

# REALIZING HUMAN RIGHTS THROUGH GOVERNMENT BUDGETS





UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER



INTERNATIONAL BUDGET PARTNERSHIP  
Open Budgets. Transform Lives.

# REALIZING HUMAN RIGHTS THROUGH GOVERNMENT BUDGETS



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## FOREWORD

All human beings are born free and equal in dignity and rights. The Universal Declaration of Human Rights and the international human rights treaties guarantee the enjoyment of all human rights by all people without distinction of any kind.

States have obligations under international human rights law to respect, protect and fulfil human rights and to make available the necessary resources to do so. They contribute to the fulfilment of their human rights obligations through human rights-based policies, plans, programmes and budgets. A government's budget is the most important economic policy and planning document, and is an essential means by which to assess government's efforts for the realization of human rights.

The close relationship between public budgets and human rights has been recognized by international human rights mechanisms in their assessment of State compliance with human rights obligations. Civil society actors, grass-roots organizations, human rights advocates and others look to social audits, expenditure tracking, budget scorecards and other budget assessment tools to develop critical evidence of human rights efforts, and to advocate for necessary budget-related steps to be taken for better realization of human rights. In this way, they help to close the gap between rhetoric and reality, and hold governments to account for their actions.

This publication, *Realizing Human Rights through Government Budgets*, explores the linkages between obligations under international human rights law and budget policies and processes. It seeks to sensitize government officials to better understand their human rights obligations as they decide budget allocations, implement planned expenditures, and assess the budget's impact on the realization of human rights. And, it aims to provide non-governmental actors with information about the relationship of human rights to budget processes and specific budget decisions, so that they are better able to hold their governments to account.

We are pleased to present this publication, a joint endeavour between the Office of the United Nations High Commissioner for Human Rights and the International Budget Partnership, as a modest contribution to these efforts. We hope that this publication will serve as a reference for further research in this field, and will inspire action to realize all human rights for all through public budgets by state and non-state actors alike.



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## ACRONYMS AND ABBREVIATIONS

CAT or	UN Committee against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment
CEDAW	UN Committee on the Elimination of Discrimination against Women
CERD	UN Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	UN Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
CSO	Civil Society Organization
ESCR	Economic, Social and Cultural Rights
GDP	Gross Domestic Product
HRC	UN Human Rights Committee
IBP	International Budget Partnership
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFI	International Financial Institution
MAR	Maximum Available Resources
MoF	Ministry of Finance
NGO	Non-Governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
SAI	Supreme Audit Institution



## INTRODUCTION

Human rights embody the minimum requirements for a dignified life, applicable to all people everywhere. These needs protected by human rights include adequate food, health, education, work and shelter, among others. People also need to be able to speak and express themselves freely, participate in public affairs, form peaceful associations and practise their religions without fear. The human rights vision incorporates images of how a society should be organized to ensure that people are able to live their lives not alone, but in the company of others—to ensure that they are able to live with their families, associate with others to achieve common goals, vote for a government of their choice, and access justice when wrongs occur.

Human rights *law* seeks to translate this universal vision into specific principles and “rules” to guide people’s everyday lives and the everyday functioning of governments. Human rights law sets out not only what people should be able to expect in a society that realizes human rights (the content of rights), but also what governments must and must not do to help realize those rights. The latter are governments’ human rights obligations.

On a day-to-day basis, governments fulfil their human rights obligations through developing and implementing well-thought-out policies, plans, institutions, and budgets—ones that hold the promise of being effective—and then assessing them to determine whether they have, in fact, been successful in realizing people’s rights.

The budget is government’s most important economic policy document. A carefully developed, implemented and evaluated budget is central to the realization of all rights. To give just three examples:

- A well-functioning judicial system is essential if people are to have access to justice. Such a system requires funding to pay a sufficient number of highly capable judges and defence attorneys for those charged with crimes, in order to ensure them the timely and fair trials guaranteed in article 9 of the International Covenant on Civil and Political Rights (ICCPR, 1966).

- Decent sanitation is necessary if people are to live in dignity and enjoy their right to health, guaranteed in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). A sanitation system requires investment in infrastructure and regular maintenance, whether by government directly or through an effective and affordable system of private provision.
- The right to education (ICESCR art. 13 and Convention on the Rights of the Child (CRC 1989) article 28) is fundamental to people's ability to realize their rights to work and thereby support themselves and their families, but also to their rights of access to information and to participate in the civic life of their country. Education requires not only well-constructed and equipped classrooms in sufficient numbers, but also a commensurate cadre of adequately paid, capable and motivated teachers.

The close relationship between governments' budgets and human rights has increasingly been recognized by United Nations (UN) bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC), as well as special rapporteurs and independent experts. In recent years the Office of the High Commissioner for Human Rights (OHCHR) has provided training and assistance to its staff to enhance their understanding of the relationship of public budgets to the human rights obligations OHCHR is mandated to advance. OHCHR field offices have pursued work in this arena with governments and civil society.

If governments are to use the budget to effectively realize people's rights, they need to understand the relationship of the budget to the human rights guarantees in their country's constitution and laws, and in the regional and international human rights treaties the government has ratified. They need to understand in detailed and concrete terms how they can meet their human rights obligations in the way they raise revenue, allocate, spend and audit the budget.

Similarly, if people are to hold their governments to account for realizing rights, they too need to know about the budget. This is particularly true for marginalized and excluded groups, such as women, children, persons with disabilities, indigenous peoples and minorities, as the budget has a disproportionate impact on their welfare. Government's revenue-raising schemes, such as school fees or fees to access reproductive health care, if they are too high, can be insuperable obstacles to accessing basic services essential to realizing rights. Because marginalized groups are often the poorest in a country, they are also more dependent on government programmes, such as food subsidies, work projects or legal aid, and yet research has shown that government resources are often disproportionately directed to programmes that benefit the less, rather than the most, needy.

*Realizing Human Rights through Government Budgets* is designed to share with government officials as well as individuals in civil society some of what OHCHR has learned over the past decade about human rights and public budgets. One goal of the publication is to better enable government officials to be guided by their human rights obligations as they develop and implement revenue-raising schemes, decide on allocations in the budget, implement planned expenditure and assess the budget's impact on the realization of rights. A second goal is to provide civil society with information about the relationship of human rights to budget processes and specific budget decisions, so that people are better able to hold their government to account for their realization of rights.

*Realizing Human Rights through Government Budgets* discusses many of the points of intersection between human rights law and public budgets. It focuses solely on international human rights law, although an analogous framework could be developed for regional and national standards. Indeed, governments are responsible for obligations at each of these levels, and should thus think through for themselves a comparable analysis of their national and regional human rights obligations with regard to the public budget.

Inserted throughout the publication are boxes that include summaries of case studies or findings from a variety of institutions, to illustrate or elaborate upon points touched on in the text. Most of the case studies are the result of work done by civil society, and many describe efforts by government to realize people's rights.

Throughout the publication a heavy emphasis is placed on the implications of economic and social rights for the budget. This is because most of the work that has been done to date (or court cases that have been heard) that assess governments' budgets from the perspective of human rights law have focused on such issues as the right to education, health, food, water, sanitation and work. As the publication makes clear, however, the government's budget is essential for the realization of all rights, and the human rights framework provides an invaluable guide to the formulation and execution of the budget as it relates to all rights.

A reference is therefore made throughout this publication to "human rights-related" allocations or expenditure. It could be argued, of course, that almost all government allocations and expenditure are human rights-related, if they are intended to ensure a stable, functioning society, as this is a *sine qua non* for the realization of rights. However, such a broad understanding of the term would fail to acknowledge that, while it can sometimes be difficult to draw a hard and fast line separating "human rights-related" allocations and expenditure from other allocations and expenditure, certain types of spending are more directly conducive to the realization of people's rights. In this publication, references to "human rights-related" allocations and expenditure refer to the latter. Whether the priorities reflected within the government budgets are appropriate from a human rights perspective, or whether the funds are spent in line with a government's human rights obligations, are separate questions that are considered later on in this publication.

*Realizing Human Rights through Government Budgets* includes the following chapters:

- I. *A Normative Framework for Human Rights and the Public Budget*  
Chapter I sets out an international human rights law framework by which to assess a government's budget process as well as the content of the budget.

- II. *The Budget Process and Human Rights*  
Chapter II discusses the process by which government budgets are developed, implemented and assessed, and the two rights whose realization is key to a sound process: the right of access to information and the right of people to participate in public affairs.
- III. *Budget Formulation*  
Chapter III is divided into three sections, reflecting three key aspects of budget formulation:
  - A. The fiscal envelope
  - B. Government revenue
  - C. Budget allocations.
- IV. *Budget Execution (Expenditure)*  
Chapter IV stresses the importance of looking not only at allocations but also expenditure, highlighting five areas where human rights problems often arise in the process of spending the budget.
- V. *Budget Oversight and Evaluation*  
Chapter V talks about the role of the supreme audit institution (SAI), and also stresses the importance of legislatures and other bodies, as well as civil society, in holding a government to account for how it raises and spends the public's money.

*Annex I* provides a list of methodologies for monitoring and analysing budgets, and their potential use for human rights monitoring and analysis.

*Annex II* provides a list of useful resources about human rights and governments' budgets.

# **I. A NORMATIVE FRAMEWORK FOR HUMAN RIGHTS AND THE PUBLIC BUDGET**

The relationship of human rights to the budget *process* is relatively straightforward. The most important standards governing that process are:

- The right of people to participate in the conduct of public affairs, as guaranteed by ICCPR article 25;
- Their right of access to information, guaranteed in ICCPR article 19; and
- The principle of accountability, whereby government is accountable to its people for its actions in realizing—or failing to realize—human rights.

These standards have significant implications for the budget process. *Firstly* all, a government must ensure that people's rights of access to information and participation are respected and fulfilled in the budget process; in other words, people should have access to information about the public budget and be able to fully participate in decisions about the formulation, implementation and evaluation of the budget. *Secondly*, the principle of accountability means that a government should expect to be held accountable for the way it raises and spends the public budget and for the impact of that budget on people's lives. At various stages of the budget process, and most particularly at the audit/evaluation stage, there are formal processes and institutions already in place to hold government to account.

The international human rights standards guiding the *content* of the budget—what funds will be raised and spent and for what—are more complex than those governing the budget process. The remaining sections of this chapter outline in broad terms what international human rights standards say about the *content* of public budgets, and the remaining chapters of *Realizing Human Rights through Government Budgets* provide greater detail on the broad directives articulated in these sections.

## THE REALIZATION OF ALL HUMAN RIGHTS REQUIRES RESOURCES

When considering governments' budgets, the distinction that has often been made between civil and political rights, and economic, social and cultural rights (ESCR), is not a useful one. Historically, civil and political rights have been described as being about what a government should *not* do—therefore not requiring resources—while ESCR are about what a government *should* do—on the assumption that all obligations associated with ESCR are resource dependent. Both are false assumptions. The reality is that the full realization of *all* human rights requires the use of resources, to varying degrees, by the State. While some human rights entitlements can only be realized through State policies that involve the mobilization of resources, the realization of all rights presupposes at least a functioning State, actively committed to their fulfilment. Every State needs to allocate resources to create, implement and sustain the network of *institutions* (such as courts, legislative bodies, national human rights institutions), *policies and programmes* (such as general plans of basic education or training programmes for security forces), *services* (free legal aid, primary health care), *infrastructure* (appropriate detention facilities, schools, recreational spaces), *personnel* (administrative and technical staff), *procedures and systems* (fair trials, birth registration, immunization against infectious diseases), etc., that are necessary to fulfil the broad range of human rights obligations.

A more useful way to “categorize” human rights when considering their relationship to governments' budgets is to look at the centrality of resources to the realization of specific rights, and the quantity of resources needed for that realization. Are budget resources essential for realizing the right—or aspects of the right—and, if so, does realization require many resources or just a few?

## NEGATIVE OBLIGATIONS AND POSITIVE OBLIGATIONS

Human rights entail obligations of different kinds. States parties to the ICCPR must “respect and ensure” the rights in that Covenant, with immediate effect. The Committee on Economic, Social and Cultural Rights (CESCR) analyses compliance with the ICESCR in terms of the obligations of States to “respect, protect and fulfil” human rights. The latter taxonomy has helped the Committee (CESCR) to structure its thinking and approach to monitoring the implementation of the ICESCR. However, for the purposes of budget analysis, such taxonomies do not necessarily reveal which obligations are subject to resource constraints and which are not. Obligations to “respect” human rights—for example, to refrain from polluting air, water or soil<sup>1</sup>—may have potentially significant budgetary and regulatory implications for the State.

For the present purpose, a simpler conceptual distinction may be more useful: the distinction between “negative” and “positive” obligations. Some human rights obligations are described as obligations on the government *not* to interfere in a person’s current enjoyment, or capacity to enjoy, his or her rights. These can be thought of as “negative obligations”. States honour them primarily by refraining from taking any action that would directly or indirectly undermine or interfere with a person’s present enjoyment of their rights. Examples of negative obligations include:

- With regard to the right to life, guaranteed by ICCPR article 6, governments must not arbitrarily take a person’s life. The UN Human Rights Committee (HRC), for example, has said: “The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance.... The deprivation of life by the authorities of the State is a matter of the utmost gravity” (general comment No. 6 (1982) on art. 6 (right to life), para. 3).
- With regard to the right to adequate food, guaranteed by ICESCR article 11, the UN Committee on Economic, Social and Cultural Rights (CESCR) has said: “The obligation to *respect* existing access to adequate food requires States parties not

to take any measures that result in preventing such access” (general comment No. 12 (1995) on the right to adequate food, para. 15).

Other human rights obligations can be described as “positive obligations”, those which require governments to maximize, achieve, deliver or secure something that would allow or preserve a person’s enjoyment of his or her rights. States honour these obligations primarily by taking action to change the status quo where an aspect of a human right is not being realized, and will not be realized unless some kind of action is taken to create the conditions for its realization. In other words, a positive obligation is one where a person cannot fully enjoy his or her rights unless the government provides essential institutions, goods and services that enable the enjoyment of the rights. Examples of positive obligations include:

- With regard to the right to life, the HRC has said: “The protection of this right requires that States adopt positive measures. In this connection ... it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics” (general comment No. 6 (1982), para. 5).
- With regard to the right to adequate food, the CESCR has said: “States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11 [of the ICESCR], even in times of natural or other disasters” (general comment No. 12 (1995), para. 6).

Since negative obligations require governments to desist from doing something, in general governments expend few, if any, resources to comply with such obligations. On the other hand, because positive obligations require governments to take action—to develop, implement and monitor policies, plans and programmes—necessary for a person’s enjoyment of his or her rights, the public budget is integrally related to the government’s compliance with its positive obligations. Much of this publication addresses situations involving positive obligations.

## POSITIVE OBLIGATIONS AND THE PUBLIC BUDGET

Sometimes provisions in a treaty, and more often paragraphs in general comments or general recommendations produced by the relevant treaty bodies, speak explicitly or implicitly of the need for resources—funds from the budget—to be directed to realization of specific rights. Here are three examples where resources are *explicitly* mentioned:

- UN Committee on the Elimination of Discrimination against Women (CEDAW), general recommendation No. 24 (1999) on women and health, para. 30, says: “States parties should allocate adequate budgetary, human and administrative resources to ensure that women’s health receives a share of the overall health budget comparable with that for men’s health, taking into account their different health needs.”
- HRC, general comment No. 21 (1993) on the humane treatment of persons deprived of their liberty, para. 4, says: “Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.”
- CRC, general comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child, para. 11, says: “While the Committee acknowledges that this is a very sensitive issue and that State parties function with varying levels of economic resources, the Committee believes that it is the duty of States to make reasonable financial provision for the operation of national human rights institutions in light of article 4 of the Convention.”

Resources may also be *implicit* in such documents—implicit in that they may not be mentioned, but the recommendation cannot be implemented without the application of resources. The following are two of numerous possible examples:

- UN Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), general comment No. 2 (2008) on implementation of article 2 by States parties to the Convention against Torture and other Cruel, Inhuman or other Degrading Treatment or Punishment, para. 24: “Eliminating employment discrimination and conducting ongoing sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations and building a culture of respect for women and minorities.”
- UN Committee on the Elimination of Racial Discrimination (CERD), general recommendation No. 27 (2000) on discrimination against Roma, para. 32: The Committee recommends that the States parties “... take the necessary measures, as appropriate, for offering Roma nomadic groups or Travellers camping places for their caravans, with all necessary facilities.”

While the box above discusses the situation where a treaty and treaty body say that the relevant rights must be realized immediately, regardless of the availability of resources, sometimes the government’s obligation to realize specific rights is conditioned on the availability of resources. While it is well known that most positive obligations in the ICESCR are of this nature, the situation is not limited to rights spelled out in the ICESCR, and arises in situations where other conventions are relevant. Here are three examples of how this type of relationship is articulated by different treaty bodies:

ICESCR, general comment No. 7 (1997) on the right to adequate housing: Forced evictions, para. 16: “Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”

## Positive obligations, immediate implementation and the budget

Where the positive obligation on the government is one of unconditional implementation, that is, when, according to the specific treaty and treaty body, the rights in question must be realized immediately and without regard to limitations on resources (as is the case for civil and political rights under the ICCPR, for example), the Committees have called on governments to adopt all the measures (including budgetary ones) that are “appropriate” to the full realization of the right in question. While appropriateness of particular measures must be determined on a context-specific basis, appropriate measures are in all cases ones that are “effective” to the realization of the right. They also need to be “adequate” to realize the right. A few examples of use of this language include:

- HRC, general comment No. 25 (57) (1996) on ICCPR article 25 and participation in public affairs and the right to vote, para. 11: “States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.”
- HRC, general comment No. 34 (2011) on ICCPR article 19, freedoms of opinion and expression, para. 40: “The Committee reiterates its observation in general comment No. 10 that ‘because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression’. The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”
- HRC, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 19: “In order to safeguard their independence, the status of judges, including their term of office, their independence, security,

adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”

The implications of these standards for the government’s budget are:

- “Appropriate” allocations and expenditure are those that are well suited to realize a specific right (for example, to ensure the availability and accessibility of health services), are responsive to the needs that people have articulated related to the right, and are not unnecessary or wasteful.
- The government would be using the budget in an “effective” manner to realize human rights if the policies, plans and programmes as well as corresponding budgets are carefully designed and implemented to best realize the right in question. The choice of programmes, for example, should be evidence based, meaning that they should have been assessed and have been shown to have a positive impact on the realization of rights.
- “Adequate” would mean that the budget is sufficient for the realization of the rights in question. The budget for programmes that are necessary to realize rights should be of such a size that (assuming the programmes are appropriately designed) ministries, departments and agencies (MDAs) have the necessary resources to implement them. This has a bearing not only on the adequacy of the budget of specific ministries, departments and agencies, but potentially on the government’s budget as a whole. The budget as a whole must be adequate to allow for the realization of rights.

HRC, general comment No. 32 (2007), para. 27: “An important aspect of the fairness of a hearing is its expeditiousness ... delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing. ... Where such delays are caused by a lack of resources and chronic underfunding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.”

CEDAW, general recommendation No. 24 (1999), para. 17: “The duty to fulfil rights places an obligation on States parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care.”

It is important to be aware that there are situations where it might be expected that realization of a right would be conditioned on the availability of resources, but where the relevant treaty bodies have made clear they are not. Two important ones are:

- CESCR, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 47: “... If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.” (In general, treaty bodies have considered the fulfilment of “core obligations” related to rights as not being conditioned on the availability of resources).
- HRC, general comment No. 35 (2014) on ICCPR article 9 on liberty and security of person, para. 37: “The second requirement expressed in the first sentence of paragraph 3 is that the person detained is entitled to trial within a reasonable time or to release ... The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case ... Impediments to the completion of the investigation may justify additional time, but general conditions of understaffing or budgetary constraint do not.”

## POSITIVE OBLIGATIONS AND “TAKING STEPS”

Various treaties require a State party to “take steps” to fully realize the rights in the treaty. Two particularly important such provisions are:

- ICESCR, article 2.1: “Each State Party ... undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights ... in the present Covenant ...”;
- ICCPR, article 2.2: “... each State Party ... undertakes to take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights ... in the present Covenant.”

The following are important dimensions to be aware of regarding the obligation to “take steps”:

- All treaty bodies using this language require that governments “take steps” *immediately*—whether those steps involve legislative changes, developing policies and plans or allocating budgets.
- There is no excuse—economic, political, institutional, cultural, etc.—that justifies not taking steps to realize the rights. For example, the HRC, in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 14, says: “The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.”
- The steps taken should be “appropriate” for realizing the rights in question. Treaty bodies repeatedly use this word, which they mean to be both “effective” and “adequate” for realizing the relevant rights (see above). The CESCR has also said, “Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant” (general comment No. 3 (1990), para. 2).

- While there is no excuse for not taking steps, *with regard to some rights or aspects of rights*, the treaties and treaty bodies recognize that the types of steps taken or the number of steps taken will necessarily be limited by the availability of resources. This is true largely with regard to economic, social and cultural rights, which fact is reflected in ICESCR article 2.1, already set out above, as well as other treaties (e.g., Convention on the Rights of the Child, art. 4). In such cases, although governments may take limited resources into account in realizing the relevant rights, the relevant treaties and treaty bodies at the same time require that:
- The steps must lead to progressive realization of the rights in question; and
- The government must use the maximum of its available resources (MAR) to realize the rights.

These two stipulations have significant implications for the government's budget, as set out in the following boxes:

### **The obligation to “achieve progressively” the full realization of rights**

Progressive realization entails two complementary obligations:

1. The obligation to continuously improve conditions. Governments must move as expeditiously and effectively as possible towards full realization of relevant rights. The CESCR expects that the resources allocated to the realization of economic, social and cultural rights (ESCR) will increase proportional to any global increase in resources. (As was mentioned above, the HRC has, on the other hand, confirmed that neither political, nor cultural nor economic circumstances are admissible as excuses or justification for failing to give full, immediate effect to the rights in the ICCPR).
2. The obligation to abstain from taking deliberately retrogressive measures. Examples of deliberately retrogressive measures are, for example, if a State party:

- Adopts legislation or policy with a direct or collateral negative effect on the enjoyment of rights;
- Makes an unjustified reduction in public expenditure devoted to implementing the relevant rights, in the absence of adequate compensatory measures aimed to protect persons adversely affected by this reduction.

In its general comment No. 13 (1999) on the right to education (para. 45), the CESCR says: "... If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources."

The CESCR has recognized that there are circumstances that require additional resources and in which the adoption of retrogressive measures or the omission to actively take steps to improve conditions is unavoidable. It insists, however, that:

- "... even in times of severe resource constraints whether caused by a process of adjustment, economic recession or by other factors the vulnerable members of the society can and indeed must be protected by the adoption of relatively low-cost targeted programmes" (general comment No. 3, para. 12);
- There are minimum essential levels of each right that States must guarantee in all circumstance, for example, protection against hunger (right to food), access to basic health care (right to health) and universal, free primary education (right to education).

In sum, a State seeking to justify a retrogressive measure or a failure to comply with the obligation to continuously improve conditions due to resource constraints must:

- Demonstrate that every effort has been made to use all resources at its disposal (including international assistance);
- Demonstrate that every effort has been made to satisfy, as a matter of priority, certain minimum obligations;

- Demonstrate that particular attention has been paid to vulnerable groups, and, in particular, that the State has taken measures to prevent or ameliorate adverse consequences that vulnerable groups may suffer; and
- Once resource constraints disappear and the economy recovers, rescind any restrictive measures taken and repair adverse effects on the population, in particular among vulnerable groups.

