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Wills, Joe J; Warwick, Ben TC

DOI:
10.2979/indjglolegstu.23.2.0629

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (Harvard):
Wills, JJ & Warwick, BTC 2016, 'Contesting austerity: the potential and pitfalls of socioeconomic rights discourse', *Indiana Journal of Global Legal Studies*, vol. 23, no. 2, pp. 629-664.
https://doi.org/10.2979/indjglolegstu.23.2.0629

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Joe Wills, Ben TC Warwick

Indiana Journal of Global Legal Studies, Volume 23, Issue 2, 2016, pp. 629-664 (Article)

Published by Indiana University Press

Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse

JOE WILLS* AND BEN TC WARWICK**

This article argues that, while socioeconomic rights have the potential to contribute to the contestation of austerity measures and the reimagining of a "postneoliberal" order, there are a number of features of socioeconomic rights as currently constructed under international law that limit these possibilities. We identify these limitations as falling into two categories: "contingent" and "structural." Contingent limitations are shortcomings in the current constitution of socioeconomic rights law that undermine its effectiveness for challenging austerity measures. By contrast, the structural limitations of socioeconomic rights law are those that pertain to the more basic presuppositions and axioms that provide the foundations for legal rights discourse. We address these limitations and conclude by arguing that it is possible to harness the strengths of socioeconomic rights discourse while mitigating its shortcomings. A key element in moving beyond these shortcomings is the development of an understanding of such rights as just one component in a portfolio of counterhegemonic discourses that can be mobilized to challenge neoliberalism and austerity.

INTRODUCTION

At the turn of the century Perry Anderson described neoliberalism as "the most successful ideology in world history."[1] Since those words were written, neoliberalism has undergone a series of crises, and following the 2008 financial meltdown there has been an unprecedented public debate concerning the relevance, credibility, and durability of neoliberalism as an economic, political, and social order.[2] The financial crash, widely attributed to the failure of governments to effectively

* Lecturer in Law, University of Leicester.
** Graduate Teaching Assistant, Durham University.

1. Perry Anderson, *Renewals*, 1 NEW LEFT REV. 1, 13 (2000).

2. *See* Stephen Gill, *Introduction: Global Crises and the Crisis of Global Leadership*, *in* GLOBAL CRISES AND THE CRISIS OF GLOBAL LEADERSHIP 1, 4–8 (Stephen Gill ed., 2012).

Indiana Journal of Global Legal Studies Vol. 23 #2 (Summer 2016)

regulate the financial sector, has undoubtedly dealt a heavy blow to the free market credo that is integral to neoliberalism's ideological self-representation.[3] Many mainstream commentators have joined radical opponents of neoliberalism in asserting the unsustainability of the current economic order.[4] Indeed, the impact of the crisis even led the associate editor and chief economics commentator at the London *Financial Times* to declare that "[t]he world of the past three decades has gone."[5]

Despite the challenge seemingly posed to the legitimacy of neoliberalism by the current economic crisis, assumptions that neoliberalism is dead or that we have now moved to a "postneoliberal world" are premature.[6] Indeed, it is clear that the response to economic recession by many national governments and global governance organizations has been to impose austerity, cut social protection, and further privatize and commodify pensions, health care, and education.[7] In other words, the structural and discursive power of neoliberalism has enabled the economic recession to be "used by many Western governments as a means of further entrenching the neoliberal model."[8] The International Monitory Fund (IMF), European Commission, and the European Central Bank's joint promotion and enforcement of austerity and privatization in Greece, Italy, Spain, Portugal, and Ireland in response to the economic crisis in the Eurozone demonstrates the continued pervasiveness of neoliberal practice in global governance.[9]

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3. *See* James Crotty, *Structural Causes of the Global Financial Crisis: A Critical Assessment of the 'New Financial Architecture'*, 33 CAMBRIDGE J. ECON. 563, 564 (2009). *See generally* WHAT CAUSED THE FINANCIAL CRISIS (Jeffrey Friedman ed., 2011).

4. *See* Gill, *supra* note 2, at 4.

5. Martin Wolf, *Seeds of Its Own Destruction*, FIN. TIMES, Mar. 8, 2009, at 19.

6. *See, e.g.*, COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM (2011); Manuel B. Aalbers, *Neoliberalism is Dead . . . Long Live Neoliberalism!*, 37 INT'L J. URB. & REG'L RES. 1083 (2013).

7. *See* Robin Blackburn, *Crisis 2.0*, 72 NEW LEFT REV. 33, 34 (2011).

8. Stuart Hall, Doreen Massey & Michael Rustin, *Framing Statement: After Neoliberalism: Analysing the Present*, *in* AFTER NEOLIBERALISM? THE KILBURN MANIFESTO 9, 10 (Stuart Hall et al. eds., 2015).

9. *See* William I. Robinson, *The Global Capital Leviathan*, 165 RADICAL PHIL. 2, 5 (2011). For an account of how neoliberal austerity became the dominant paradigm in the post-2008 world, see generally PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN (2013) (arguing that the pervasiveness of neoliberal thought serves to further evidence its ultimate veracity). For accounts of how neoliberalism became hegemonic, generally see Susan George, *How To Win The War Of Ideas: Lessons from the Gramscian Right*, DISSENT, Summer 1997, at 47; PHILIP G. CERNY, *Embedding Neoliberalism: The Evolution of a Hegemonic Paradigm*, *in* RETHINKING WORLD POLITICS: A THEORY OF TRANSNATIONAL NEOPLURALISM 128 (2010); David Miller, *How Neoliberalism Got Where It Is: Elite Planning, Corporate*

The neoliberal "solution" to the crisis of its own making is widely perceived as unjust and unsustainable.[10] While the wealthy financial actors responsible for the crisis were saved by public funds, the massive public debt incurred in the wake of these bailouts is now being serviced through austerity cuts that have disproportionately fallen upon the already marginalized and exploited.[11] The growing pressure to adopt these measures, ostensibly for reasons of fiscal consolidation, is undermining social protection, public health, and education programs on which the vulnerable, the poor, and working people depend.[12]

There are innumerable critiques that could be deployed to challenge the current neoliberal wave of "austerity politics."[13] However, this paper will focus on the role that the *discourse of socioeconomic rights* might play in contesting the current social and economic impasse. For the purpose of this paper, socioeconomic rights are understood as the subcategory of human rights concerned with the material bases of human well-being.[14] Their primary normative function is to secure a basic quality of life for individuals and communities through guaranteeing access to material goods and services such as food, water, shelter, education, health care, and housing. These rights find legal expression in a number of international instruments and national constitutions.[15]

This article will argue that socioeconomic rights discourse contains a number of principles that can be used to interrogate the present neoliberal austerity drive, namely the principles of progressive realization, non-retrogression, maximum available resource mobilization, non-discrimination and equality, minimum core duties, and participation and accountability. These principles can serve as important counterframes to the dominant neoliberal fixation on competitiveness, efficiency, and economic rationality.

However, while socioeconomic rights have the potential to contribute toward the reimagining of a "postneoliberal" order, there are

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Lobbying and the Release of the Free Market, *in* THE RISE AND FALL OF NEOLIBERALISM: THE COLLAPSE OF AN ECONOMIC ORDER? 23 (Kean Birch & Vlad Mykhnenko eds., 2010).

10. *See generally* DAVID STUCKLER & SANJAY BASU, THE BODY ECONOMIC: WHY AUSTERITY KILLS (2013).

11. *See* Jan Breman, *Myth of the Global Safety Net*, 59 NEW LEFT REV. 29, 29 (2009).

12. *See* U.N. DEPT. OF ECONOMIC & SOC. AFFAIRS, THE GLOBAL SOCIAL CRISIS: REPORT ON THE WORLD SOCIAL SITUATION, at 6, U.N. Doc. ST/ESA/334, U.N. Sales No. E.10.IV.12 (2011).

13. *E.g.*, POLITICS IN THE AGE OF AUSTERITY (Armin Schäfer & Wolfgang Streeck eds., 2013).

14. *Cf.* Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1207 (1992).

15. *See infra* Section I.b.

a number of features of socioeconomic rights as currently constructed under international law that limit these possibilities. We identify these limitations as falling into two categories: "contingent" and "structural." We classify *contingent limitations* as shortcomings in socioeconomic rights law as it is currently constituted that undermine its effectiveness in challenging austerity measures. These shortcomings can be overcome through clarifying and extending existing principles within the normative architecture of international socioeconomic rights law. By contrast, the *structural limitations* of socioeconomic rights law are those that pertain to the more basic presuppositions and axioms that provide the foundations for legal rights discourse. Unlike contingent limitations, these structural limitations cannot be overcome simply by tweaking the extant framework. Instead, they require moving beyond, or supplementing, appeals to legal rights with more overtly political demands and programs.

Part I of this paper will examine key philosophical and legal principles that underpin socioeconomic rights law which can provide a basis for contesting neoliberal austerity measures. Part II will focus on two contingent shortcomings of socioeconomic rights for these purposes. The first is the failure of existing socioeconomic rights standards to adequately address the responsibilities of transnational actors such as the IMF and World Bank, which have played a major role in promoting and maintaining austerity measures that have negatively impacted socioeconomic rights. The second limitation is the absence of clear standards with respect to the presumptive proscription of "retrogressive measures" in the context of austerity programs. This lack of clarity on the doctrine's criteria limits the possibilities to deploy it against cuts to social protection systems. Part III will explore some of the structural limitations of legal rights discourse. These include the formal and abstract character of this discourse, well documented in critical legal literature, and the ways this undermines its capacity to address the systemic driving forces behind austerity and obscures, and to some extent naturalizes, the social systems and power structures that determine who will suffer and who will be shielded from harm. Finally, the paper will conclude by arguing that it is possible to harness the strengths of socioeconomic rights discourse while mitigating its shortcomings by understanding it as just one component of a portfolio of counterhegemonic discourses that can be mobilized to challenge neoliberalism and austerity.

