

Cooperating to Continuously Improve

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I. INTRODUCTION

THE OBLIGATION TO continuously improve living conditions does not stop at territorial borders. Woven throughout Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ is an obligation of international cooperation. This cross-border obligation is made explicit twice in the right to an adequate standard of living. Article 11(1) recognises the importance of international cooperation to the realisation of the right and Article 11(2) requires States to take measures through international cooperation to guarantee the fundamental right of everyone to be free from hunger. There is an unspoken assumption in the text that cooperation is an essential ingredient to realising the right to continuous improvement of living conditions. Despite the centrality of international cooperation to Article 11, its role in continuously improving living conditions has been largely ignored. In part, this is due to the pull of the obligation of international assistance and cooperation in Article 2(1) of ICESCR and to the enduring controversy around the idea that human rights obligations are not circumscribed by territorial boundaries.² Saul, Kinley and Mowbray observe ‘that in terms of a legal obligation in the Covenant’ to cooperate to continuously improve living conditions ‘the Committee ... talk[s] mainly in hope rather than expectation’.³ In the last five years, however, the Committee on Economic, Social and Cultural Rights (CESCR) has been building a body of jurisprudence on international cooperation, moving this obligation from hopeful aspiration to concrete reality. This chapter analyses the jurisprudential developments by CESCR on the duty of international cooperation and considers how these relate to the right

¹ (Adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.

² M Langford, F Coomans and F Gomez Isa, ‘Extra-Territorial Duties in International Law’ in M Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of ESCR in International Law* (CUP 2013).

³ B Saul, D Kinley and J Mowbray (eds), *ICESCR: Commentary, Cases and Materials* (OUP 2014) 967.

to continuous improvement of living conditions. It evaluates the clarity that CESCR has brought to this cooperative obligation and diagnoses where blind spots remain in relation to the right. Understanding the practice of CESCR can provide crucial insights and open up new lines of inquiry into the theory and practice of cross-border human rights obligations.

This chapter proceeds as follows. Section II analyses the textual base for cooperation in ICESCR and briefly sketches the continued uncertainties around this duty. Section III turns to assess how CESCR is engaging with these uncertainties and developing a duty of cooperation under ICESCR by mapping how CESCR is monitoring States in respect of their obligation to cooperate to improve living conditions in Article 11. It also expands the scope of analysis by mapping CESCR's approach to the other cooperative obligations threaded through ICESCR as CESCR rarely differentiates between cooperation in different obligations. This provides greater clarity on how CESCR is answering conceptually difficult questions on the development of a duty of cooperation.

The analysis in Section III illuminates unseen patterns in the evolution of international cooperation. First, CESCR is seeking to build legitimacy for holding States to account for cooperation and, second, it is taking tentative steps to put in place criteria for determining when a State has a duty to cooperate. Unlike much of the academic discourse, CESCR is also considering the circumstances when a State is required to seek cooperation. Third, the majority of CESCR's focus has been towards developing the normative content of cooperation. Its attention to this aspect of cooperation, however, is skewed. CESCR disproportionately focuses on the cooperative measures a State can take to ensure that business and trade operating across borders upholds human rights. It only gives passing engagement to other facets of cooperation, largely ignoring the facets articulated in Article 11. An even more glaring absence is that CESCR does not frame cooperation as a necessary component for improving living conditions. The chapter concludes (Section IV) by considering where CESCR can further engage with cooperation in Article 11 of ICESCR.

II. THE CONTENTIOUS DUTY TO COOPERATE IN ICESCR

Cooperation is arguably the fulcrum of Article 11. It holds in full:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of *international co-operation* based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through *international co-operation*, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by *disseminating knowledge* of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an *equitable distribution of world food* supplies in relation to need.

International cooperation is a vital ingredient to an adequate standard of living and to the right to continuous improvement of living conditions. It is a component of the right to be free from hunger. Cooperation is implicit in the dissemination of scientific and technical knowledge on food production and nutrition. The equitable distribution of food between importing and exporting States is also premised on coordination and cooperation. There is a strong textual basis to hold States to account for cooperation to continuously improve living conditions, particularly in respect to the right to food.

There are two further cooperative elements in ICESCR. Article 2(1) requires:

Each State Party ... 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 ... Covenant ...