### **The obligation to use the maximum of available resources (MAR)**

Over the years the CESCR, through its general comments (particularly general comment No. 3 (1990) on the nature of States parties' obligations and concluding observations, has set out some useful guidelines for how to interpret the obligation on governments to use "the maximum of available resources" (MAR) to realize the rights in the ICESCR. The following are, in brief form, the principal points the Committee has reiterated that have a direct or potential bearing on a government's budget:

- MAR means that a government must do the maximum it can to mobilize resources within the country. Budget revenue would obviously be a key element in these national "resources." The government must also do all it can to secure international assistance (which would include official development assistance (ODA) where national resources are inadequate to realize ESCR).
- MAR also means that governments must give due priority to ESCR in the use of resources. The implications for the government's budget are that allocations and expenditure on ESCR-related areas should be given such priority.
- Government expenditure must be efficient. Wasteful expenditure is a failure to make maximum use of available resources (MAR). This efficiency criterion would logically also apply to revenue collection.

- Government expenditure must also be effective; that is, the impact of the expenditure must be such as to actually help realize ESCR.
- Because corruption is an inefficient use of available resources, failure to curb corruption is also a failure to comply with MAR. Corruption can often be spotted through monitoring revenue, allocations and expenditure in the budget.
- Funds allocated in the budget for ESCR must not be diverted to non-ESCR areas, and funds allocated for ESCR must also be fully expended.
- If the government adopts deliberately retrogressive measures affecting ESCR, it has the burden of proving that it has used MAR to avoid taking such steps.

## CROSS-CUTTING OBLIGATION OF NON-DISCRIMINATION AND ITS RELATION TO RESOURCES

The obligation of non-discrimination is a cross-cutting one, expressly recognized in all international human rights treaties. It is of immediate application. It is also unconditional; that is, compliance with the obligation is not dependent upon the availability of resources. The main traits of this obligation, which are fleshed out in CESCR general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights and HRC general comment No. 18 (1989) on non-discrimination, are:

- States parties must eliminate both *direct* discrimination (discrimination explicitly encouraged or allowed in laws, policies, etc.) and *indirect* discrimination (when the impact of the law, policies, etc., is discriminatory, even though discrimination is not explicitly articulated in them)—in other words, *de facto* discrimination.
- To attenuate or suppress conditions that perpetuate discrimination, States parties may, and in some cases should,

take some positive measures that imply preferential treatment for the neglected groups.

- Prohibited grounds of discrimination include, but are not limited to, race, colour, sex, language, religion, political or other opinion, national or social origin, property and birth. The CESCR considers that the grounds also include disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation.
- States have a duty to eradicate discrimination in both the public and private spheres. Differential treatment based on prohibited grounds is discriminatory unless the justification for differentiation is reasonable and objective.

## Human rights budgeting and gender budgeting<sup>2</sup>

Article 3 in both the ICESCR and ICCPR addresses, in particular, the obligation on governments to ensure equality between men and women, in other words, gender equality. CEDAW provides a detailed elaboration on this basic obligation. Initiatives by governments to ensure that their budgets are non-discriminatory with regard to gender and that they are advancing gender equality are called gender budgeting or gender-responsible budgeting.

The former United Nations Development Fund for Women (UNIFEM), which was in the forefront among international organizations in encouraging gender budgeting, described it thus:

“Gender-responsive budgeting (GRB) is government planning, programming and budgeting that contributes to the advancement of gender equality and the fulfilment of women’s rights. It entails identifying and reflecting needed interventions to address gender gaps in sector and local government policies, plans and budgets. GRB also aims to analyse the gender-differentiated impact of revenue-raising policies and the allocation of domestic resources and Official Development Assistance.”

The obligation of non-discrimination has numerous implications for a government's budget. These include:

- Revenue must be raised in a way that does not discriminate against any specific group on grounds such as those already mentioned;

Human rights budgeting encompasses efforts to ensure non-discrimination and the advancement of equality through governments' budgets with respect to all people, including women, children, the poor, minorities, indigenous peoples, older persons, persons with disabilities and other groups. As such, gender budget work can be seen as part of human rights budget work. At the same time, because gender budgeting initiatives have been under way for a number of years, human rights budgeting can learn a lot from those initiatives, particularly with regard to the emphasis they place on: (1) assessing the differential impact of the government's budget on different groups of people; (2) disaggregating data, including budget figures, and analysing them to spot implicit (indirect) discrimination where aggregate figures may seem neutral; and (3) using performance indicators to assess the impact of the budget (on equality between men and women).

- At the same time, some gender budgeting does not always frame its analysis using international human rights standards, such as those in ICESCR, ICCPR and CEDAW. In such cases it is possible to envision a situation where, for example, a gender budget analysis would find that education resources are equitably distributed with regard to gender, but a deeper human rights analysis would uncover the fact that, while this may be the case, the government is nonetheless failing to meet its obligation to realize the right to education of all its people—both women and men—because it is devoting an inadequate share of the budget to education. As a result, gender budgeting could deepen its analysis through drawing on the experiences of human rights budgeting.

- Allocations and expenditure must be non-discriminatory on the same bases; and
- A government may allocate additional funds to programmes benefitting historically disadvantaged groups in order to enable such groups to enjoy their rights on a par with others in society.

Further details on these broad points, along with relevant examples, are provided in the chapters that follow.

## **GOVERNMENTS' BUDGETS, THE VIOLATION OF HUMAN RIGHTS AND REMEDIATION**

Budgets are related to human rights violations in different ways. For example:

- In some cases, a budget decision (or the lack of one) may in itself constitute a human rights violation. The clearest cases can be found where the State fails to fulfil appropriately an unqualified, explicit and concrete positive obligation to allocate resources or to adopt effective budgetary measures. Discriminatory budget decisions, as well as explicitly regressive ones, when related to positive obligations to take steps to apply MAR, are also examples of these kinds of situations.
- In other cases, a budget decision may be part of a series of government actions that result in a violation. For example, inappropriate or ineffective funding of policies, or services that are part of a sequence of poorly designed and implemented policies and services, can result in a failure by the government to comply with its human rights obligations.

Treaty bodies have established that States parties have to ensure that there are effective remedies for human rights violations. Regardless of whether the breached obligation was a positive or a negative one, remediation of the breach will require some kind of positive action. In most cases that action will necessitate the design and implementation of public policies,

along with resource allocations, over time in order to create the institutional infrastructure to ensure realization of the right.

To effect the remediation, the government must take steps, allocating resources and spending them, in an appropriate, adequate and effective way. The standard the government should have used in the first instance to design and implement policies, plans and budgets should be applied to the design of the remediation process. For example:

If the government is providing less funding *per capita* for health clinics in rural areas than in urban ones, this is a failure to comply with the obligation of non-discrimination. Since this obligation is an immediate one, the government must immediately correct allocations and spending to ensure that *per capita* spending is equal geographically.

- If a government is providing so little funding that conditions in prisons are inhuman and degrading for the prisoners, it must immediately provide adequate funding to ensure that conditions are such as to be in keeping with human dignity. The obligation applicable to the rights of detainees (guaranteed in art. 10 of the ICCPR) is one of taking immediate and appropriate measures to realize those rights.
- If the government has cut the budget for food subsidies with the result that some people's access to those subsidies is eliminated, this is a failure to comply with the obligation to progressively realize the right to food. Remediation would involve the government reinstating the funds for the programme as expeditiously as possible, so that it (or some alternative, equally effective, programme) will continue to reach the previous beneficiaries.

### **Key points to remember about human rights obligations when considering the content of the budget**

- The human rights obligations set out in various international human rights treaties articulate standards that have multiple implications for how a government raises revenue, allocates and spends funds, and evaluates and audits the budget.
- The international human rights treaties establish both negative and positive obligations. Positive obligations may often require the allocation of budget resources.
- Where a human rights treaty requires immediate and full realization of the rights or aspects of rights set out in the treaty, budget constraints are not acceptable as an excuse for non-compliance with this obligation.
- Governments are obligated to take immediate steps to realize all the human rights guaranteed in the treaties to which they are a party. The steps taken must be appropriate, adequate and effective for realization of the rights in question. These standards have important implications for the government's budget.
- Where the treaty recognizes that budget limitations may delay the full realization of the treaty rights, States parties must progressively realize the rights using the maximum of available resources (MAR). These standards have numerous implications for how the government formulates, executes and audits the budget.
- The obligation of non-discrimination is common to all international human rights treaties and means that governments should take utmost care not to discriminate against any group or groups through the budget.

## **II. THE BUDGET PROCESS AND HUMAN RIGHTS**

Most people think of a government's budget as a set of papers containing a lot of numbers. It is that, but it is more. Indeed, the budget documents are simply a written record of a much larger process. That process, if undertaken properly, involves extensive discussions, consultations, negotiations and votes. It should be guided by the human rights norms and principles set out at the beginning of Chapter I.

### **Children exercise their right to participate in public affairs<sup>3</sup>**

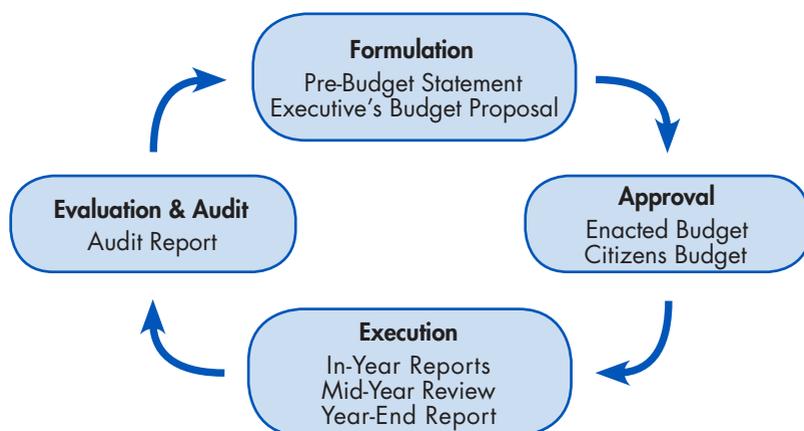
Numerous civil society organizations (CSOs) in countries around the world monitor governments' budgets to determine how they treat children. The underlying concern of these groups is that children are given a lower priority in the budget than their needs, numbers, and the realization of their rights, would warrant.

Groups that work on budgeting for children analyse whether, for example, adequate funding is allocated to ensure that policies and programmes directed to children can be properly implemented. They assess whether children from disadvantaged groups, such as the poor or ethnic minorities, are allocated their fair shares in the budget. They also assess whether allocated funds are efficiently and appropriately spent.

A number of these groups actively involve children in their work. They educate children about governments' budgets and how budgets impact on their lives. A number of groups have included children in monitoring government expenditure, often in the context of schools, having them address such questions as: Have the textbooks allocated for in the budget been purchased? Are they of proper quality and appropriateness? Despite the technical nature of governments' budgets, children are often highly motivated to learn about and monitor budgets, because they can see the direct relationship of budgets to their well-being and the well-being of their families.

The budget cycle can be broken down into four stages—formulation, approval, execution and evaluation/audit. At each of these stages—according to best practices recognized by the World Bank, the International Monetary Fund (IMF) and other international organizations—certain important budget documents should be produced and made available to the public in an accessible and timely fashion. Because these documents enable people to get a fuller sense of the government’s priorities and plans, they are essential for enabling people to hold their government to account. Failure to make the documents available within a time frame that enables people to use the information to have a meaningful say in the budget process may not only violate people’s right of access to information, but undermines their right to participate in public affairs.

The budget cycle (and related budget documents) may be visualized as follows:



At the **formulation stage**, the executive branch of government develops its proposal of the budget for the upcoming fiscal year. The Ministry of Finance (MoF) (or its equivalent) is normally in charge of the overall process, setting the parameters of the budget, providing direction to other ministries in the preparation of their budgets, and reconciling the varying requests coming from ministries and other government departments and agencies. At this stage, the MoF should produce two documents:

## The Open Budget Initiative

The availability of the key budget documents is essential to effective citizen participation in the budget process, and governments are strongly encouraged to make these documents publicly available. The International Budget Partnership (IBP), an international non-governmental organization (NGO), undertakes a biennial survey to assess the openness of the budget process in 100 countries by determining how many of these documents are readily available to the public.<sup>4</sup>

- A *pre-budget statement* (PBS) is the description of the broad parameters of the budget. The PBS generally sketches out the Ministry's assumptions as to how the economy will fare during the next fiscal year, what the government expects to bring in in revenue and what its spending priorities will be. It highlights any significant changes in spending from the previous fiscal year, and discusses any budget deficit or borrowing the Ministry foresees.
- The *executive's budget proposal* (EBP) is the detailed budget document given to the legislature. At a minimum it should provide information about the anticipated sources of revenue, and how much is projected to come from each source, as well as the budgets for each government ministry, department or agency in some detail.

Both of these documents should be readily available to the public, either on the MoF's website (the most common practice nowadays) or through a request to the Ministry. Because the PBS gives a preview of what the Ministry is planning to propose in the budget, it is important in providing the legislature and civil society with lead time to better prepare their input when the EBP is introduced.

The EBP should not only be made available in sufficient time to allow people to have a say as to the priorities reflected in the budget before any vote on it by the legislature, but should also be presented in an intelligible format, one that enables people's understanding of its contents.

Civil society groups that have worked on governments' budgets for a number of years are often able to provide input into the formulation of the budget, particularly through engagement with line ministries (e.g., the Ministry of Health, the Ministry of Education) that is a regular part of their work. In addition, some groups produce analyses of the EBP, which can serve as an accessible and relatively brief summary of the government's plans and priorities. These analyses have proved to be useful not simply for members of the public or CSOs who do not have expertise on the budget, but also for legislators who have responsibilities at the approval stage, but do not feel adequately equipped on their own to fully understand the EBP.

### Participatory budgeting<sup>5</sup>

Municipal governments in a number of countries have initiated a practice known as participatory budgeting. In participatory budgeting citizens—to varying degrees depending upon the context, but in all cases substantially more than is true in the normal budget process—have a significant voice in setting priorities for budget expenditure, most often those for infrastructure (capital expenditure). Such a process is obviously an important step in realizing people's right to participate in the conduct of public affairs, and in enhancing government's accountability to the population. At the same time it is likely that expenditure of funds in such cases is more effective in realizing rights, because investment choices have been informed by people's needs.

At the **approval stage**, the legislature considers the EBP. Typically, the most intensive deliberations happen in committees. Following these deliberations, the legislature makes amendments to the EBP (in those cases where the law gives them this authority) and then votes on it. Once the budget has been approved by the legislature, the executive can start spending the budget.

In its role of reviewing the budget, and later of assessing its implementation, the legislature plays an essential role in holding the government to account. Many civil society groups also participate in this stage of the budget process, by discussing their concerns with various members of the legislature, and even attending and sometimes testifying in legislative

hearings related to the budget. Failure by the government and legislature to facilitate civil society involvement in this stage of the budget process may amount to a violation of the right to participation.

The budget that is approved by the legislature is called the *enacted budget*. Because it is the definitive version of the budget for the designated fiscal year, it is the most important budget document. Civil society groups concerned about specific issues will want to have access to this enacted budget in order to monitor subsequent government revenue-raising and spending, to make sure that it is in line with the approved purposes, sources, amounts of revenue and allocations.

Because of the importance of the enacted budget and because even clearly laid-out budgets are difficult for an uninitiated person to understand, increasingly in recent years governments have been publishing *citizens' budgets*, which are short, simplified and more accessible versions of the enacted budget.<sup>6</sup> While citizens' budgets do not normally provide the detail necessary to monitor government spending on specific issues, they are a very important means for the ordinary person to have some idea of the government's priorities as reflected in the budget.

### Tunisian Government produces a citizens' budget

In December 2013 the **Tunisian** Ministry of Finance published its first citizens' budget, developed for the FY 2014 budget. The publication was a sign of increased commitment by the government to transparency, and the process of developing the citizens' budget demonstrated a growing engagement by government with civil society in the budget process.

The citizens' budget was developed using an open and inclusive process that involved civil society members of a Joint Committee on Budget Transparency. The Committee undertook a survey of approximately 100 CSOs in the country, and survey findings helped identify the budget information needs of civil society. The latter, in turn, provided essential guidance for developing the content of the citizens' budget.<sup>7</sup>

During the **execution stage** of the budget process the executive spends according to its designated purposes the funds that have been allocated in the budget. Throughout the fiscal year it should produce the following documents:

- *In-year reports:* These reports are typically prepared on a monthly or quarterly basis, and provide detail on how much of the projected revenue has been raised and how much of the allocated funds has been spent. The reports are important not only for enabling the government to know how it is doing, but for assisting civil society to keep an eye on government spending and call attention to spending problems that may become apparent in the reports.
- *Mid-year report:* Halfway through the fiscal year the government should assess where it is relative to the plans and projections in its EBP (or the enacted budget). The mid-year report is more than a six-month in-year report. In this report the executive looks at the assumptions underlying its original budget proposal on revenue, inflation, borrowing etc., to determine whether these are still valid. If conditions have changed significantly (e.g., if revenue is falling significantly short of projections), the budget may need to be adjusted. This is the point at which the government makes the necessary adjustments. The availability of this report to the public is very important as the budget for areas of particular concern may be cut, for example, in response to lower-than-anticipated revenue, or for other reasons.
- *Year-end report:* At the end of the fiscal year, the executive should provide a complete and detailed picture of government revenue and spending for the fiscal year. This report is not only essential for understanding what the government has spent money on but is an important means of reviewing changes in revenue and expenditure projections over the course of the fiscal year, and comparing changes in government revenue and expenditure from one year to the next.

## Local government budgets and human rights processes

Subnational governments (state/provincial as well as local/municipal) often have their own budget processes. Human rights obligations are not limited to the national or central government. Subnational levels of government also have an obligation to ensure that people's rights of access to budget information and to participate in the budget process are effectively realized. Numerous examples of local or state/provincial budgeting and civil society budget monitoring are included below and in the following chapters.

- The **evaluation and audit stage** is the stage in the process when the records of the previous year's budget are assessed for accuracy and to ensure that the budget was formulated and implemented within the framework of the law. The audit is normally done by an independent supreme audit institution (SAI), which goes by a different name in different countries, but is frequently called the Auditor General or the *Cour des Comptes*. The SAI reviews the government's year-end report and other documents related to the fiscal year just completed. Its *audit report* sets out findings as to the accuracy of the budget reports and the budget's compliance with the law. This report is presented to the legislature, which should review it and take measures to help correct any problems the SAI uncovered. As the diagram of the budget cycle above illustrates, the findings of the audit report should also help shape the formulation of future budgets.

### **Supreme audit institutions (SAIs), access to information and participation**

SAIs can play a central role in holding governments to account for the way they raise and spend the budget. In most countries, however, they have little interaction with civil society and a low profile among the public, both of which limit the potential impact of their findings. In some countries, however, SAIs play a more active, higher profile role in public life. In Costa Rica, for example, the General Comptroller Office (GCO) has implemented a transparency policy by which it provides technical inputs to legislators, the media, CSOs, and the general public.

It is often difficult to persuade journalists to cover what are often quite dry and technical reports, but journalists in Costa Rica have found that the GCO's policy has improved the quality of their coverage of audit reports by providing access to first-hand information about the results of external oversight. Legislative review of the auditor's report is also an essential aspect of accountability, and the GCO's policy has reportedly enhanced the quality of the legislature's discussion on audit reports as well, by providing it with relevant supporting documentation.<sup>8</sup>

### **Key points to remember about human rights obligations when considering the budget process**

- Government should establish proper mechanisms and inclusive processes through which civil society and the public can have a meaningful say in all stages of the budget process.
- Key budget documents should be made publicly available in a timely fashion, so that civil society and the public have the necessary information to make a useful contribution to the process.
- Key budget information should be produced in a format and using language that makes the budget accessible to ordinary people.

### **III. BUDGET FORMULATION**

A country's Ministry of Finance (MoF) normally has the primary responsibility for the formulation of the budget. The MoF decides on the fiscal envelope (see section A), which includes deciding how much revenue the government can anticipate bringing in from which sources (see section B). It also decides how much the government should borrow, and how much of a deficit it can and should run. In collaboration with the line ministries (e.g., of health, education, transport, water), it decides how much of the national budget should be allocated (see section C) to different ministries as well as between national and subnational governments. The following are particularly important points to keep in mind with regard to the formulation stage.

*Firstly*, while a MoF may consider its job to be technical, in reality it has key human rights responsibilities. The MoF is responsible for ensuring that the overall budget is formulated and then implemented in a manner that is in keeping with the government's human rights obligations as set out in Chapter I. Is the budget—revenue, allocations and expenditure—sensitive to and respectful of the government's human rights obligations and appropriate for the realization of rights? Are revenue, allocations and expenditure adequate and effective to realize human rights? Do they show that the government is using the maximum of its available resources (MAR) to realize those rights or aspects of rights whose realization is subject to the availability of resources? According to the budget, is the government taking steps towards the progressive realization of rights? Do revenue, allocations and expenditure all comply with the government's obligation of non-discrimination? It is not just line ministries that are responsible for answering these questions. The MoF is as well.

*Secondly*, a government's budget reflects its priorities. These priorities should first and foremost be embodied in policies and plans, and the latter should include appropriate indicators and benchmarks. The budget then would be only one means—although a very important one—by which the government implements what it has set out in policies and plans. In order for a government to have a budget that will advance human rights, those involved in designing plans and programmes relevant for the realization of human rights should work closely with those involved in developing the budget, to ensure that the policy, plans and budgets are all pulling in the same direction.

*Thirdly*, a performance budget seeks to link a government's objectives, plans and anticipated outcomes with specific funding in the budget. One of the central purposes of a performance budget is to enhance accountability, by enabling the government to better relate figures in the budget to specific results on the ground. A performance budget is desirable from a human rights perspective, in part because it enables this greater accountability. It is also desirable because the government has obligations not simply of conduct, but of result, and performance budgets are considered more effective budgets in helping realize desired outcomes.

*Fourthly*, an assessment of a government's compliance with its human rights obligations would ideally be based on an analysis of a consolidated budget, in other words a budget that includes all domestically generated revenue (of the national government and subnational governments) as well as international grants and loans, together with all related allocations and expenditure. While it is important to look at national and state/local government budgets separately, it is also true that, without a consolidation that allows for an overall analysis of government revenue, allocations and expenditure, an assessment as to whether, for example, the government is using MAR to advance ESCR will be incomplete.

*Fifthly*, subnational governments, in developing their own budgets, must ensure that their revenue and allocations comply with the government's human rights obligations. The national government, for its part, should monitor subnational budgets to ensure that authorities at that level are carrying out the obligations. It is also important to keep in mind that, to the extent that wealth is distributed unevenly throughout a country, the ease with which people can enjoy their rights will vary—either because they have greater or lesser individual wealth with which to access education, health services and so on, or because their state or local government has more or fewer resources with which to support programmes essential to the realization of rights. A national government has the responsibility of ensuring that all people in a country enjoy their rights on an equal footing and without any discrimination, regardless of where in the country they live, and should take measures via the budget and through other means to ensure equal enjoyment of human rights across the country.

*Lastly*, essential to the development and implementation of a human rights-compliant budget is the availability of adequate, disaggregated data, related but not limited to, for example, population, literacy, maternal mortality, formal versus informal employment, kilometres of paved roads, etc., in different states and localities. This data needs to be able to show trends over time and be disaggregated by specific categories, so that the government at various levels, in developing the budget, can be sensitive to the impact of the budget on particular groups in the overall population, such as women, children, indigenous peoples and minorities, older persons, persons with disabilities, people living in rural areas, etc. This data is essential for ensuring that the government is realizing the rights of its people in a non-discriminatory fashion.

The remaining sections of this chapter on budget formulation address:

- A. The fiscal envelope
- B. Government revenue
- C. Budget allocations.

## A. The fiscal envelope

As mentioned at the beginning of Chapter I, resources are essential for the realization of all rights, and resource limitations (whether of a government or of an individual) inhibit the realization of rights. In any given fiscal year the resources available through a government's budget are defined by the "fiscal envelope", which is "the aggregate level of expenditures and revenues (and the resulting deficit or surplus) in the budget. A government will frequently set the fiscal envelope consistent with its macroeconomic policy, and then the budget debate will focus on the composition of expenditures and revenues within this envelope."<sup>9</sup>

In setting the fiscal envelope at the start of the annual budget process, a government projects how much revenue it anticipates raising internally (through taxes, fees, internal loans, etc.) and externally (through external loans, ODA, etc.) on the basis of a number of factors, including the rate of growth in the economy, prices of commodities, relations with potential donors, the costs of borrowing, etc. In this context, it also makes decisions about how much it is willing to spend and for what broad purposes. Integral to calculations around revenue and expenditure is the issue of whether the government is willing and able to take on debt in the event that projected expenditure exceeds projected revenue.