I. THE POTENTIAL OF INTERNATIONAL SOCIOECONOMIC RIGHTS STANDARDS

A. Neoliberalism and Socioeconomic Rights: Foundational Tensions

It is widely recognized in the human rights literature that neoliberalism as a doctrine is hostile to socioeconomic rights at a foundational level.[16] Historically, neoliberals have rejected socioeconomic rights on two main grounds: one libertarian and one utilitarian. The libertarian argument is based upon a conception of "negative freedom" which holds that individuals are free when they are not subject to coercion by others.[17] As socioeconomic rights seem to carry the guarantee that individuals have access to certain material goods and services—such as food, housing, and health care—neoliberals believe that, in the final analysis, they are premised on coercive acts, such as taxation or appropriation, and therefore undermine individual freedom.[18] The most notable of the purported interferences is with the individual's right to private property, which is one of the central rights of a free society for neoliberals.[19] As Erich Weede of the Cato Institute, a libertarian think tank, puts it: "Since positive rights or entitlements need funding, the attempt to provide positive rights requires an infringement of negative rights, especially of the right to enjoy the fruits

16. *E.g.*, Phillip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 826–27 (2002); Marius Pieterse, *Beyond the Welfare State: Globalisation of the Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa*, 14 STELLENBOSCH L. REV. 3, 14 (2003); Paul O'Connell, *On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights*, 7 HUM. RTS. L. REV. 483, 507 (2007); RAYMOND PLANT, THE NEO-LIBERAL STATE 116 (2010).

17. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 16–17 (1960).

18. *See* 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE 102–03 (1998 ed. 1976); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 238 (2013 ed. 1974). Nozick is usually classified as a libertarian rather than a neo-liberal. Nevertheless, as Raymond Plant notes, Nozick's theories have been influential in the development of neo-liberalism. *See* PLANT, *supra* note 16, at 96.

19. *See* HAYEK, *supra* note 17, at 140; MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 67 (1990 ed. 1980); JAMES M. BUCHANAN, PROPERTY AS A GUARANTOR OF LIBERTY 59 (1993). Murray Rothbard goes so far as to argue that "not only are there no human rights which are not also property rights, but the former rights lose their absoluteness and clarity and become fuzzy and vulnerable when property rights are not used as the standard." MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 113 (1982). *See generally* DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE (1998) (critiquing assumptions behind the welfare state).

of one's labor."[20] It follows for neoliberals that rights protection should be limited to traditional civil and political rights that only impose duties of forbearance (i.e., noninterference).[21]

The utilitarian objection to socioeconomic rights is based on the belief that such rights constitute an unacceptable interference with the "spontaneous order" of the free market.[22] On the neoliberal account, markets are not only an intrinsic expression of freedom but also have instrumental value as vehicles for welfare maximization, information coordination and the guarantee of broader political freedom.[23] Whereas the state is regarded as bureaucratic, unresponsive, and inefficient, markets are held to be flexible, responsive, and self-correcting.[24] The superiority of the market stems from its ability to "spontaneously" coordinate the dispersed, separate, and partial knowledge of individuals through the price mechanism and the laws of supply and demand.[25] Markets are threatened by the interventions of central authorities that seek to achieve particular outcomes because such interventions distort their information-coordinating capacity.[26] Socioeconomic rights are at least in part concerned with achieving particular outcomes—for example, assuring that individuals have access to affordable water—and therefore favor the distribution of resources according to normative criteria such as human dignity or need.[27] To achieve this, a central authority would have to determine how and on what basis goods and

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20. Erich Weede, *Human Rights, Limited Government, and Capitalism*, 28 CATO J. 35, 47 (2008).

21. It should be noted that the neoliberal argument that social rights impose positive obligations, whereas civil and political rights only impose negative obligations, is based upon a false and oversimplified dichotomy that has been largely rejected in the human rights literature. *See, e.g.*, SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 66–70 (2008); *see also* Aoife Nolan et al., *The Justiciability of Social and Economic Rights: An Updated Appraisal* 7 (N.Y.U. Cent. Hum. Rts. Glob. Justice, Working Paper No. 15, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944.

22. *See* HAYEK, *supra* note 18, at 103, 107–32; Cass R. Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35, 35 (1993) (arguing against constitutionalized socioeconomic rights on the basis that they compel governments to interfere with free markets); Weede, *supra* note 20, at 40.

23. *See* HAYEK, *supra* note 17, at 120; FRIEDMAN & FRIEDMAN, *supra* note 19, at 9–38; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–21 (2002 ed. 1962).

24. *See* FRIEDMAN & FRIEDMAN, *supra* note 19, at 9–69.

25. *See id.* at 13–24; HAYEK, *supra* note 18, at 120.

26. *See* HAYEK, *supra* note 18, at 128–29.

27. The Universal Declaration of Human Rights states that everyone is entitled, "as a member of society," to the realization of "the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

services should be distributed. The effect of such interference would be to "distort" the information-coordinating role of markets.[28]

Hence neoliberals argue for a strict separation of the political sphere of the state, which has the responsibility of upholding fundamental civil and political rights, and the economic sphere of the market, which should be left to its own mechanisms to determine social and economic entitlement.[29] Particular levels of education, health care, social security, and so forth are not regarded as legal or moral entitlements, but rather as commodities to be acquired through the market.[30] It follows from this that neoliberals tend to welcome the cuts to public services currently being undertaken on the basis that the reduction in state spending and the privatization of formerly public services create better conditions for individual freedom and economic efficiency.[31]

Advocates of socioeconomic rights contest these arguments. First, they question why freedom is the *sole* criterion for rights on the neoliberal account. Freedom is undoubtedly an important human value, but it is not the *only* value: a state of physical and mental well-being, the ability to participate in democratic life, and substantive equality amongst citizens are also all important human values that can be promoted by rights. More fundamentally, however, advocates of socioeconomic rights question the very account of "freedom" advanced by neoliberals. They argue that "negative freedom," freedom from coercion, is not an end in itself, but rather is valuable or instrumental in achieving a broader and more basic good: autonomy, "living a life shaped by ones [sic] aims and goals—the exercise of our capacity for agency."[32] Freedom on this account is not simply the absence of coercion but rather the ability to exercise genuine choice and act on those choices.[33] This requires the removal of all sources of "unfreedom," including poverty, social deprivation, and neglect of public facilities.[34] As Raymond Plant argues,

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28. *See* FRIEDMAN & FRIEDMAN, *supra* note 19, at 17; *cf.* HAYEK, *supra* note 17, at 75 (arguing that services have "value only to particular people" and not a separate "determined and ascertainable 'value to society'").

29. *See* TONY EVANS, THE POLITICS OF HUMAN RIGHTS: A GLOBAL PERSPECTIVE 79–80 (2nd ed. 2005).

30. *See* HAYEK, *supra* note 18, at 106 ("To establish enforceable rights to the benefits is not likely to produce them.").

31. Austerity measures that threaten macroeconomic stability may however be subject to critique within the neoliberal/neoclassical paradigm. *See* Jonathan D. Ostry et al., *When Should Public Debt Be Reduced?* 2–7 (Int'l Monetary Fund, Staff Discussion Note 15/10, 2015) (warning against low-risk governments adopting needless austerity measures).

32. *See* Raymond Plant, *Social and Economic Rights Revisited*, 14 KINGS COLL. L.J. 1, 16 (2003).

33. *See* FREDMAN, *supra* note 21, at 10–16.

34. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (4th prtg. 2000).

> For the capacity for autonomy to exist there has to be a degree of physical integrity and health insofar as this is achievable and alterable by human agency; there has to be an appropriate level of education; and there has to be an appropriate level of security in terms of income and social security in that individuals will not develop the capacity for autonomy if the whole of each individual's life is devoted to securing the basic means of subsistence.[35]

As such, socioeconomic rights are regarded as *freedom enhancing* rather than freedom reducing.[36]

Like the libertarian objection grounded in negative freedom, the utilitarian objection to socioeconomic rights has also been subject to critique. First, the empirical assertion that governmental intervention in the market reduces aggregate welfare through its "distorting" effect has been challenged.[37] Indeed, it is widely agreed that it was government *underregulation* of the market that was the most immediate cause, not just of the present economic crisis, but also of previous ones, such as the 1929 Wall Street Crash or the 1997 Asian financial crisis.[38] At a deeper level, advocates of human rights question the aggregative logic of utilitarian calculations in neoclassical economics. They argue that the fixation with maximizing the aggregate welfare of society loses sight of individuals as the principle locus of moral value.[39] Advocates of socioeconomic rights are concerned not only

35. *See* Plant, *supra* note 32, at 17.

36. There are a number of other critiques that are outside the scope of this article. The first is that the neoliberal argument that social rights impose positive obligations, whereas civil and political rights only impose negative obligations, is based upon a false and oversimplified dichotomy. *See* FREDMAN, *supra* note 21, at 66–70. The other argument, advanced by Cohen, points out a fundamental contradiction in the neoliberal account: the neoliberal valorization of private property contradicts their defense of negative liberty, as property rights require restrictions on the negative liberty of others. (If X owns a field, she may exclude Y from walking across it, backed by the power of state coercion, thereby infringing Y's negative liberty to be free of such coercion.) *See* G.A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY 38–67 (1995).

37. See, for example, the arguments of Ray Kiely, *Neo Liberalism Revised? A Critical Account of World Bank Concepts of Good Governance and Market Friendly Intervention*, 22(1) CAPITAL & CLASS 63 (1998); Richard B. Freeman, *Labor Market Institutions and Policies: Help or Hindrance to Economic Development?*, 6 WORLD BANK ECON. REV. 117–144 (1992); RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY EQUALITY IS BETTER FOR EVERYONE 49-173 (2010)

38. *See* U.N. DEV. PROGRAMME REP., HUMAN DEVELOPMENT REPORT 1999 2–4 (1999).

39. *See* Margot E. Salomon & Colin Arnott, *Better Development Decision-Making: Applying International Human Rights Law to Neoclassical Economics*, 32 NORDIC J. HUM. RTS. 44, 61 (2014).

with maximizing aggregate welfare but also with the *distribution* of welfare gains in ways that respect the inherent dignity of every individual. In particular, they are concerned that distributional patterns are not only non-discriminatory but also *prioritarian*, giving priority to interests of the most disadvantaged and marginalized members of society.[40]

Having identified some of the core foundational differences between neoliberal and socioeconomic rights discourses, the next section will examine some of the principles that govern the international law of socioeconomic rights and consider their potential as important counterframes to the neoliberal logic that underpins the current austerity drive.

B. Socioeconomic Rights Under International Law

The Universal Declaration of Human Rights (UDHR), the foundational constitution of international human rights law, contains civil and political protections as well as socioeconomic guarantees.[41] The process of translating this declaration into binding international standards was a protracted affair significantly shaped by the geopolitical rivalries of the Cold War.[42] The initial unity seen in the UDHR was fractured into two binding interstate treaties covering socioeconomic rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[43] and civil and political rights in the International Covenant on Civil and Political Rights (ICCPR).[44] Two separate United Nations (U.N.) committees—the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee—monitor the implementation of each of these treaties,

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40. *See id.* at 64; Audrey R. Chapman & Benjamin Carbonetti, *Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*, 33 HUM. RTS. Q. 682, 683 (2011).