And Article 15(4) requires:

The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of *international contacts and co-operation* in the scientific and cultural fields.

Despite these explicit textual commitments, the cooperative obligation is both controversial and notoriously under-theorised. After combing through the *travaux preparatoires*, Alston and Quinn concluded that it is difficult to sustain 'the argument that the commitment to international cooperation can be accurately characterized as a legally binding obligation upon a particular State to provide any particular form of assistance'.⁴ In the intervening years, greater attention has been paid to cooperation, but at this stage, there are more questions than answers.⁵ The aim here is not to give a full accounting of the

⁴P Alston and G Quinn, 'The Nature and Scope of States Parties Obligations Under ICESCR' (1987) 9 *Human Rights Quarterly* 156, 191.

⁵T Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under ICESCR' in E Riedel, G Giacca and C Golay (eds), *Economic, Social and Cultural Rights in International Law* (OUP 2014).

theoretical and practical challenges to fully implementing a duty of cooperation. Instead the chapter briefly outlines four of the key questions that illuminate the larger debates on a duty of cooperation, before turning to the practice of CESCR to understand and critique its current approach to cooperation, particularly cooperation to continuously improve living conditions.

The first question concerns whether there is a legal obligation to cooperate. As Alston and Quinn demonstrate there was initial resistance. While there is ample evidence of States embracing cooperation in a series of UN Declarations and Frameworks⁶ and strong arguments in favour of a legal duty,⁷ there is also ample evidence of States continuing to resist a human rights obligation to cooperate.⁸ There remain questions on the legitimacy of a legal duty to fulfil socio-economic rights across borders that CESCR must and, as evidenced below, does address.

Second, perhaps the greatest challenge is in delineating when must a State provide cooperation and when must a State seek cooperation. There are competing theories based on the power and influence of the State, causation, historical relationships and the inability to fully protect socio-economic rights.⁹ The difficulty in identifying principled triggering criteria lead Alston to conclude, in 2005, that at best the duty of international cooperation is ‘a generic one that attaches to the undifferentiated international community’.¹⁰ In CESCR’s monitoring work it has had an opportunity to develop triggering criteria, arguably slowly evolving beyond this undifferentiated obligation.

Third, in popular discourse, international cooperation is invariably equated with the transfer of financial resources. However, beyond the transfer of economic resources, there are questions around what measures a State must undertake to discharge the cooperative obligations. There are convincing arguments that a wide range of measures are needed to meet the cooperative obligation under Article 2(1), although any measures that have resource implications remain highly controversial.¹¹ The academic discourse, however, has not yet fully unpacked the cooperative measures specifically engaged under Article 11.

⁶ *ibid*; W Vandenhole, ‘Towards a Division of Labour for Sustainable Development: Extraterritorial Human Rights Obligations’ in M Kaltenborn, M Krajewski and H Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer 2020).

⁷ O de Schutter, ‘The International Dimensions of the Right to Development’ (2018) UN Doc A/HRC/WG.2/19/CRP.1.

⁸ A Vandenbogaerde and W Vandenhole, ‘OP-ICESCR: An Ex-Ante Assessment of its Effectiveness in Light of the Drafting Process’ (2010) 10(2) *Human Rights Law Review* 207.

⁹ S Skogly, ‘Causality and Extraterritorial Human Rights Obligations’ in M Langford et al (eds), *Global Justice State Duties* (CUP 2013).

¹⁰ P Alston, ‘Ships Passing in the Night: The Current State of Human Rights and Development Debate Seen Through the Lens of the MDGs’ (2005) 27(3) *Human Rights Quarterly* 755.

¹¹ M Sepulveda Carmona, ‘The Obligations of “International Assistance and Cooperation”: Under ICESCR’ (2009) 13(1) *The International Journal of Human Rights* 86; The Maastricht Principles on Extraterritorial Obligations <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 9 July 2020.

In theory, a wide range of cooperative measures is needed to realise the right to continuous improvement as it speaks to cooperating through disseminating scientific knowledge on food production and in coordinating the global distribution of food. And the question explored below is whether CESCR has filled this gap and pinned down the normative content of cooperation under Article 11.