While certain factors determining the fiscal envelope (such as global commodity prices or international financial conditions) are beyond a single government's control, other factors are not. A number of revenue and expenditure choices are determined by the macroeconomic policies the government adopts. These policies take positions on such fundamental issues as the role of government in a country's economy, the desirable level of public expenditure, the impact of debt and deficits on the economy as well as on specific social sectors, etc.

### Right to housing compromised by macroeconomic policy

In 2010 Queen's University Belfast (QUB), cognizant of a recent growth in homelessness and the demand for social housing (housing for low-income populations) in Belfast, undertook an analysis of the government's housing budget in the preceding years. Reviewing the **Northern Ireland** budget and the Department for Social Development's *Northern Ireland Housing Statistics* together with other government documents over a series of years, as well as studies produced by non-governmental researchers, QUB uncovered the fact that during the 1980s the United Kingdom Government had adopted a macroeconomic strategy that sought to expand the role of the private sector in the provision of public services. In line with this, the approach to social housing had shifted from a belief in the government's central role in ensuring access to housing to an emphasis on home ownership. This shift was accompanied by a disinvestment in social housing. Responsibility for maintaining and building social housing was transferred from the Northern Ireland Housing Executive (NIHE) to private housing associations. One result of this approach was a significant decline in the social housing stock. From 2001 onwards, waiting lists for public housing grew annually (with a small respite in 2007–2008) as did the numbers of homeless people. In other words, the supply of social housing failed in significant ways to keep up with the need for it. The QUB study concluded that this indicated a retrogressive impact of the adopted measures with regard to the right to housing in Northern Ireland.<sup>10</sup>

In establishing the fiscal envelope, a government is not simply engaging in a technical exercise; it is making a number of policy choices. In line with its treaty commitments, these choices should be informed by and responsive to a government's human rights obligations. In other words, these human rights obligations should serve as a framework for the negotiations that are involved in setting the fiscal envelope.<sup>11</sup>

This section now addresses four important decisions the government makes about the fiscal envelope that relate to its human rights obligations. The decisions focus on:

1. Government revenue and a nation's gross domestic product
2. Running a budget deficit versus reducing the national debt
3. Budget ceilings
4. Official development assistance.

## **1. Government revenue and a nation's gross domestic product**

A government's tax policy is a key means of mobilizing resources, which in turn can be made available for investment in human rights-related areas. It can also help redress social and economic inequalities and strengthen accountability between the State and the public.

Tax economists often use the ratio of tax collection to a country's gross domestic product (GDP)<sup>12</sup> as an indication of the tax collection effort of the government. This ratio could also be taken as an indicator of the seriousness of a government in ensuring that it has adequate resources to direct to the realization of rights. If the tax/GDP ratio is low relative to what would normally be expected from a country with an economy of its size, it could be argued that the government is failing to do all it can to secure adequate resources.

A government, of course, may choose to pursue a macroeconomic strategy of lower taxation in order to stimulate private investment and growth, and encourage private actors (households and service providers) to enter into contracts for service provision. If it pursues such a strategy, however, that strategy must be justified in terms of realizing human rights. In other words, the government must not simply take on faith that private investment and private spending deliver more in terms of public well-being than does public expenditure, but must provide data showing that its choice has led

### Low tax rates and arbitrary killings

In his report on his 2006 mission to **Guatemala**, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions highlighted the importance of an appropriate tax rate if a government is to have sufficient resources to properly address extrajudicial executions. He said:

“When government officials complain about a lack of resources, it serves in part as a convenient excuse ... one would imagine that Guatemala could do better than a single-digit conviction rate for murder without spending an additional dollar. Nevertheless, the resources provided to the PNC, the Ministerio Público, and the courts are woefully inadequate and place a harsh upper limit on how effective the criminal justice system will be ....

“The reason the executive branch ... has so little money to spend on the criminal justice system is that the legislative branch, the Congress, imposes exceptionally low taxes .... (A)s a percentage of GDP, Guatemala’s total tax revenue has hovered on the high side of 10 per cent of the gross domestic product (GDP), and according to the latest estimates, tax revenue amounted to 9.6 per cent of GDP in 2005. In regional comparison, its tax revenue is a lower percentage of GDP than that of Belize, Costa Rica, El Salvador, Honduras, or Nicaragua, and is radically lower than that of the countries of South America.”<sup>13</sup>

to more effective realization of human rights than increasing government revenue would have. As was mentioned in Chapter I, the obligation of progressive realization means that resources allocated to the realization of rights should increase proportionally to any overall increase in resources. As a nation’s GDP increases, the potential exists for increasing the government’s own resources (revenue). This, in turn, could provide the government with a larger pool of funding to allocate to rights-related areas. Both the obligation on government to take adequate measures to immediately realize certain rights and the obligation of progressive realization imply that a government should give serious consideration to increasing its revenue in step with increases in GDP.

The obligation of progressive realization does not necessarily require a growth in the budget, because a government can employ other resources at its disposal to realize rights, including, for example, the country's natural resources, an educated work force, etc. The ultimate test is whether people's enjoyment of their rights is being realized. If the government adopts a macroeconomic strategy that assumes that more limited growth in the public budget leads to better rights results, the actual results from this policy must be demonstrably leading to progressive realization of rights (or to their immediate realization, for those rights or aspects of rights that the government is obligated to realize immediately).

## **2. Running a budget deficit versus reducing the national debt**

One way for a government to increase the fiscal envelope, thereby maximizing its resources, at least in the short term, is to run a budget deficit, which would, sooner or later, need to be covered out of government reserves, through borrowing from domestic or external sources, or other means. The added funds made available by running a deficit could be directed to rights-related areas, thus arguably complying with the government's obligation to maximize its available resources. Many mainstream economists, however, would argue that most governments in normal times should avoid running a deficit and should, in fact, work to reduce the country's overall debt. One result of the latter approach, when an economy is small and/or revenue is low, is that there are serious constraints on spending that directly (e.g., on education or the court system) or indirectly (e.g., on roads or other infrastructure) helps realize rights.

From a human rights perspective, one consideration to take into account when weighing the desirability of taking on additional debt is the sustainability of the debt. In other words, will the government be able to repay the debt in reasonable steps over time, or are the terms so onerous and interest rates/service costs so high that repayment will be a significant burden on future budgets—thus cutting into funds available for realizing human rights in the long term?

Another consideration is how additional funding will be used. Will it be spent on goods and services considered consumption or could the spending be treated as an investment (as much education spending could be, for example)? If the debt is considered an investment, then different considerations come into play with regard to its sustainability (the assumption being that such investment will result in greater revenue or lower expenses in the long term).

A number of other complex issues need to be considered. For example, what determines debt servicing costs? Can a government policy reduce these costs and make debt more sustainable? Monetary policy influences interest rates and can affect the cost of domestic debt; exchange rate policies may be essential for managing dollar-denominated (or other foreign currency-denominated) debt.

Austerity measures are often prescribed by mainstream economics as the best option for a government to tackle a sizeable budget deficit or reduce debt, or when a financial crisis hits. In 2008, for example, the world suffered what was considered to be the worst global economic crisis since the “Great Depression” of the 1930s. The origins of the crisis were complex and reflected systemic flaws in the national and international financial architecture. Many governments responded with austerity measures, cutting public sector employment and social safety nets. As a result, the ability of individuals to exercise their human rights, and that of States to fulfil their obligations to protect those rights, was diminished. This was particularly true for the most vulnerable and marginalized groups in society, including women, children, minorities, migrants and the poor, who suffered from decreasing access to work and social welfare programmes, as well as reduced affordability of food, housing, water, medical care and other basic necessities.

A human rights framework does not prescribe specific policy measures that a government should adopt to deal with a deficit or debt. What a human rights framework does imply is that negative human rights impacts of whatever policies a government chooses to follow should not be considered simply unfortunate side effects of tough, but necessary, decisions. The potential human rights impact should be foremost in the

### Special Rapporteur points to debt-to-GDP ratio in addressing the right to food

The UN Special Rapporteur on the right to food discussed the debt-to-GDP ratio in his report on his 2012 country mission to **Canada**:<sup>14</sup>

“The Special Rapporteur is concerned that the 2012 federal budget reportedly envisages a reduction of public spending of CAN \$5 billion annually, with total reduction in spending of CAN \$37 billion over five years, without the implications for the realization of the right to food having been given explicit consideration. Canada has one of the lowest deficit-to-GDP ratios and debt-to-GDP ratios among industrialized countries, and it is precisely in times of economic and financial crisis that guaranteeing robust social protection measures is most required. Furthermore, the “maximum available resources” include resources that could be mobilized by the Government, including through fiscal reform. According to the Canadian Centre for Policy Alternatives, since 2000, cuts to personal, sales and corporate taxes have been such that the 2011–2012 tax revenues would have been CAN \$48 billion higher than the actual revenues collected if the tax regime of a decade ago was still in place. The tax-to-GDP ratio of Canada has fallen to 31 per cent of GDP and it is now in the lowest third of OECD countries. Consequently, Canada has the fiscal space to address the basic human needs of its most marginalized and disempowered.”

minds of the government. When it is necessary to introduce austerity measures to address deficit and debt issues, a government should explain the policies it has chosen, including their anticipated impact on rights, particularly in relation to marginalized populations. It should explain why it has not chosen other policy approaches, ones that may be less injurious to rights spending. If its policy choices appear reasonable, it should in any case explain when and how it plans to shift back to policies more directly beneficial to the realization of human rights. Decision-making processes should be participatory, and decision-makers should be held accountable for the outcomes.

### 3. Budget ceilings

Budget ceilings are limits on spending that are usually set during the budget formulation stage. While the underlying logic of budget ceilings is simple enough, they may engender problems of non-compliance with a government's human rights obligations.

A budget ceiling may be applied to:

- The whole of the government's budget, setting a limit on the overall size of the budget;
- Sectoral budgets or the budgets of specific ministries, thereby capping spending by those ministries; or
- Specific types of government expenditure, for example, salaries.

Budget ceilings are normally set for one or more reasons, including:

- A concern that too much spending will spark or feed inflation;
- A desire to avoid running a deficit, thereby increasing overall debt;
- In the case of a ceiling on salaries ("wage cap ceilings"), an effort to reduce bloated public payrolls; and/or
- A belief that too large a presence of public expenditure in the economy stifles the private sector, by, among other things, making it more difficult for the latter to access capital.

Depending upon how and where they are used, budget ceilings may be a blunt instrument, particularly when applied in a rigid fashion, and can harm critical sectors. For example, using budget ceilings to keep inflation lower than necessary in a given economy can undercut efforts to improve people's health or education.

Bloated public payrolls can be a drain on a government's resources and on resources essential for realizing people's human rights. As such, they can constitute inefficient spending, creating problems with meeting

human rights obligations (see section E). However, when applied without considerable thought as to their context and impact, imposing wage cap ceilings may result in a government's failure to use MAR to realize rights.

### Cuts in public sector pay ruled unconstitutional

In a 2013 case, *ATE v. Municipalidad de Salta*, the Supreme Court of **Argentina** considered the substantial reductions in public sector remuneration that had been among a number of budget cuts made by the government following the 2001 crisis in the country. The Court considered that the obligation of progressive realization was applicable to the case, and that the budget cuts were a retrogressive measure, which carried a "strong presumption" of unconstitutionality. It took into account CESCR general comment No. 2 (1990) on international technical assistance measures (para. 9), which says that measures taken in times of economic crisis should have as a goal protecting the rights of the poor and vulnerable. Because the cuts in pay to public sector employees in fact hurt the poor and vulnerable, it ruled the pay cuts unconstitutional.<sup>15</sup>

The following case (see box) highlights the role of international financial institutions (IFIs), particularly the IMF and the World Bank, in a government's decisions to set budget ceilings. In making recommendations and encouraging governments to follow certain courses of action, these institutions should be cognizant of the potential that their recommendations have to conflict with the government's human rights obligations. Where they have substantial leverage and their recommendations lead to problematic results, they could themselves end up sharing responsibility to some degree for a government's non-compliance with its international treaty obligations.

## 4. Official development assistance

ICESCR article 2 calls on States "to take steps, individually and through international assistance and co-operation, especially economic and technical ...". The CESCR has noted that the phrase "to the maximum of

## Wage cap ceilings and the right to education

In 2007 ActionAid undertook extensive research on the impact on education of wage cap ceilings governments had in place in **Malawi, Mozambique** and **Sierra Leone**. The ceilings were inhibiting the ability of the governments to hire teachers necessary to lower the very high pupil-to-teacher ratios. The organization learned that the wage cap ceilings had been imposed because the governments were concerned that increasing the public sector workforce budget would push inflation up beyond the targets set out in their loan agreements with the IMF. Part of ActionAid's research included a review of economists' differing assessments of the impact of varying inflation rates on growth and development. Drawing on the governments' education policies, plans and budgets, ActionAid also estimated the numbers of teachers who would have to be hired between 2006 and 2015 to reach a pupil-to-teacher ratio of 40:1 by 2015, and how much this would cost the governments. It compared its findings to projections in the governments' plans.

ActionAid argued that, by insisting on overly restrictive macroeconomic policies, particularly with regard to inflation, with their constraint on government spending on wages, the IMF was in part responsible for the persistent teacher shortage. In all three countries, the wage bill ceiling was unnecessarily low, too low to allow the government to hire or attract the teachers necessary to improve the pupil-to-teacher ratio, thereby compromising the availability and quality of education in each country.<sup>16</sup>

its available resources" refers to both the resources existing within a State and those available from the international community through international cooperation and assistance (general comment No. 3, para. 13). This means, in part, that if a government needs additional resources to realize its people's rights, other States parties and the international community have an obligation to help provide those resources if they can.

ODA has been one of the main elements of international cooperation for many decades. It has played a critical role in supporting developing

## Official development assistance and the rights to water and sanitation

- The UN Special Rapporteur on the rights to water and sanitation analysed human rights obligations associated with aid in her 2011 report to the UN General Assembly:<sup>17</sup>
- Where household contributions and government spending are insufficient to realize the rights to water and sanitation, international aid frequently contributes to financing. In order to employ the maximum available resources in compliance with the principle of progressive realization, countries have an obligation to turn to international support when necessary. In turn, countries in a position to assist have an obligation to provide support in a manner consistent with human rights principles (para. 30).
- The share of international aid going to water and sanitation has decreased over the past decade and deserves higher priority in funding given the significant benefits brought by enhanced access (para. 31).
- In the current economic climate, States relying heavily on international aid should push for the prioritization of funding for water and sanitation within existing aid allocations, while also adopting measures to sustain progress towards realization of those rights even without significant increases in funding (para. 32).
- International aid should adhere to the principles articulated in the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action, ensuring that aid agreements are consistent with international human rights law and aligning aid priorities with the national policy frameworks of their development partners (para. 34).
- In addition, money for water and sanitation is mobilized through loans and grants from international financial institutions and donors. These actors must work to eliminate inappropriate conditionalities attached to these financing agreements (para. 35).

countries' efforts to meet their development objectives. However, the unpredictability and volatility of ODA remains a major concern, especially during financial and other crises. Moreover, a growing body of evidence indicates that most aid funding is not provided directly to governments, but instead is channelled to end recipients through civil society and NGOs. Governments' lack of control over the disbursement of development aid, coupled with the unpredictability of aid, can have serious effects on government budget planning and expenditures, with governments having to frequently adjust their budgets to account for shortfalls in aid receipts.<sup>18</sup>

Another of the complexities related to implementation of ODA is the number of governments and international institutions typically involved: donor governments, recipient government and, quite frequently, one or more regional or international financial institutions such as the IMF and the World Bank. Each of these actors plays a different role, and each may also contribute to creating a situation that gives rise to a problem of non-compliance with human rights obligations. Indeed, there may be situations where the recipient government does not have the degree of control necessary to avoid non-compliance. Donor governments and IFIs should both be cognizant of this possibility and do their best to ensure that recipient governments are in a position to meet their obligations.

The following scenarios and their impacts on the realization of human rights must be carefully considered.

*Firstly*, when a government relies on external sources of support for key rights-related sectors, these sectors may suffer significant budget cuts when a donor decides to discontinue its assistance. The cuts may bring into question the recipient government's compliance with its obligation to immediately or progressively achieve the enjoyment of rights (see sections C.5 and C.6). In such situations, donors have a responsibility to work with the recipient government to avoid the government's failure to comply with its human rights obligations.

*Secondly*, the way donors deliver aid can affect the recipient government's capacity to meet its obligations. Aid may be "on budget" so that the donor support is directly reflected in the government's budget and

related financial reports. On the other hand, it may be “off budget” and therefore not reflected in the government’s budget or financial reports. When donor funds are off budget it is difficult to determine how much the government is spending in total and on specific sectors, and challenging for the government and civil society monitors to assess the government’s compliance with its obligations. How is it possible, for example, to determine the priority that has been given to human rights in the budget (see section C.6) in the absence of complete figures for the total budget and for sectoral budgets? Even when a recipient government has a desire to develop such complete budget figures, it may not have the technical capacity necessary to analyse the funding coming from different sources, in different formats, for a variety of programmes and projects.

When ODA is off budget the government also has a more difficult time developing and following through on coherent plans, because it usually does not have the full information it needs to integrate the off-budget funds into its planning. Off-budget funds are often spent independently of government plans, with the likelihood of duplication or other wasteful spending. Such wasteful spending runs counter to the obligation to spend funds effectively and efficiently (see section E). It would amount to a failure to use funds appropriately and effectively (see section C.5) or to use MAR to realize rights whose realization is subject to this obligation (see section C.6).

When aid is on budget donor support can be reflected in budget allocations. Such on-budget support makes it easier for monitors to hold the recipient government to account. However, when on-budget aid has been promised and integrated into budget allocations, but then is not delivered as promised, or is not delivered in a timely fashion, the recipient government may not be able to fully spend the funds within the fiscal year. This leads to underspending, which, in turn, triggers questions about the recipient government’s compliance with its obligation to take effective measures to realize rights, or its ICESCR article 2 obligations (see section B).

*Third*, donor governments may also deliver different *types* of funding, such as project support, sector support or budget support. However, there are particular difficulties with regard to ICESCR article 2 that each type

of aid can create. For example, research has shown that ODA in the form of project funding, say in the area of health, is often not effective in significantly increasing funds directed to that area, because recipient governments, knowing they will be getting the earmarked funds, redirect their own funds to other uses.<sup>19</sup> Alternatively, a recipient government may want, with donor assistance, to increase its allocations to human rights-related areas, but pressure from other influential actors may contribute to a decision on the part of the MoF to disallow such increases. The recipient government bears the burden of justifying its budgetary choices in human rights terms in these circumstances, and donor governments and organizations should ensure—at a minimum—that their own actions do not increase the risk of human rights violations.

### Different sources, different demands

In 2002 the Global Fund to Fight AIDS, Tuberculosis and Malaria offered **Uganda** a grant of US\$ 52 million for the 2002/03 fiscal year. The Ministry of Health welcomed the money, which it felt would be very helpful in fighting the HIV/AIDS epidemic then plaguing the country. However, the Ministry of Finance, in line with advice from the IMF, said that such assistance could only be accepted if a comparable amount was cut from elsewhere in the health budget. The Ministry's argument was that it had to control the amount of money flowing into the country, as temporary, unsustainable inflows might cause distortions in the economy. This condition was unacceptable to the Global Fund.<sup>20</sup>

*Fourth*, in a number of countries where donor governments provide assistance in such spheres as health, education and water, the recipient government may spend only a small proportion of its own budget on these areas, while tolerating significant corruption in government expenditures. Failure to take action to halt such corruption is directly contrary to the government's obligation to spend funds appropriately (see section C.6) or direct MAR to realizing human rights (see sections D and E). If a donor government continues to provide aid knowing that the recipient government is failing to meet its human rights obligations as a result of corruption, it may be complicit in human rights violations.

Similarly, donor governments may provide assistance in such spheres as health, education and water, while the recipient government spends only a small proportion of its own budget in these areas, directing large shares instead to sectors that seem less directly relevant for guaranteeing human rights. In situations where, for example, defence and security expenditures comprise a significant share of the budget while expenditures on areas such as rural development, which would more immediately enable people to access their rights, are very limited, the government should, at a minimum, be able to explain why this set of priorities is in compliance with its MAR obligations. Similarly, donor countries should be able to explain how their continued giving does not enable the government to evade its obligations.

### **Key points to remember about human rights obligations when considering the fiscal envelope**

Historically, MoFs have not understood that their responsibilities include ensuring the realization of the full range of human rights. However, as central actors in any government, they are responsible, along with their other government partners, to help realize the full range of human rights.

A government's economic policy and its budget are critical to the realization of rights. MoFs are the principal actors in ensuring the development and effective implementation of a government's economic policies and its budget. These economic policies and budget decisions have a direct bearing on the realization of human rights, particularly of the most vulnerable populations. Therefore, in line with their responsibility to help ensure the realization of rights, the economic policy choices and the budget decisions that MoFs make must not be based solely on macroeconomic considerations but must be fundamentally guided and informed by human rights.

The fiscal envelope is central to defining what a government will do and will be able to do in realizing rights over the coming years. The decisions MoFs make with regard to the composition and size of the fiscal envelope must be guided by and comport with the government's obligations to take appropriate, effective and adequate measures to realize all rights, and to progressively achieve in a non-discriminatory fashion the realization of ESCR using MAR.

## B. Government revenue

The human rights obligations detailed in Chapter I have critical implications not only for how much revenue a government should raise but also for the types of revenue upon which it should rely. Government revenue is typically derived from consumption, income, property and other kinds of taxes together with a range of non-tax revenue. Consumption taxes include value-added taxes (VAT) and sales taxes, excise taxes, tariffs on imports and user fees. Income taxes are taxes on personal and business income, and include social security and other forms of payroll taxes. Sources of non-tax revenue include grants or loans from donors and income from public enterprises and from natural resource extraction, among other sources.

Progressive, non-discriminatory tax policies implemented by capable and accountable tax authorities can generate substantial revenue for programmes on which the realization of human rights depends. Equitable mobilization of revenue through such tax policies will be consistent with a State's obligations to use MAR to realize human rights. However, there is no single answer to the question of how much taxation is desirable from a human rights point of view. The situation will vary from country to country, although considering tax burdens in countries of similar size and with similar economies can provide some guidance as to whether a government is doing all it can to secure adequate resources.

Increasing the taxes of low-income people beyond a certain point will, of course, detract from the realization of rights, since access to many rights requires a basic level of household income. It is important for governments to ensure that people are not deprived of that basic income through government revenue-raising schemes. Moreover, different countries have adopted different divisions of responsibility between the public and the private sector with regard to key social services (which, in turn, has direct bearing on the realization of rights). These various considerations must be factored into any assessment of a government's choices regarding revenue-raising schemes.

In seeking to comply with its obligation to secure adequate revenue to realize rights, a government must at the same time ensure that it complies with its obligation to ensure *equality and non-discrimination*. A system that maximizes revenue may unfairly burden certain groups of people. A government should be sensitive to the fact that different forms of revenue (e.g., income tax, VAT, property tax, royalties from extractive industries) affect different groups of people differently, often according to gender, economic status and/or ethnicity. It should consider whether its overall revenue and tax structure (the types of taxes on which it relies, the respective tax bases and tax rates, etc.) is one that will enable it to comply with its obligation to ensure equality and non-discrimination. In this context, it is essential to keep in mind the distinction made between direct and indirect

### The importance of monitoring to address discrimination

In **South Africa**, women predominate in labour-intensive industries, such as clothing and textiles. These industries were hard hit when, in the late 1990s, import tariffs—an important source of revenue in many countries—were reduced. In making the decision to reduce tariffs, there was no intent to discriminate against women. However, because of the structure of these industries, the inflow of imports resulted in large layoffs in the textile and clothing industries, which, in turn, disproportionately affected women. The impact of the tariff reduction thus was discriminatory.<sup>21</sup>

In the 1980s, the government of the State of Andhra Pradesh in **India** wanted to raise revenue to subsidize the price of rice. It decided to promote the production and sale of arrak, an alcoholic beverage, raising revenue by fees on state licences to sell arrak. In five years, revenue from liquor licences increased by over 400 per cent. In human rights terms, at first glance, this might be seen as a successful effort to comply with the obligation to maximize the resources available to realize the right to food. However, the increased availability of arrak led to increases in alcohol abuse among poor men, with negative impacts on household income, which could, in turn, have been used to meet the needs of poor women and children. It also led to more domestic violence against women and children.<sup>22</sup>

discrimination. There are various types of revenue that are not intended to discriminate among different groups of people, but which, *de facto*, do.

