the second to fourth periodic reports of Viet Nam (14 December 2014) UN Doc E/C.12/VNM/CO/2-4, para 15.

and to stress the importance of safeguards that guarantee the positive effect of targeted tax measures.

The Committee raised concerns regarding the negative impact of the reduction that the child tax benefit had in the case of the United Kingdom of Great Britain and Northern Ireland and particularly highlighted the negative effect this has on marginalised and disadvantaged groups as well as individuals.¹⁵⁷

There were also several occasions where the Committee made recommendations regarding health-related tax measures to regulate behaviour that has a negative impact on the right to health. These entail higher taxes on junk food and sugary drinks to tackle childhood obesity¹⁵⁸ as well as taxes on alcohol and drugs.¹⁵⁹ In the more extended version of the List of Issues being used since August 2017, the Committee requires information on the value added tax rate, exclusive of the value added taxes on luxury items, tobacco, alcohol, sugary drinks or snacks and gasoline.¹⁶⁰

3.4 Recommendations Regarding Participation, Transparency and Accountability

The principles of participation, transparency and accountability are applied throughout the Covenant. The Committee references to them in a number of cases regarding the fiscal cycle or explicitly with regards to the conduction of the process of the adoption of taxation policy. This section will present these recommendations.

The Committee stressed the importance of a transparent and participatory tax planning process various times, for instance in the cases of El Salvador, Guatemala and Burundi.¹⁶¹ It urged Paraguay to ensure that the income tax is applied in a transparent manner.¹⁶² The Committee recommended that Kenya should ensure that the bodies in charge for investigations

¹⁵⁷ CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 40.

¹⁵⁸ CESCR, Concluding Observations on the sixth periodic report of Poland (25 October 2016) UN Doc E/C.12/POL/CO/6; Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 14; Concluding observations on the fifth periodic reports of Italy (27 October 2015) UN Doc E/C.12/ITA/CO/5, para 8.

¹⁵⁹ CESCR, Concluding observations on the sixth periodic report of Finland (16 December 2014) UN Doc E/C.12/FIN/CO/6, para 25.

¹⁶⁰ CESCR, List of issues in relation to the third periodic report of Estonia (25 April 2018) UN Doc E/C.12/EST/Q/3, para 3.

¹⁶¹ CESCR, Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador (18 June 2014) UN Doc E/C.12/SLV/CO/3-5; Concluding observations on the third periodic report of Guatemala (9 December 2014) UN Doc E/C.12/GTM/CO/3, para 8 and Concluding observations on the initial report of Burundi (15 October 2015) UN Doc E/C.12/BDI/CO/1, para 8.

¹⁶² CESCR, Concluding observations on the fourth periodic report of Paraguay (19 May 2015) UN Doc E/C.12/PRY/CO/4, para 10f.

of corruption operate in an independent manner and that their investigatory capacity is strengthened.¹⁶³

The recommendations to the United Kingdom of Great Britain and Northern Ireland included the conduction of a human rights impact assessment with broad public participation of the introduced changes to the fiscal policy, which should encompass an analysis of the distributional consequences and the tax burden of different income sectors and marginalised and disadvantaged groups.¹⁶⁴

In the case of Liechtenstein, the Committee positively highlighted the implementation of the global standards of transparency and exchange of information, developed by the OECD, and the conclusion of 17 double taxation agreements and 27 tax information exchange agreements.¹⁶⁵ It is fundamental that the Committee requires information on laws on transparency and the automatic exchange of information on a more regular basis and starts recommending the implementation to states which have not yet done so.

Spain was urged to conduct an evaluation with all affected social groups of the fiscal policy that had been implemented and it was furthermore asked to analyse the distributive consequences of the adopted changes and whether they could be said to result in positive outcomes for different groups, in particular as regards marginalised and disadvantaged persons.¹⁶⁶

The application of the principles of participation, transparency and accountability is of fundamental importance in order to uphold the rule of law. The recommendations presented should be the basis for a General Comment on taxation. However, there are aspects that the Committee has not focused on so far. The CEDAW Committee for instance scrutinised Switzerland's secrecy policies and required the state to conduct an "independent, participatory and periodic impact assessment of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights and substantive equality and ensure that such

¹⁶³ CESCR, Concluding observations on the combined second to fifth periodic reports of Kenya (5 April 2016) UN Doc E/C.12/KEN/CO/2-5, para 18. Note: this recommendation was made with respect to the combat of illicit financial flows and tax abuses, therefore it is included here. The Committee makes recommendations on the combat of corruption in many Concluding Observations without a specific relation to taxation. This will be discussed in the next chapter in more detail.

¹⁶⁴ CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 14.

¹⁶⁵ CESCR, Concluding observations on the combined second and third periodic reports of Liechtenstein (3 July 2017) UN Doc E/C.12/LIE/CO/2-3, para 3.

¹⁶⁶ CESCR, Concluding observations on the fourth periodic report of Spain (24 April 2018) UN Doc E/C.12/ESP/CO/6, para 15.

assessment is conducted in an impartial manner with public disclosure of the methodology and finding”.¹⁶⁷

The number of cases in which the Committee made recommendations concerning the three principles is still very low and a more coherent approach would be favourable. The next chapter will outline a more comprehensive approach that should be considered in a General Comment.