41. *See* Universal Declaration of Human Rights, *supra* note 27; *see also* AM. L. INST., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, n.6 (1987) (describing the Universal Declaration of Human Rights as the "accepted articulation of recognized rights").

42. *See* Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1156 (2005); *see also* Office of the High Comm'r for Hum. Rts., *Frequently Asked Questions on Economic, Social and Cultural Rights (Fact Sheet No. 33)*, at 9 (2008).

43. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx [hereinafter ICESCR].

44. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

reviewing states on a regular basis and providing guidance through "General Comments."[45]

Despite their historically subordinate status as the "poor cousins"[46] of their civil and political counterparts,[47] socioeconomic rights have gained in prominence in the last three decades and have been incorporated in a number of international instruments,[48] regional treaties,[49] and national constitutions,[50] all of which have helped to develop "an increasingly expansive" international socioeconomic rights jurisprudence.[51] Despite past treatment of socioeconomic rights as mere nonbinding "aspirations" at best, or as lacking the intrinsic character of

45. The Human Rights Committee monitors the ICCPR and, since 1987, the Committee on Economic, Social and Cultural Rights has monitored the implementation of the ICESCR. *See* Philip Alston & Bruno Simma, *First Session of the UN Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747, 747–49 (1987).

46. JOINT COMMITTEE ON HUMAN RIGHTS, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, TWENTY-FIRST REPORT, 2003-4, H.L. 183, H.C. 1188, ¶ 163 (U.K.); *see also* BEN SAUL ET AL., THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 8 (2014); Colm O'Cinneide, *Bringing Socio-Economic Rights Back into the Mainstream of Human Rights: The Case-Law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication* (2009), *available at* http://ssrn.com/abstract=1543127.

47. *See* David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53, 54 (2006) ("Despite innumerable proclamations of indivisibility and equality, socioeconomic rights languish far behind their civil and political counterparts in the pantheon of human rights protection.").

48. *See, e.g.*, ICESCR, *supra* note 43; United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, arts. 24–28, U.N. Doc. A/RES/61/106 (Dec. 13, 2006); United Nations Convention on the Rights of the Child, G.A. Res. 44/25, arts. 23–31, UN Doc. A/Res/44/49 (Nov. 20, 1989); United Nations Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, arts. 10–14, UN Doc. A/Res/34/46 (Dec. 18, 1979).

49. *E.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 16, 1999, O.A.S.T.S. No. 69; African Charter on Human and Peoples' Rights arts. 15–17, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217 (enumerating the rights to work under satisfactory conditions, equal pay for equal work, the right to health, and the right to education); European Social Charter, arts. 1–3, Oct. 18, 1961, 529 U.N.T.S. 89 (outlining the foundation of the socioeconomic rights to work, to just conditions of work, and to safe and healthy working conditions).

50. *See* Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3 (Malcolm Langford ed., 2008) (claiming that both constitutions and international law serve as instruments through which human rights and social values are vindicated) [hereinafter SOCIAL RIGHTS JURISPRUDENCE].

51. Philip Alston, *Foreword* to SOCIAL RIGHTS JURISPRUDENCE, *supra* note 50, at x.

rights at worst,[52] today the status of socioeconomic rights is settled: they are bona fide legal rights that generate binding normative obligations under international law.[53]

The socioeconomic rights framework applied in this article is based on the ICESCR. While this is not the only international socioeconomic rights instrument, it is the oldest, the most widely ratified, and the most wide-ranging instrument of its kind. The ICESCR contains a number of rights, including rights to work, to just and favorable conditions of employment, to form and join trade unions, to social security, to the protection of the family, to an adequate standard of living, to health-related rights, to education, and to cultural rights.[54] The generally applicable obligations of State Parties in relation to these rights are set out in Articles 2 and 3 of the ICESCR. Articles 2(2) and 3 require State Parties to ensure non-discrimination in relation to the enjoyment of the rights under the covenant.[55] Article 2(1) stipulates that

> Each State Party to the present Covenant undertakes to *take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized* in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[56]

While the requirements of this rather convoluted obligation were subject to considerable debate in the past, since 1990 the CESCR have

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52. *See* MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 88 (Amy Gutmann ed., 2001); CHARLES FRIED, RIGHT AND WRONG 113 (1978) (arguing that socioeconomic rights are negative rights, the type of which honoring "is costly"); MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 37–38 (Taplinger ed. 1973) (1973); Kenneth Minogue, *The History of the Idea of Human Rights*, *in* THE HUMAN RIGHTS READER 3, 14 (Walter Laqueur & Barry Rubin eds., 1979); Maurice Cranston, *Human Rights, Real and Supposed*, *in* POLITICAL THEORY AND THE RIGHTS OF MAN 43, 43 (D. D. Raphael ed., 1967); Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 1 (2006) (suggesting the adjudication of socioeconomic rights disputes as "unmanageable through the judicial process").

53. *See* The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 1, U.N. Doc. E/CN.4/1987/17, Annex (reprinted in 9 HUM. RTS. Q. 122 (1987)); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 5, M.C.H.R. 97-124 (Mar. 4, 1997).

54. *See* ICESCR, *supra* note 43, at arts. 6–15.

55. Comm. on Econ., Soc. & Cultural Rts., The Right to Work, General Comment No. 18, ¶33 U.N. Doc. E/C.12/GC/18 (Feb 6, 2006).

56. *Id.* at art. 2(1) (emphasis added).

issued "General Comments" and other statements to delineate the normative content of state obligations under the ICESCR.

This section will briefly outline some of these obligations and discuss the ways in which they could be useful to challenge the dominance of austerity policies.

1. Progressive Realization and Non-retrogression

The requirement of "progressive realization" set out in Article 2(1) of the ICESCR imposes an obligation on State Parties "to move as expeditiously and effectively" to ensuring the fulfilment of socioeconomic rights.[57] The obligation to realize socioeconomic rights continues to apply, and is perhaps more pertinent, during times of economic contraction.[58] As such, the primary obligation on states is to continue to progressively realize socioeconomic rights at a rate commensurate to the "maximum available resources" of the state.

Where states cannot (or do not) comply with this obligation to progressively improve rights realization, a major "corollary" duty is engaged.[59] This duty—to avoid enacting deliberately "retrogressive measures"—is said to derive from the obligation to progressively realize socioeconomic rights. The principle of non-retrogression establishes a strong presumption against State Parties deliberately adopting laws and policies that would jeopardize existing achievements in the realization of socioeconomic rights.[60] The presumption against

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57. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 3: The Nature of State Parties' Obligations, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter CESCR, General Comment No. 3].

58. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4: The Right to Adequate Housing, ¶ 11, U.N. Doc. E/1992/23 (Dec. 13, 1991); *see also* Comm. on Econ., Soc. & Cultural Rts., Globalization and Economic, Social and Cultural Rights, ¶¶ 436–61, U.N. Doc. E/1999/22–E/C.12/1998/26 (1998); Comm. on Econ., Soc. & Cultural Rts., General Comment 2: International Technical Assistance Measures, ¶ 9, U.N. Doc. E/1990/23 (1990) [hereinafter CESCR, General Comment No. 2].

59. *See* Illari Aragon Noriega, *Judicial Review of the Right to Health and Its Progressive Realisation: The Case of the Constitutional Court of Peru*, 1 UCL J.L. & JURISPRUDENCE 166, 172 (2012); Dianne Otto & David Wiseman, *In Search of 'Effective Remedies': Applying the International Covenant on Economic, Social and Cultural Rights to Australia*, 7 AUST. J. HUM. RTS. 5, 44 (2001); Craig M. Scott, *Covenant Constitutionalism and the Canada Assistance Plan*, 6 CONST. F. 79, 81 (1994).

60. *See* General Comments *supra* note 58; *see also* Econ. & Soc. Council, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: International Consultation "Economic, Social and Cultural Rights in the Development Activities of International Institutions" Organized in Cooperation with the High Council for International Cooperation (France), ¶ 8, U.N. Doc. E/C.12/2001/6 (Mar. 12, 2001) (by Hamish Jenkins).

retrogressive measures has important salience in the context of austerity measures, which have involved cuts to social protection systems and other services based in socioeconomic rights that have adversely impacted people's enjoyment of those rights.[61]

Where deliberately retrogressive measures are taken, the burden of proof is on a State Party to demonstrate that a number of conditions have been met. These conditions have varied throughout the previous two decades;[62] however, the most recent guidance requires that a proposed policy change in response to financial crisis must meet a number of human rights requirements: first, it must be temporary, in the sense that it covers only the period of crisis; second, it must be necessary and proportionate, in the sense that the adoption of any other policy, or failure to act, would be more detrimental to economic, social, or cultural rights; third, the policy must not be discriminatory;[63] fourth, the policy should identify the minimum core of rights and ensure the protection of this minimum at all times.[64]

The dual aims of the progressive realization and non-retrogression obligations are to establish "clear obligations" while also being a "necessary flexibility device."[65] As such, the progressive realization obligation and especially the doctrine of non-retrogression provide an

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61. *E.g.*, Independent Expert on the Question of Human Rights and Extreme Poverty, *Rep. of the Independent Expert on the Question of Human Rights and Extreme Poverty*, ¶¶ 44, 47, U.N. Doc A/HRC/17/34/Add.2, annex (May 17, 2011) (by Magdalena Sepúlveda Carmona).

62. *See* Comm. on Econ., Soc. & Cultural Rts., Comment No. 3, *supra* note 57; *see also, e.g.*, Comm. on Econ., Soc. & Cultural Rts., General Comment No. 19: The Right to Social Security, ¶ 42, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) [hereinafter CESCR, Comment No. 19]; Comm. on Econ., Soc. & Cultural Rts., General Comment No. 15: The Right to Water, ¶ 19, U.N. Doc. E/C.12/2002/11 (2002) [hereinafter CESCR, General Comment No. 15]; Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 32, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter CESCR, General Comment No. 14]; Comm. on Econ., Soc. & Cultural Rts., General Comment No. 13: The Right to Education, ¶ 13, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter CESCR, General Comment No. 13].

63. Discussed further at Part I.B.4. *infra.*

64. *See* Chairperson of the Comm. on Econ., Soc. & Cultural Rts., Letter dated May 16, 2012 from the Chairperson of the Comm. on Econ., Soc. and Cultural Rights addressed to States Parties to the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. CESCR/48th/SP/MAB/SW (May 16, 2012); *see also, e.g.*, Comm. on Econ., Soc. & Cultural Rts., Concluding Observations on the Fourth Report of Iceland, Adopted by the Committee at its Forty-Ninth Session, ¶ 6, U.N. Doc. E/C.12/ISL/CO/4 (Nov. 30, 2012); Comm. on Econ., Soc. & Cultural Rts., Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Spain, ¶ 8, U.N. Doc. E/C.12/ESP/CO/5 (June 6, 2012) [hereinafter CESCR, *Spain*].