It is, of course, important when considering the potential discriminatory impact of revenue-raising schemes at the same time to factor in government expenditures, as those expenditures may compensate for what would otherwise be inequities on the revenue side.

In most countries a great deal of service provision is the responsibility of provincial/state or local/municipal governments. In providing these services the latter often rely on block or conditional grants from the national government. The size of these block or conditional grants are typically decided upon by the national government using formulas that take into account such factors as population and poverty levels in the different subnational units. From a human rights perspective, it is important for both national and subnational governments to monitor these block and/or conditional grants for their human rights impacts, as it is not unusual, despite the seeming impartiality of the formulas used, for different subnational governments to receive disproportionately large or small *per capita* shares of the disbursed funds (this issue is discussed further in section C.3).

It is also necessary to keep in mind that, while all levels of government have human rights obligations, the capacity of subnational governments to raise adequate revenue is often constrained by their limited revenue-raising authority. Thus, if a subnational government wants to increase its resources (through taxation, etc.) to better realize certain rights, it will likely have a difficult time doing so. This means that the national government must ensure that not only itself but also subnational governments have the adequate revenue available to them to enable them to carry out their human rights responsibilities.

Earmarking in the context of budgets and revenue is the practice of assigning revenue from particular taxes or groups of taxes to specific government activities or broad areas of government activity. In general, earmarking grows out of a desire to protect certain categories of expenditure by linking them to dedicated revenue sources (e.g., taxes on

## Ensuring non-discrimination through the distribution of revenue

In Brazil, the federal government is primarily responsible for university education, states for secondary education, and municipalities for primary and preschool education. According to the Brazilian Constitution of 1988, the federal government must apply at least 18 per cent of the taxes it collects to education. States and municipalities, in their turn, must apply 25 per cent of the taxes they collect to education. These resources can be applied to a range of education-related goods and services, including paying educational professionals, constructing and maintaining school facilities, scholarships, textbooks and school transportation. While these mandated funds are an important indication of Brazil's commitment to education, at the same time the country suffers from significant wealth inequality among states and municipalities. The result is that some states and municipalities can derive significant revenue from taxes, while others end up with much less revenue to direct to education. To help reduce these inequalities among states and municipalities, in 2007 Brazil created a budgetary fund, FUNDEB, from which poorer municipalities and even states can receive additional funds to ensure that they have the resources necessary to guarantee the right of education to all students in the country, regardless of where they live. In this context, Brazil thus provides a good example of a government responding in a thoughtful manner to its obligation of non-discrimination.<sup>23</sup>

tobacco earmarked for health programmes or tolls on roads earmarked for highway construction). Earmarking can help guarantee certain levels of funding for critical public services and thus potentially help guarantee the progressive realization of specific rights. However, if revenue is earmarked for areas that are not related (directly or indirectly) to human rights, earmarking may mean that funds that should otherwise be prioritized for rights-related programmes are going to non-priority areas. Earmarked revenue, whether from ODA or domestic sources, needs to be assessed, as does all government revenue, within the framework of the government's human rights obligations.

The following sections elaborate upon some human rights problems that can arise with regard to specific forms of revenue:

1. Corporate and individual income taxes
2. Value-added taxes and sales taxes
3. Property taxes
4. User fees
5. Revenue from extractive industries.

This section concludes with a consideration of the human rights implications of:

6. Inefficient revenue collection
7. Foregone revenue
8. Inaccuracies in revenue projection.

## 1. Corporate and individual income taxes

An income tax is a tax levied on the income of an individual or business. Because the absolute amount of tax owed generally increases as income increases, income taxes tend to be a form of revenue generation favoured by those concerned with equity in government revenue.

### Corporate income taxes

Corporate income taxes potentially apply to a range of companies, from small businesses to large corporations. A central consideration from a human rights perspective is whether a government is securing the maximum possible revenue from corporate income taxes. The issues and challenges associated with doing so vary with the size of the business, among other factors.

When a large proportion of business in a country is in the informal sector, the government might be missing out on significant revenue. Sometimes

businesses do not register and pay income tax because the associated laws and regulations are complex and difficult to understand. Sometimes, however, they may stay in the informal sector precisely to avoid paying taxes. If the government is not making sufficient efforts to enable businesses to understand the law and instituting incentives for businesses to pay taxes, it may be failing to comply with its obligation to secure adequate revenue to realize rights and to use MAR to advance ESCR. Whether a government's efforts are "sufficient" will, of course, depend in part on the capacities and resources of the governmental taxing authorities, and the government's efforts to strengthen these.

Corporate income taxes paid by large companies are a potentially significant source of revenue. The potential is rarely realized, however. Multinational corporations, in particular, often take advantage of tax havens, transfer pricing and other methods (some legal, some not) for minimizing their tax payments. If a government is not making sufficient efforts to close excessive "loopholes" and prevent tax evasion, it is failing to comply with its human rights obligations (see section B.7).

### Individual income taxes

Different approaches to individual income taxes must be analysed from the perspective of equality and non-discrimination. Economists distinguish, for example, between a proportional or "flat" tax (by which each income earner pays the same percentage of their income in income tax), and a "progressive" income tax system (in which the percentage of income paid in taxes rises as income increases, so that higher earners pay a greater share of their income in income tax).

The question has been asked, Why is a flat tax not acceptable from the perspective of equality and non-discrimination, given that each income earner pays an equal share of his or her income in this form of tax? From a human rights perspective, a person's income must be sufficient to enable him or her to access the goods and services necessary to enjoy their rights, including the right to food, health, education, housing, adequate standard of living, etc. A basic level of enjoyment depends upon a certain level of income (which will vary from country to country). A proportional income

tax on a low-income earner may cut into their capacity to buy necessary food, medicine or shelter, while the same tax rate on a higher income earner will not have a similar effect.

A progressive income tax, in which the tax rate increases as the taxpayer's income increases, could enable the government to bring in the same amount of revenue as, for example, a flat tax, while doing a better job of protecting low-income people's access to the enjoyment of their basic rights.

## 2. Value-added taxes and sales taxes

VAT and sales taxes are consumption taxes, in that the tax is generated for the government by the consumption of particular goods. In both cases, the consumer pays the tax. A principal difference between the two is the way they are collected. VAT is paid to the government by the producer(s) as the good is being produced and/or by the seller of the good. Sales tax is collected only at the point of sale. Because VAT is paid by registered enterprises at stages during the production process (as well as at point of sale), it is a surer form of revenue for the government than is a sales tax. Although it can also lend itself to evasion and fraud (principally through the credits and refunds to manufacturers and sellers that are built into the VAT system), securing the tax is not solely dependent upon a single sales transaction.

The government's obligation to secure adequate revenue to realize rights and to use MAR for the realization of ESCR should influence its decision as to the VAT threshold, that is, how big a business needs to be before it must register as part of the VAT system. A set of factors, including the government's tax-raising capacities, come into play in arriving at this decision. This same question, however, also has to be looked at from the perspective of non-discrimination.

VAT also raises potential human rights problems for consumers. All individuals purchasing particular goods whose price includes VAT, or which are subject to sales tax, will pay the same amount of tax regardless of their income. This means that the VAT or sales tax puts a

### The potential for discrimination in applying a VAT threshold<sup>24</sup>

A 2006 study pointed out that in **Uganda** the threshold for VAT registration was annual turnover of Shs 50 million (approximately US\$ 29,000). In addition, only enterprises that were registered could claim rebates on VAT they paid on inputs. This rule excluded informal enterprises from claiming rebates for VAT paid on items required to run businesses, such as weighing scales, juice makers, popcorn makers, groundnut paste makers, paraffin, etc. Researchers learned that most enterprises run by women were small, with an annual turnover that fell below the threshold. The result was that a larger share of businesses run by women than businesses run by men was negatively affected by the threshold rule.

greater burden on low-income individuals, in that they pay a greater portion of their income in VAT or sales tax on the same items that are bought by those with higher income. The taxes cut in a more significant way into their more limited resources, and thus inhibit their ability to access their rights to housing, food, health, education and so on.

Some research seems to indicate that the most effective way for a government to protect the poor while sustaining its revenue flow through VAT is not to lower VAT rates or exempt certain items from VAT, but to put into place compensatory measures specifically targeted to increase the real income of poorer households.<sup>25</sup> If a government believes that VAT is an essential source of revenue, whether it adopts this approach or another, it must ensure that through its reliance on VAT it is not discriminating on the basis of economic status.

### The poor are hit hardest by consumption taxes

The Institute of Applied Economic Research (IPEA) in **Brazil** found in the mid-2000s that:

“Families with monthly income of up to two minimum wages spend 53.9 per cent of their income on tax payments. They have to work 197 days per year just to pay for their taxes. By comparison, families with monthly income over 30 minimum wages pay proportionately less of their income on taxes (31.7 per cent), having to dedicate 106 days per year to pay their taxes .... In sum, the main mark of the Brazilian tax system, which has remained indelible throughout the years, is its huge regressiveness due to its preference for indirect taxes, with a perverse impact on the poorest layer of the population. This occurs because of the high tax incidence on consumption.”

The IPEA went on to point out that women and black Brazilians make up a disproportionately large share of those with monthly income up to two minimum wages, with the result that these two populations are particularly hard hit by these consumption taxes.<sup>26</sup>

In a 2003 judgment the Supreme Court of **Colombia** recognized the difficulties taxes on consumption can cause for people of low income. The legislature had passed a law that extended the VAT to essential staples. The Court found a number of problems with it. There had been no proper deliberation within the legislature. Moreover, the VAT was contrary to the progressive design of the tax system and it placed an undue burden on poor people, whose access to basic consumables was put in jeopardy. In short, the VAT threatened the constitution’s fundamental right to a basic level of subsistence (associated with the right to life, health, etc.) of the most disadvantaged segments of the population. The Supreme Court ruled the law unconstitutional.<sup>27</sup>

### 3. Property taxes

Property taxes, which are levied on land and/or the buildings on a piece of land, are generally considered more equitable than are sales taxes or VAT, because the more property someone owns, the more tax they pay. In addition, those who own property are generally wealthier, so access to enjoyment of their rights is less at risk from the imposition of a tax. However, the way that a property tax is structured and administered has its own human rights consequences. For example, if a government allows tax exemptions or relies on assessment policies that disproportionately benefit the well-to-do, this will not only undercut the equity of the tax but, by foregoing important revenue, could also result in failure by the government to secure adequate revenue to realize rights, and to use MAR to advance ESCR.

Because property is stationary and visible, and because property taxes generally do not rely on self-reporting, they may be a particularly important form of taxation in countries where it is difficult to secure adequate revenue from income taxes because of a failure by people to report income. In addition, because subnational, and particularly local, governments are generally better able to assess the value of the properties within their jurisdictions than is the national government, national governments tend not to rely on property taxes. These can instead be an important source of revenue for subnational governments, particularly because local governments often have few other lucrative revenue-raising options.

However, because property taxes are typically raised—and spent—at a subnational level, problems of inequality and discrimination can arise when viewed from the national level. The value of property normally varies from one region to another within a country, and between rural and urban areas. A heavy reliance on property tax as a source of revenue—if not otherwise balanced by supplementary funds provided by the national government—can result in some areas of a country having significantly fewer resources to spend on roads and other infrastructure, health and education services, etc. If the national government fails to take measures to balance out significant resource discrepancies, it could be failing to meet its obligation to ensure equality and non-discrimination.

### Reliance on property taxes undercuts education equality

In the **United States** public education has long been primarily the responsibility of state and local governments, and funding for education in most localities depends heavily on property taxes. This type of funding for education inevitably results in significant inequalities between schools in different localities, as schools in areas with higher property values (and related property taxes) are funded from a revenue pool that is correspondingly greater. While the US Government does provide some limited funding for education, the funding is often quite narrowly targeted and in any event falls far short of what would be necessary to smooth out the significant inequalities in local funding.<sup>28</sup>

## 4. User fees

Virtually all governments generate some revenue from the collection of fees on the use of specific government-provided goods and services. While some of these goods and services are not essential, others are fundamental to the enjoyment of specific rights. Of particular relevance in this context are fees related to education (e.g., school fees), health (e.g., fees for services at health clinics), water/sanitation (e.g., water tariffs) and the use of other social services. Depending upon how they are structured and applied, such user fees can negatively affect access to these basic goods and services by specific groups of people. Such impacts are normally felt by poor and low-income people and by women, and thus give rise to questions about discrimination on the basis of income and gender.

The ICESCR, for example, guarantees free and compulsory primary education of good quality. At the same time, governments in many countries charge user fees, either directly in the form of school fees, or indirectly through charges for textbooks, the cost of school uniforms, etc. Teachers in a number of countries, who are often underpaid, levy their own “charges” on students. All of these types of user fees (whether formal or informal) put more of a burden on poor and low-income families, thereby

either discouraging them from sending their children (or all their children) to school or forcing them to cut back on food, health care and shelter. If a governmental entity needs to charge fees to secure the revenue necessary to ensure quality education for all, measures must be put in place to ensure that these fees do not affect the access of poor and low-income children (including girls) to their right to education.

The right to health guarantees, at a minimum, access to essential services related to sexual, reproductive, maternal and child health, affordable and essential medicines, essential primary health care, emergency obstetric care, immunization and the prevention and treatment of endemic and epidemic diseases.<sup>29</sup> When governments put in place a system of fees for access to these services, these fees can and typically do have the

### User fees and retrogression

User fees can affect the enjoyment of a range of rights and, intentionally or not, may do so in a discriminatory manner. The introduction of user fees may also violate the obligation of non-retrogression. The Special Rapporteur on the right to food spoke of this problem in his report on his 2010 mission to **China**:<sup>30</sup>

“The introduction at the local level of user fees—in effect the marketization of basic services delivery—has introduced more insecurity, precisely at a time of deep social transformation when security is most highly valued. And for the poorest citizens, it has meant less real disposable income. For instance, poor farmers in rural areas in China may need to use their produce to raise cash to pay for medical bills, making illness the leading cause of rural poverty in China. According to a 2003 Chinese National Health Survey, 62 per cent of ill people in rural areas of China’s western regions needed treatment but could not afford it due to economic difficulties, triggering a vicious circle of illness leading to poverty, and the proportion of the poor population who fell into poverty due to illness or fell back into poverty due to illness rose from 22 per cent to 33 per cent between 1998 [and] 2003.”

effect of discouraging the poor and those of low income from accessing necessary services. In some cases they specifically discriminate on the basis of gender.

While human rights guarantees do not prevent governments from maintaining user fees as a means to support the provision of healthcare services, when they do depend on user fees, they must structure them in a manner that, at a minimum, does not prevent the poor and those of low income, as well as other vulnerable groups, from accessing basic and emergency services to deal with life-threatening injuries and diseases.

## 5. Revenue from extractive industries

A significant number of countries depend to some degree on revenue derived from extractive industries (oil, natural gas, mining, rubber, etc.) within the country. While such industries can be an essential source of income for the government, when viewed from the perspective of human rights obligations, a number of potential problems can arise.

*Firstly*, tax structures affecting extractive industries tend to be quite complex, often varying considerably from country to country. At the same time, a government's obligation to mobilize resources within a country to help realize people's rights implies that the terms of contracts with companies involved in resource extraction must be such as to ensure that the country receives the maximum revenue feasible from the exploitation of its resources. Of course, because of the complexities of the taxing schemes, it sometimes can be difficult to assess such contracts and their implementation to ensure whether the government has met its MAR obligations.

*Secondly*, the division of revenue derived from resource extraction among different states, provinces or areas of a country can also generate problems related to equality and non-discrimination. Resource extraction typically occurs in only a single or a few areas of a country. It most often occurs at sites far from urban centres, with a result that rural populations, including many indigenous peoples, often suffer disproportionately from the environmental degradation and pollution

### The loss of maximum revenue through royalty agreements<sup>31</sup>

As a result of changes made to the Mining Law in **Guatemala** in 1997, mining enterprises were required to pay royalties on production at a rate of only 1 per cent of total (non-auditable) revenue, down from an earlier royalty rate of 6 per cent. This 1 per cent rate was the lowest in the country's history and the lowest in all of Latin America. Despite clear community opposition to the company's presence and operations, Goldcorp Inc., which runs the Marlin Gold Mine in Guatemala, began extracting gold and silver in Sipakapa and San Miguel Ixtahuacán, San Marcos, in 2005. The mine has increased its output as the international price of gold has continued to rise (US\$ 1,744 per ounce as of January 2012). Throughout the time of the company's operations, the government continued to receive royalties at only 1 per cent, resulting in revenue that was considerably below what it would have been had the royalty rate stayed at 6 per cent.

In 2009, Christian Aid did a simple calculation to determine the amount of lost revenue. It concluded that Guatemala had forfeited US\$ 28 million between 2006 and 2008 alone. Such a loss has direct consequences on social spending. In 2006, for example, the foregone revenue amounted to more than what was spent on health infrastructure by the government in that same year.

It is strongly arguable that, by decreasing the amount of revenue it could have secured from mining royalties, with little return in the way of new jobs or other social benefits, the government of Guatemala was failing to use MAR to realize human rights.

associated with such industries. A critical question in this context is: What share of the revenue derived from those resources should be directed to the state or province where the extraction occurs and how much to the national budget for the benefit of the whole country? While there is no single or simple answer to this question, decisions related to the division of revenue must, in all cases, be shaped by a concern for equality and non-discrimination, and should, in particular, take into account the injury suffered by those living in close proximity to the industries.

Large international, as well as national, corporations, IFIs and banks may all be involved in natural resource extraction in a country. These same entities should work to ensure that the country receives the maximum possible revenue from natural resources extraction, and that the revenue is equitably shared within the country, so that funds are available to realize human rights.

### Taxing extractive industries

The tensions between human rights and revenue-raising in the extractive industries are made clear in a recent report of the UN Special Rapporteur on the right to food:<sup>32</sup>

“The Special Rapporteur notes that some stakeholders, notably the International Monetary Fund, recommend that **Cameroon** lower its taxes on the exploitation of natural resources, including forest resources. He disagrees entirely with this recommendation. Apart from the ‘race to the bottom’ that this would trigger in the other countries of the Congo Basin, and the resulting loss of revenue for the State, there is no need to lower taxes in order to attract the main forestry companies (companies like Wijmar and Rougier operate in the country despite the current level of taxation). Such a measure would serve not only to attract companies that are less technically qualified and less concerned about the sustainable exploitation of the forests and respect for the rights of local communities, but also to accelerate the deforestation of tropical forests, which are slow to regenerate, and this when the true value of forests is better understood. In fact, most countries of the Congo Basin have raised forest taxes considerably over the past decade. The World Bank estimates that the tax rate has stabilized at an average of 19 per cent of company turnover.”

## 6. Inefficient revenue collection

Inefficient revenue collection is a widespread problem, one that undercuts many governments' claims to lack adequate resources to realize human rights.

One useful way of analysing the collection of tax revenue (which normally comprises a major part of overall government revenue) is to compare potential tax revenue figures, that is, the maximum collectable taxes under the current taxation system and laws, with the actual tax revenue as set out in the government's annual budget documents or reports. Consistent gaps between such projected and actual tax revenue over several years may indicate inefficiencies in tax collection.

A number of factors may contribute to this problem, including consistent overprojection of tax revenue, poor tax collection structures and processes within government and tax evasion. The precise reasons in a given country would need to be analysed to determine what the government should be doing to correct the problem (see section B.8).

Inefficient tax collection may be rooted in a government's lack of capacity and/or in inadequate political will to enhance revenue collection.

### Multiple causes of inefficient tax collection

Taxes are **Liberia's** main source of government revenue, but tax evasion and withholding of taxes present serious challenges. Still recovering from years of war, in 2011 Liberia did not yet have in place adequate mechanisms for enforcing tax laws and punishing evaders, and it was common for both individuals and businesses to withhold payments. This situation was compounded by the fact that tax officials had to travel to distant areas to collect taxes and then return to Monrovia and deposit the money in the consolidated account of the Ministry of Finance; this system provided considerable scope for manipulation of revenue. There was also significant cross-border tax evasion, when, for example, businesses in Liberia involved in joint ventures with businesses in neighbouring countries used schemes to avoid paying the full taxes owed to both countries.<sup>33</sup>

With greater political will and enhanced capacity, a government, without changing its tax structure, may be able to greatly improve its fiscal position simply by putting into place processes that enhance revenue collection.

### Successful approaches to enhancing efficiency in tax collection

In recent years the Government of **Cameroon** computerized its system of revenue collection at the port of Douala, which reduced opportunities for corruption at the same time as improving revenue collection. It also set up a system of unique identifiers for all business persons that allowed it to easily track the payment of taxes, including of arrears, on their various companies. In addition, in the first half of 2008 it enacted stringent measures to collect the land fee, an annual property tax assessed on the basis of the size of the piece of land and height of the building on the land. Prior to this, few citizens paid the land fee. One result of these various initiatives was that overall government revenue increased significantly in 2008.<sup>34</sup>

In the late 1990s **South Africa** computerized its tax system, simplified its collection process and identified those areas that offered the greatest promise of increased revenue. Since then it has successfully increased its rate of revenue collection. It appears that the reasons behind this turnaround were not simply technical, they were also cultural. As part of its effort to enhance revenue collection, South Africa considered the reasons why people and companies do or do not pay taxes, and integrated its findings into the development of its strategy.<sup>35</sup>

Taking a somewhat different approach, **Tanzania** conducted a study in 2003 into how to increase the efficiency of the tax system. Following the study, it raised the VAT registration threshold from TShs 20 million (US\$ 15,800) to TShs 40 million (US\$ 36,800). Because of the higher threshold, 7,000 of 15,320 VAT taxpayers were deregistered effective from 1 July 2004. By eliminating the smaller businesses from the system, the government was less encumbered by administrative difficulties in collecting from small businesses, and was able to direct its resources to more effective enforcement on payments from the larger companies. VAT revenue increased from TShs 230 billion (US\$ 181.7 million) in June 2004 to TShs 336 billion (US\$ 265.4 million) in June 2006.<sup>36</sup>

In situations where the government (whether at the national or subnational level) does not have an efficient and effective system for collecting revenue and at the same time is not making concerted efforts, such as those described above, to improve revenue collection, it is failing to comply with its obligation to use MAR to advance ESCR.

The problem of inefficient tax collection is compounded, of course, when individuals and companies deliberately evade taxes. Tax evasion is an endemic drain on revenue that could be used for the realization of rights. The problem of tax evasion is particularly egregious in countries where poverty and inequality are already high and the tax base is low.<sup>37</sup> About 8 per cent of the world's wealth, or US\$ 7.6 trillion, is currently held in tax havens.<sup>38</sup> Governments worldwide reportedly lose US\$ 3.1 trillion annually to tax evasion, equivalent to about half the world's total expenditure on health care.<sup>39</sup> While high-income countries are among the biggest losers in absolute terms, low- and middle-income countries are particularly vulnerable to these losses.<sup>40</sup>

### Small-scale businesses and tax evasion

In **India**, for years small businesses and significant numbers of individuals or entities engaged in unregistered or even illegal economic activities have evaded taxes completely. In 2011 researchers estimated that the underground economy was equivalent to between 60 per cent and 150 per cent of the registered (formal) economy. They concluded that, if revenue were collected from the former through an efficient tax administration, it would be possible to generate at least 50 per cent more tax revenue.<sup>41</sup>

When a government does not take action to try to curtail this type of behaviour (thus failing to ensure that taxes are paid as they should be), it is failing to comply with its MAR obligation to advance ESCR.