3.5 Conclusion

This chapter deemed to give insight in the current state of affairs regarding the Committee’s position on taxation. The Committee’s role in the interpretation of the Covenant is fundamental with respect to reacting to new common challenges of states in the realisation of rights. In recent years, the Committee made large steps in scrutinising state’s tax policies to generate resources, distribute income and wealth as well as to strengthen the civic bond between the government and the people.

One of the major focuses of the Committee is the sufficiency of resources, albeit without specifying what sufficient means. It raises this issue in general in cases in which the tax revenue collection falls completely short and therefore focuses on ensuring the minimum core content of the Covenant rights. However, there is still a lacuna regarding the progressive realisation clause, in particular in the context of advanced economies. It is the author’s opinion that the redistributive effect of taxation includes not only the progressivity of the personal income tax and the weight of consumption related taxes but also taxes levied on wealth which have been largely neglected up until this point.

It is through taxes and transfers, the provision of an adequate minimum wage and the provision of a certain standard of education and health that a more equal society is created. The Committee noticed the unequal distribution of wealth in some cases, such as Honduras, Paraguay, El Salvador and China. In these cases, the Committee relates wealth inequality to poverty reduction and includes it under article 11.¹⁶⁸ The recommendations are usually of general nature, noting that the state should adopt measures to combat inequality. In these specific cases, the Committee actually made recommendations to taxation under article 2,

¹⁶⁷ CEDAW Committee, Concluding observations on the combined fourth and fifth reports of Switzerland (18 November 2016) UN Doc CEDAW/C/CHE/CO/4-5, para 41.

¹⁶⁸ See for instance: CESCR, Concluding observations on the second periodic report of Honduras (10 July 2016) UN Doc E/C.12/HND/CO/2, para 24.

however, without relating it to inequality which was mentioned under article 11. It was only in a few cases that the Committee made specific recommendations to change the country's tax policy, in order to combat wealth inequality.

As outlined in the section on tax avoidance and abuse, the Committee's position and application in practice on this matter is developed more thoroughly. However, it would be essential that the foundation of these conducts was related more strongly with respect to the principles of transparency and accountability. Furthermore, there are certain cases and circumstances where it is not entirely clear why the Committee did not cover the topic of taxation at all and refrained from making recommendations. One example that is striking is the Netherlands which state report was considered in July 2017. There are 12000 special financial institutions by Multi-National-Corporations located in the Netherlands with an estimate of 4000 billion euros through the country and it was ranked very high in the Financial Secrecy Index.¹⁶⁹

The next chapter departs from considerations that the Committee has been focusing on already and looks at the time ahead. The recommendations made throughout this chapter constitute the basis for the further discussion and will therefore not recur in the next chapter.

4 Considerations for the Time Ahead

It is important to notice once again that the human rights framework does not provide for a fixed set of policy options that have to be implemented in every country. However, the importance of taxation policy and the realisation of ESCR is apparent when taking into consideration the increasing attention and interest the Committee devotes to this topic.

This chapter will dive into more detail regarding certain aspects of taxation that the Committee should consider including in a General Comment on taxation, which has not been devoted any attention yet. This General Comment should focus on certain strictly defined legal obligations on one hand and should include forward-looking policy options on the other hand. The General Comments are usually divided into general remarks and obligations and violations, as well as specific topics depending on the issue of the General Comment, such as a specific gender perspective. As long as this distinction between the legal interpretation and

¹⁶⁹ Tax Justice Network, 'Financial Secrecy Index 2018: Narrative Report on the Netherlands', <https://www.financialsecrecyindex.com/PDF/Netherlands.pdf> (accessed on 6 June 2018), p 1. (The cited numbers are based on a report from 2013 which means it was published before the state's report consideration.)

policy recommendations is made clearly, the Committee will avoid being confronted with criticism regarding the legitimacy and integrity of its monitoring role.¹⁷⁰

The Committee should take a holistic approach to taxation in a General Comment that provides principles and guidelines for an efficient tax generation with a view to the redistributive power of taxation. This should encompass a comprehensive outline on the progressivity of taxation and should explain attributes like socially just, adequate, equitable and needs-based. In the author's opinion these attributes are an important step in order to challenge states to generate the maximum of *potential*¹⁷¹ available resources but they could be understood to imply only a minimum level of sufficiency of resources. This however should be complemented with the requirement to continuously increase the availability of resources, in light of the progressive realisation clause. In addition, the Committee should emphasise the importance of the principles of accountability, participation and transparency in all their facets.

The chapter is divided into two main parts. The first part provides a detailed discussion on the progressivity of taxation. The second part deals with human rights principles in relation to taxation: Issues are raised that have to be considered from a gender perspective and the principles of transparency, participation and accountability will be discussed thoroughly.

4.1 A Comprehensive Approach to the Progressivity of Taxation

It has been established that progressive tax systems are the most conducive source for the realisation of ESCR. However, in order to reduce inequality, progressivity has to meet certain criteria. While it is important to analyse the tax-to-GDP share the richest part of society contributes in percentage terms, it foremost depends on the absolute level of the contribution. If the system is progressive by the standards of the the Kakwani index, but the rate of the income tax is very low, the redistributive capacity of the tax system will be limited. For this reason, it is essential to take into account the Reynolds-Smolensky index which measures the redistributive capacity.¹⁷² Moreover, the ability to combat inequality depends on the policy programmes that are financed with the generated resources. If they are allocated and spent to benefit the rich, there will not be a positive outcome for the poor segment in a country. In 2015,

¹⁷⁰ Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', p 946f.