And a fourth and largely overlooked question is how the obligation to cooperate rooted in different socio-economic obligations may develop in different ways. Little attention has been paid to whether cooperation means the same in Articles 2(1) (maximising available resources), 11 (continuous improvement) and 15(4) (cultural rights). With these questions in mind, the chapter now turns to CESCR's practice of monitoring States in light of their duty to cooperate.

III. THE PRACTICE OF MONITORING COOPERATION

Since 2015, CESCR has been building up a body of jurisprudence on cooperating that has begun to delineate the contours of the obligation. This section maps CESCR's current practice of monitoring States' obligations to undertake international assistance and cooperation. Specifically, it examines the Concluding Observations, Statements, Open Letters and General Comments from the 54th Session in February 2015 to the 67th Session in March 2020. This is deliberately not a comprehensive assessment but zones in on the Committee's contemporary practice so as to have a detailed assessment that reveals current, previously unseen trends. There was no relevant material under the Optional Protocol to ICESCR.¹²

There are some intriguing insights that emerge from this mapping analysis. First, although the duty of international cooperation is threaded throughout multiple obligations in ICESCR, in practice CESCR rarely distinguishes between cooperation under Article 2(1), 11 and 15(4). The predominant practice is to refer to cooperation as a facet of the obligation to maximise the available resources under Article 2(1). Cooperation is infrequently connected to continuously improving living conditions or to an adequate standard of living. The lack of attention to the different requirements of cooperation in the text has an impact, as CESCR rarely encourages States to cooperate in relation to food, clothing, or housing. Implicitly, the aspects of cooperation CESCR homes in on under Article 2(1) will have positive spillover effects on Article 11, but there is room for further engagement with the different permutations of cooperation in ICESCR. Second, the most well-developed facet of the duty of cooperation is in relation to business and human rights. Amongst other things, CESCR routinely requires host and home States to regulate the practices of multinational corporations

¹² A/RES/63/117.

to uphold rights and requires States to ensure trade agreements are based on human rights. There is a rich academic discourse on business and human rights suggesting that CESCR has tapped into this momentum and echoes its insights.¹³ Perhaps more cynically, it may also spring from a desire to preserve its position as the foremost instrument on socio-economic rights and negate the need for a treaty to address the relationship between socio-economic rights and business.¹⁴ Comparatively, other aspects of cooperation are not developed to anywhere near the same degree.

This section proceeds as follows: (i) it begins by analysing CESCR's arguments for the legitimacy of cooperation; (ii) it evaluates the criteria CESCR has developed for activating the obligation to cooperate; and (iii) it concludes by exploring the different types of cooperation CESCR is advocating. Threaded throughout this assessment is an evaluation of CESCR's approach to the different permutations of cooperation under Article 11, Article 2(1) and Article 15(4). Due to the intertwining of these Articles, this chapter evaluates both 'cooperation' and 'assistance', although some have argued they are conceptually distinct.¹⁵ The pertinent questions that arise from this mapping exercise are then explored in the Conclusion.

A. Legitimacy of Cooperation

The duty of cooperation is controversial. States, particularly in the Global North, deny any legal obligation to cooperate across borders and frame acts of cooperation as altruistic largesse.¹⁶ In beginning to operationalise the duty of cooperation, CESCR must provide persuasive arguments to justify a legal duty to cooperate. This is particularly important for CESCR, as its outputs are not legally binding, and it must rely on the strength of its reasoning to 'enforce' its recommendations. Although CESCR has not released a General Comment on international cooperation and assistance, it has been dedicating notable space to developing this obligation in the General Comments released in the last five years. The General Comments serve overlapping functions and one of those functions is to justify evolutions in the UN human rights system.¹⁷

¹³ S Deva and D Bilchitz (eds), *Building a Treaty on Business and Human Rights* (CUP 2017).

¹⁴ Similar debates have arisen in relation to the Convention on the Elimination of All Forms of Discrimination against Women and the need for a treaty on gender-based violence. See R McQuigg, 'The CEDAW Committee and Gender-Based Violence Against Women' (2017) 6 *International Human Rights Law Review* 263.

¹⁵ M Craven, 'The International Covenant on Economic, Social and Cultural Rights' in R Hanski and M Suksi (eds), *An Introduction to the International Protection of Human Rights* (2nd edn Abo Akademi University 1999) 108.