Considerable attention has been paid in different countries to the problem of "false invoicing" between companies, which is designed to incorrectly represent the income or expenses of the companies, resulting in lower tax liabilities. A similar problem, called transfer pricing abuse, exists when multinational companies that have subsidiaries in different countries falsely

represent the price of goods and services sold between them. Tax evasion by individuals represents a similar problem.

### **Poverty results from inefficient tax collection coupled with poor public expenditure**

In Latin America inadequate revenue collection, combined with poorly targeted public expenditure, has led to a situation where poverty and inequality have not been reduced as they should have been. According to a 2010 report, inequality in Latin America and Europe is very similar before the effect of direct taxes and government transfers are taken into account. After they have been factored in, inequality in Europe falls considerably, while inequality in Latin America remains largely unchanged. The tax problem in Latin America is not low tax rates, but the fact that many taxes are simply not collected, due to illegal evasion of taxes. Collection of direct taxes is very low compared with indirect tax collection, which also makes total tax collection relatively regressive in Latin America. In addition, exemptions and loopholes in the tax code favour high-income households. In Europe most tax systems tend to be progressive, while direct tax collection and indirect tax collection produce about the same amount of revenue.<sup>42</sup>

## **7. Foregone revenue**

The obligation to allocate adequate funds to ensure the realization of rights (see section C.5) and to use MAR to realize those rights or aspects of rights whose realization is conditioned by the availability of resources (see section C.6) implies not simply that a government should ensure that its tax collection is efficient and effective, but also that it is not unnecessarily foregoing revenue that could be directed to the realization of rights.

Governments forego revenue when they decide as a matter of policy to set tax rates at a low level or provide tax breaks/holidays to investors. Tax rates may be set low for all taxpayers or for specific groups of taxpayers (individual or corporate). If tax rates could be higher without, for example, provoking widespread tax evasion, thereby enabling the government to

secure more revenue, a failure to set the rates higher could amount to a failure to use MAR to advance ESCR and could result in failure to secure adequate revenue necessary to realize rights requiring immediate realization. The example of mining royalties in Guatemala was cited above (section B.5).

### **Tax expenditures mean less revenue for realization of human rights**

In the 2010-2011 Indian Union Budget the government estimated that tax expenditure (tax breaks or tax privileges) by the central government alone amounted to 85 per cent of the total tax revenue for 2009/2010, and the trend was increasing.<sup>43</sup> This information would seem to indicate that there was potential for significant increases in tax revenue if many of the tax expenditures, especially those related to business activities, were to be eliminated.

Also, governments (national, but also state and local) often provide tax breaks (or tax holidays) to companies as an incentive to invest in the country or locality/state. The revenue that is foregone can be quite significant. Such incentives are typically considered necessary to secure investment. Analysts, however, differ as to the necessity of these tax breaks, some arguing that in many cases governments are unnecessarily generous in the concessions they offer, either because the investment would have occurred even with less generous concessions or the loss of revenue from the concessions offered outweigh the benefits derived from the investment.<sup>44</sup> Where a government does offer tax breaks that are unnecessarily generous, it is arguably falling short in meeting its MAR obligations to advance ESCR.

Governments also forego revenue when they decide to enter into a trade agreement that requires lower or no tariffs on incoming goods or on exports. In a number of countries these trade taxes amount to a significant share of the budget, and the loss of that revenue is likely to result in cuts to goods and services necessary to realize human rights.

In a case where the government cuts the budget for rights-related services, programmes or institutions because of the decrease in revenue, in the

absence of substantial evidence that the net benefit in rights terms from the trade agreement will be positive, the government could be failing to meet its obligation to effectively or to progressively realize human rights. Similarly, even where no cuts are made in essential services, by foregoing the revenue from tariffs the government could be failing to use MAR to realize human rights.

### **Illusions created by tax incentives**

In recent years the majority of states in the United States have adopted tax incentives to attract the film industry from California to their territories. The assumption of the state legislatures has been that, when films are produced in a state, people living there are hired as actors, local restaurants and hotels have more business and, in general, the economy of the state gains. In 2013 the Maryland state legislature requested a review of the benefits of such a law it had first adopted in 2001. The review was undertaken by the Maryland Department of Legislative Services (DLS). It concluded that the law should be allowed to expire, because in net terms it cost the state millions of dollars each year. Because so many states had, over the years, started offering incentives, Maryland had had to increase what it offered in order to compete with other states, to the point where the income gained by people in Maryland and taxes generated by film industry activity were much less than the tax incentive provided to the film industry. The DLS stressed that the net loss to the state was enhanced by the fact that funds directed to the tax incentive were then not available for other state programmes that would have generated more jobs and thus more income to people in the state.<sup>45</sup>

## **8. Inaccuracies in revenue projection**

The World Bank has advised that realistic and reasonably accurate revenue projections should be a primary objective of forecasts in the annual budget process. However, the Bank recognizes that underestimation and overestimation of revenue is a common problem in many countries, and notes that forecast revenue can be unintentionally, but also intentionally, under- or overstated. Governments in developing and transition countries, for example, often tend to overestimate revenue, and this can help pressure

tax administrators to perform tax collection tasks effectively. On the other hand, subnational or local governments are likely to underestimate revenue, sometimes for political and other reasons, including aversion to deficits and the need to request increased transfers from the central government.<sup>46</sup>

Problems arise, from a human rights perspective, when actual revenue comes in at significantly lower or higher levels than projected. When there is a lack of transparency in revenue forecasting and collection together with weak regulation of excess revenue, underestimation of revenue can generate problems related to a government's MAR obligations. For example, an IMF working paper that focuses on revenue forecasting in low-income countries points out that most low-income countries produce one-year budget estimates based on extrapolation, making little use of more complex forecasting techniques. In addition, as a result of a lack of transparency in the forecasting process, government actors are in a position to underproject revenue. This allows for diversion of "excess" revenue that comes in, without the diversion being spotted. This is particularly common with regard to revenue from extractive industries.<sup>47</sup>

Even where excess revenue is not diverted to corrupt purposes, the situation can be problematic. MoFs in many countries have considerable discretion in allocating excess revenue. In some countries MoFs habitually underestimate revenue, which, in turn, provides them with the opportunity to allocate at their discretion a significant amount of the revenue. The CESCR has said that the MAR obligation means that the government, in its budget, must prioritize ESCR. However, there is little in the way of regulation of such excess revenue that directs it to be utilized in line with the government's human rights obligations. Regulating the use of excess revenue could be an important step in the process of ensuring that the government's budget is used to realize people's human rights.

Overestimation of revenue can lead to problems with a government's compliance with the obligation of progressive achievement of ESCR. When a government overprojects revenue, it is faced with the necessity to cut spending. This, in turn, can result in cuts to expenditures on critical ESCR-related programmes. Alternatively, overestimation can result in the

government's having, in the end, inadequate resources to realize rights whose realization is not conditioned on the availability of resources. In either case, when revenue has been overprojected and it is not possible to fund all programmes, decisions as to which programmes to fund should be guided by human rights priorities and principles.

### **Key points to remember about human rights obligations when considering government revenue**

- The decision a government makes about how it is going to raise its revenue has a substantial impact on people's enjoyment of their rights. Human rights are realized not simply through how the government allocates and spends the budget, but through the choices it makes with regard to raising revenue.
- The government's obligation to allocate adequate resources to fully realize rights that are not conditioned on resource availability, and to use MAR to realize ESCR, means that it must not only seek to bring in maximum revenue in keeping with economic sustainability, but must also work to ensure that revenue is collected in an efficient and effective manner, maximum effort is made to curb tax evasion and tax expenditures are justifiable on the basis of sound economic analysis.
- Non-discrimination means that the impact of the government's revenue-raising schemes must not have a disproportionate impact on certain groups, particularly those in the lowest income brackets, in a negative manner. The government should do regular tax incidence analyses to assess the impact on different groups of the ways it raises revenue. In particular, government should take measures to ensure that the tax system is progressive, recognizing that regressive taxes, such as user fees, disproportionately affect the poorest.

## C. Budget allocations

An allocation in a government’s budget is the amount the government intends to spend for a designated purpose. While allocations are a critical element of a budget, on their own they provide limited insight into a government’s compliance with its human rights obligations. To get a fuller picture of the meaning of an allocation, it is essential to look at what happens or should happen prior to the allocation—during the development of relevant policies and plans.

Too often there is a “disconnect” between policies, plans and allocations. For example, budgets typically increase in an incremental fashion from one year to the next. Thus, when a new policy or plan with a relatively clear bearing on human rights is put into place, it may not automatically be accommodated in existing budget allocations. Even when a ministry recognizes that the budget needs to increase by more than the normal increment to accommodate the new programme, this may not happen. Those responsible for designing and implementing a policy or plan are often not involved in costing, have no expertise in doing so, and may not understand the importance of this step of the process. At the same time, those who do the costing are typically not policy experts, and so may not understand all of the elements needed in a programme. As a result, the allocations may be inadequate to implement the new policy or plan.

To understand the meaning of an allocation, it is also essential to consider what happens after an allocation is approved—by looking at *how much* of the allocation was spent and *how* it was spent. An allocation may appear to be in line with the government’s human rights commitments, but various things can go wrong when it comes to spending the allocation. Expenditures are addressed in Chapter IV.

Even though policies and plans, as well as expenditures, allow for a more complete understanding of allocations in a budget, it is nonetheless possible to gain useful insights into the government’s compliance with its human rights obligations by focusing on the allocations themselves. The following sections address some important issues:

- The first three sections explore some ways in which allocations may be discriminatory, if not by intent, then by their impact. Following an overview of non-discrimination in allocations (section C.1), section C.2 focuses on the common problem of geographical disparities in allocations. A fuller understanding of how such disparities happen is addressed in section C.3, which looks at the formulas national governments use to allocate funds to subnational governments.
- Section C.4 looks at the obligations of progressive realization and non-retrogression by discussing increases in allocations and what the obligation of non-retrogression means for allocations.
- The final two sections discuss important implications for allocations of the obligation to take “appropriate”, “adequate” and “effective” measures to realize immediately certain rights (section C.5) and CESCR’s interpretation of the MAR obligation to mean that governments must give “due priority” in their budgets to ESCR (section C.6).

## 1. Non-discrimination in allocations

Analysing allocations can provide indications of a government’s priorities and potentially reveal discriminatory policies. Human rights law prohibits both direct and indirect discrimination. Recognizing this, it is important to look for both: (1) allocations where different treatment of different groups is apparent from line items in the budgets (when considered together with other relevant data, such as population figures); and (2) allocations that seem equitable on their face, but which, for various reasons, affect different groups differently.

The most common forms of discrimination in government budgets are those based on gender, ethnicity and socioeconomic status. Discrimination is often multidimensional, because, for example, ethnic minorities are often disproportionately poor, and women are typically the poorest of the poor. The examples provided in this and other sections will often reflect this

type of multidimensional discrimination. The following two sections, on geographical disparities and formulas for allocations, are closely related to these categories, but are addressed in separate sections because they are complex in their own right.

### **Discrimination on the basis of ethnicity (and poverty)**

The Glass of Milk Programme (Vaso de Leche Escolar, or VLE), which ran from 2005 to 2008 in Guatemala, had as its stated objective to provide a daily glass of fortified milk to school-aged students in regions categorized as being at high risk for food insecurity. In reality, the VLE was an initiative of the National Dairy Chain and the Chamber of Commerce to reactivate the national dairy industry, pushing for investments in farms and cold chains as well as commercialization and distribution of dairy products, with international competition in mind.<sup>48</sup> The programme started as a pilot project in 2005, reaching 1,108 schools in 35 municipalities of five departments and two zones in the capital city. In 2006, the programme expanded its services to 92 municipalities in 16 departments, plus two zones in Guatemala City, serving 3,253 schools. However, only 9 per cent of rations were distributed to areas categorized as highly vulnerable to food insecurity while 33 per cent were distributed to departments considered low risk. The former were the poorest areas and had the highest percentage of indigenous population. Overall, only 37.4 per cent of budget allocated to the programme was executed in areas categorized with high to very high vulnerability to food insecurity, while 62.5 per cent of the budget was executed in areas categorized as of moderate to low vulnerability.<sup>49</sup>

### Discrimination on the basis of health status

The Institute for Social Security and Services for State Workers (ISSSTE) provides and regulates health services for public employees in **Mexico**. Public employees in Sonora state are covered by the state institute (ISSSTESON). In the past, by regulations governing these services, these employees were denied health services if they had certain pre-existing conditions, such as diabetes or hypertension. In 2007, a Mexican civil society group, Sonora Ciudadana, took the case of one such worker to court, arguing that the employee's right to health was being unfairly denied. ISSSTESON countered, claiming that affiliating all previously excluded public employees was not financially feasible. Sonora Ciudadana submitted hundreds of requests for information, including for detailed budget information, seeking to demonstrate that the government had money that could be used for this purpose. From the information it received it learned that:

- While ISSSTESON had incurred deficits every year, several public institutions owed it considerable amounts of money; they had not paid the quotas due from them to affiliate their employees;
- Each year ISSSTESON paid increasing amounts to private health institutes to provide services that it could not offer. From 2002 to 2009 it also spent over 400 million pesos (US\$ 38 million) to buy out-of-stock medicines from private drug stores, at a considerably higher price than they were paying through their own procurement process;
- In the state budget as a whole, there were numerous non-essential expenditures that could be cut back in order to make room for an increased budget for ISSSTESON.

The court ordered ISSSTESON to provide health services to the worker in question. In the end Sonora Ciudadana succeeded in securing a ruling from the Supreme Court that affected a large number of public workers who suffered from pre-existing medical conditions at the time they were hired.<sup>50</sup>

## Remedial measures to counteract gender and income discrimination

In **Tanzania**, in the late 1990s, the government initiated a Community Education Fund, which provided matching grants to schools related to the amount the school had raised through fees, as well as what it had raised from selling the output of school farms and parents' voluntary contributions. The government used the grants to help equalize access to education among different communities: for schools whose families had above average income, the government matched 100 per cent of the money raised, for those of average income, 150 per cent of the money raised, and, for those with below average income, 200 per cent of the money raised. This sliding scale enabled schools in poor communities to charge lower fees. Not only did these special measures avoid entrenching discrimination in access to education on the basis of socioeconomic status, but they also helped schools avoid gender discrimination, as families would be less inclined to withdraw their daughters from school because they could not afford the fees.<sup>51</sup>

Human rights law requires States to take special measures to help diminish and, if possible, eliminate the lingering effects of historical or systemic discrimination. This has potential implications for the budget as such measures may require the allocation of more resources to traditionally neglected groups. Differential treatment in the budget in this context does not amount to discrimination, although, as the CESCR has made clear, allocations specifically designed for these purposes must be discontinued once the effects of historical or systemic discrimination have dissipated.

## Special measures in the budget

The Constitution of **India** guarantees the protection of scheduled castes and tribes. In 1980 the Planning Commission of India introduced a Special Component Plan for Scheduled Castes (SCP), mandating the government to direct a specific proportion of the government's overall funds to programmes for Dalits. If Dalits comprise 16 per cent of the population, for example, then at least 16 per cent of funds and associated benefits should be directed to them. In 2006–2007 the SCP was renamed the Scheduled Caste Sub-Plan (SCSP), which aimed to promote education, social and economic development of Dalits and to play a “positive interventionist role to neutralise the accumulated distortions of the past” (National Policy of Education, 1986).

In 1995 the Planning Commission created a code, 789, which ministries and departments used to identify funds for programmes for Dalits. However, in 2007 the National Coalition for Dalit Human Rights (NCDHR) filed a Right to Information (RTI) case to find out why the Indian Government was not using the code, as it was impossible to determine whether funds were being directed to Dalits at the required level. Not satisfied with the response to its petition, it succeeded in generating sufficient pressure for the Government to agree to use the code, by referring to media, involving members of the legislature and mobilizing members of the Dalit community who organized protests.

The NCDHR discovered that code 789 funds were inappropriately directed to the 2010 Commonwealth Games, and it secured a promise from the Government that the funds would be replaced. Despite these gains, the work to ensure that the SCP/SCSP measures are properly implemented continues. For example, according to a 2011 report, the Plan has been plagued by chronic underallocation of funds. Notwithstanding the constitutional guarantee, in 2007/08 only 6.1 per cent of developmental funds were channelled through the SCP/SCSP, and in 2011/12 the allocation remained at 8.84 per cent of the total outlay, when it should have been 16.2 per cent.<sup>52</sup>

## 2. Non-discrimination and geographical disparities

Certain areas of a country (or a state or a city) are often underserved in sectors such as health, education, justice and affordable housing, compared with other areas. This poorer service is typically reflected in lower *per capita* allocations (and expenditure) in the government's budget.

Three significant reasons for such geographical disparities are leakages, the centralization of political power and a lack of information.

*Firstly*, leakage in this context refers primarily to corruption in the handling of public funds, so that funds allocated or disbursed for a given purpose are diverted to other purposes, often for the personal enrichment of government officials or use by politicians for their own ends. There is typically a much higher rate of leakage in money intended for poor areas than rich at the same time that government services in poor areas often manage government funds less efficiently. Thus, even if allocations were equitable, expenditures might not be.

*Secondly*, those in power often allocate a disproportionate share of the budget to the geographical areas that will benefit them, and political power is often centred in cities. Moreover, geographical disparities resulting from these inequitable allocations can be aggravated by decentralization: urban areas tend to bring in more revenue than do rural areas and thus urban governments typically start with more revenue. Transferring responsibilities from central government to local governments without at the same time transferring resources adequate for carrying out responsibilities can result in an even greater imbalance between urban and rural areas. Local authorities may often be expected to provide the resources for any added responsibilities, but those authorities, particularly in rural areas, can typically generate quite limited added revenue.

*Thirdly*, the political centre is often poorly informed or unwilling to recognize the rights and specific needs of people in specific geographical areas and fails to monitor the performance of government programmes in reaching the poor in those areas. If there is no poverty map and no data concerning the effectiveness of spending in poor areas, there is a greater

likelihood of underfunding or ineffective funding. Asymmetric information entrenches the disparity by further barring people living in poor areas from understanding their rights and claiming from their government the services that should help them realize those rights.<sup>53</sup>

### Geography affects access to social services

The UN Special Rapporteur on the right to food found that geography was a factor determining access to social services in **China**:

“One major reason for the widening of the rural-urban gap resides in the fact that local governments have insufficient revenues to fulfil all the tasks assigned to them. A large number of essential services, including education, health care and old-age pensions, are provided at the local level, and it is estimated that local governments finance 80 per cent or more of basic health and education expenditures. While levels of subsidies from the central Government are significant—fiscal transfers (excluding tax rebates) from the centre to local governments increased from 435 billion yuan in 2002 to 2.4 trillion yuan in 2009—there remains a high inequality in the distribution of medical and health resources. It is estimated that in 2005, only 25 per cent of public health resources were devoted to rural residents, although they make up close to 60 per cent of the total population.”<sup>54</sup>

This geographical unevenness in allocations is problematic not only from the perspective of the obligation of non-discrimination, but also the obligation to use MAR to realize rights. The CESCR has said that MAR means that governments must use their funds efficiently. Directing the same amount of funds for a particular service to an underserved area can be a more “efficient” use of the funds than would be directing those funds to a more adequately served area, because, for example, more people could save more time in travelling to access the particular service than would those in a better-served area, where services are already more accessible. While these conclusions are fairly straightforward, making the most equitable and efficient use of funds in such cases can be quite challenging. In particular, it raises questions of whether and how to target funds so that they reach the areas and people who most need them.

### 3. Non-discrimination and formulas used in allocations

A related issue and a frequent focus of attention of those concerned with equality and non-discrimination in the government's budget are the formulas a national government uses to disburse funds to subnational units of government. These funds can be in the form of "block grants", which the subnational government may use according to the priorities it sets within its own sphere of authority. They may also be in the form of "conditional grants", which are normally earmarked to be used for specific purposes (e.g., for education or for health infrastructure projects). These grants have

#### Special Rapporteur finds that formula results in discrimination

In a 2011 mission to **Namibia** the UN Special Rapporteur on the rights to water and sanitation acknowledged the efforts being made by the government to improve sanitation in the country through increasing allocations to the sector. Despite this, she found that:

"... Government expenditure on rural sanitation has been much slower than that devoted to urban and peri-urban areas .... Efforts have been made to prioritize the most marginalized rural regions, namely Kavango, Omusati and Oshana, and they have been allocated a higher budget in the past few years. A more strategic and consistent approach, however, will be needed to improve rural sanitation. For instance, financial assistance to regional councils for sanitation is supposed to be determined according to population and geographical size, number of settlement areas, existing infrastructure, income and performance level of the region. However, a recent analysis conducted by auditors from the Office of the Auditor General found that the actual subsidy allocation to the regional councils is not determined according to the said criteria. The study further indicates that regions that are geographically vast with a high population, low income levels and poor infrastructure receive less subsidy than regions that are small with a low population, but with better income levels and infrastructure."<sup>55</sup>

been mentioned above (see section B), because they are a form of revenue for subnational governments. They generally take the form of allocations in the national government's budget.

The formulas are usually based on a number of factors, such as population and poverty levels in different subnational units, etc. While they may appear neutral and, in fact, sensitive to human rights considerations, the impact of the formulas may be counterproductive to the goals of advancing equality and avoiding discrimination.

A number of governments have sought to address these kinds of disparities. In navigating this challenge, governments need to keep in mind the CESCR's statement that "failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition ... to address and eliminate the discrimination, as a matter of priority". Governments may face dilemmas when attempting to eliminate discrimination, however, since this would typically require either that more resources are allocated to those areas that currently receive less *per capita* funding or, alternatively, existing funding is redirected, away from more favoured areas to those less favoured. Doing the latter could be problematic, because it could amount to a retrogressive measure with respect to people in the more favoured areas.

### Pakistan revises formula to realize greater equity<sup>56</sup>

In **Pakistan** in 2009/2010 the national and provincial governments agreed on a revised formula for allocating revenue, so that the poorer and more sparsely populated provinces would receive a larger share. Under this new formula, which took into account population (82 per cent), poverty (10.5 per cent), revenue (5 per cent) and Inverse Population Density (2.7 per cent), Punjab, a wealthier part of the country with approximately 56 per cent of the population and generating around 65 per cent of the national government's revenue, was allocated only 52.74 per cent of the allocations.

## 4. Progressive realization and non-retrogression in allocations

The obligation of progressive realization means that a government should allocate funds for ESCR areas in such a way as to ensure the progressive realization of people's rights (where realization of rights is conditioned by the availability of resources).

### Progressive realization of children's right to an adequate standard of living

In 1998 **South Africa** introduced a Child Support Grant (CSG). The CSG was essentially a social security payment intended, in particular, to ensure an adequate standard of living for the poorest children. The initial monthly grant amount was R100 per eligible child up to the age of seven. In 2000 two civil society groups, the Institute for Democracy in South Africa (IDASA) and the Children's Institute, found that, due to inflation, the value of the grant had fallen in real terms since its introduction in 1998. This evidence was used in a number of submissions to relevant government departments and legislative committees in 2000 and 2001. The grant was increased to R110 in July 2001, and increased every year from then until 2010 at a rate equal to or slightly more than inflation.

Over time, civil society has repeatedly used budget analysis to demonstrate that public resources existed that were sufficient to finance an extension of the CSG to children and young people up to 18 years old, thereby potentially facilitating the progressive realization of their rights. Budget allocations for the CSG went from R2.4 billion (US\$ 315 million) to R14.4 billion (US\$ 1.89 billion) between 2001 and 2008, and the number of beneficiaries increased from 1.9 million in 2001 to more than 9 million in 2009, in part because the age of the children who could apply for the grant increased from 7 years at its inception to 18 years as of 2012.<sup>57</sup>

The CESCR has said that the government's obligation to continuously improve conditions conducive to the realization of human rights means that resources allocated to the realization of ESCR should increase proportionally to any overall increase in resources.<sup>58</sup> This would imply, with respect to the government's budget, that allocations (and expenditure) on economic and social rights-related areas should increase by at least the same rate as the overall budget. In other words, if the total government budget increases by 5 per cent from one year to the next, funding for such critical areas as education, health and water should increase by 5 per cent or more.