¹⁷¹ Emphasise added by the author.

¹⁷² Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' (forth coming) (10 July 2017), p 29.

the OECD average of personal income tax-to-GDP ratio was 8.4 percent. In Columbia for instance it made up 1.2 percent, while the average in Latin America was 1.8 percent. This means that 60 percent of the income of the top 1 percent and even 80 percent of the income of the top 0.1 percent was not taxed at all.¹⁷³ The Committee could start drawing connections between comparable countries and urge the adoption of policies accordingly.

The Committee adopted a statement on poverty and has an extensive interpretation to ensure the minimum core content and noted that remuneration has to provide for a “decent living” for workers and their families.¹⁷⁴ However, it has not yet considered that one of the most important principles with regards to poverty reduction is that the minimum taxable income is above the poverty line and the progressivity of the income tax has to be aligned to the cost of living.¹⁷⁵

The General Comment should therefore require states to implement a tax system that ensures sufficient, predictable and sustainable resource generation. The tax system should follow the principle of the ability-to-pay and be progressive and equitable in nature. The shares of tax revenue should be evaluated with regard to the different taxes on income, wealth and consumption and there should be disaggregated data available on the share different groups contribute to the revenue. Furthermore, it has to be ensured that the tax regime has a distributive character and that tax benefits, deductions and exemptions are in place for marginalised groups. States should ensure a minimum tax-to-GDP rate in order to guarantee sufficient revenues for redistribution. The poverty line and the progressivity of the income tax has to be continuously aligned to the cost of living.¹⁷⁶

A Special Rapporteur urged states to implement a taxation policy that is progressive “with real redistributive capacity that preserves, and progressively increases”. She continues and states that this could be achieved through special targeted measures, like well-designed subsidies and tax exemptions for low-income households, in order to achieve substantive equality.¹⁷⁷

¹⁷³ Centre for Economic and Social Rights, Columbia UPR Factsheet 2018 <http://www.cesr.org/sites/default/files/Colombia-Factsheet-English.pdf> (accessed 1 May 2018), p 2.

¹⁷⁴ CESCR, General comment No. 23 on the right to just and favourable conditions of work (article 7) (26 April 2016) UN Doc E/C.12/GC/23, para 18.

¹⁷⁵ General Comment 23, para 60.

¹⁷⁶ CESCR, General Comment 23, para 60.

¹⁷⁷ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 13ff.

4.1.1 Taxation of Economic Capital

According to the OECD, wealth is defined as “ownership of economic capital”.¹⁷⁸ Wealth is distributed even more unequally than income which is fundamental for concerns about equity and intergenerational mobility. This is said to have an impact on the stability of the economic system in a country as well as for its resilience to shocks.¹⁷⁹ That said, a recent report suggests that wealth inequality can meaningfully be tackled through the tax system because “wealth accumulation operates in a self-reinforcing way and is likely to increase in the absence of taxation”.¹⁸⁰ However, the way in which wealth inequality is addressed is a matter of policy choices of the state and there are different examples of taxes that can be implemented. There are three main distinctions of wealth taxes: It can be the transfer of wealth (inheritance and gift taxes), the holding (wealth net taxes or property for instance) and the appreciation (capital gains taxes) that is the subject of taxation.¹⁸¹ A recent study of the OECD comes to the conclusion that capital gains taxes and wealth transfer taxes are the most efficient and equitable taxes.¹⁸²

While the Committee stresses the progressivity of taxation in general terms, it never made any recommendations with regards to capital taxation. The IMF affirms that the distribution of capital is even more unequal than that of labour income.¹⁸³ The income generated from capital gains is usually taxed with a flat tax. This situation feeds into the process of rent seeking which Joseph Stiglitz describes as unproductive.¹⁸⁴ While there are people that are born with inherited wealth for instance, from which capital gains-income can be generated at a low tax rate, labour is usually taxed at higher rates.

Low capital tax rates have a discriminatory effect for several other reasons. The vertical distribution between high- and low-income households is very unequal, and women are overrepresented in the low-income group. This translates directly into horizontal inequality because marginalised groups in general are less likely to own capital. The Special Rapporteur

¹⁷⁸ OECD, “Wealth. Key statistical concept.”, available at <https://stats.oecd.org/Index.aspx?DataSetCode=WEALTH> (accessed 14 May 2018).

¹⁷⁹ OECD, “Wealth”, available at <https://stats.oecd.org/Index.aspx?DataSetCode=WEALTH> (accessed 14 May 2018).

¹⁸⁰ OECD, *The Role and Design of Net Wealth Taxes in the OECD*, OECD Tax Policy Studies No. 26 (OECD Publishing Paris 2018), p 11.

¹⁸¹ Centre on Household Assets and Savings Management, ‘Wealth taxes: problems and practice around the world’ Briefing Paper 2013 available at <https://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/CHASM/briefing-papers/2013/wealth-taxes-problems-and-practices-around-the-world.pdf> (accessed 6 July 2018).