65. *See* Comm. on Econ., Soc. & Cultural Rts., *supra* note 55.

"escape hatch" which allow states to reduce protection of socioeconomic rights in some circumstances.[66]

2. Maximum Available Resources

Although attention to state expenditures has grown,[67] in the context of state incomes, there has been a historical "hesitation" to dealing with taxation frameworks from a human rights perspective.[68] Sepùlveda, grounding her analysis in Article 2(1) of the ICESCR, notes that the obligation of governments to realize socioeconomic rights requires that they must mobilize resources within their country to their utmost availability.[69] Available resources are not limited to financial resources, but may also include human and organizational resources.[70] To that end, taxation constitutes a vital source of revenue in the context of utilizing maximum available resources.[71] The design and structure of a taxation framework, as well as the State's willingness and ability to implement and enforce it, is of vital importance in this respect.[72]

One of the controversies in the current period of austerity is that, while governments justify reductions in social programs on the basis that they do not have the resources to finance them, large amounts of tax are often not collected due to weak enforcement, corruption, criminal tax evasion, and legal strategies of tax avoidance.[73] Yet a landmark report by the U.N. Special Rapporteur on Extreme Poverty and Human Rights notes that the effective collection of tax is the most "straightforward" way of ensuring such rights, as it means that

66. *See* Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81, 94 (1998).

67. *See* Aoife Nolan, *Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis*, 4 EUR. HUM. RIGHTS LAW REV. 360–371 (2015) (noting the development of the CESCR's approach to economic policy).

68. *See* Magdalena Sepúlveda, *Taxation for Human Rights*, 9 TAX JUST. FOCUS 3, 3 (2014).

69. *See* M. MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 313–19 (2003).

70. *See* Diane Elson et al., *Public Finance, Maximum Available Resources and Human Rights*, *in* HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 13, 15 (Aoife Nolan et al. eds., 2013).

71. *See* RADHIKA BALAKRISHNAN ET AL., MAXIMUM AVAILABLE RESOURCES & HUMAN RIGHTS: ANALYTICAL REPORT 3 (2011); Sepúlveda, *supra* note 68, at 3.

72. SAUL ET AL., *supra* note 46, at 144.

73. *See* Wolfgang Obenland, *Taxes and Human Rights*, 8e INFO STEUERGERECHTIGKEIT 3 (2013).

governments have sufficient resources for high-quality public services.[74] For these reasons, demands for "tax justice" are increasingly conceptualized as a human rights issue.[75]

The pressures on state resources are intensified during a financial crisis.[76] Yet the CESCR has made clear that a crisis or fiscal deficit does not absolve governments of their obligations to utilize their maximum available resources to realize socioeconomic rights. Quite the opposite: it requires that they take extra care in allocating their available resources to protect marginalized and vulnerable groups.[77]

The presumed impermissibility of retrogressive measures is inseparably connected to the requirement that states use the maximum of their available resources to implement ICESCR rights. The CESCR has affirmed that, "even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the most vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."[78] Furthermore, if a state uses "resource constraints" as an explanation for a retrogressive measure, the CESCR will assess the situation considering, among other factors, the country's level of development, the severity of the breach, whether the situation concerned the enjoyment of the minimum core of the rights, and whether the state had identified low-cost options or sought international assistance.[79]

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74. *See* Special Rapporteur on Extreme Poverty & Hum. Rts., *Rep. on Extreme Poverty and Human Rights*, Hum. Rts. Council, ¶ 42, U.N. Doc A/HRC/26/28 (May 22, 2014) (by Magdalena Sepúlveda Carmona).

75. *See id.* ¶¶ 36–42. *See generally* Ignacio Saiz, *Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective*, *in* HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 70, at 77.

76. Additionally, many states started from a weak socio-economic position. Pillay and Wesson, in the context of South Africa, ask whether the country can be seen as having experienced, "[a] crisis prior to a crisis." Anashri Pillay & Murray Wesson, *Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 335, 336 (Aoife Nolan ed., 2014).

77. This is reflected in the work of the Committee. *See* Chairperson of the Comm. on Econ., Soc. & Cultural Rts., *supra* note 64. *See also* David Bilchitz, *Socio-Economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L. J. CONST. L. 710, 729–33 (2014).

78. Comm. on Econ., Soc. & Cultural Rts., *supra* note 55, ¶ 12.

79. *See* Comm. on Econ., Soc. & Cultural Rts., An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant, ¶ 10, U.N. Doc E/C.12/2007/1 (May 10, 2007).

3. Minimum Core Obligations

In 1990, the CESCR established that "a core obligation" of immediate effect was to ensure the satisfaction of, at the very least, the "minimum essential levels" of each of the ICESCR rights.[80] A State Party is *prima facie* failing to discharge its obligations under the ICESCR where a significant number of individuals under its jurisdiction are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.[81] Thus, where cuts are made to social security schemes that impinge on the minimum core of these rights, a State Party is *prima facie* in breach of its ICESCR obligations.[82] The burden of proof then lies with the state to demonstrate that it has done everything possible to make full use of all available resources to satisfy these minimum obligations as a matter of priority.[83] In the context of austerity, the CESCR has argued that any policy change or adjustment should identify the minimum core content of rights, or a social protection floor, as developed by the International Labour Organisation (ILO), and ensure the protection of this core content at all times.[84]

4. Non-discrimination and Equality

The ICESCR requires that State Parties ensure that protection of the rights contained within it is without discrimination of any kind.[85] Non-discrimination is an immediate obligation that requires not merely the proscription of arbitrary differentiation between groups but also the promotion of substantive equality in the enjoyment of rights.[86] This obligation requires, *inter alia*, that states ensure the satisfaction of socioeconomic rights is available and affordable for all, and that poorer households are not disproportionately burdened with expenses.[87] In relation to austerity measures, states must demonstrate that they have taken all possible measures, including tax measures, to support social

80. *See* Comm. on Econ., Soc. & Cultural Rts., *supra* note 55, ¶ 10.

81. *See id.*

82. *See* U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment 19: The Right to Social Security, *supra* note 62, ¶ 59(a).

83. *See id.* ¶ 60.

84. *See* Chairperson of the Comm. on Econ., Soc. and Cultural Rts., *supra* note 64.

85. *See* ICESCR, *supra* note 43, arts. 2(2), 3.

86. *See* Comm. on Econ., Soc. & Cultural Rts., General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶¶ 7–9, U.N. Doc. E/C.12/GC/20 (May 25, 2009) [hereinafter CESCR, General Comment No. 20].

87. *See, e.g.*, CESCR, General Comment No. 15, *supra* note 62, ¶ 27; CESCR, General Comment No. 14, *supra* note 62, ¶ 12(b).

transfers and mitigate the inequalities that can grow in times of crisis.[88] This may require states to adopt progressive tax structures[89] and avoid regressive sales taxes or value-added taxes that may be incompatible with these principles given the disproportionate impact they have on those already experiencing financial difficulties.[90]

State Parties are also under an obligation to attenuate laws, policies, and practices that are *indirectly discriminatory*: facially neutral measures which have a disproportionate impact on certain groups' enjoyment of socioeconomic rights.[91] This is a particularly critical obligation during times of economic and financial crisis, as austerity measures have been documented to have significant and disproportionate negative impacts on disadvantaged and marginalized individuals and groups. Particularly affected groups include the poor, women, children, persons with disabilities, older persons, persons with HIV/AIDS, indigenous peoples, ethnic minorities, migrants, refugees, and the unemployed.[92]

5. Obligations to Respect, Protect, and Fulfil

The CESCR have also used General Comments to advance a tripartite typology of state obligations.[93] This imposes three "types" or "levels" of obligations on state parties: to *respect*, *protect*, and *fulfil*.[94] The duty to respect requires that states refrain from interfering with

88. *See* Chairperson of the Comm. on Econ., Soc. & Cultural Rts., *supra* note 64.

89. *See, e.g.*, Special Rapporteur on the Right to Food, *Rep. of the Special Rapporteur on the Right to Food*, ¶ 87(e), U.N. Doc. A/HRC/13/33/Add.4, annex (Jan. 26, 2010) (by Olivier De Schutter). *See generally* Obenland, *supra* note 73 (examining how tax policy in Germany affects human rights); Saiz, *supra* note 71 (discussing how tax structures can be adjusted to support human rights principles).

90. Independent Expert on the Question of Human Rights and Extreme Poverty, *supra* note 61, ¶ 50; Special Rapporteur on Extreme Poverty & Human Rts., *supra* note 74, at 9–10.

91. CESCR, General Comment No. 20, *supra* note 82, ¶ 10(b).

92. Office of the High Comm'r for Human Rights, *Rep. of the United Nations High Commissioner for Human Rights*, ¶ 49, U.N. Doc. E/2013/82 (May 7, 2013).

93. *See generally* Henry Shue, *Rights in the Light of Duties*, *in* HUMAN RIGHTS AND U.S. FOREIGN POLICY 65 (Peter G. Brown & Douglas MacLean eds., 1979) (arguing that human rights impose three core duties on States: the duty to avoid depriving, the duty to protect from deprivation and the duty to aid the deprived); Asbjørn Eide, *Economic, Social And Cultural Rights As Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 21 (Asbjørn Eide et al. eds., 1995) (arguing that that human rights obligations can be classified into three categories: the State's obligations to respect, protect and fulfil).