### **Increases in the budget is evidence of a serious commitment**

In the period between 2000 and 2010, **South Africa** suffered from a range of serious health problems, including the HIV/AIDS epidemic as well as very high rates of infant and maternal mortality. During this same period, the health budget in the country did not meet the 15 per cent target set in the Abuja Declaration (for health as a share of government budgets in Africa). Despite this shortcoming, health was demonstrably a priority for both national and provincial governments. One piece of evidence was that, as the overall, consolidated (national and provincial) budget of the country increased, allocations for the health sector did likewise. Particularly notable is the fact that, during two periods of time when the overall economy contracted, the government, at both the national and provincial levels, used the budget to counter the downturn. At these points the growth in the health budget kept pace with the growth in the overall budget. This is particularly important, since it is typically at points of economic downturn that the need for government services increases.<sup>59</sup>

Of course, assessing whether a government is progressively realizing a right normally involves analysing a complex set of factors, not just the budget.<sup>60</sup> The Brazilian civil society group Instituto de Estudos Socioeconômicos (INESC) has pointed to the importance of the government's setting goals to realize rights (which are articulated in policies and plans) and identifying indicators to assess the realization of rights.<sup>61</sup> The role and centrality of the government's budget in such a

process will vary not simply from country to country, but from situation to situation within a country. An increase in the government's budget in an area that should help advance a particular right will not automatically lead to greater realization of that right.

### Budget increase goes hand in hand with retrogression

A 2010 study done by Queen's University Belfast (see section A) detailed a policy development by the United Kingdom Government that favoured home ownership over home rental, as well as public-private partnerships in the building and maintenance of social housing. Following this policy shift, in **Northern Ireland** from 2003 to 2008 (with the exception of one year), funding for housing and community amenities increased. During the same period, however, two important indicators of shortcomings in the housing situation—waiting lists for social housing and the number of households in “housing stress” (at risk of being homeless)—grew. In other words, despite the increase in expenditure for social housing, the Northern Ireland Government did not achieve results amounting to compliance with its obligation of progressive achievement with regard to the right to housing.<sup>62</sup>

The CESCR has also said that the obligation of governments to avoid retrogressive measures implies that there should be no unjustified reduction in public expenditure devoted to implementing ESCR in the absence of adequate compensatory measures aimed to protect those who might be affected by the cuts. This does not mean that, once introduced, a programme or budget line item can never be reduced or eliminated. Indeed, the need for a programme may have come to an end and, in such a situation, cutting its budget would not constitute retrogression. The obligation of non-retrogression does, however, require recognition on the part of the government that cutting allocations (particularly those related to recurrent expenditures) generally diminishes some people's enjoyment of their rights. If the government does not, in such a situation, introduce alternative programmes or means to compensate for any negative consequences engendered by the reduction in allocations, it would be failing to comply with its obligation to avoid retrogression.

### The need to justify budget cuts

In 2007 a local government in Maharashtra State in **India**, together with a number of civil society groups, started a health counselling programme designed to improve health services for pregnant women and children in Melghat, a low-income tribal area within the state. Two years later an independent evaluation of the programme concluded that it had enabled qualitative and quantitative improvements in health services, including a 13 per cent increase in patients receiving outpatient and in-house services, while expenditures increased by less than 5 per cent. The evaluation also found improvements in referral facilities, ambulance services and food quality for severely malnourished babies. Despite this, the authorities ended the programme in early 2010 without any explanation. A civil society group sought the intervention of the Mumbai High Court, citing underutilization of allocations in key healthcare areas, the inadequacy of funds allocated to the programme and the low level of health spending in Melghat compared with other districts. In December 2010 the High Court held a hearing to review the evidence and ordered the continuation of the programme.<sup>63</sup>

In situations of economic contraction, governments must take care in making necessary budget cuts in order to ensure that, as a priority, the most vulnerable are protected.<sup>64</sup>

### Budget cuts hit the most vulnerable hardest

In 2010 the **Republic of Ireland**'s health budget was cut by €800 million or 5 per cent, in 2011 by €746 million (5 per cent) and in 2012 by €543 million or approximately 4 per cent. Only 10 per cent of households in lower income groups have private medical insurance, while 55 per cent of higher income households do. As government-sponsored healthcare services are cut in response to budget stringencies, it is likely that those more dependent on government-provided services will be hit harder. Thus, retrogressive measures can be, and often are, at the same time discriminatory. In Ireland, vulnerable groups such as the traveller community, asylum seekers and the disabled, who already have difficulties accessing quality healthcare services, were likely to be hit hardest.<sup>65</sup>

An example of a government taking careful steps in making cuts is provided by Portugal.

### Taking care to avoid retrogression

The **Portuguese** Constitution includes a universal right to social security. For a number of years, the government provided a family allowance to all families, a flat-rate benefit based upon the number of children in the family. Allowances for those who were formally employed came from a contribution system funded by employers and employees. Funds from general taxation covered allowances to those who had never contributed to the former pool, or, having done so, did not meet the entitlement conditions. Children and young people were entitled to the child allowance regardless of their situation.

In 1997, in the face of fiscal constraints due, in part, to a decrease in contributions to the social security system as a result of unemployment, underemployment and demographic changes, the government decided it needed to modify the programme, prioritizing poorer families with more children. Families were grouped into resource

brackets. As a family's resources increased, the amount of the benefit decreased; some families in the higher resource brackets were no longer entitled to the benefit. The government did not consider this approach to be retrogressive. It saw it as a necessary measure in light of the tighter budget. The sliding scale sought to ensure that people would continue to have the income necessary to realize their rights, and the government had prioritized the most vulnerable.<sup>66</sup>

## **5. Appropriate, effective and adequate allocations for immediate realization**

As was discussed in Chapter II, there are numerous rights, particularly those articulated in the ICCPR, which the government has an obligation to realize immediately, and in respect of which economic considerations are no excuse for their non-realization. The government is obligated to immediately take "appropriate" measures, which relevant treaty bodies have interpreted to include "effective" and "adequate" measures. A key measure at the government's disposal is, of course, the public budget.

### Allocations neither effective nor adequate<sup>67</sup>

ICCPR article 10 guarantees that "(a)ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Despite this, in a March 2013 report the UN Joint Human Rights Office in the **Democratic Republic of Congo** described how this right was being neither effectively nor adequately realized. Its evidence included details about the government's budget:

"Firstly, ... in recent years, the government's budget policy on the prison system appears to be deficient and inconsistent .... An examination of the proportion allocated to the prison service in the Finance Act establishing the State budget for 2009, 2010 and 2011 shows that only 11 central prisons and three detention camps receive a regular budget. It therefore appears that district, urban and territorial prisons, as well as annexes to prisons and other detention camps, have no budget allocation and, in the best case scenario, receive money from the State (at central or provincial level) in a sporadic fashion ....

"Secondly, the prison budget should be determined according to the prison population. However, between 2009 and 2011, except for the prison of Makala, which received higher sums, the central prisons mentioned in the state budgets all received the same amount to feed their detainees, regardless of the average prison population, which differs significantly from one institution to the other. Consequently, the central prison of Bukavu, which has a capacity of 500 detainees and had an actual prison population of more than 1,505 detainees on 1 October 2012, received exactly the same food budget for its detainees as, for example, the central prisons of Mbandaka and Matadi, despite the latter having a capacity of 150 detainees and an actual prison population of 457 detainees on 1 October 2012. So, in practice, detainees' food rations are allocated according to the budget available and not according to the population. It is therefore unsurprising that this budget is not sufficient to cover the prison population's food requirements."

Appropriate measures include measures and the related budget allocations that are well designed to realize the rights in question and, given the foreseeable limitations on public resources, are not wasteful.

### The costs of pretrial detention

ICCPR article 14 guarantees those charged with a criminal offence the right to be tried without undue delay. The reality in many countries is that such trials can take months or years to occur. In the interim most of those charged are held in pretrial detention, often in horrendous conditions, with inadequate food and poor sanitation, while at the same time the person's family has lost any income the person was earning as a member of the labour force.

Until recently there were few detailed studies of the cost, not only to families but also to the government, of large-scale incarceration of those awaiting trial. Advocates have long argued that many of those in jail awaiting trial present no danger to society and would be unlikely to flee if let out on bail prior to their court hearings. Studies done in recent years have raised another issue: Is pretrial incarceration of large numbers of people an "appropriate" measure, not only from the human rights perspective but also from a budgetary point of view? People in the society as a whole have a right to personal security and the persons in detention have a right to liberty and to be presumed innocent until proven guilty. Governments should be spending funds appropriately to realize those rights. Spending large sums of money to hold in pretrial detention persons who would present no threat to society as a whole, when less costly alternatives exist, is not an "appropriate" decision from the budgetary, as well as human rights, perspective.<sup>68</sup>

When rights are to be realized immediately, HRC general comment No. 31 (2004) stresses that economic considerations are no excuse for non-realization. This means that an economic crisis should not lead to cuts in budget allocations or expenditure that threaten realization of these rights.

### Economic crisis and the right to life

In the winter of 1996–1997 **Bulgaria** was facing a serious economic crisis. The Dzhurkovo home for the mentally and physically disabled, where approximately 80 children were housed, received its funding through the local government's budget. That budget was severely cut as a result of the crisis and the local authorities were unable to provide the funding necessary for the home to secure adequate food, heating and medical care for the children living there. The local mayor joined with the director of the home in making repeated requests to various ministries of the national government, but received no reply. By the end of the winter 15 children housed in the facility had died from a lack of adequate food and the unsanitary conditions resulting from the home's inability to provide adequate heating and wash bed linen and clothing.

A case was brought on behalf of the children who died to the European Court of Human Rights, which held that, when government officials, who had notice that a problem existed, did not take necessary measures within the scope of their powers to provide assistance to the facility, the State was in violation of article 2 of the European Convention on Human Rights, which protects the right to life. The Court found that the conditions at the facility were not due to any sudden *force majeure* event to which the State would have been unable to respond, but, rather, was part of a national crisis of which high-level government officials had been informed.<sup>69</sup>

As was also mentioned in Chapter 1, the obligation to immediately realize rights is not just limited to civil and political rights. The CESCR in its general comment No. 3 (1990) has stated unequivocally that everyone is guaranteed an immediate, minimum essential level of enjoyment of each of the rights in the Covenant, without discrimination. With regard to the right to food, for example, the minimum core obligation is to ensure that no one suffers from hunger. Where a government is unable to meet this minimum core obligation, it must be able to demonstrate that it has made every effort to reach this level as a matter of priority.

### Indian Supreme Court and the right to food – immediate realization

Although it has relied on the **Indian** Constitution and not international treaty provisions for its decision, the Indian Supreme Court in a case on the right to food has treated an economic and social right as requiring immediate realization. The right to life is designated a fundamental right in the Indian Constitution, thus requiring immediate implementation. In a case charging violation of the right to food that was brought to it in 2001, the Supreme Court ruled that food is necessary for life and thus the right to food is part of the right to life and subject to immediate realization. Over the course of several years the Court has issued numerous interim orders directing the government to improve and extend its food supplement programmes and ordering the government to allocate sufficient funds for this purpose. Since 2001 it has closely monitored the government's actions, including its expenditure, to ensure that the Court's orders are being carried out.<sup>70</sup>

## 6. Maximum available resources and prioritizing economic and social rights in the budget

The CESCR has made clear that the obligation to use MAR means that “due priority” should be given in a country's budget to ESCR-related plans, programmes and projects. One of the challenges facing governments, of course, is interpreting what “due priority” means.

- Clearly, allocations that prioritize non-essential areas would not comply with the obligation to give “due priority” to rights-related areas. However, it is not simple to define “non-essential”, as many sectors may not directly support realization of a right, but might do so indirectly, through providing jobs or developing needed infrastructure (e.g., roads), which can be essential to the realization of human rights. It is important to understand the multiple factors affecting the rights-related situation and assess the budget accordingly. This may result

in a budget that does not at first glance sufficiently prioritize human rights. For example, a local government may appreciate that its ability to deliver education or health services is hampered by its lack of capacity in managing the related budgets, so it may allocate resources for three years to allow for training of its administrative staff. In this case, giving a relatively high priority to finance administration may be entirely appropriate within overarching strategy geared towards realizing human rights.<sup>71</sup>

- “Due priority” does not mean that a specific share or percentage of a budget must go to a specific sector, and making an assessment of “due priority” has to be context specific. Occasionally, national constitutions, laws or policies themselves provide benchmarks for spending on particular sectors.

### Failing to meet national constitutional standard

The Constitution of **Indonesia** states that 20 per cent of the budget should go to education. The government’s failure to reach this benchmark was the subject of a case that went to the country’s Constitutional Court. The complaint was that only 15.6 per cent of the 2008 budget was so allocated. The Court ruled in 2008 that the government was obligated to reach the 20 per cent mark.<sup>72</sup>

- In assessing “due priority,” it can be useful to compare allocations for a specific sector with allocations for the same sector in similarly situated countries. It can sometimes even be useful to refer to regional or international indicators to assess whether a government is giving “due priority” to ESCR-related sectors.

### Not giving “due priority” to ESCR

As of 2009 **Guatemala**’s allocations for social spending—the spending allocated to health, education, housing, water and sanitation, and social security and welfare, including social services—were the lowest in Latin America and the Caribbean (7.7 per cent of GDP in 2008). This low level of social spending has severely limited the State’s ability to address the significant levels of poverty, deprivation and inequality in the country.<sup>73</sup>

- In order for a government (and civil society) to be able to assess whether the government is giving “due priority” to ESCR, budget categories must make clear what allocations are intended for. In a number of cases, due to the broad or vague labels the government assigns to certain lines in its budget, it can be difficult to make such an assessment.

### Broad, vague budget titles can result in inappropriate spending

The Government of **Cambodia** has over the years allocated increasing amounts of the budget to “precautionary expenses” and “other expenses”, ostensibly for emergency or unforeseen expenditure. These grew from US\$ 36 million in 2005 to US\$ 145 million in 2009. Over this period, the Ministry of Finance spent US\$ 152 million of these totals (while expenditure for health amounted to only US\$ 26.2 million). At the same time it has been reported that only five of a total 110 sub-decrees related to such “precautionary expenses”, including one for victims of a natural disaster and two for the Red Cross, could actually qualify as having been spent for emergency or unforeseen developments.<sup>74</sup>

- Prioritizing ESCR in the budget does not mean simply that ministries whose work has the most significant impact in realizing these rights should be prioritized in the budget, but also that the budgets of these same ministries should *themselves* reflect human rights priorities. In the case of the Ministry of Health, for example, in line with CESCR general comment No. 14 (2000), its budget should prioritize primary and preventive health care over tertiary care, and (in general) direct services over administrative or non-essential items. Too often allocations do just the opposite. The same is often true in the area of education, where secondary or tertiary education are allocated larger funds than primary education, even though human rights standards (CESCR general comment No. 13 (1999)) direct governments to prioritize the latter.

### Considering priorities within the health budget

A group of NGOs in **Turkey**, in analysing the 2009 budget, said: "We observe that the composition of the public expenditures on health is significantly problematic ... (The) share of public expenditures on health in GDP is 5 per cent in 2009 where 3.35 per cent and 1.65 per cent are spent on pharmaceuticals and curative services by SGK [Turkey's universal healthcare scheme] and the Ministry of Health, respectively. When tracked from the budget allocation charts of the Ministry of Health among various Directorate Generals (DGs), 71 per cent of the expenditures would be made by the DG of Curative Services and 29 per cent by the DG of Primary Health Care Services and other services. Therefore, we observe that only a third of the 1.65 per cent, which is only 0.5 per cent of GDP is allocated to the public expenditures on preventive health care services while 4.5 per cent constitute expenditures on pharmaceuticals and curative services."<sup>75</sup>

### Key points to remember about human rights obligations when considering budget allocations

- A government's policies, programmes and plans should reflect its human rights obligations, and should be developed and implemented in such a manner as to best ensure realization of human rights. A key step in the process of implementing policies, programmes and plans is ensuring that allocations in the government's budget are based on a thorough and realistic analysis of the resources needed to realize them.
- There are some rights whose realization must be immediate and where resource limitations are not a valid reason for not allocating and spending sufficient funds to fully realize those rights.
- The CESCR has said that governments must give "due priority" in their policies, programmes and plans to the realization of ESCR, and that priority must be reflected in the government's budget allocations. The Committee uses a few different calculations to assess "due priority."
- Cuts in budget allocations to ESCR-related programmes and projects normally result in cutbacks in related goods and services with correspondingly negative impacts on people's enjoyment of their rights. In such situations, the government must be able to demonstrate that it has in place alternative plans and programmes that ensure that people's rights will not be and are not being harmed as a result of the decrease in allocations.
- Governments should do regular benefit incidence analyses to assess the impact of allocations in the budget on different groups and to ensure that it is meeting its obligation of non-discrimination (direct and indirect) in the way it has allocated funds.

## **IV. BUDGET EXECUTION (EXPENDITURE)**

After the legislature approves the budget, the executive, in the form of ministries, departments and agencies (MDAs), is responsible for executing or implementing the budget. In many ways a government's expenditure reveals more about its compliance with its human rights obligations than do allocations. Policies and plans may be well designed, and allocations in the budget may accurately reflect the costs of realizing those policies and plans. Nonetheless, the best-laid plans may still go awry when the time comes to spend the money. Without appropriate expenditure, the sound policies and plans will not be realized.

It is worthwhile addressing a few broad points about governments' expenditure and human rights obligations before focusing on the implications of these obligations for some specific problems that often arise related to government spending.

*Firstly*, increased government revenue does not necessarily imply increased spending. Section III.A.1 on the fiscal envelope discussed the desirability of a government's increasing revenue in line with increases in GDP, in order to make additional resources available for public spending for objectives related to human rights. However, a government may choose not to increase spending significantly when the economy is strong and revenue is growing apace, but instead save a share of the added revenue in a "rainy-day" fund to allow for countercyclical spending when the economy and revenue are growing at a slow rate or even shrinking. The nature of some human rights spending, where realization of the rights is not conditioned on the availability of resources, together with the obligation to progressively realize ESCR, implies the need for sustainable support for these areas. Such a rainy-day fund may be a sound way to ensure sustainability of rights realization.

*Secondly*, subnational governments often have primary responsibility for certain governmental functions, such as providing services in the areas of education, health or water, and thus do most of the related spending. In a similar vein to the above, all levels of government are responsible for complying with the government's human rights obligations in the way they *spend* the budget. This is true for subnational governments whether or not they receive funding for specific functions from the national government.

In turn, the national government is responsible for monitoring subnational governments' budgets to ensure that those levels of government are executing their budgets in line with the government's human rights obligations.

*Thirdly*, it is important to bear in mind that what may be considered "efficient" from the point of view of an economist may not be acceptable from a human rights perspective. The CESCR has interpreted the MAR obligation to mean that a government should be efficient in its expenditure, and most of the following sections discuss different ways that spending may be efficient or inefficient. Because economists also use the word "efficient," it is necessary to unpack the term a bit to develop a better understanding of the implications of using that term in human rights policies, planning, research and advocacy. In this regard, a key distinction should be made between "operational efficiency" and "allocative efficiency".

Operational efficiency focuses on getting the most out of the resources spent. Much civil society budget work is focused on operational efficiency: Was funding wasted through poor procurement processes? Were there leakages in funds going to service delivery points?

Allocative efficiency, on the other hand, looks at the allocation of resources across different activities and asks whether that allocation makes the most efficient use of available funds: Do we get the most we possibly can from that distribution of resources, or would an alternative distribution give us more? While allocative efficiency can be very important to consider in assessing, for example, whether budgets are well designed to help implement policies that are intended to increase access to basic services, it can be problematic for human rights when looked at from another angle. For example, building a school in a rural area where the population is thinly spread may make education geographically more accessible to 100 children, while building the same school in a town would make it more accessible to 1,000 children. Operational efficiency would argue for building the school in the town, but human rights law prohibits rural children from being left behind simply because it costs more to make education accessible to them.

Lastly, significant shares of a government's spending may be treated as off budget. Problems associated with ODA when treated off budget have been mentioned in section III.A.4. However, there are sources of off-budget spending other than those derived from ODA. These can include, among others, social security and pension funds, income pools from domestic natural resource extraction and resources provided by public corporations. While there may be sound reasons for off-budget treatment of such funds, there are also potential hazards related to a government's compliance with its human rights obligations. When spending is happening outside of the budget process, often in a manner that is not transparent, the government's capacity to monitor and control spending can be significantly impeded. It can be difficult for the government (and civil society monitors) to know what is being spent and on what, and to ensure that government spending from the different sources, when taken together, is consistent with the government's human rights obligations. Compliance with these obligations would likely be easier for a government if such off-budget spending were limited.

A number of problems commonly arise when governments spend money. The following sections focus on the human rights implications of some of these problems. The first (section A) looks at non-discrimination in government spending. The problems addressed in the remaining sections have implications for the government's compliance with its human rights obligations, and most particularly its obligation to use MAR to realize ESCR. Those problems are covered in sections:

- B. Underexpenditure
- C. Trade-offs in expenditure between and within ministries
- D. Leakage
- E. Wasteful expenditure.

## A. Non-discrimination in expenditure

Even if allocations comply with the obligation of equality and non-discrimination, expenditure of those allocations may be fraught with problems.

As was mentioned in Chapter I, non-discrimination is an immediate, cross-cutting obligation that is included in all international human rights treaties and applies to all rights. Thus, expenditure related to any and all rights must comply with this obligation.

### **Freedom of expression threatened by discriminatory expenditures**

In many countries, including those in Latin America, governments spend a significant amount of money to pay for different forms of publicity in media outlets. They may use the publicity to inform people about important issues related to, for example, health or safety, to encourage certain behaviour (e.g., to get out to vote), or to advise people of government programmes for which they may qualify. In many countries income from this type of government publicity constitutes a significant share of the operating income of various media outlets. While this type of financial support to media can be an important means of encouraging freedom of expression, the relevant funding has frequently been used improperly to punish certain media outlets for their political perspectives. The Organization of American States (OAS) has reported on this problem:

“There exists no inherent right to receive government advertising revenue. It is only when a state allocates advertising revenue in discriminatory ways that the fundamental right to freedom of expression is infringed. A state could deny advertising revenue to all media outlets, but it cannot deny publicity income only to specific outlets based on discriminatory criteria. Although states may make determinations to award advertising based on the percentage of the population reached by the source, frequency strength, and

similar factors, determinations to award or cut off publicity based on coverage of official actions, criticism of public officials, or coverage that might hurt officials' financial contributors amount to penalizing the media for exercising the right to freedom of expression. It is possible that government advertising is so central to an outlet's operation that the denial of it will have as much adverse impact as would a fine or prison sentence. Because their hopes for advertising revenue hinge upon a favourable allocation of official publicity, media sources will be compromised and effectively forced into producing reports favourable to the ultimate publicity decision-makers."<sup>76</sup>

The reasons for discrimination in expenditures, even when allocations are not on their face discriminatory, are potentially numerous. Sometimes those responsible for expending funds consciously direct them to favoured groups or regions. This can result in discrimination against more vulnerable groups, as they are less likely to have powerful political patrons.