¹⁸² OECD, *The Role and Design of Net Wealth Taxes in the OECD*, OECD Tax Policy Studies No. 26 (OECD Publishing Paris 2018), p 11.

¹⁸³ IMF, ‘Fiscal Monitor: Tackling Inequality’, October 2017 IMF Publishing, p x.

¹⁸⁴ Joseph Stiglitz, *The Great Divide. Unequal Societies and What We Can Do about Them*, p 98f.

on Effects of Foreign Debts therefore recommended that capital income should not receive privileged treatment.¹⁸⁵ In addition, the IMF suggests that “adequate taxation of capital income is needed to protect the overall progressivity of the income tax system by reducing incentives to reclassify labour income as capital income and through a more uniform treatment of different types of capital income.”¹⁸⁶

Furthermore, the IMF also notes that “taxes on real estate or land are both equitable and efficient and remain underused, but may require a sizable investment in administrative infrastructure, particularly in low-income developing countries.”¹⁸⁷ In fact, throughout the OECD countries the share of taxes on property fell from 7.9 percent to 5.8 percent of total tax revenues on average from 1965 and 2015.¹⁸⁸ Saiz argues that in countries in which property is unequally distributed, the implementation of a property tax has the potential to increase resource generation and has a direct redistributive character as well.¹⁸⁹

Moreover, states which have an inheritance tax implemented, gradually lowered the threshold for the payment of the tax.¹⁹⁰ According to a study by Thomas Piketty, one-sixth of those who are born in France today are going to inherit a larger amount of wealth than the bottom half of the French population is going to earn through labour during their lifetime. In addition, the bottom 50 percent tend to not inherit anything at all. On the other hand, the upper ten percent of French society are going to acquire as much from inherited wealth as from their own labour.¹⁹¹ Oxfam noted that the 500 richest persons will inherit over 2.4 trillion dollars within the next 20 years.¹⁹² Moreover, a report on countries in the European Union showed that there was a general shift in favour towards wealth-related transaction taxes and estate taxes and away from inheritance and gift taxes. This is said to burden lower and middle wealth groups more.¹⁹³

¹⁸⁵ Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, presented at the 31st session of the Human Rights Council (12 January 2016) UN Doc A/HRC/31/60, para 61.

¹⁸⁶ IMF, ‘Fiscal Monitor: Tackling Inequality’, p x.

¹⁸⁷ Ibid.

¹⁸⁸ OECD, ‘Revenue Statistics 2017. Tax revenue trends in the OECD’ available at: <https://www.oecd.org/tax/tax-policy/revenue-statistics-highlights-brochure.pdf> (accessed on 20 June 2018), p 11.

¹⁸⁹ Aoife Nolan Rory O’Connell and Colin Harvey, *Human Rights and Public Finance Budgets and the Promotion of Economic and Social Rights* Ignacio Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ (Hart Publishing Oxford and Portland, Oregon 2013), p 86.

¹⁹⁰ Olivier De Schutter, ‘Taxation for the Realization of Economic, Social and Cultural Rights’ (May 2017) CRIDHO Working Paper 2017/1, p 7f.

¹⁹¹ See Thomas Piketty, *Das Kapital im 21. Jahrhundert* (Cambridge, Massachusetts, Harvard University Press 2014), p 528, 557f.

¹⁹² Oxfam, ‘Reward work, not Wealth.’ (January 2018) Oxfam Briefing Paper Summary, p 11.

¹⁹³ European Parliament, Directorate General for Internal Policies Policy Department C: Citizens’ Rights and Constitutional Affairs ‘Gender Equality and Taxation in the European Union’ (2017) PE 583.138, p 23.

Until now, the distribution of wealth has not received enough attention by the Committee. As has been presented above, the focus has been laid to wealth distribution primarily in the context of poverty reduction and therefore the fulfilment of the minimum core content, as well as immediate obligations. Especially in the context of developed countries, the obligation to progressively realise ESCR to the maximum of available resources in the Covenant has been largely neglected by the Committee. It will be interesting to see whether states might have the obligation to implement new taxes in order to increase resource generation and balance the unequal distribution. There are certain European countries, in which advanced progressive tax systems are in place that have a redistributive character. However, wealth is distributed very unequally which shows that if wealth inequality is not tackled, the tax system perpetuates and favours wealth concentration.¹⁹⁴ The unequal distribution of wealth can also lead to discriminatory outcomes as far as the access to certain services like education, health or old age security are concerned and are reserved only for a few because of barriers in the form of high fees.

There are various correlations to substantive human rights in the Covenant with regard to wealth and related taxes. For instance, the lack of the alignment of taxes on real estate and land with market prices have a great impact on the realisation of the human right to adequate housing for low-income earners due to the increase of prices. A Special Rapporteur also noted once that the rural territorial tax in Brazil amounted only to 0.1 percent of GDP in 2008 which meant that due to the concentration of the land and the high incomes generated from the agricultural sector, the tax was regressive.¹⁹⁵

There are countries in which funding for education is based on the revenue of the local property tax. This can lead to the fact that districts where real estate is more expensive, higher levels of funding for public schools are generated. Earmarked taxes are not a problem per se, as long as it is ensured that the federal level provides additional funding in those districts in which the generation lags back. However, in the United States for instance, this earmarked finance system leads to discriminatory outcomes in the educational sector. It was found that schools with a majority of students of minority groups receive the least amount of general education revenue and schools with the lowest number of pupils of minority groups have the

¹⁹⁴ The Netherlands and Austria are examples of countries in which wealth is distributed very unequally despite having a rather progressive tax system. OECD 'Household wealth inequality across OECD countries: new OECD evidence' Wealth Distribution Database (June 2015) Statistics Brief No. 21, p 4.