94. *E.g.*, Comm. on Econ., Soc. & Cultural Rts., General Comment No. 12: The Right to Adequate Food, ¶ 9, U.N. Doc. E/C.12/1999/5 (May 12, 1999); CESCR, General Comment No. 13, *supra* note 62, ¶ 46; CESCR, General Comment No. 14, *supra* note 62, ¶ 33; CESCR, General Comment No. 15, *supra* note 62, ¶ 20.

the enjoyment of a right.[95] The duty to protect requires the adoption of measures to ensure that third parties do not interfere with the socioeconomic rights of individuals and collectives under the State Party's jurisdiction.[96] Given the increasing tendency to privatize public services under conditions of austerity, the duty to protect will at least require that the state regulate and monitor private service providers to ensure that the objects of socioeconomic rights remain affordable, accessible, adequate, and are provided in a non-discriminatory manner.[97]

The duty to fulfil requires states to take positive measures to assist individuals and communities to enjoy their rights. Such measures are particularly important in the context of economic crisis, where high unemployment and rising costs of living can push individuals and communities further into poverty. Measures that should be adopted to ensure essential goods are affordable include appropriate low-cost techniques and technologies; appropriate pricing policies (for instance, free or low-cost access to goods such as water and services such as healthcare); and income supplementation.[98] Where individuals are unable to realize rights for themselves for reasons beyond their control—for example, having been made redundant—states are obliged to guarantee the right directly.[99]

II. CONTINGENT LIMITATIONS OF SOCIOECONOMIC RIGHTS FOR CHALLENGING AUSTERITY

In Part I, we argued that the international law of socioeconomic rights contains a number of principles that can be mobilized to contest neoliberal austerity measures. Nevertheless, while socioeconomic rights discourse contains a number of potentially counterhegemonic frames, there are also a number of limitations to the discourse. Part II will address two of the contingent limitations, which we define as shortcomings in socioeconomic rights law as currently constituted that undermine its effectiveness in challenging austerity measures. We shall look in turn at the failure of human rights standards to adequately

95. Asbjørn Eide, *Realization of Social and Economic Rights: The Minimum Threshold Approach*, 43 INT'L COMMISSION JURISTS REV. 40, 40–41 (1989).

96. *See* CESCR, General Comment No. 14, *supra* note 62, ¶ 33 (preventing parties from interfering with the article 12 guarantees to the right to health).

97. *E.g.*, *id.* ¶ 42; CESCR, General Comment No. 15, *supra* note 62, ¶¶ 22, 23; CESCR, General Comment No. 16, *supra* note 60, ¶¶ 45, 46; *see also* Manisuli Ssenyonjo, *The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?*, 12 INT'L J. HUM. RTS. 725, 725–26 (2008).

98. *Cf.* CESCR, General Comment No. 15, *supra* note 62, ¶ 27.

99. *See id.* ¶ 25.

address the responsibilities of transnational actors, and then at ambiguity in the interpretation of the "non-retrogression" doctrine.

A. Human Rights Standards Fail to Adequately Address the Responsibilities of Transnational Actors

Some critics have questioned the adequacy of traditional, territorially bounded conceptions of human rights obligations for addressing the types of violations of socioeconomic rights associated with neoliberal globalization.[100] The traditional human rights paradigm imposes obligations on states to respect, protect, and fulfill the human rights of those subjects within their territorial jurisdiction. However, the capacity of states to regulate certain aspects of economic and social affairs within their own borders has been significantly weakened by developments in the financial and commodity markets, the consolidation of global productive capacity by transnational corporations, and the economic and ideological leverage of international financial institutions (IFIs) like the IMF and World Bank.[101] During the 1990s and 2000s, much ink was spilled documenting the negative impact on poverty levels and income inequality of "structural adjustment programs"[102] imposed by the IMF and World Bank.[103]

Today, IFIs are playing a key role in imposing austerity across Europe. The recent sovereign debt crisis in the Eurozone triggered joint action by the IMF, the European Commission (EC), and the European Central Bank (ECB)—often termed the "Troika"—in imposing budgetary cuts on heavily indebted European nations such as Ireland, Cyprus, Spain, Portugal, and Greece.[104] These measures have had negative—in the Greek case, catastrophic—consequences for socioeconomic rights. A report by the Center for Economic and Social

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100. *E.g.* MICHAŁ GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 291–367 (2009) (explaining the extraterritorial application of treaties on economic, social, and cultural rights).

101. LESLIE SKLAIR, GLOBALIZATION: CAPITALISM & ITS ALTERNATIVES 309 (3d ed. 2002).

102. These were officially reclassified as "Poverty Reduction Strategy Papers" after 1999, but they remained fundamentally the same in substance. *See* Frances Stewart & Michael Wang, *Poverty Reduction Strategy Papers Within the Human Rights Perspective*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS A MUTUAL REINFORCEMENT 447, 447–48 (Philip Alston & Mary Robinson eds., 2005).

103. *See* STRUCTURAL ADJUSTMENT PARTICIPATORY REVIEW INT'L NETWORK, THE POLICY ROOTS OF ECONOMIC CRISIS AND POVERTY: A MULTI-COUNTRY PARTICIPATORY ASSESSMENT OF STRUCTURAL ADJUSTMENT 173–74 (2002); M. RODWAN ABOUHARB & DAVID CINGRANELLI, HUMAN RIGHTS AND STRUCTURAL ADJUSTMENT 135–49 (2007).

104. *See* Martin McKee et al., *Austerity: A Failed Experiment on the People of Europe*, 12 CLINICAL MED. 346, 346 (2012).

Rights concluded that measures adopted by Ireland that were negotiated by the Troika had "severely reduced enjoyment of a range of economic and social rights."[105] In his End of Mission Statement to Greece, the U.N. Independent Expert on Foreign Debt and Human Rights concluded that the imposition of austerity on Greece had imposed significant social costs on the Greek people, including high unemployment, homelessness, poverty, and inequality, as well as setbacks in the rights to work, social security, health care, and housing.[106] In relation to the far-reaching welfare reforms introduced in Greece, Manos Matsaganis has noted that, "[w]ith no exceptions, reforms were forced on reluctant governments . . . and on a (at best) suspicious public from above, by the Troika."[107]

Advocates of socioeconomic rights have argued that the traditional, territorially bounded and state-centric model of human rights enforcement creates an "accountability gap" whereby transnational actors whose actions have an enormous impact on the protection and promotion of human rights are nevertheless not directly bound by any human rights obligations. Margot Salomon illustrates the nature of this accountability gap through an examination of the European Union's (EU) response to the Greek sovereign debt crisis.[108] The Troika established a European Stability Mechanism (ESM) through which consecutive loan agreements have been provided to Greece.[109] Continued support has been conditional on reductions in public spending, drastic labor market reform, and retrenchment of the welfare state—policies that have brought extreme poverty and hardship on the Greek people.[110]

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105. CTR. FOR ECON. & SOC. RIGHTS, MAULED BY THE CELTIC TIGER: HUMAN RIGHTS IN IRELAND'S ECONOMIC MELTDOWN 24 (2012), http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf.

106. *United Nations Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Mr. Cephas Lumina Mission to Greece, 22-26 April 2013: End of Mission Statement*, UNITED NATIONS HUM. RTS. OFFICE OF THE HIGHER COMM'R (April 26, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13272&LangID=E.

107. MANOS MATSAGANIS, THE GREEK CRISIS: SOCIAL IMPACT AND POLICY RESPONSES 26 (2013), *available at* http://library.fes.de/pdf-files/id/10314.pdf.

108. *See* Margot Salomon, *Austerity, Human Rights and Europe's Accountability Gap*, OPEN DEMOCRACY (Mar. 18, 2014), https://www.opendemocracy.net/openglobalrights-blog/margot-salomon/austerity-human-rights-and-europe%E2%80%99s-accountability-gap (last visited Apr. 7, 2016).

109. *ESM Programme for Greece*, EUROPEAN STABILITY MECHANISM, http://www.esm.europa.eu/assistance/Greece/index.htm (last visited Apr. 26, 2016).

110. Stuckler and Basu's harrowing account documents the return of HIV and malaria epidemics to Greece as a result of "health service reforms" required by the Troika. *See* STUCKLER & BASU, *supra* note 10, at 77–94.

Greece's imposition of these austerity conditionalities led to a finding by the Council of Europe's European Committee of Social Rights that Greece had violated the right to social security under the European Social Charter (ESC).[111] Yet, as Salomon notes, the IFIs that imposed these austerity conditions upon Greece were able to avoid any human rights accountability for their actions because the ESC only binds ratifying *states* and not international organizations.[112] Furthermore, the ESM was constituted as a *separate* international organization rather than as an EU agency, which means that the ESM Member States are not applying EU law and thus are not bound by the socioeconomic rights guarantees contained in the EU Charter.[113] The upshot is that human rights claims can only be bought against "enfeebled governments" but not the transnational actors that enforce "disciplinary neoliberalism" on them.[114]

Two proposed reforms to dominant understandings of human rights obligations are put forward to plug this gap. The first argues that institutions such as the IMF and the World Bank, as legal personalities under international law, are directly bound to at least *respect* the rights contained within the ICESCR in their operations.[115] Whatever the correctness of this legal argument is, it should be noted that representatives of these institutions have staunchly resisted any imposition of binding human rights standards.[116] The second line of

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111. *See* Fed'n of Employed Pensioners of Greece (IKA-ETAM) v. Greece, 57 Eur. H.R. Rep. (ser. 2) 34, 49–50 (2012).

112. Margot E. Salomon, *Of Austerity, Human Rights and International Institutions*, 21 EUR. L. J. 521, 528–31 (2015); *see also* Aoife Nolan, *Addressing Economic and Social Rights Violations by Non-state Actors Through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"*, 9 HUM. RTS. L. REV. 225, 226–30 (2009) (surveying regional human rights bodies' practices regarding State responsibility for violations of economic and social rights by non-state actors).

113. *See* Salomon, *supra* note 108, at 532–37. Socioeconomic rights are contained within Chapter IV of the Charter. *See* Charter of Fundamental Rights of the European Union ch. IV, Dec. 7, 2000, 2000 O.J. (C 364) 15–17.

114. "Disciplinary Neoliberalism" is the term Stephen Gill uses to describe the role played by transnational structures to expand the scope and increase the power of market-based structures and forces so that governments and other economic agents are disciplined by market mechanisms. *See* Stephen Gill, *Globalisation, Market Civilisation, and Disciplinary Neoliberalism*, 24 MILLENNIUM J. INT'L STUD. 399, 399–400 (1995).

115. *See, e.g.*, SIGRUN I SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND INTERNATIONAL MONETARY FUND 125–36 (2001); JEAN ZIEGLER ET AL., THE FIGHT FOR THE RIGHT TO FOOD: LESSONS LEARNED 84–90 (2010).

116. *See, e.g.*, IBRAHIM F. I. SHIHATA, THE WORLD BANK INSPECTOR PANEL: IN PRACTICE 241 (2d ed. 2000) ("There is no legal obligation on the part of the Bank or its staff to guarantee that the project it finances will succeed or will not cause any harm to any party."); Willem van Genugten, *The World Bank Group, the IMF and Human Rights: About Direct Obligations and the Attribution of Unlawful Conduct*, *in* CHALLENGING

argument is that the individual states that make up organizations such as the World Bank and IMF should be held accountable for the "extraterritorial" violations of human rights that they cause or contribute to by their conduct vis-à-vis these organizations, particularly the rich states that wield disproportionate power and influence within them.[117] There is some textual support for this argument within the ICESCR, as well as the jurisprudence of the CESCR.