### Governments' budgets and private schools

The City of Buenos Aires in **Argentina** has spent a significant share of its education budget on subsidies for private schools. During the period 2005–2010 the government increased the amount spent for such subsidies from \$ 605.5 million (approximately US\$ 210 million) to \$918.8 million (approximately US\$ 234.5 million). In addition, the proportion of the budget spent for these subsidies was higher than the proportion allocated in the budget law. In 2005 the spending on private schools represented 15.4 per cent of the education budget, in 2010, 17.8 per cent. In 2011 the CSO Asociación Civil por la Igualdad y la Justicia (ACIJ) reported on the distribution of resources between the private schools in different areas of the city and concluded that the distribution of the subsidies contributed to the deepening of educational inequalities between the richest and the poorest students. The government had provided subsidies to many schools that charged very high fees and could thus only be attended

by the wealthiest students. In addition, the majority of the private schools receiving subsidies were located in the richest area of the city, where a larger percentage of the students attended private institutions, and where even public schools had more space and much better educational conditions. In other words, the government, through the way it was spending education funds, was failing to ensure equal access to a quality education.<sup>77</sup>

### Discrimination issues around cash transfer programmes

According to a 2011 report, a significant percentage of public budgets in middle-income countries such as Brazil, India, Mexico, Nigeria and Turkey is allocated for conditional cash transfers. These poverty-reduction programmes disburse cash subsidies directly to low-income families so they can invest in their children's health and education. Women are usually the recipients of these subsidies on behalf of their children, but they frequently face gender discrimination from public officials when requesting health and education services. For example, in the case of the *Transferencias en Efectivo Condicionadas (TEC)* programme in **Mexico**, known as "Oportunidades", between 2006 and 2009 there were 8,366 reported cases of misconduct, 39 per cent of which were for abuse of authority in the health sector. In **Argentina** 5,000 cases of sexual, physical and psychological harassment or violence were reported between 2002 and 2008 related to the implementation of the programme "Jefas de Hogar". For example, women were forced to participate in unpaid activities outside the scope of the programme, such as attending political demonstrations or cleaning private properties in exchange for health and education benefits.<sup>78</sup>

As the UN independent expert on human rights and extreme poverty has said with regard to such cash transfer programmes (CTPs):

"CTPs without accountability and redress mechanisms are less likely to be understood in term of entitlements and rights and are rather more likely to be viewed as instruments of clientelism, which can be manipulated by political actors.... The principle of equality and

non-discrimination requires ... States to give priority to disadvantaged and marginalised individuals and groups. States must ensure that targeting processes and eligibility criteria are fair, effective and transparent, and that they safeguard against discrimination. CTPs must not lead to further stigmatization or social exclusion of any individual or group in society."<sup>79</sup>

## B. Underexpenditure

Underspending of allocated funds is a common problem in a large number of countries. Underexpenditure of allocated funds may, depending upon the situation, amount to failure by a government to appropriately comply with its human rights obligations.

- *Equality and non-discrimination*: Even when allocations show no discriminatory intent, underexpenditure may, whether deliberately or not, be discriminatory in impact. Allocations directed to areas with large ethnic minority populations, for example, may be underspent while those to majority areas are fully spent. Allocations to urban areas may be spent while funds directed to rural areas remain underspent at the end of the fiscal year. Overall allocations may be underspent at the same time that underserved areas need additional investment and could benefit a great deal from the funding that is left over.
- *"Adequate" spending*: Where a government is obligated to immediately realize a right, and where resource constraints are not an excuse for failing to do so, it is important to look not only at what is allocated to realize the rights but also at what is spent. Spending may be inadequate, where the allocation, if fully spent, would have been adequate.
- *Progressive realization/non-retrogression*: Assessing the relationship between the government's budget and progressive realization of rights involves considering a range of factors,

not simply the government's budget. Nonetheless, it is important to consider expenditure just as it was important to consider allocations. That is because allocations in a budget may show an increase (with the government thus apparently complying with its obligation of progressive realization) while underexpenditure of the allocated funds results in a *de facto* decrease in what is spent on particular sectors or programmes from one year to the next.

- *Use of maximum available resources:* The CESCR has said that funds allocated for ESCR-related areas should be fully spent. A failure to do so amounts to a failure to comply with the government's obligation to use MAR. MAR has also been interpreted to mean that funds must be spent efficiently and effectively, and this will not happen when funds are spent in a rapid, unplanned fashion. Potential non-compliance with MAR obligations is apparent in some of the situations described in the following pages.

There are a number of possible reasons for underspending.

*Firstly*, underspending may be the result of a lack of capacity within a ministry, department or agency (MDA) to fully spend the allocated funds. This can be a particular problem at subnational government levels.

### Addressing problems of underspending

**Nigeria's** Public Procurement Act and Fiscal Responsibility Act of 2007 were part of a reform effort aimed at increasing the judicious use of resources and obtaining value for money in capital project implementation. When the laws were first implemented, however, many civil servants were unaware of their detailed requirements, from needs assessment to procurement planning to implementation, and thus various MDAs made a series of inadvertent errors. The laws required that, after the procurement process was completed, the process documentation (including CSO reports and complaints from competing firms) had to be sent to the Bureau for Public Procurement (BPP) for a "No Objection" certificate to the procuring MDA. Only

then could contracts be awarded to the winning service provider. If the BPP found faults in the process, the certificate would be withheld and the process had to start all over again. This often resulted in an inability to award a contract before the end of a fiscal year—and thus underspending. Another reason for underspending was the option for competing firms to appeal to the courts for unfair treatment, even after the contract had been awarded. When such an appeal stopped projects in their tracks, the related funds were not spent. There were also reports that some civil servants, who were no longer able to award a contract to their favoured provider, simply allowed a project to remain unimplemented.

To address the problem of delays and projects left unimplemented, in 2010 the BPP mandated MDAs to appoint qualified procurement officers and organized training sessions for them. From the 2011 budget onwards, the BPP also raised the threshold of projects requiring a certificate to N1 billion (US\$ 6.25 million), which greatly reduced the number of projects that would require a certificate before implementation. The BPP also trained and accredited several CSOs to monitor procurement processes and report any concerns to the BPP or any other anti-corruption body.<sup>80</sup>

*Secondly*, underspending can result from low levels of utilization of government services or benefits because a series of obstacles discourages or prevents qualified individuals from accessing them. These obstacles can include: a lack of awareness about a particular programme because of inadequate government outreach; fees to access services, which can be prohibitive, particularly for the very poor; and complex, formal processes and/or application forms, which create substantial difficulties for people who are unable to read or write (often the very people for whom the services were originally intended).

### Programme complexity and poor administration lead to underspending

The National Rural Employment Guarantee Act (NREGA) in **India**, which came into force in 2006, importantly guarantees each rural household a minimum of 100 days of paid work each year. However, in the first two years of the scheme only half of those registered applied for work, and only 10 per cent of those were offered the full 100 days of work. There were numerous start-up problems with the programme, with the result that projects were not identified in a timely fashion and records were not kept, among other problems. Often the necessary door-to-door surveys to identify those interested in registering were not conducted. The application process was often not clearly explained, and could itself be quite onerous. In addition, in some states fees were charged for applying for the programme. Illiterate people had a difficult time establishing the necessary accounts, whether in banks or post offices, to receive payment. Job identification cards were often not issued in a timely fashion and in many cases the person's photograph was not appended to the card. Wages were frequently not paid on time and in many cases the minimum wage was not provided. Grievance redress systems were frequently not established.<sup>81</sup>

*Thirdly*, underspending may also be due to an apparent lack of political will within a ministry, department or agency. This may be one of the causes of another problem: delays in the transfer of authorized funds to the relevant MDAs, with the result that funds cannot be fully spent before the end of the fiscal year. Since funds typically need to be fully spent in a fiscal year in order to avoid cuts in the next year's allocation, delays in transfers of funds also encourage MDAs to dump late-arriving funds into programmes or projects in an inadequately planned fashion.

## Underspending undercuts human rights in South Africa and Brazil

For a number of years the Government of **South Africa** resisted establishing a programme to fight mother-to-child transmission of HIV/AIDS, despite the epidemic proportions of the disease in that country. The principal reason it gave was that a prevention programme would put “strain” on the “already limited health budget.” The Treatment Action Campaign (TAC), an advocacy group led by people infected with HIV/AIDS, took the government to court, presenting evidence about the cost of such a programme, claiming that the government could afford it. In response, the government said that a full roll-out of the programme would cost US\$ 33.3 million. The TAC used publicly available budget information to point out that provincial departments of health had actually underspent their budgets by approximately US\$ 63.1 million in 2000. In December 2001 the High Court found in favour of the TAC, stating that it was clear from its budget evidence that a countrywide mother-to-child transmission programme was affordable. The government subsequently established such a programme.<sup>82</sup>

An interrelationship between underspending in social areas and the government’s choice to prioritize other expenditures (see section C.6) is illustrated by the **Brazilian** federal government’s increasing the government’s primary surplus through decrees that, during a fiscal year, withheld the release of authorized budget funds. In 2008, Provisional Measures 435 and 450 authorized the government to use funds appropriated for social areas for debt payment, “provided their release had been withheld and they had not been spent by yearend”.<sup>83</sup> The government’s prioritizing debt repayments through deliberate underspending in social areas raises significant questions about the government’s compliance with its MAR obligations.

## C. Trade-offs in expenditure between and within ministries

During the course of a fiscal year allocations that have been proposed by the executive and approved by the legislature may be modified, sometimes by the Ministry of Finance, sometimes within line ministries. In such cases funds that have been allocated for one MDA or programme are, in effect, spent by another. This type of reallocation (and disbursement) can present human rights problems. The CESCR has said that funds allocated for economic and social rights should be spent on those rights.

### Diversion of funds from education

In 2010 the Minister of Finance of the City of Buenos Aires (**Argentina**) adopted a resolution that diverted \$41 million (approximately US\$ 10 million) originally allocated to school infrastructure to the Ministry of Environment and Public Space, to be used to improve street lighting, repair streets, etc. At the time there were many problems in city schools related to infrastructure, such as a lack of space, overcrowding in the poorest areas and a lack of accessibility for persons with disabilities. The Asociación Civil por la Igualdad y la Justicia (ACIJ), with the support of an organized group of public school parents, challenged the diversion of resources in court. ACIJ and the parent group argued that the resolution violated the right to education of the students affected by the diversion and the government was failing to meet its obligation to use MAR to comply with the right to education. It was also violating article 25 of the Buenos Aires Constitution, which states that “budget lines assigned to education cannot be directed to different purposes”. The judge ordered a court hearing, during which the government confirmed that it had just adopted a new resolution that returned the money to the Ministry of Education. A few days later the government presented the new resolution, issued the same day as the court hearing, to the court.<sup>84</sup>

Sometimes national laws and regulations determine when and how such reallocations and expenditure may legally happen. However, such laws and regulations should, but typically do not, ensure that any reallocations are in line with the government's human rights obligations.

In the absence of specific legal provisions, reallocations often happen at the discretion of the MoF or line ministry officials. Funds may be and often are directed away from programmes that benefit the poor. Problems can also arise when a MoF is provided considerable discretion in disbursing funds that come in during the course of the fiscal year. It may first direct available funds to non-human-rights-priority areas, while funds to be disbursed to human rights-related areas either never materialize or are released later in the fiscal year (with resulting underspending, as discussed).

It can thus happen that the initial allocations in a government's budget can be quite "human rights-friendly" but during the course of the year sectors such as health, education or justice underspend, because their funds come to them too late in the fiscal year. One permutation of this scenario is where funds are delivered to an MDA in a timely fashion, but are then diverted away from human rights-related allocations *within* the MDA to non-priority programmes (e.g., funds allocated for primary education are directed to the tertiary level). Again, because the funds have been allocated, they are "available resources" and yet, by diverting them to non-priority areas, the government will have failed to comply with its MAR obligation.

## Challenges in monitoring the diversion of funds

In **South Africa**, an in-depth 2009 study using a public expenditure tracking survey and a benefit incidence analysis concluded that a considerable share of funds allocated for education, rather than benefiting the learners themselves, had been captured by administrative structures within the Gauteng Department of Education. Even those funds that actually reached the learners disproportionately benefited the less poor.<sup>85</sup>

In **India**, the logic behind the Scheduled Caste Sub-Plan (SCSP) is to provide funds directly for exclusive aid to scheduled castes. However, according to a 2009 report, the administration divided the SCSP into “divisible—funds that directly benefit Dalits” and “indivisible—funds spent on general welfare or development assuming that Dalits will *also* benefit from it”. This was done because more than 30 departments of the government said that they could not divide the benefits among different sections of the population, as what they do (e.g., building and maintaining roads and infrastructure) affects all people living in a given area. In practice, it was almost impossible to track where the funds were allocated, because no budget code was assigned until 1995.<sup>86</sup>

## D. Leakage

Often a lot of social sector service delivery happens at the state or local level with some or all of the related funding coming from the national government. In many countries there are significant problems of “leakage”, so that funding sent “down the chain” from the national level, in whole or in part, fails to reach the service provider or the intended beneficiaries. Leakage can also occur within a particular MDA even when there is no process of funds passing from one level of government to another. In either case, this type of leakage or corruption raises problems with regard to the government’s compliance with its obligations to undertake all appropriate budgetary measures, and more evidently with regard to its ESCR obligations of MAR, since the funds have been allocated for human rights-related programmes but are not spent for their designated purposes.

The problem of leakage in expenditure can aggravate pre-existing discrimination in allocations. For example, urban (normally richer) areas often receive greater *per capita* allocations than do rural (normally poorer) areas. At the same time some researchers have concluded that leakage of funds from the national level is greater when funds are directed to rural areas than to urban areas.<sup>87</sup>

### Tracking leakage that affects the right to education

A 2010 study by the Centre for Democratic Development of the capitation grants in 30 districts in **Ghana** found significant leakage in transfers from districts to schools. "During the 2008/2009 school year, for example, over 60% of head teachers reported that they did not receive the full capitation grant amount to which their school was entitled. The findings on leakage at the school level echoed a 2007 Public Expenditure Tracking Survey<sup>88</sup> (PETS) carried out by the government in the education sector; the 2007 PETS also found that education financing was being used for expenditures not sanctioned by the program, including travel costs for administration."<sup>89</sup>

## E. Wasteful expenditure

Expenditure can be wasteful in a number of ways, when, for example:

- it is not used for its intended purpose;
- government pays more than it needs to for goods and services;
- it is made in a rush at the end of a fiscal year, without adequate thought and not in line with agreed priorities;
- the underlying allocations were not based on sound evidence;
- it duplicates other expenditure.

To elaborate on these points:

*Firstly*, a government might appear to have a budget that is “human rights-friendly”, because a significant amount of available resources is allocated to social sectors or the justice sector. However, it is not unusual that, once the budget is examined closely, resources are not actually being spent to buy medicines, train teachers or fund legal aid programmes, but are to acquire expensive cars for MDA officials or to pay inflated prices for goods and services.

### Eliminating wasteful expenditure in Tanzania

A **Tanzanian** CSO, Sikika, was concerned that the very limited public funds available for the health sector in the country were not being spent wisely. It tracked what it believed was “unnecessary” or non-essential expenditure in the health budget to providing health services. Drawing on earlier audit reports that had identified some questionable expenditure, it focused on travel, workshops, sitting allowances and expensive vehicles, and then analysed the Tanzanian Government’s financial reports for the period 2008–2010. As a result, Sikika found several cases of expenditure that it had identified as non-essential. Sikika took its findings to senior officials in the government, and the Prime Minister’s office consequently issued directives that such wasteful expenditure be reduced. Sikika also went to the legislature and media, in an effort to generate pressure on the government to rein in such expenditure.

Sikika’s advocacy and efforts achieved some notable results. For example, the Ministry of Education and Vocational Training reduced its spending on training, which was often held in expensive hotels, from TSh 231 billion (US\$ 172 million) to TSh 11 billion (US\$ 8 million). However, allowances (payments to public officials for days spent outside the office) increased from TSh 171 billion (US\$ 127.5 million) in 2008/09 to TSh 269 billion (US\$ 198 million) in 2010/11, and varied wildly among MDAs. The Attorney General’s chamber also reduced its travel budget from TSh 33 billion (US\$ 24.6 million) in 2008/09 to TSh 1.8 billion (US\$ 1.3 million) in 2010/11.<sup>90</sup>

*Secondly*, a significant share of government expenditures typically goes to outside providers of goods and services needed by the government. Securing these services requires a government to analyse bids made by private companies and award contracts to the selected providers. The government should be getting the best quality goods and services for the lowest cost possible, but sometimes it pays more than it needs to or buys inferior quality goods. In such cases, the government is failing to meet its MAR obligations.

### Paying too much for essential goods

In the 1990s the **Philippines** Government faced a serious problem of corruption in the education sector, with officials awarding overpriced contracts to unqualified bidders, suppliers not honouring their contracts, and some vendors providing inferior quality goods. In 2003, when a new government came into office, it collaborated with civil society groups in monitoring the procurement of textbooks. The project investigated the procurement process, inspected the printing presses of suppliers and monitored the delivery and distribution of textbooks. The project concluded that the government was paying almost twice as much as it needed to for the books. It also found many defective textbooks were being provided, and that only about 60 per cent of those that were due to the schools actually arrived. Following reforms made following this project, textbook provision improved significantly in the Philippines.<sup>91</sup>

In its report for fiscal year 2009 the **Mexican** supreme audit institution (ASF) pointed to some institutional weaknesses in the Seguro Popular (SP) programme, which provides health services to people without social security. Most of the irregularities were occurring at the state level related to SP funds transferred to the states by the federal government. The ASF identified both a lack of supporting documentation related to expenditure and use of funds for purposes other than those intended. These problems affected almost 10 per cent of the total transferred to the states. The purchase of medicines was a particular problem. Among other problems, states were buying medicines above the reference price (sometimes for more than 500 per cent of that price),

were buying medicines that were not included in the official list or lacked documentation showing the real cost of medicines. The ASF also found that, as of March 2010, states had still not spent more than one third of the funds that had been transferred for the previous year.<sup>92</sup>

*Thirdly*, if an MDA does not receive its funds until the second half of the fiscal year, it may feel compelled to spend the money quickly in order not to lose it, or in order not to risk a lower allocation the following year.

*Fourthly*, expenditure can be wasteful if it is not originally allocated on the basis of sound evidence as to need, with a result that funds may be inadequate in some areas and unspent in others.

### Funds not allocated in line with evidence of need

In 2011 the **Indian** CSO PAC-India published its study related to the “Madilu kit”, a bag of 18 essential items such as a wrapping cloth, diapers, soap, powder and so on, which is given as an incentive to women to encourage delivery in health centres and hospitals. The primary purpose of the kit was to promote safe delivery in order to reduce maternal and infant mortality rates in the state of Karnataka. PAC-India observed that maternity homes often ran out of Madilu kits. The apparent reason was that budget allocations for the kits were inadequate. The organization learned that budgetary provisions were not based on evidence, such as delivery rates in each of the maternity homes. Instead, the budget was randomly allocated, resulting in shortages in maternity homes.<sup>93</sup>

*Fifthly*, different parts of a government may not plan together or coordinate their spending, which can result in duplicate or otherwise wasteful spending.

### Waste and constituency development funds

In many countries constituency development funds (CDFs) channel money from central government directly to electoral constituencies for local infrastructure projects. Members of Parliament generally have substantial control over the distribution and application of CDFs, although the degree of their control and the degree to which local citizens participate in them vary from country to country. Despite their intent, CDFs may have a negative impact on governments' capacity to contribute to service delivery and development, especially at the local government level.

For example, critics in **Kenya** have argued that CDF projects are often driven by political factors and do not target the neediest or reach all community members. Existing legislative oversight of the executive, which should help government become more efficient and effective, is compromised because CDF funds detract from legislators' interest in monitoring the executive's budget. In addition, projects selected for CDF funding may not be aligned with local priorities and plans, resulting in funds being spent on duplicated and non-priority projects. CDF funding can also put additional administrative burdens on local authorities, who need to oversee both their own projects and those funded by CDFs. Furthermore, CDF funds spent for infrastructure do not have related funds to ensure staffing. For clinics or schools built by CDF funds, for example, either local funds will be diverted to staff and maintain those buildings or clinics and schools will remain unused.<sup>94</sup>

### **Key points to remember about human rights obligations when considering budget expenditure**

- Government should closely monitor the impact of its expenditure to ensure that funds are being used in an effective manner to realize people's rights.
- Government should also regularly assess the impact of expenditure to ensure that funds are being spent in a non-discriminatory fashion and that the impact of the funds is enhancing people's equal access to enjoyment of their rights.
- Government should also do its utmost to ensure that, in the way it is spending the budget, it is complying with its obligations to take appropriate measures to realize all rights and to use MAR to realize those rights whose realization is conditioned on the availability of resources. In particular, it must ensure that funds allocated to human rights-related areas are fully spent on those areas, are not spent in a wasteful manner, and are not illegally diverted.
- Persistent underspending of human rights-related allocations or expenditure of those allocations in non-human-rights-related areas would constitute failure by the government to comply with these obligations. Wasteful spending of these allocations and illegal diversion of such funds is similarly a failure by government to comply with its human rights obligations.



## **V. BUDGET OVERSIGHT AND EVALUATION**

Accountability is a fundamental human rights principle. Governments must account to the people for their actions. Structures and processes for budget oversight and evaluation should be developed, implemented and supported in such a way as to guarantee meaningful accountability by the government for the impact of its budget on people's human rights.

Governments have obligations of both *conduct* and *result*. In line with its obligations of *conduct*, a government's budget must be designed to advance human rights and executed accordingly (in a non-discriminatory manner, using MAR where appropriate, etc.). The financial reports of governments generally include information on revenue collected and expenditure undertaken, and compare these with projections in the original budget. Such financial reports would be useful for assessing how well a government has complied with this obligation of conduct.

At the same time, there is little possibility of proper oversight and evaluation of the government's obligations of conduct if adequate financial reports are not prepared by the government. In some countries governments (whether at the national level or, more commonly, at the subnational level) fail to develop or, more frequently, fail to publish reports on expenditures. In the absence of such official data and reports, assessing a government's compliance with its human rights obligations can be quite difficult, if not impossible.

Similarly, when a government does not collect and make available adequate statistics and other data to enable a full understanding of the implications of budgets and financial reports, it is failing to be fully accountable.

Governments also have obligations of *result*. It is not enough that a government design and execute the budget intending to advance human rights and make all the relevant financial reports and statistics available. In addition, the *impact* of the budget must be a greater realization of people's human rights; in other words, the budget must be effective in realizing rights. A well-designed and implemented budget is not the ultimate goal. It is, rather, a means to this ultimate goal.

The following pages discuss the roles of a range of actors in holding government to account for meeting these obligations.

### **Oversight institutions and mechanisms**

There are a number of institutions and mechanisms that provide, or should provide, essential oversight and evaluation of the government's budget and its impact on the enjoyment of human rights. They include:

- The supreme audit institution (SAI)
- The legislature
- The courts
- National human rights institutions
- Civil society organizations.

The *supreme audit institution* (SAI) is the principal body with oversight and evaluation responsibilities vis-à-vis a government's budget. While the precise mandate of an SAI varies from country to country depending upon the powers given to it by the country's constitution and laws, none currently has a mandate that explicitly directs it to ensure that the government's budget and expenditures are in line with the country's human rights obligations. However, SAIs are mandated to ensure that the budget is developed in line with the laws of their countries, and the laws should include the country's human rights obligations.

Traditionally, SAIs have focused on curbing government waste, corruption and abuse. Instances of such that an SAI might uncover can be useful evidence of, for example, discrimination in expenditure or a failure to use MAR to advance human rights. However, as a general rule, SAIs are not required to identify the human rights impacts of practices such as these. Nonetheless, the mandates and roles of SAIs are evolving. An increasing number of SAIs do performance (or value-for-money) audits, which look at how efficiently and effectively a policy is implemented. When it looks at effectiveness, it could assess how well a government has implemented a policy ostensibly geared towards the realization of one or more human rights, and thus how far it has complied with its obligation of result. In the

longer run SAIs should have an explicit mandate to assess the government's compliance with its human rights obligations.

*The legislature* has responsibility not only for initially approving the executive's budget but also, typically, for reviewing the year-end report and the report of the SAI. In both roles, legislators should be alert to their obligations to help realize human rights. In reviewing the SAI's report, for example, if the SAI does not yet frame its report in human rights terms, legislators should ask about the human rights implications of the SAI's findings, and ask for additional analysis where the existing report does not provide relevant information on key human rights concerns.