¹⁹⁵ Report of the Special Rapporteur on the right to food, Mission to Brazil, Olivier De Schutter (12-18 October 2009) UN Doc A/HRC/13/33/Add.6, para 36.

highest revenue inflow due to the dependency on the local property tax.¹⁹⁶ This is a matter that must be taken into consideration by the Committee in the light of the right to education.

4.1.2 Deductions, Credits, Exemptions and Benefits

The Committee took notice of the exemption scheme twice in the Concluding Observations with regard to the potential limiting effect they have on the resource generation and it also once claimed that this was unjustified. While in the General Comment 24, the Committee makes clear that tax exemptions for businesses have to be aligned with human rights principles, the Committee should consider including a more coherent approach to deduction, credit, incentive and exemption schemes in a General Comment on taxation.

With respect to the value added tax, the Committee requires the information on the value added tax “exclusive of the value added tax on luxury items, tobacco, alcohol, sugary drinks or snacks and gasoline” on a more regular basis.¹⁹⁷ However, the Committee could start requiring even more information in the List of Issues on the tax deductions, exemptions and benefits a state has implemented for different social and income groups. These tax-related measures can lead on one hand to the loss of resources but also to the exacerbation of existing socioeconomic inequalities by favouring rich individuals and corporations on the other hand.

This is for instance the case with tax incentives that are granted for the enrolment in the private education sector. The Committee on the Rights of the Child raised concerns towards Brazil regarding the exacerbation of socioeconomic inequalities in the educational sector.¹⁹⁸ This could be equally applicable in the case of tax deductions for private health services.

Moreover, with respect to the right to adequate housing, a Special Rapporteur highlighted that the reason for the increase in home ownership in Spain was due to tax deductions and other means. This was said to result in an insufficient availability of other tenancy options, such as rental which negatively impacted low-income earners.¹⁹⁹ The OECD stressed that due to the high demand in the housing market, tax deductions are capitalised into the prices. The same

¹⁹⁶ Radhika Balakrishnan, Diane Elson, James Heintz, Nicholas Luisiani, ‘Maximum Available Resources & Human Rights: Analytical Report’ Center for Women’s Global Leadership (Rutgers The State University of New Jersey 2011), p 7.

¹⁹⁷ CESCR, List of issues in relation to the third periodic report of Estonia (25 April 2018) UN Doc E/C.12/EST/Q/3, para 3.

¹⁹⁸ Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Brazil (30 October 2015) UN Doc CRC/C/BRA/CO/2-4, arts. 28-31.

¹⁹⁹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, presented at the seventh session of the Human Rights Council (7 February 2008) UN Doc A/HRC/7/16/Add.2, para 12.

study incorporating this viewpoint, the conclusion is that if those tax-related measures were ended, property prices would decrease between 15 to 30 percent.²⁰⁰

4.1.3 Taxation of the Financial Sector

The financial sector still remains largely undertaxed and has been identified as the main contributor to economic inequality and crises situations. According to the principle of equity, it would be important to adopt financial transaction taxes.²⁰¹ The IMF has identified financial transaction taxes to be “highly progressive” due to the fact that they burden the rich segment of society the most because financial assets are primarily owned by this group.²⁰² Furthermore, with respect to the obligation to generate the maximum of available resources, even a small tax would widen the tax base and generate more revenue. In fact, a financial transaction tax is already implemented unilaterally in about 40 countries, such as South Korea, India, South Africa and in ten member states of the European Union. In the preparatory work for the report on taxation by the Special Rapporteur on extreme poverty in 2014, one set of questions to CSOs was: “What is the fiscal pressure on the financial sector? Would you characterize the financial sector as paying a fair share of taxes? On what basis?”²⁰³ The Committee could consider requiring information on this in the List of Issues preceding the adoption of a General Comment.

4.2 Specific Human Rights Principles and their Relation to Taxation

4.2.1 A Gender Perspective on Taxation

The tax structure often directly or indirectly perpetuates discrimination against women. Due to a matter of deeply entrenched stereotypes and gender norms, there is still an unequal

²⁰⁰ Ibid, para 25.

²⁰¹ There are various possibilities and suggestions, on what is being taxed, whether it is implemented internationally or nationally and at which rate. For further information: see for instance Schulmeister, Schratzenstaller, and Picek ‘A General Financial Transaction Tax: A Short Cut of the Pros, the Cons and a Proposal’ (2009) (Österreichisches Institut für Wirtschaftsforschung Vienna).

²⁰² Thornton Matheson, ‘Taxing Financial Transactions: Issues and Evidence’ (2011) IMF Working Paper: WP/11/54, p 23.