In respect of the ICESCR, two points can be made. First, the ICESCR, unlike the majority of international human rights treaties, makes no explicit mention of the scope of its territorial application.[118] Whereas Article 2(1) of the International Covenant on Civil and Political Rights imposes obligations on State Parties to respect and ensure the rights of all individuals "within its territory and subject to its jurisdiction," there is no mention of territory or jurisdiction in the wording of Article 2(1) of the ICESCR.[119] Second, there is an explicit reference within Article 2(1) of the ICESCR to international assistance and cooperation as a means to achieve the full realization of the rights provided by the covenant. This reference to international assistance and cooperation is reiterated in several other articles.[120]

Furthermore, the CESCR has established in its General Comments that State Parties to the ICESCR have a number of international obligations. From General Comment No. 14 onwards, the CESCR has consistently used mandatory language to express the international obligations of states to respect and protect the enjoyment of ICESCR rights of people in third countries ("have to"), while obligations to fulfill

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TERRITORIALITY IN HUMAN RIGHTS LAW: BUILDING BLOCKS FOR A PLURAL AND DIVERSE DUTY-BEARER REGIME 44, 45–47 (Wouter Vandenhole ed., 2015); FRANÇOIS GIANVITI, ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE INTERNATIONAL MONEY FUND paras. 10-30 (2002), http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf (arguing that the ICESCR does not apply to the IMF).

117. *See, e.g.*, Smita Narula, *International Financial Institutions, Transnational Corporations and Duties of States*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 114, 115–16 (Malcolm Langford et al. eds., 2012); Radhika Balakrishnan & James Heintz, *Extraterritorial Obligations, Financial Globalisation and Macroeconomic Governance*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 146, 147–52 (Aoife Nolan ed., 2014).

118. On the implications of not mentioning the scope of ICESCR's territorial applications, see MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW 75–77 (2007).

119. *Compare* International Covenant on Civil and Political Rights, art. 2(1), *supra* note 44, *with* International Covenant on Economic, Social and Cultural Rights, art. 2(1), *supra* note 43.

120. *See* ICESCR, arts. 11(2), 15(4), 22, 23, *supra* note 43.

have been expressed in recommendatory language ("should").[121] For example, in relation to the right to health, the CESCR has held that:

> To comply with their international obligations in relation to article 12, States parties *have to respect* the enjoyment of the right to health in other countries, *and to prevent third parties from violating the right* in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States *should facilitate* access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.[122]

This robust language would indicate that Member States acting within IFIs such the IMF and World Bank have mandatory obligations to *respect* and *protect* socioeconomic rights, such that they may not formulate loan conditionalities or other lending policies that will negatively impact the enjoyment of socioeconomic rights in the recipient country. At a minimum, this might require IFIs to engage in some basic consultation on the projected socioeconomic effects of their policies.[123] Unfortunately however, whenever the CESCR expressly mentions the obligations of States Parties as Member States of IFIs, it qualifies the nature of their extraterritorial obligations in recommendatory language ("should"):

> Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, *should pay greater attention* to the protection of the right to health in

121. *E.g.*, CESCR, General Comment No. 15, *supra* note 62, ¶¶ 31, 36; *see also id.* ¶¶ 20–29 (discussing the taxonomy duties to respect, protect, and fulfill).

122. CESCR, General Comment No. 14, *supra* note 62, ¶ 39 (emphasis added).

123. *See* Salomon, *supra* note 108, at 530 (discussing how consultation was sometimes omitted or prevented from taking place).

> influencing the lending policies, credit agreements and international measures of these institutions.[124]

This is a particularly weakly worded obligation. First, it is non-mandatory ("should"); second, it is ambiguously relativized ("greater"—but in relation to what?); and third, its terms could be satisfied in an entirely tokenistic way. For example, greater attention could be paid to the right to health in lending policies and then simply be ignored in policy formulation. This is an extremely important point, as the policy design of conditional loans can have severe adverse impacts on a country's capacity to ensure socioeconomic rights.[125] As Stuckler and Basu show in their harrowing account, the "health service reforms" and budget cuts imposed on Greece by the Troika have had disastrous consequences on the nation's health, including helping to foster the return of HIV and malaria epidemics.[126] Such dire health indicators in any European nation would have been scarcely imaginable a few years ago.

The jurisprudence of the CESCR is therefore ambiguous in terms of the strength of the obligations of States Parties within IFIs. This is most unfortunate in light of the considerable influence, evident in the Greek case, that IFI activity has on States Parties' abilities to comply with their obligations under international socioeconomic rights instruments. It is hoped that, with the maturation of the Optional Protocol to the ICESCR, a more detailed and concretized jurisprudence with regard to extraterritorial application of socioeconomic rights will be developed through periodic reporting procedures, individual complaints, and inquiry procedures.[127] This path, however, is likely to be a slow one. To date[128] there are only twenty-one parties to the Optional Protocol and, as Eide Riedel, member of the CESCR from 1997 to 2012, has argued,

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124. CESCR, General Comment No. 14, *supra* note 62, ¶ 39 (emphasis added); *see also* CESCR, General Comment No. 15, *supra* note 62, ¶¶ 31, 235; CESCR, General Comment No. 19, *supra* note 62, ¶¶ 53, 58.

125. In her account of conditionality in the Greek case, Salomon notes the highly prescriptive nature of the Troika conditions including, for example, a requirement to "[e]liminate pension bonuses." Salomon, *supra* note 108, at 528–29.

126. *See* STUCKLER & BASU, *supra* note 10, at 77, 87. *See generally* RICK ROWDEN, THE DEADLY IDEAS OF NEOLIBERALISM: HOW THE IMF HAS UNDERMINED PUBLIC HEALTH AND THE FIGHT AGAINST AIDS (2009) (discussing the interplay between neoliberal economics and the spread of HIV/AIDS and other diseases related to poverty).

127. *See generally* Ashfaq Khalfan, *Accountability Mechanisms*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW, *supra* note 117, at 391 (discussing the ways in which IESCR could compel nations to comply with socioeconomic rights regulations).

128. Dec. 9, 2015.

> [T]he Committee should take great care not to overstep its role once the Optional Protocol [comes into] force . . . . It would be wise to choose micro-level issues first and keep away from macro-issues such as extraterritorial application of [the] ICESCR . . . . This would definitely frighten off many states from ratifying.[129]

In the interim period, the CESCR could adopt a new, more detailed General Comment addressing the question of the extraterritorial scope of socioeconomic rights, building on recent scholarly work in the area, especially pertaining to questions of jurisdiction, causation, and division of responsibility.[130]

B. Ambiguity of the Concept of "Non-retrogression"

As outlined above, a major component of the ICESCR obligation to "progressively realize" socioeconomic rights is the obligation to avoid reductions in the protection of these rights. Given the propensity of austerity programs to reduce enjoyment of socioeconomic rights,[131] the duty of non-retrogression has clear potential to limit the damage done. A strong version of non-retrogression can "lock in" rights protection and counter the logic of austerity.[132] The core of this duty of non-retrogression is a presumption against backwards steps or "backsliding" in the protection of rights.[133] States wishing to enact such a

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129. ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 217 (2013).

130. *See generally* Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084 (2012) (commenting on the key themes, strengths, and weaknesses of the Maastricht Principles); GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW, *supra* note 117 (examining the state of international law on extraterritorial obligations in the context of economic, social, and cultural rights).

131. *See generally* James Harrison & Mary-Ann Stephenson, *Assessing the Impact of the Public Spending Cuts: Taking Human Rights and Equality Seriously*, *in* HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 219 (Aoife Nolan et al. eds., 2013) (surveying various austerity measures nations have undertaken and how such measures affect the nations' respective citizens).

132. *See* Aoife Nolan et al., *Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 121, 128–29 (Aoife Nolan ed., 2014). *See generally* Joe Wills, *The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony*, 27 LEIDEN J. INT'L L. 11 (2014) (discussing the ways in which austerity must temporarily and proportionately affect a nation to preserve human rights).

133. *See* Jill Cottrell & Yash Ghai, *The Role of the Courts in the Protection of Economic, Social & Cultural Rights*, *in* ECONOMIC, SOCIAL & CULTURAL RIGHTS IN PRACTICE: THE

retrogressive measure have the burden of proving that the measure is justified according to criteria set down by the CESCR.[134] Yet the criteria against which states are tested have been subject to frequent change. The resulting lack of clarity, and the CESCR's weak examination of the obligation, has caused the principle of non-retrogression to be of limited effect in challenging austerity measures.[135]

In various statements the CESCR has outlined multiple versions of the criteria that it will use in testing for a retrogressive measure. From a modest starting point in 1991, the CESCR's doctrine of non-retrogression developed into a more fully textured obligation in the period from 1999 to 2007.[136] Although the committee originally only required states to justify retrogressive measures by reference to the "totality of rights" and to use the maximum of available resources in order to avoid a finding of an impermissible retrogressive measure,[137] the list of criteria later expanded. By November 2007, the CESCR had developed some seven factors that would purportedly be examined: whether there was a "reasonable justification" for the measure; whether the State had examined alternative measures; whether the measure had been justified by reference to other ICESCR rights; whether there had been participation of affected groups in devising the policy; whether the measures were in any way discriminatory; whether there would be a sustained or unreasonable impact resulting from the measure; and whether there had been independent review of the measure.[138]

However, this relatively comprehensive framework was subject to significant revisions in 2012 when the chairperson of the CESCR released a letter addressing the financial and economic crises.[139] That letter purported to substantially alter the test for a retrogressive measure.[140] The committee noted that, to avoid enacting a retrogressive measure, states' measures should be temporary, necessary, proportionate, non-discriminatory, and must not infringe the minimum core of the right.[141] This is a clear weakening of earlier standards. Such an alteration of the standards of scrutiny is particularly concerning

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ROLE OF JUDGES IN IMPLEMENTING ECONOMIC, SOCIAL & CULTURAL RIGHTS 58, 61 (Yash Ghai & Jill Cottrell eds., 2004); *see also* Nolan et al., *supra* note 132, at 123.

134. *See, e.g.*, CESCR, General Comment No. 13, *supra* note 62, ¶ 45.

135. *See* Nolan et al., *supra* note 132, at 140.

136. This began with the U.N. Committee on Economic, Social and Cultural Rights. *See* CESCR, General Comment No. 13, *supra* note 62, ¶ 45.