¹⁶ Open Ended Working Group on Optional Protocol to ICESCR, 'Report of the Working Group' (2005) E/CN.4/2005/52 para 76.

¹⁷ H Keller and L Grover, 'General Comments of the HRC and Their Legitimacy' in H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012).

Across the UN treaty bodies, General Comments that contribute to the evolution of international human rights law follow a pattern.¹⁸ They begin by justifying the need for the evolution: for example, that gender-based violence is endemic or water is vital for human dignity. The General Comment then proceeds to explain the legal basis in the treaty for the evolution and situates the evolution ‘within broader trends in international law’.¹⁹ CESCR generally follows this pattern when analysing international cooperation and assistance in conjunction with other substantive socio-economic rights.

Cooperation is needed to realise socio-economic rights. At various points, CESCR describes international cooperation and assistance as a ‘key element’, ‘crucial’ and ‘essential’.²⁰ For instance, CESCR explains that without cooperation States Parties will lack the resources or capacity to fulfil sexual and reproductive health rights.²¹ CESCR has added texture on the need for cooperation. First, the unique and starkly transnational nature of Covid-19 has emphasised the essentialness of international assistance and cooperation. CESCR correctly observes that ‘pandemics are a crucial example of the needs for ... cooperation ... viruses and other pathogens do not respect borders’.²² The inability of one State acting on its own to address the global and devastating nature of Covid-19 requires ‘stronger commitments from States to international cooperation’.²³ The failure to address Covid-19 in developing countries will affect and impact on developed countries. Global interdependence requires cooperative efforts to fully protect socio-economic rights. While CESCR has used Covid-19 as a prism to discuss the need for cooperation to tackle to challenges to socio-economic rights that are inherently cross-border in nature, these insights can be extended to similar types of challenges such as climate change.

Second, in General Comment No 25 on science, CESCR notes the ‘existence of deep international disparities among countries’.²⁴ To correct this disparity, in the context of science CESCR encourages ‘developed states to contribute to the development of science and technology in developing countries’ through overseas development aid, promoting collaboration across geographic borders and stemming the effects of the ‘brain drain’.²⁵ Third, along with anchoring cooperation in the need generated by cross-border challenges and global disparities

¹⁸The CEDAW Committee, ‘General Recommendation No. 19 on violence against women’ (1992) CEDAW/C/GC/19 para 1; CESCR, ‘General Comment No. 15 on the right to water’ (2002) E/C.12/2002/11 para 1.

¹⁹M Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018) 215.

²⁰CESCR, ‘General Comment No. 22 on the right to sexual and reproductive health’ (2016) E/C.12/GC/22 para 50; CESCR, ‘General Comment No. 25 on science’ (2020) E/C.12/GC/25 para 79.

²¹‘General Comment No. 22’ (n 20) para 50; CESCR, ‘Social Protection Floors: An essential element of the right to social security and the Sustainable Development Goals’ (2015) E/C.12/2015/1.

²²CESCR, ‘Statement on the COVID-19 pandemic’ (2020) E/C.12/2020/1 para 23.

²³ibid.

²⁴‘General Comment No. 25’ (n 20) para 79.

²⁵ibid para 79.

the rationale for cooperation is rooted in the realities of technology. CESCR explains that ‘international cooperation should be enhanced as technologies need global regulations in order to be effectively managed’.²⁶ The scope, prevalence and power of technologies requires global cooperation. Without it, there is a risk of fragmented national regulations which could create governance gaps and ‘perpetuate technological divides and economic disparities’.²⁷ Cooperation among States is needed because of global inequalities and failing to cooperate can entrench these gaps, thus the reasons CESCR provides for cooperation are linked together. At this stage, while CESCR is only giving passing acknowledgment to the complexities underpinning the disparities among States,²⁸ it could more fully engage with the magnitude of the need for cooperation. Fully unearthing the roots of global gaps and stressing the cross-border nature of human rights obstacles can act as a diagnostic tool and provide greater clarity on the role of cooperation in fulfilling socio-economic rights. Teasing out the reasons why international cooperation and assistance is required could also, in theory, build greater legitimacy and support among stakeholders for a legal duty of cooperation.