²⁰³ Special Rapporteur on Extreme Poverty and Human Rights, ‘Consultation: The human rights impact of fiscal and tax policy’, available at https://www.ohchr.org/Documents/Issues/EPoverty/Questionnaire_Civil_Society.pdf (accessed on 1 June 2018).

distribution of disposable pre-tax income and land between women and men.²⁰⁴ It has also been assessed that significantly fewer women are company owners and financial investors and that they are less likely to receive capital income.²⁰⁵ This means that a broad understanding of the progressivity of the tax system that includes capital and wealth taxes plays a fundamental role in achieving economic substantive equality of gender which is incorporated in the Covenant in article 3.²⁰⁶

There are certain measures in the taxation system that lead to a disincentive for women in the labour market. These range from mandatory joint filling (also known as spouse splitting), dependent spouse allowances as well as tax exemptions or deductions that are conditional on family income. Women are still the second income earner in most countries and these regulations disincentivise their labour market participation, in order to avoid surpassing the marginal threshold to enter the next tax category. This effectively means that women will not work, or only part-time, which perpetuates economic inequality, directly impedes substantive equality and creates dependency. In this regard, the CEDAW Committee noted that this system was an impediment of the participation of women in the labour market in Switzerland and identified it as discriminatory.²⁰⁷ Those who are advocating for women's rights have long urged and highlighted the importance of individual taxation systems, for both - income as well as any tax credit or benefit to increase female labour force participation.²⁰⁸

The informal economic sector still takes up large parts of the economic activity, in particular in developing countries. This sector is not taxed, which means that countries tend to rely on indirect taxes in order to generate sufficient resources. Due to gender norms still embedded in many societies, women spend a greater amount of their disposable income on food and household products.²⁰⁹ Therefore, if the indirect tax system is not well-designed, low-income earners, in particular women, are disproportionately impacted. Furthermore, the Committee has recognised that women are overrepresented in the informal economy sector.²¹⁰

²⁰⁴ Oxfam, 'Reward work, not Wealth.', p 13.

²⁰⁵ European Parliament, Directorate General for Internal Policies Policy Department C, 'Gender Equality and Taxation in the European Union', p 9ff.

²⁰⁶ Ignacio, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', p 82.

Article 3 ICESCR: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

²⁰⁷ CEDAW Committee, Concluding Observations on the third periodic report of Switzerland (7 August 2009) UN Doc C/CHE/CO/3, para 37f.

²⁰⁸ IMF, 'Women, Work and the Economy: Macroeconomic Gains from Gender Equity' (2013) IMF Discussion Note SDN/13/10, p 13.

²⁰⁹ De Schutter, 'Taxation for the Realization of Economic, Social and Cultural Rights', (CRIDHO Working Paper 2017/1) May 2017, p 6.

²¹⁰ CESCR, General Comment 23, para 62.

Women globally perform 75 percent of unpaid care work, in developed, as well as developing countries.²¹¹ Thus, this results on one hand in a limited tax revenue which restricts the ability of a state to allocate and spend resources on ESCR realisation. On the other hand, it means that women cannot benefit from targeted tax measures in the income tax system.²¹² Due to the fact that women perform large parts of the care work and unpaid labour in general they depend on public institutions and services. Thus, if the state cuts on social spending out of the lack of resources available, women are disproportionately burdened as a consequence.²¹³

The Committee interpreted that states should implement targeted measures to achieve *de facto* equality. Therefore, it is essential that the Committee starts requiring disaggregated data by gender with respect to land, financial assets, etcetera. If it comes to the conclusion that the unequal distribution is gender biased, the state should implement targeted measures to overcome this issue. In this vein, the government of Nepal introduced a system that exempted women from the property tax when they purchased land, in order to increase women's access.²¹⁴ If measures like these are introduced, it has to be ensured that they in fact lead to the desired outcome and therefore safeguards need to be implemented accordingly.

4.2.2 Participation, Transparency and Accountability

Taxation plays a fundamental role for economic development but is also critical in building an effective state. The tax structure and the way taxes are levied and administered entail a special character that can be described as "the civic contract between people and the government".²¹⁵ This, in effect mutually strengthens the relation between economic, social and cultural rights and civil and political rights. A Special Rapporteur highlighted the importance of the application of the principles of access to information, transparency and participation "throughout the policy cycle, from design of budgets and tax codes, allocation of expenditure, through to monitoring and evaluation of impact".²¹⁶ In fact, adhering to these principles would

²¹¹ Institute for Development Studies, 'Redistributing Unpaid Care Work – Why Tax Matters for Women's Rights' (January 2016) Policy Briefing Issue 109, p 1.

²¹² Ibid, p 2.

²¹³ Alliance Sud, Centre for Economic and Social Rights, Global Justice Clinic of New York University School of Law, Public Eye and Tax Justice Network, 'Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women's Rights' (2 November 2016), available at: http://chrgj.org/wp-content/uploads/2016/12/switzerland_cedaw_submission_2nov201628.pdf (accessed on 25 June 2018).

²¹⁴ International Organization for Migration, 'Barriers to Women's Land and Property Access and Ownership in Nepal' (Kathmandu 2016), p 12f.

²¹⁵ De Schutter, 'Taxation for the Realization of Economic, Social and Cultural Rights', p 6.