137. *See* CESCR, General Comment No. 3, *supra* note 57, ¶ 9.

138. *See* CESCR, General Comment No. 19, *supra* note 62, ¶ 42.

139. *See* Chairperson of the Comm. on Econ., Soc. & Cultural Rts., *supra* note 64.

140. *See* Ben TC Warwick, *Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression*, 65 INT'L & COMP. L.Q. 249, 257 (2016).

141. *See* Chairperson of the Comm. on Econ., Soc. & Cultural Rts., *supra* note 64.

given the context of wide-reaching austerity programs and raises the question of why a period of retrenchment for socioeconomic rights was seen as the appropriate juncture for such changes.

While there remains a need for greater conceptual clarity around non-retrogression[142] and, in particular, a reversal of the weak position taken in the 2012 letter, a balance must be struck between change and stability. It is likely that the regular variation of the doctrine of non-retrogression over the past fifteen years has contributed somewhat to its weak enforcement in the CESCR's examinations of State Parties. Only infrequently has the CESCR addressed the issue of retrogression in its Concluding Observations on state compliance.[143] On these occasions the committee has been tentative about finding a violation of the obligation, opting instead to remind states of their obligations.[144] Stability in the terms of the doctrine is likely to be beneficial in addressing this enforcement gap. With the progress of states being examined approximately every five years,[145] having a constantly shifting set of criteria for such a key general obligation lends little certainty to the CESCR or to states about the scope of non-retrogression, or the standard against which examinations are made.

The choice to modify the doctrine of non-retrogression in the midst of a wave of austerity programs meant, in concrete terms, that the CESCR's changes were introduced in the same biannual session of the

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142. *See* Nolan et al., *supra* note 132, at 121–22.

143. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations on the Combined Fourth and Fifth Reports of Bulgaria, Adopted by the Committee at its Forty-Ninth Session*, ¶ 11, U.N. Doc. E/C.12/BGR/CO/R.4–5 (Nov. 30, 2012) [hereinafter CESCR, *Bulgaria*]; Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, ¶ 17, U.N. Doc. E/C.12/NZL/CO/3 (May 31, 2012); Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany*, U.N. Doc. E/C.12/DEU/CO/5 (May 20, 2011); Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, ¶ 52, U.N. Doc. E/C.12/CAN/CO/5 (May 22, 2006); Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Chile*, ¶ 56, U.N. Doc. E/C.12/1/Add.105 (Dec. 1, 2004); Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mauritius*, ¶ 16, U.N. Doc. E/C.12/1994/8 (May 31, 1994) [hereinafter CESCR, *Mauritius*]; Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Hungary*, ¶ 152, U.N. Doc. E/C.12/1992/2 (1992).

144. This is especially the case in recent years. *Compare* CESCR, *Mauritius*, *supra* note 143 (admonishing directly "the re-introduction of fees at the tertiary level of education, which constitutes a deliberately retrogressive step"), *with* CESCR, *Bulgaria*, *supra* note 143 (reminding States to "avoi[d] any retrogressive step with regard to the protection of workers' labor rights.").

145. WOUTER VANDENHOLE, THE PROCEEDURES BEFORE THE UN TREATY BODIES: DIVERGENCE OR CONVERGENCE? 126 (2004).

committee that saw the examination of the significant and high-profile austerity measures of the Spanish state.[146] The timing of this change limited the committee to doing little more than "draw[ing] the State party's attention" to its modified standards on non-retrogression.[147]

It is also a matter of concern that analysis of retrogression is largely absent from the ICESCR reporting guidelines.[148] These guidelines request information on key aspects of a state's performance of their socioeconomic rights obligations. However, at present, states are not required to submit information, justifications, or explanation on any backwards steps that have been enacted in the period under examination.[149] Such an omission reduces the CESCR's ability to systematically hold states accountable and prevents the committee from subjecting socioeconomic-rights-reducing policies to a full examination. In the context of widespread austerity programs, where there are more frequent occurrences of backwards steps, there is even greater value to such information being provided.

Furthermore, this information must be appropriately circumscribed in order to be of use to the CESCR in its monitoring. Examples abound of national situations for which there are more general statistical indicators which raise issues of concern, but for which the specific information needed in order to demonstrate retrogression is limited. Thus there is much awareness, for instance, of the fact that health services in Ireland were subject to significant budget cuts at a time when need for the services was on the increase.[150] Yet the doctrine of non-retrogression does not extend to preventing "economic constraints,"[151] but rather relies on showing some specific deterioration of rights standards. This necessitates a more focused statistical account of the enjoyment of some aspect of the right to health during the period of austerity.

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146. In fact, the Letter containing the guidance was released on May 16, 2012—eight days after Spain had been examined by the Committee.

147. *See* CESCR, *Spain*, *supra* note 64.

148. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rts., *Guidelines On Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights*, U.N. Doc E/C.12/2008/2 (Mar. 24, 2009).

149. See *id.*

150. *See* ANNE NOLAN ET AL., EUR. OBSERVATORY ON HEALTH SYSTEMS & POLICIES, THE IMPACT OF THE FINANCIAL CRISIS ON THE HEALTH SYSTEM AND HEALTH IN IRELAND 1 (2014); CTR. FOR ECON. & SOC. RIGHTS, *supra* note 105, at 5.

151. This point is taken to its height in Mary Dowell-Jones, *The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments*, 15 HUM. RTS. L. REV. 193, 197 (2015).

While demanding greater information on retrogressive policies and ensuring a degree of doctrinal stability are important to ensuring a more robust response to harmful backwards steps brought about by austerity, the system of state reporting described here is a sluggish and fundamentally retrospective exercise. States report to the CESCR around every five years, and, although there is a degree of chance inherent in when during a period of austerity this examination falls,[152] such a length of time is significant when compared to the rapidity of some austerity programs. The time period between state examinations is sufficient to allow an austerity program to "take hold," and, even following a finding of retrogression by the CESCR, such delays might make reversal of enacted and embedded policies more difficult.

Two other methods besides cyclical state examinations offer greater responsiveness in challenging austerity measures on the basis of socioeconomic rights. The first is the individual-complaint mechanism, recently in force, which allows individuals to bring a "case" against a state which has ratified the terms of the Optional Protocol to the ICESCR.[153] Although currently only twenty-one states have ratified the protocol,[154] as the number of ratifications grows, the number of complaints is also likely to grow.[155] Strategic litigation offers the potential for impermissible retrogressive measures to be identified by the CESCR much sooner after their enactment, and for the impacts of austerity on socioeconomic rights to be addressed more quickly. The second method, which might allow for more timely interventions, requires the CESCR to provide further examples of, and greater detail on, the kinds of measures that it will find to be retrogressive. Currently, the only clear example given relates to the right to work.[156] By providing further points of comparison in General Comments, Concluding

152. For example, by chance Spain fell to be examined relatively soon after it began its austerity program (austerity underway 2011; examined 2012), whereas Ireland (austerity underway 2011; examined 2015) and the UK (austerity underway 2010; examined 2016) have had a longer period of austerity without having been examined by the CESCR.

153. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

154. *3.a) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/iv-3-a.en.pdf (last visited Apr. 8, 2016).

155. *See Table Of Pending Cases Before The Committee On Economic, Social And Cultural Rights, Considered Under The Optional Protocol To The International Covenant On Economic, Social And Cultura [sic] Rights (OP-CESCR)*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx (last visited Apr. 8, 2016).

156. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 18, ¶ 34, U.N. Doc. E/C.12/GC/18 (Nov. 24, 2005) ("An example would be the institution of forced labor or the abrogation of legislation protecting the employee against unlawful dismissal.").

Observations, and in its Optional Protocol jurisprudence, the CESCR would aid rights advocates working in national settings to make well-founded cases against proposed retrogressive measures. Such actions are crucially important in addressing potential socioeconomic rights violations *ex ante*, before harms have resulted.

III. STRUCTURAL LIMITATIONS OF SOCIOECONOMIC RIGHTS FOR CHALLENGING AUSTERITY

In Part II, we discussed two contingent limitations of appeals to socioeconomic rights law. Such limitations could conceivably be overcome through the clarification of existing standards (better and more consistent definition of the meaning of non-retrogression) or extending their reach (to include transnational actors). There are, however, a number of structural features of socioeconomic rights law which limit its ability to challenge austerity and are trickier to surmount. These are the more fundamental presuppositions and axioms that frame socioeconomic rights law which ignore and naturalize the factors and forces that drive the current austerity measures. We call these *structural limitations*.

The limitations of legal human rights discourse have been well documented in critical legal theory. Human rights are argued to be too narrow and legalistic as a discourse to be used to challenge the systematic and material bases for social deprivation that are governed by the systemic logic and organization of the global political economy.[157] Such arguments are concerned that rights discourse channels oppositional movements into technical legal disputes around peripheral questions and diverts attention away from the need for meaningful social and political transformations.[158] Human rights challenges, particularly in the form of litigation, often revolve around relatively narrow issues, while underlying structural factors (political, social, cultural, and economic) are generally left unaddressed.[159] It is true that in recent years, a number of human rights scholars have been developing tools and models to apply socioeconomic rights standards

157. *See* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 11–13 (Princeton Univ. Press, 2005); *see also* NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 118–28 (2008); Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 147, 147–52.

158. *See* KENNEDY, *supra* note 157 ("The strong attachment of the human rights movement to the legal formalization of rights and the establishment of legal machinery for their implementation makes the achievement of these forms an end in itself.").

159. *See id.* at 10–13.

more broadly to fiscal policy.[160] While undoubtedly a step forward and a valuable contribution to expanding the lens of socioeconomic rights analysis, these models can only address distributive patterns and state policies, but not the underlying forces and factors that drive those patterns and policies.

What are the underlying structural factors associated with the current austerity drive? Robin Blackburn argues that the current financial crisis is the culmination of a number of trends strongly promoted by neoliberal globalization: "extreme inequality, poverty, financial deregulation, privatization and a pervasive commodification of the life course, via mortgages, credit-card debt, student fees and private pensions."[161] Rising inequality both within and between countries led to low wages in emerging economies and growing indebtedness and extreme concentration of wealth in established economies, which, taken in conjunction with the deregulation of financial markets, allowed investment banks and hedge funds, heedless of the consequences, to pursue short-term advantage through expanded credit schemes.[162] This in turn generated the succession of asset bubbles that created the current crisis. Marxist political economists like David Harvey have argued financial crises like the current one are an inherent and recurrent feature in the workings of the capitalist system.[163] Legal socioeconomic rights discourse is ill-suited to addressing these structural dynamics; it may address certain symptoms, but it has little to say about root causes. A failure to fully diagnose a problem inevitably means that the prescriptions will be limited or ephemeral.