In contrast to earlier questions on whether there is a legal obligation to cooperate, CESCR holds that cooperation is not only needed to respond to cross-border challenges and global disparities, but it is a legal, as opposed to moral, obligation. CESCR provides a textual analysis by drawing an inverse inference from Article 14. States are only required to provide primary education within their jurisdictions; thus, the absence of any reference to jurisdictional limits in the remaining socio-economic rights obligations means ICESCR is not constrained by territorial borders.²⁹ To buttress this reading, CESCR also refers to the duty of cooperation in Articles 2(1) and 15(4).³⁰ It explains that it would be contradictory to allow a State to remain passive to the status of human rights in other States under Article 2(1).³¹ Surprisingly, there is no reference in the latest General Comments to the role of cooperation in the right to continuous improvement of living conditions under Article 11. This is a missed opportunity to stress the centrality of a legal duty to cooperate in ICESCR.

Beyond the text of the treaty, CESCR references cooperation in other international legal instruments. This implicitly legitimates the obligation to cooperate and justifies CESCR’s increased focus on this duty. It refers to the UN Charter, the International Court of Justice, the UN Special Rapporteur on extreme poverty and human rights, and customary international law.³² In drawing on

²⁶ *ibid* para 74.

²⁷ *ibid*.

²⁸ J Linarelli, M Salomon and M Sornarajah, *The Misery of International Law* (OUP 2018).

²⁹ CESCR, ‘General Comment No. 24 on business activities’ (2017) E/C.12/GC/24 para 27.

³⁰ ‘General Comment No. 25’ (n 20) para 77.

³¹ ‘General Comment No. 24’ (n 29) para 27.

³² *ibid*.

these other sources, CESCR is employing techniques common among UN treaty bodies to legitimise international cooperation and assistance. There are odd omissions, as CESCR makes no reference to cooperation in the remaining core UN treaties³³ or Sustainable Development Goal 17, which calls for a global partnership to ‘strengthen domestic resource mobilization including through international support to developing countries’.³⁴ At this stage CESCR has only begun to lay the foundation for a more in-depth engagement with the obligation of international cooperation.

B. Triggering the Obligation

In theory, a duty of cooperation, like many human rights, including the duty to continuously improve living conditions, could be so broad as to be a meaningless utopian goal. Crafting principled and practical triggering criteria for cooperation has bedevilled academic discourse.³⁵ CESCR is beginning to develop criteria to place boundaries on the obligation to cooperate. The criteria, however, are currently vague.

CESCR is considering triggering criteria for both sides of the cooperation equation. CESCR calls on States to maximise available resources through international cooperation³⁶ and urges them to seek cooperation ‘when facing considerable difficulties in achieving progressive realisation’.³⁷ This statement is in the same paragraph where CESCR discusses the need to avoid deliberately retrogressive measures, suggesting that cooperation is a bulwark against retrogression.³⁸ In another place in the same General Comment, CESCR explains that ‘when a State ... is not in a position to meet its obligation’ under ICESCR, ‘it must seek international assistance’³⁹ This is a slightly broader requirement as it is not only failing to make forward progress that triggers the obligation, but the failure to realise the core obligation or any stagnation in the full enjoyment of socio-economic rights that activates the obligation to seek cooperation. If the obligation to seek cooperation hinges on the failure to fully realise socio-economic rights, then every State in the world would have to seek cooperation.

³³ Articles 4, 17(b), 22, 24(4), 45 of the Convention of the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3; Articles 2, 32, 37 and 38 of Convention on the Rights of Persons with Disabilities A/RES/61/106.

³⁴ ‘Sustainable Development Goal 17-Target 17.1’ <<https://sustainabledevelopment.un.org/sdg17>> accessed 23 June 2020.

³⁵ W Vandenhole and W Benedek, ‘Extraterritorial Human Rights Obligations and North-South Divide’ in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of ESCR in International Law* (CUP 2013).

³⁶ ‘General Comment No. 22’ (n 20) para 50.

³⁷ CESCR, ‘General Comment No. 23 on the right to just and favourable conditions of work’ (2016) E/C.12/GC/23 para 52.

³⁸ *ibid.*

³⁹ *ibid* para 67.