²¹⁶ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 20.

not only lead to more accountability, but would positively impact tax compliance as well as tax morale.²¹⁷

In 2013, the General Assembly adopted a resolution that recognises these three principles as essential to achieve “financial stability, poverty reduction, equitable economic growth and the achievement of sustainable development” by adopting qualitative, efficient and effective fiscal policies.²¹⁸

It is incumbent that the Committee highlights that states must apply human rights impact assessments, as it has already recommended in several cases. These should include the assessment of the distributive capacity with a view to ensure substantive equality. This should be done on a continuous basis and be publicly available, in order to ensure the possibility of public scrutiny and to hold the government to account. However, attention should be paid that states resort not only to the conduction of impact assessments. In fact, it is fundamental that the General Comment sets out the responsibility of states to actually assess all possible policy options and alternatives before their adoption. With respect to this matter, particular focus should be laid on the capacity of people to participate in the decision-making and adoption process by ensuring that they are well-informed about the implications certain changes might have. An important step would be to assess human rights compliance in current tax laws and policies and potentially make changes to align them accordingly.

The Committee clarified that national human rights institutions play an important role in “promoting and ensuring the indivisibility and interdependence of all human rights”.²¹⁹ It would be important to develop or strengthen the capacity of national human rights institutions in order to enable them to analyse and scrutinise taxation policies, as well as require access to data on fiscal policy and governmental expenditures.²²⁰ This should be envisaged and highlighted in a General Comment. National human rights institutions are aware of the national context and play an important role in guaranteeing that the public is well informed. Moreover, De Schutter points out that the participation of civil society in shaping budgetary decisions would likely lead to a stronger position of governmental departments of health, education and social welfare to set priorities.²²¹

²¹⁷ Centre for Economic and Social Rights and Christian Aid, ‘A Post-2015 Fiscal Revolution’, p 11.

²¹⁸ United Nations General Assembly, Resolution on promoting transparency, participation and accountability in fiscal policies (20 March 2013) UN Doc A/RES/67/218, p 1.

²¹⁹ CESCR, General Comment No. 10 on the role of national human rights institutions in the protection of economic, social and cultural rights (10 December 1998) UN Doc E/C.12/1998/25, para 3.

²²⁰ Kayum Ahmed, ‘Government Accountability, Taxation and the Paris Principles: The Role of National Human Rights Institutions in the Global South’, CHR/GJ, Abstracts of Papers Presented ‘Human Rights & Tax in an Unequal World’ (New York 22-23 September 2016), p 4.

²²¹ De Schutter, ‘Taxation for the Realization of Economic, Social and Cultural Rights’, p 19.

Furthermore, evidence shows that developed countries collect more taxes, not only due to higher tax rates but also because of a broader tax base. In contrast, developing countries are faced with tax compliance problems. Therefore, it is essential that well-funded tax collection offices that guarantee the oversight of the execution process are in place.²²² In fact, this is of particular importance because there is a widespread problem in the effective application of the implemented tax laws. It is a common problem in developing countries that the audit institutions do not have the capacity to oversee the laws in place which leads to the non-execution of the legal framework.²²³ There is also a tendency to cut the budgets of tax collection and oversight offices which the Committee should pay special attention to and assess with its framework on retrogressive steps. Moreover, a Special Rapporteur highlighted that it is incumbent that tax administration offices are viewed as being “independent, fair, transparent and accountable” by the population.²²⁴ In 2017, the CEDAW Committee made a recommendation to Guatemala in this regard and urged the state to “increase tax collection and improve revenue administration”.²²⁵

The principle of accountability can in fact only be said to be upheld if remedies are in place. In contrast to article 2.3 (b) of the International Covenant on Civil and Political Rights, there is no provision which sets out the obligations of states to “develop the possibilities of judicial remedy”.²²⁶ The Committee has clarified that the right to an effective remedy does not always require a state to implement judicial remedies. If the state party decides for administrative remedies, they should be “accessible, affordable, timely and effective”.²²⁷ In a General Comment on taxation, the Committee should clarify that in accordance with art 2 ICESCR, states are required to ensure access to effective judicial or other appropriate remedies at both national and international levels. In this vein, it was proposed to implement judicial oversight of the introduction of tax incentives for corporations.²²⁸

Moreover, attention should also be paid to the provision of financial transparency. Multi-National-Corporations should be required to report country-by-country on their economic

²²² Centre for Economic and Social Rights and Christian Aid, ‘A Post-2015 Fiscal Revolution’, p 8.

²²³ Esteban Ortiz-Ospina and Max Roser, ‘Taxation’ (2018) available at: <https://ourworldindata.org/taxation> (accessed on 24 June 2018).

²²⁴ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 57.

²²⁵ CEDAW Committee, Concluding observations on the combined eighth and ninth periodic reports of Guatemala (10 November 2017) UN Doc CEDAW/C/GTM/CO/8-9, para 39a.

²²⁶ Article 2 ICCPR.

²²⁷ CESCR, General Comment No. 9 on the domestic application of the Covenant (3 December 1998) UN Doc E/C.12/1998/24, para 9.

²²⁸ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (22 May 2014) UN Doc A/HRC/26/28, para 23.

activity in different countries. This would enable the public to scrutinise the payment of their tax duties. In light with the obligation of international cooperation, it would be an important further step to ensure the automatic exchange of tax information between tax authorities²²⁹, as well as to set up a framework of disclosure of beneficial ownership of corporations.²³⁰ While the Committee should clarify the obligations of states in this regard, it would be essential to highlight that corporations should comply with these principles regardless of the legal framework in the state. Yet, corporations should adopt these requirements in their due diligence framework.