*The courts* play an essential role in ensuring that people's rights are respected and that the government (at various levels) is complying with its legal obligations to realize those rights. While the situation varies from country to country, increasingly courts are recognizing that they have a role to play in budget issues that affect human rights, whether the latter are guaranteed by a national constitution or as a result of international treaty obligations. Courts frequently rule on government compliance with its human rights obligations. As the most important redress mechanism available to people in the event of a violation of their rights, the courts' role in ensuring government compliance with human rights obligations in the budget is central.

*National human rights institutions* (NHRIs), which, while often funded by government, are supposed to operate independently of it, also have a potentially important role to play. NHRIs do not have to wait for the SAI to produce its report to initiate their own research and analysis to assess how well a government's budget (or specific areas of the budget) helps realize human rights. Indeed, in many ways they are optimally positioned to undertake such an analysis. They normally receive numerous complaints in the course of a year, which could provide them with a unique vantage point as to the government's impact on people's rights. They also often have access to government information that is not available to civil society organizations (CSOs). As a result, they could be in a better position to undertake an assessment than would CSOs of the role of a government's budget in a situation where the government seems to have failed to comply

with its human rights obligations. Such reports could be produced in response to a specific complaint or case, or undertaken as a part of an annual report.

*Civil society organizations* (CSOs) typically base their advocacy issues on research that they or others have done utilizing a wide range of tools and methodologies to monitor and analyse the government's budget. The choice of tools and methodologies a CSO uses depends upon the type of work it does and the issues of concern to it, along with the level of government it is addressing and its own capacities. Some of the methodologies and tools would be familiar to those in government with responsibility for formulating, reporting on and auditing the budget. These include socioeconomic analyses and sectoral analyses, along with benefit and tax incidence analyses.

However, many groups that work at the grassroots level use simpler tools that are both relevant and accessible to the communities with which they work. Quite often they are involved in educating the community about the budgets that impact on their day-to-day lives.

### Civil society monitoring of allocations and expenditures

The Federation of Water and Sanitation Users in **Nepal** (FEDWASUN) is a network rooted in households and user groups in rural Nepal. FEDWASUN provided the user networks with basic information about government expenditure decisions so that they could track how money was being spent and how the spending translated into water and sanitation programmes. Through their monitoring the groups learned that three remote areas had received no budget allocation for water and sanitation that year, and that there was no allocation for school latrines and thus no sanitation facilities for more than a quarter of schools. At public hearings users spoke about their findings and FEDWASUN lobbied the government on their behalf. Following this process the local government allocated funds to the three areas, and the district education office committed to providing latrines for all schools.<sup>95</sup>

One now common methodology is the social audit, which is generally used when organizations and communities are concerned about local government expenditures.

### Using a social audit to help realize the right to sanitation

The South African Constitution guarantees all people the right to access clean sanitation facilities. At least 500,000 still lack access to such facilities in the City of Cape Town. In April 2013 the CSO Social Justice Coalition (SJC) and the residents of Khayelitsha, an informal settlement on the outskirts of the city, conducted a social audit on the chemical toilets provided to the community by the City government. As part of the social audit, SJC and its volunteers counted all the toilets in Khayelitsha and compared these numbers to the City's records of how many toilets should be there. They interviewed hundreds of local residents about the cleaning and maintenance of the toilets. SJC found that 54 per cent of the toilets were unusable, and that contractual obligations for cleaning the toilets were not being met. In some cases, as many as 10 to 26 families were sharing a single toilet. Given that the City paid the contractor more than 126 million Rand (US\$ 13 million) to provide and maintain the temporary toilets, a large amount of public funds was spent without effectively guaranteeing residents' right to access clean sanitation facilities.<sup>96</sup>

In some situations government and civil society work together to monitor and analyse the quality and impact of government spending. Some methodologies that are currently used principally by civil society can also provide government with useful insights and information—whether the methodology is employed by the government on its own or in collaboration with civil society.<sup>97</sup>

### International and regional human rights bodies and mechanisms

International and regional human rights bodies and mechanisms have demonstrated a growing interest and concern about the role of the budget in helping to realize human rights. While the specific focus of this

publication is on international human rights law and the corresponding bodies and mechanisms, it should be mentioned that regional bodies are themselves starting to take a closer look at governments' budgets. The excerpt from the Annual Report of the OAS Special Rapporteur for freedom of expression (see section A) is one example of such interest.

Some international bodies are considering budget issues closely. Recent examples of comments made by two different treaty bodies in their concluding observations on country reports include:

From the Committee on the Rights of the Child:<sup>98</sup>

"17. In the light of its Day of General Discussion in 2007 on "Resources for the Rights of the Child — Responsibility of States" and with emphasis on articles 2, 3, 4 and 6 of the Convention, the Committee recommends that the State party:

- (a) Utilize a child-rights approach in the elaboration of the State budget, by implementing a tracking system for the allocation and the use of resources for children throughout the budget. The State party should also use this tracking system for impact assessments on how investments in any sector may serve "the best interests of the child", ensuring that the differential impact of such investment on girls and boys is measured;
- (b) Conduct a comprehensive assessment of budget needs and establish transparent allocations to progressively address the disparities in indicators related to children's rights;
- (c) Ensure transparent and participatory budgeting through public dialogue, especially with children and for proper accountability of local authorities;

- (d) Define strategic budgetary lines for children in disadvantaged or vulnerable situations that may require affirmative social measures and make sure that those budgetary lines are protected even in situations of economic crisis, natural disasters or other emergencies ...”;

From the Committee on Economic, Social and Cultural Rights:<sup>99</sup>

“11: The Committee is particularly concerned at the lack of information on the use of maximum available resources by the State party in progressively achieving the full realization of the rights recognized in the Covenant (art. 2, para. 1). The Committee recommends that the State party regularly evaluate the impact of the measures taken and the budget allocations made for the various areas of implementation of the Covenant in order to assess whether the maximum of available resources has been used in progressively achieving the full realization of the rights recognized in the Covenant, taking into account the Committee’s general comment No. 3 (1990) on the nature of States parties’ obligations and its 2007 statement on the obligation to take steps to the “maximum of available resources” under an optional protocol to the Covenant.”

Interest in governments’ budgets extends well beyond the treaty bodies. Budget issues could be considered in the Universal Periodic Reviews of the UN Human Rights Council. A few UN Special Rapporteurs have begun asking questions about the government’s budget in their country missions; included elsewhere in this report are examples from the Special Rapporteurs on extrajudicial, summary and arbitrary executions, the rights to water and sanitation, and the right to food.

CSOs themselves are also raising questions about budget issues in their “shadow reports” to countries’ periodic reports to treaty bodies and discussing them with Special Rapporteurs.

### Excerpt from a civil society shadow report on India to the CRC<sup>100</sup>

“Since the last review, there have been important strides taken towards the recognition of budget for children (BfC) by the Government of India .... However, increase in the resources for children is not proportionate to the increase in the overall budget of the Union Government. In 2013–14, while the total Union Budget increased by 11.7 per cent over the previous year, corresponding increase in allocations for children was 8.7 per cent.

“There has been a consistent rise in the allocation and spending on children. It was 2.39 per cent in 2000–01 and has systematically gone up to over 5 per cent in 2006–07, and since then it has remained around 5 per cent of the total budget, which is clearly quite low. However, HAQ: Centre for Child Rights’ Budget for Children (BfC) analysis shows that in the Central Government’s Budget, the share of budget allocations for children has increased very marginally from 5.08 per cent to 5.09 per cent between 2007–08 and 2011–12; and the share of expenditure on children has gone down from 4.28 per cent to 4.11 per cent between 2007–08 and 2009–10, reflecting under-utilization of even the meagre funds allocated for implementation of children’s rights.”

### **Key points to remember about human rights obligations when considering budget oversight and evaluation**

- The legislature and national human rights institution should be provided with the resources and authority to review the government's budget to ensure that it has been developed and implemented in a way that complies with the government's human rights obligations.
- The SAI should be encouraged to include in its annual assessment of the government's budget an evaluation of the government's compliance with its human rights obligations, including:
  - its obligation to raise and spend funds in a non-discriminatory manner;
  - its obligation to make adequate resources available to realize those rights whose realization is not conditioned on the availability of resources; and
  - its obligation to progressively achieve realization of the remaining rights using MAR.

Reports to international human rights bodies and mechanisms should include relevant information about the government's budget and the government's efforts to comply with its obligations through the way it formulates and executes the budget.

# ANNEXES

## ANNEX I Methodologies for monitoring and analysing budgets

Methodology	Short explanation of methodology	Potential use in human rights monitoring and analysis
<b><i>I. Analysing the figures in governments' budgets and financial reports</i></b>		
Socioeconomic analysis of the budget	Assesses how a budget affects or would affect people who fall into different categories (class, gender, ethnicity, etc.). It can be done of revenue (e.g., How does an income tax affect different classes of people? How does a sales tax affect people by gender?) or it can be done of allocations and expenditures (e.g., Who benefits more from specific types of government expenditures and why?).	Useful for identifying discrimination in revenue generation or expenditures according to category. It may show, for example, that health funding is disproportionately benefiting people living in urban areas, that girls are benefiting less from education funding than boys, or that low-income groups are paying a disproportionate share of taxes.
Sectoral analysis of the budget	Looks at specific parts of the budget, for example, allocations affecting health. It could analyse the composition of health spending (e.g., how much is going to hospitals as opposed to primary healthcare services, how much is going to salaries as opposed to drugs) or it could look at the amount allocated or spent on health compared with other sectors of the economy/society (such as education or security).	A sectoral analysis that compares shares of the budget devoted to specific sectors (e.g., health, tourism, justice, education, policy, armed forces, etc.) can provide insights into which sectors of the economy or society are being prioritized by the government. An analysis of a specific sectoral budget (e.g., education) can help assess whether the priorities in the education budget are in line with the government's obligations, for instance, to prioritize free primary education.

	<p>A sectoral analysis can also analyse revenue, examining the types of revenue the government relies on (e.g., income, sales or excise taxes; revenue from state enterprises; revenue from natural resources such as oil or minerals).</p>	<p>On the other hand, an analysis of revenue can highlight the government's dependence on sales taxes, which tend to disproportionately affect lower income groups, or user fees for essential services (such as health care), which are often an obstacle to access to necessary care for these same groups.</p>
Summary of the budget	<p>A summary can overlap to varying degrees with a budget guide and a «citizens' budget» (see section II below). The emphasis in a summary of the budget, however, is on explaining the content and priorities in the current year's budget. It is often produced by civil society groups immediately after the executive's budget is released, to explain that budget to legislators, other interested groups or the public at large.</p>	<p>Summaries of budgets are important educational tools, whether to raise people's awareness about the budget as a whole, or to highlight, for legislators, for example, how specific items or areas in the budget need to be modified to comply with the government's human rights obligations.</p>
Analysis of monthly, quarterly, midyear and year-end budget reports	<p>The financial reports a government produces in the course of and at the end of a fiscal year provide essential insight into how much revenue the government was actually able to raise and how much it actually spent. Analysing these reports provides essential information about how projections compare to actuals. A significant discrepancy between projections and actuals raises questions about, for example, the adequacy of government planning, the government's capacities to deliver services or its political will to expend funds in specific areas.</p>	<p>It is always important to consider not only what a government allocates but also what it actually spends. It may appear from budget allocations, for example, that the government is pursuing a specific policy in a non-discriminatory fashion, but expenditure may paint a different picture. Or, allocations in a human rights-sensitive area may be increasing from year to year, but at the same time expenditures may be remaining flat or decreasing (thus raising questions about retrogression). Midyear reports may show that revenue has come in over projections, but subsequent financial reports may show corresponding, increased allocations to areas that are not priorities in human rights terms.</p>

Costing	Costing is the process of estimating the cost of goods and/or services. When a government wants to implement a new policy or introduce a new programme or project, it needs to determine how much it should budget to pay for the policy, programme or project. Civil society groups also undertake costing exercises if they, for example, plan to propose that the government implement a new programme and they want to be able to say how much it will cost.	If a government's programme in a human rights-related area is inadequate from a human rights perspective, and it wants to modify the existing programme or introduce a new programme that will enable it to better comply with its human rights obligations, it will need to calculate how much that will cost. Similarly, if civil society groups believe that the government needs to change its policies or programmes to be more human rights-compliant, they may do an estimate of what it would cost the government, and even suggest where the money could be found in the budget.
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## **II. Making budgets more accessible or reflective of peoples' priorities**

Guide to the budget	Guides are generally simple explanations of the structure and/or content of a government's budget and budget process. When produced by a government, a guide may be called a "citizens' budget", although such guides are also developed by civil society groups.	Guides to the budget are essential educational tools that facilitate people's right to participate in governmental affairs.
Public budget hearings/ poverty hearings	These public hearings, when convened by civil society, are often a component of the process leading to an alternative budget or people's budget (see below). They are generally designed to elicit from the broad public issues, particularly those related to poverty, which should be addressed in the government's budget. When convened by governments, they are normally called "participatory budget" processes.	These hearings can be infused, to a greater or lesser extent, with considerations of people's human rights and how those human rights should be reflected in a government's budget.

Alternative budget or people's budget	<p>An "alternative budget" is normally developed by a civil society group to suggest priorities that should be incorporated in the government's budget, or to reflect how a government's budget that responds adequately to the needs of a specific group or groups would look. An alternative budget, normally developed through a participatory process, does not include a lot of budget figures, but, rather, sets out a list of priorities of specific communities that should be incorporated in the government's budget. It is more elaborate and structured, and incorporates proposed budget figures. It can be a «full» alternative to the government's budget or can be limited to a specific part of the budget (e.g., the education, housing or health budget) that is of specific concern to the group or community.</p>	<p>An alternative budget (or people's budget) could be used to suggest or reflect how a human rights-friendly budget would look. The simpler, alternative budget could suggest priorities for a budget that reflect human rights priorities. Figures in the more fully elaborated alternative budget could be developed using human rights standards as guides to what should be included in the budget and what priorities should be in government revenue streams and in allocations.</p>
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### III. *Tracking expenditure in a government's budget*

Public expenditure tracking survey (PETS)	<p>A public expenditure tracking survey (PETS) tracks the flow of resources from their starting point to ultimate destination (usually the point of service delivery). PETS is useful in highlighting the diversion of public funds as they make their way, for example, from the national to local level.</p>	<p>PETS could have multiple uses in assessing human rights compliance. A key human rights principle is accountability, and information gathered by PETS could be important in documenting the existence of or weaknesses in accountability mechanisms. The government's obligation under the ICESCR to use MAR to realize ESCR means, among other things, that governments should use funds efficiently, and that all funds allocated for rights-related programmes should be fully spent on those programmes.</p>
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	<p>The surveys that form the basis of PETS collect information on topics beyond financial flows and are thus also useful for assessing efficiency in the use of funds, the quality of services, accountability mechanisms and so on.</p>	<p>Thus, diversions or inefficiencies uncovered by PETS are important pieces of evidence as to a government's compliance with its human rights obligations.</p>
<p>Community-based monitoring and evaluation of expenditure</p>	<p>Community monitoring and evaluation of government expenditure involves a community in tracking government programmes and projects that are being implemented at the local level, to ensure that the funding allocated for the specific programmes or projects are being spent on them (and not on something else), and that the funding is being spent efficiently (e.g., money for textbooks is spent on appropriate, reasonably priced and good quality textbooks).</p>	<p>Community monitoring of expenditure can provide evidence of whether or not the government is fulfilling its human rights obligations through actual expenditure of public funds, and that those funds are being used in an effective and efficient manner (see PETS, above).</p>
<p>Monitoring procurement bids and awards</p>	<p>A significant part of a government's budget pays providers of goods and services (e.g., drugs, textbooks, construction supplies). Contracts for provision of these goods and services are awarded on the basis of bids that are tendered in response to a government-initiated bidding process. Groups monitoring procurement bids and awards assess the technical requirements in a tender offer and compare the content of the winning bid with those requirements and with other bids, to determine whether the government has awarded the contract in a cost-effective manner.</p>	<p>Monitoring procurement bids and awards can provide valuable evidence of whether a government is complying with its obligation to budget appropriately to realize rights and to use MAR to realize ESCR by spending public funds in an efficient manner.</p>

<p>Monitoring delivery of procured goods and services</p>	<p>A process that is complementary to monitoring procurement bids and awards is one of ensuring that the contractor receiving the award delivers the goods and services promised, and that those goods and services are of the promised quantity and quality. This methodology is generally more participatory than that discussed above, typically involving members of the affected communities (e.g., school children in monitoring a contract to provide textbooks). Monitors are present at delivery of the goods (or services) in question, counting to ensure that the promised numbers have been delivered and spot-checking to ensure adequate quality.</p>	<p>Again, this expenditure-tracking methodology, by determining the quality and quantity of good and services delivered, can provide evidence of whether a government is complying with its obligation to ensure that the budget is appropriate to realize rights as well as its obligation to use MAR to realize ESCR.</p>
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#### IV. Using audits

<p>Monitoring audits and trends in audit report assessment</p>	<p>The SAI in a country analyses the government's budget and related financial reports to ensure that expenditure in the reports was actually made, and made according to the relevant laws and regulations. External organizations and institutions monitor the SAI's annual reports, which can contain important information about government expenditure, pointing to inaccuracies, fraud and other shortcomings in government financial management.</p>	<p>Monitoring audit reports provides insights into the general reliability of government financial management, and thus of the viability of relying on the reports to assess the government's compliance with its human rights obligations. In addition, although the SAI analyses only a small portion of the government's accounts each year, it may be that it has recently audited ministries or departments of specific relevance to human rights, such as education, prisons, justice, health, etc. Any such information could shed light on the government's compliance with its various obligations.</p>
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Social audit	<p>A social audit is a process by which the work of a government department or office is assessed. Its primary focus is on whether public funds have been used for the purposes intended, particularly for programmes and projects affecting lower income groups. Social audits generally gather evidence from individual people and communities (the reported recipients or beneficiaries of the projects or programmes) as to the use or misuse of the related government funds. They are a valuable tool in uncovering fraud and corruption, and in creating awareness about government budgets and documentation. Because they include public hearings that bring together communities and government officials, they serve as important accountability mechanisms.</p>	<p>Social audits are important tools for advancing people's right to participate in government affairs, and are a mechanism for holding government officials to account if they fail to meet their human rights obligations. They are also useful for determining whether funding intended for human rights-related projects or programmes were, in fact, used in an efficient and effective manner for the intended purpose. If they were not, this would be evidence that the government failed to comply with its obligation to use the budget effectively to realize rights, or to use MAR to advance these rights (see PETS, above).</p>
Independent audit investigation	<p>In addition to social audits, occasionally outside actors will undertake other types of independent audit of the government's expenditure. The processes used vary. Some are quite similar to the SAL's audit in that they involve comparing the government's financial reports against other financial records, such as invoices, etc. Others look not at invoices but at a range of government financial reports and other documents as well as the government's own audit, comparing these with the budget.</p>	<p>An independent audit could serve the same end of generating evidence on human rights matters as could an official audit.</p>

	<p>Because of the complexity of such audits and the need to have access to the relevant government documents, to date these audits have generally been quite focused, looking at specific ministries, departments, programmes or projects. On occasion, the government and outside actors have collaborated on a joint audit.</p>	
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## V. *Assessing the impact of the government's budget*

<p>Citizen report card (CRC)</p>	<p>Citizen report cards (CRCs) are based on surveys designed to assess user satisfaction with the quality, adequacy and efficiency of public services. The survey form grows out of discussion in small focus groups comprised of service users and service providers, who identify the principal problem areas of the services. The form is then used in interviews with a larger, random group of users, and the results are compiled into a "report card." The "grades" in the CRC are reported back to the users, and pressure for improvement is put on service providers through media coverage and civil society advocacy.</p>	<p>The "obligation of result" requires that a government not only allocates and spends money in a way that is designed to advance human rights, but that its expenditure is effective in doing so. Assessing the impact of government expenditure is thus critical to assessing a government's compliance with its obligations. Human rights require that people have access to specific services (e.g., in the areas of education, health, housing), and that those services are affordable, accessible and of good quality. Stated this way, it is readily apparent how a CRC can provide important data to assess the government's compliance with its obligations of result.</p>
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Community score card (CSC)	A CSC is a mix of social audit, community monitoring and citizen report cards. Representative members of the community come together in focus groups and develop score cards to assess a particular service delivery. The cards are less extensive than CRC surveys and the group itself fills them out, so the number of participants is smaller. The less rigorous nature of the score card and smaller group allows for quicker results. Similar discussions are held with service deliverers, who are asked to score themselves. A public meeting is held (as in a social audit) which allows for discussion between the community and the service deliverers about the service delivery issues.	A CSC could be used in a similar way as a CRC would be.
Tax incidence analysis	Tax incidence analysis examines specific taxes to determine what groups are ultimately most impacted upon by the taxes. Tax incidence analysis is quite complex and is thus generally undertaken by government agencies and academic or research institutes, rather than CSOs.	Governments have an obligation to raise revenue in a way that advances rather than obstructs the realization of human rights. Certain taxes, such as VAT, are regressive; that is, the poor pay a disproportionately large share of their income in VAT. Tax incidence analysis can help identify whether specific taxes the government uses are discriminatory in their impact.
Benefit incidence analysis (BIA)	Benefit incidence analysis (BIA) analyses specific policies, programmes or expenditures to determine which groups will ultimately benefit most from them. As with tax incidence analysis, BIA is quite complex, and is typically done by government agencies, academic or research institutes.	As desirable as it is, it is not enough that a government allocates and spends public funds in a way that is designed to realize human rights. In line with its obligations of result, the effect of the government's expenditure must be that rights are indeed realized. BIA will help identify whether the likely beneficiaries of such expenditure will be the same as the intended beneficiaries.

## ANNEX II Other resources

### Human rights and governments' budgets – general

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### Governments' budgets and ESC rights – The right to food

Blyberg, Ann, and Frank Mischler. *Budget Work to Advance the Right to Food: "Many a Slip..."*. Rome, Food and Agriculture Organization of the United Nations (FAO), 2009. Available from: [www.fao.org/righttofood/publications/publications-detail/en/c/129287/](http://www.fao.org/righttofood/publications/publications-detail/en/c/129287/)

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### **Governments' budgets and women's rights**

Elson, Diane. *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*. New York, United Nations Development Fund for Women (UNIFEM), 2006. Available from: [https://www.un.org/ruleoflaw/files/MonitoringGovernmentBudgetsComplianceCEDAW\\_eng.pdf](https://www.un.org/ruleoflaw/files/MonitoringGovernmentBudgetsComplianceCEDAW_eng.pdf)

### **Governments' budgets and child rights**

Save the Children, and HAQ: Centre for Child Rights. *Budget for Children Analysis: A Beginner's Guide*. Kathmandu, Nepal, 2010. Available from: [www.haqrc.org/publications/toolkit-budget-analysis](http://www.haqrc.org/publications/toolkit-budget-analysis)

Streak, Judith. *Monitoring Government Budgets to Advance Child Rights: A Guide for NGOs*. Cape Town, Institute for Democracy in South Africa, 2003. Available from: [www.csoforum.info/wp-content/uploads/2011/04/ACERWC-3rd-CSO-Forum-Monitoring-Government-Budgets-to-Advance-Child-Rights-Presentation.pdf](http://www.csoforum.info/wp-content/uploads/2011/04/ACERWC-3rd-CSO-Forum-Monitoring-Government-Budgets-to-Advance-Child-Rights-Presentation.pdf)

### **Participatory budgeting**

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## **Macroeconomic policies and human rights**

Balakrishnan, Radhika. *Why MES with Human Rights? Integrating Macro Economic Strategies with Human Rights*. New Brunswick, N.J., Rutgers Center for Women's Global Leadership, 2005. Available from: [www.cwgl.rutgers.edu/docman/economic-and-social-rights-publications/19-whymeswithhumanrights-pdf/file](http://www.cwgl.rutgers.edu/docman/economic-and-social-rights-publications/19-whymeswithhumanrights-pdf/file)

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## ENDNOTES

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