Legal socioeconomic rights discourse is also limited in its perception of power dynamics. In human rights analysis, the identification of a violator, violation, and remedy is foregrounded, while broader relations and structures of power are bracketed or minimized.[164] Susan Marks has suggested that the identification of human rights *violators* can often obscure the question of who the *beneficiaries* of such violations are.[165] As

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160. *See, e.g.*, RORY O'CONNELL ET AL., APPLYING AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK TO STATE BUDGET ALLOCATIONS: RIGHTS AND RESOURCES (2014).

161. Blackburn, *supra* note 7, at 35.

162. *See id.*

163. *See generally* DAVID HARVEY, SEVENTEEN CONTRADICTIONS AND THE END OF CAPITALISM (2014).

164. *See* Alicia Eli Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda*, 27 HUM. RTS. Q. 1200, 1221 (2005).

165. *See generally* Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57, 70–74 (2011) (suggesting that much human rights analysis still treats abuses as contingent phenomena rather than the necessary outcomes of particular systemic or material arrangements).

Thomas Pogge has argued, material deprivation is not natural or inevitable but rather something that is happening as the result of a particular "global institutional order designed for the benefit of the affluent countries' governments and corporations, and of the poor countries' military and political elites."[166] Denials of basic socioeconomic rights are not "accidents" nor are they "random in distribution and effect."[167] Rather they are, as Paul Farmer has put it, "symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm."[168] It is no coincidence that Western governments responded to their economic crises by providing liquidity for the financial elites while cutting services that the poor and vulnerable rely upon. Nor is it a coincidence that

> [A]t the very same time we see millions of people pushed further into penury through conscious state policy (with all the right-denying effects that this has), we also see the number of wealthy people around the world steadily increasing, as well as governments introducing "business friendly" tax regimes . . . . [Austerity] now provides a pretext for a more brutal and extensive application of the inegalitarian logics inherent within neoliberal capitalism.[169]

In other words, neoliberalism functions, as David Harvey argues, to serve "the interests of private property owners, businesses, multinational corporations, and financial capital."[170] An atomizing focus on violations and remedies alone cannot identify these patterned logics, nor can it prescribe meaningful long term solutions to them.

In one sense, this observation is not new. Indeed, the U.N. human rights system is expressly premised on the understanding that the legal and political are entirely distinct categories, and it is the function of its human rights bodies to clarify, monitor, and enforce the content of

166. Thomas Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, 18 LEIDEN J. INT'L L. 717, 740 (2005).

167. Amartya Sen, *Foreword* to PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR xiii (2003).

168. *Id.* at 7.

169. Paul O'Connell, *Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity*, *in* HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 59, 65–67 (Aoife Nolan et al. eds., 2013).

170. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 7 (2005).

international legal norms while remaining neutral on questions of a political nature.[171] This is the position of the CESCR, which insists that

> in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach.[172]

However, the broader point to be made here is that casting legal doctrine as politically neutral is "at best a sleight of hand," for it is "precisely in acting as *though* law were neutral that legal discourse operates *ideologically*, not merely masking social inequalities but making those inequalities appear the inevitable concomitant to a neutral and impartial legal order."[173] We can see the operation of this "sleight of hand" in the jurisprudence of the CESCR, which, despite its insistence of political neutrality, ends up embracing a variant of neoliberalism that has been termed the "Post-Washington Consensus" (PWC).[174]

The CESCR has, in the face of overwhelming evidence, expressed concern about and criticism of the impact of adjustment measures and austerity on socioeconomic rights on numerous occasions.[175]

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171. *See, e.g.*, Office of the High Comm'r for Human Rights, *Rep. on the 5th WTO Ministerial Conference. Cancún, Mexico 10-14 September 2003: Human Rights and Trade*, at 4 (Sept. 2003), *available at* http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterial Cancun.pdf.

172. CESCR, General Comment No. 3, *supra* note 57, ¶ 8.

173. Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L L. 701, 704–05 (2013).

174. According to Joseph Stiglitz, the Post-Washington Consensus represents the realization that making markets work requires sound financial regulation, competition policy, and policies to facilitate the transfer of technology. It also envisions a role for the state in social protection and welfare. *See* Jospeh E. Stiglitz, Senior Vice President & Chief Economist, The World Bank Group, Keynote Address: More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus (Jan. 7, 1998), *in* Ger. Found. Int'l Dev. Villa Borsig Workshop Series, 1999, at 11, 27.

175. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rts., Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria, ¶ 43, U.N. Doc. E/C.12/1/Add.71 (Nov. 30, 2001); Comm. on Econ., Soc. & Cultural Rts., Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Venezuela, ¶ 8, U.N. Doc. E/C.12/1/Add.56 (May 21, 2001); Comm. on Econ., Soc. & Cultural Rts., Consideration of Reports Submitted by States Parties Under Articles 16

Nevertheless it also recognizes "that adjustment programmes will often be *unavoidable* and that these will frequently involve a major element of austerity."[176] The CESCR does not regard austerity to be necessarily incompatible with the realization of socioeconomic rights.[177] Rather, it has argued that such measures must be compensated for by approaches which enhance the compatibility of those trends and policies with full respect for socioeconomic rights.[178] In response to the current wave of austerity measures, the chairperson of the CESCR has acknowledged "the pressure on many States Parties to embark on austerity programmes . . . in the face of rising public deficit and poor economic growth" and notes further that "the Committee is acutely aware that this may lead many States to take decisions with sometimes painful effects."[179] While some retrogression in the enjoyment of socioeconomic rights is "inevitable," it must be compatible with state obligations under the ICESCR.[180] In short, the CESCR supports "adjustment with a human face."[181]

To make these observations is not necessarily to criticize the CESCR; given the limits of their mandate within the state-centric U.N. human rights system, the most pragmatic path for them to take may be to adopt a stance that scrutinizes austerity measures and holds governments accountable for the ways in which they implement it when they do. Indeed, in Part I.B above, we argued that the CESCR have developed a number of principles that are useful for doing just that. However, the stance adopted by the CESCR does indicate the limits of international socioeconomic rights law: not only does it not allow for broad political critique of these policy trends, it may also contribute to normalizing and naturalizing austerity measures by describing them as "unavoidable" and "inevitable." This is the general paradox of "political neutrality": failing to take a stance in relation to a dominant political trend can be to politically acquiesce to that trend.

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and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, ¶¶ 10, 28, U.N. Doc. E/C.12/1/Add.44 (May 23, 2000).

176. CESCR, General Comment No. 2, *supra* note 58, ¶ 9.

177. *See* Comm. on Econ., Soc. & Cultural Rts., Globalization and Economic, Social and Cultural Rights, *supra* note 58, ¶¶ 515.2, 515.3 ("[Globalization] has also come to be closely associated with a variety of specific trends and policies, including an increasing reliance upon the free market, . . . a diminution in the role of the State and the size of its budget, . . . and a corresponding increase in the role and even responsibilities attributed to private actors. . . . None of these developments in itself is necessarily incompatible with the principles of the Covenant or with the obligations of Governments thereunder.").

178. *See id.* ¶ 515.4 ("All of these risks can be guarded against, or compensated for, if appropriate policies are put in place.").

179. *See* Chairperson of the U.N. Comm. on Econ., Soc. & Cultural Rts., *supra* note 64.

180. *Id.*

181. CESCR, General Comment No. 3, *supra* note 57, ¶ 12.

Austerity is neither natural nor "inevitable": it is the product of a particular political-economic order and the conscious political choice of governments and intergovernmental organizations. Legal socioeconomic rights norms can serve as a useful standard to measure and critique the adverse human impact of these policies. But they can only go so far. As Robin Blackburn, talking about human rights more generally, so eloquently put it,

> "Human rights" can serve as a valuable watchword and measure. But because inequality and injustice are structural, constituted by multiple intersecting planes of capitalist accumulation and realization, more needs to be said—especially in relation to financial and corporate power and how these might be curbed and socialized. The plight of billions can be represented as a lack of effective rights, but it is the "property question"—the fact that the world is owned by a tiny elite of expropriators—that is constitutive of that plight. The slogan of rights takes us some way along the path; but it alone cannot pose the property question relevant to the 21st century.[182]

CONCLUSION

This paper has argued that many of the principles underscoring international socioeconomic rights law can serve as useful discursive tools for contesting neoliberal driven austerity measures. The principles of progressive realization, non-retrogression, maximum available resource mobilization, non-discrimination, equality, minimum core duties, participation, and accountability were argued to constitute important counterframes to the neoliberal fixation on economic growth, efficiency, and competitiveness. However, the paper also argued that there are a number of limitations to appeals to socioeconomic rights discourse to challenge austerity, most notability its inability to address the structural forces that drive these policy choices or to articulate the radical forms of transformation that will be needed to overcome them.

These identified shortcomings should not, however, form the basis for the rejection of socioeconomic rights discourse altogether. They should rather be the impetus for a "two-track" approach to socioeconomic rights. The first track is tactical: this involves mobilizing

182. Robin Blackburn, *Reclaiming Human Rights*, 69 NEW LEFT REV. 126, 137–38 (2011).

and reforming current discourses of socioeconomic rights so as to make them better vehicles for contesting neoliberal policy measures. This will require, amongst other things, clarifying the principle of non-retrogression, and seeking to apply socioeconomic rights standards to transnational actors (if not in law then at least in political discourse). The second track is strategic: this consists of linking socioeconomic rights discourses to counterhegemonic political discourses that articulate attempts to move beyond the neoliberal logic of austerity.[183] The recent emergence of anti-austerity movements such as the Coalition of the Radical Left ("Syriza") in Greece, Podemos in Spain, a socialist coalition government in Portugal, a revived social democratic Labour Party in the United Kingdom, and the Scottish National Party in Scotland, as well as a variety of grassroots and popular movements across Europe, shows that a continent-wide movement against austerity is growing.[184] Socioeconomic rights advocates should work with grassroots campaigns and political movements against austerity, identifying intersections between these groups' demands and the principles established in socioeconomic rights law.

183. *See generally* Robert Knox, *Strategy and Tactics*, 21 FINNISH Y.B. INT'L L. 193 (2010) (distinguishing tactical and strategic engagements with the law).

184. Europe's Anti-austerity Movements: From Podemos to the SNP, CHANNEL 4 NEWS, http://www.channel4.com/news/europes-anti-austerity-movements-from-podemos-to-the-snp (last visited May 5, 2016).