In order to uphold the principle of transparency, the protection of whistle-blowers is fundamental. There are numerous examples of the last years, such as the Luxemburg Leaks, Swiss Leaks, Panama Papers and the Paradise Papers that helped to shed light on the extent of tax abusive conduct by corporations and individuals. In the last General Comment 24, the Committee dedicated an entire paragraph to corruption which is said to be an impediment for the promotion and protection of human rights. In this regard, the Committee connected this issue with the protection of whistle-blowers.²³¹ There are numerous examples in which the Committee requires information on the protection of whistle-blowers in its List of Issues. However, this is done in connection with the lost revenue due to corruption and therefore aims at developing countries. In a General Comment on taxation, the Committee should stress the protection of whistle-blowers regarding the disclosure of tax information in the public interest and should apply this to developed, as well as developing countries.

5 Conclusion

The purpose of this thesis was threefold: It was to examine the current state of affairs of the Committee's position on taxation; to provide a coherent illustration of taxation matters that have not been considered so far and to provide recommendations on issues that the Committee should include in a General Comment on taxation. The Committee publishes General Comments as the authentic interpretation of the Covenant to respond to emerging global phenomena that may threaten the realisation of ESCR. They have an important function in the continuous protection and promotion of ESCR in the face of emerging global phenomena

²²⁹ Ibid, para 79f.

²³⁰ Ibid, para 79g.

²³¹ CESCR, General Comment 24, para 20.

that may threaten their realisation. The General Comments shed light on difficulties arising from these international developments and provide guidance to the states in their efforts to fulfil the rights stipulated in the Covenant.

The thesis was structured in such a way to provide the Committee's current position on taxation, and to depart from there with a view to the adoption of a General Comment on taxation. Therefore, the second chapter provides the theoretical legal framework to the issue and the third chapter was dedicated to an extensive analysis of the Committee's published documents. The conclusion thereto was that the development of the process by which the Committee faces the matter of taxation and ESCR is still in the beginning stages. Over the preceding six years, the Committee has devoted more attention to taxation with a view to scrutinising the state's availability of financial resources. This shift started when the Committee departed from merely considering whether a state allocated and spent the available resources towards the fulfilment of ESCR. However, it examines whether a state in fact generates enough resources. In the Concluding Observations, the Committee emphasises the sufficiency of resources, albeit without specifying what sufficient in fact means. The Committee makes recommendations in this regard with respect to the principle of "maximum available resources" stipulated in the Covenant. However, the Committee resorts to raise concerns in cases in which there is an obvious presumption of noncompliance concerning the sufficiency of resources. In these cases, the Committee makes recommendations that the state should ensure the minimum core content of the Covenant rights. Furthermore, the Committee has a well-developed position on the implementation of retrogressive steps which have to be justified, to be viewed to be in accordance with the Covenant. This is interpreted to derive from the obligation to progressively fulfil the rights in the Covenant, which entails the achievement of full realisation of all ESCR. Moreover, in cases in which low-income earners are disproportionately affected, the Committee presumes noncompliance which can be related to the non-discrimination clause in the Covenant.

To summarise, the Committee extracted three general notions between taxation and the realisation of ESCR: First, taxation allows the state to generate sufficient resources which have to be allocated and spent to ensure the fulfilment of the ESCR obligations. Second, taxation should be implemented in such a way that it has a redistributive effect in the resource mobilisation in order to combat income and wealth inequality. Third, it is through human rights compliant taxation that the principles of good governance are upheld.

The fourth chapter departs from considerations that the Committee has been focusing on already and looks at the time ahead. In a General Comment on taxation, it would be of

fundamental importance to address taxation in a comprehensive way and to set out legal obligations, as well as human rights principles, that have to be considered in the implementation of taxation policies. The Committee should consider contextualising the purpose and aim of taxation with economic growth and rising (income and wealth) inequality. The implementation of redistributive taxation policy is a means to achieve inclusive economic growth which is said to lead to sustainable economic growth over time and leads to poverty alleviation and impedes the concentration of wealth.

Furthermore, it is incumbent that the General Comment includes a comprehensive outline on the progressivity of taxation and emphasises not only the obligation to generate the maximum of *potential*²³² available resources but also stresses the obligation to progressively realise which entails the requirement to continuously increase the availability of resources. Moreover, the importance of the obligation of international cooperation and assistance should be highlighted and strengthened with a view to collective actions in taxation matters. The forth chapter concludes with a specific gender perspective, which should be included in a General Comment, as well as an extensive consideration on the principles of transparency, participation and accountability.

Until now, the Committee has played a fundamental role in shedding light on the issue of taxation in relation to the fulfilment of ESCR. However, the development of the process by which the Committee faces the matter of taxation and ESCR is still in the beginning stages and the process of the development of a General Comment can take many years. Therefore, throughout the thesis, there are also recommendations for the time until the adoption of a General Comment. It was argued that the Committee should take a more coherent approach concerning the List of Issues, asking the same set of questions on taxation to all countries, in order to enable itself to draw connections. Another aspect that the Committee could consider is to explicitly invite representatives of the ministries of financial affairs due to the fact that they will be able to provide better insight and information on tax matters in the constructive dialogue.

²³² Emphasise added by the author.

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