While this might be attractive, as it accords formal equal treatment to all States, it fails to account for the global disparities that, as CESCR explains, anchors the need for cooperation. This overly broad formulation fails to provide concrete guidance on when a State has a legal obligation to seek cooperation. This makes it temptingly easy for States to continue to dismiss this duty as a rhetorical utopian dream. Furthermore, the triggering criteria have been developed in relation to Article 2(1) and mobilising resources, not in relation to the right to continuous improvement. In some ways, tying cooperation to failure to fully realise continuous improvement is potentially even more conceptually confusing as there is a lack of conceptual clarity on whether continuous improvement has a ceiling or upper limit.⁴⁰ It is difficult to unpack the triggering criteria for cooperating to continuously improve as the right itself is conceptually murky.

On the other side of the equation, States ‘in a position to do so’ must provide cooperation.⁴¹ There has been a minimal engagement with what it means to be ‘in a position’ to provide cooperation. States must respond to requests for cooperation in good faith. CESCR also alludes to the availability of resources when providing cooperation and explains that ‘economically developed States have a special responsibility for assisting developing countries’.⁴² This seems to imply that the special responsibility is realised through the transfer of economic resources. In practice, CESCR sees the special responsibility to cooperate as not purely a function of the availability of economic resources but also of power, leverage and clout. States are obligated to cooperate when ‘they are in a position to influence’ business actors not to undermine human rights in other States.⁴³ CESCR illustrates this capacity to cooperate by influencing the corporation to pay taxes in other States. A State is also ‘in a position’ to provide cooperation if it has knowledge or can reasonably foresee a risk that a business will harm socio-economic rights in other States. The well documented risks in the extractive industry mean the State has a due diligence obligation to oversee mining and oil development projects operating beyond the State borders.⁴⁴ CESCR is working to refine the criteria to provide cooperation and is seeking to develop triggering conditions that are not exclusively tied to the availability of economic resources.

C. Facets of Cooperation

CESCR has devoted most of its energies towards developing the normative content of cooperation. This can be in the form of vague reminders to the State

⁴⁰ See Lott, chapter seven in this volume, and Skogly, chapter eight in this volume.

⁴¹ *ibid* para 66; ‘General Comment No. 22’ (n 20) para 50.

⁴² *ibid* para 50; ‘General Comment No. 23’ (n 37) para 67.

⁴³ ‘General Comment No. 24’ (n 29) para 37.

⁴⁴ *ibid* para 32, fn 81.

to cooperate to realise socio-economic rights⁴⁵ or more specifically to strengthen cooperation on certain issues such as sex tourism, the Rohingya refugee crisis or the Sustainable Development Goals.⁴⁶ CESCR provides overarching guiding principles on the implementation of international cooperation. States must respond to requests for cooperation by providing economic and technical assistance.⁴⁷ Cooperation must be sustainable, culturally appropriate and uphold human rights standards, although CESCR does not expand on these standards.⁴⁸ It further explains that the transfer of knowledge and technology is a tool to maximise the available resources to fulfil socio-economic rights under Article 2(1).⁴⁹ Noticeably, there is no reference to economic, technological or knowledgeable cooperation in furthering Article 11. Although the cooperation it advocates for under Article 2(1) can have a positive knock-on effect on living conditions, CESCR for all intents and purposes appears to have forgotten about the cooperative obligation under Article 11. The transfer of economic or technical resources is rarely earmarked for improving food production, water or housing conditions. This subsection critically evaluates the different facets of cooperation advocated for by CESCR.

i. International Organisations

To begin with, CESCR consistently advocates that States cooperate with the other actors in the international human rights system. There are three methods of cooperation: (i) ratifying an international (and occasionally regional) instrument; (ii) collaborating with different branches of the UN; and (iii) influencing international organisations to strengthen socio-economic rights.

CESCR has a repeated pattern of encouraging States to adopt various International Labor Organization (ILO) Conventions, but only erratically recommends adoption of other human rights instruments. It consistently encourages States to domesticate ILO Conventions and Recommendations on social protection, collective bargaining, freedom of association, informal work and Indigenous peoples.⁵⁰ There are only isolated recommendations to adopt other ILO Conventions such as on minimum wage, domestic workers and forced labour.⁵¹ There are only a handful of examples of CESCR encouraging States to

⁴⁵ CESCR, 'CO: Gambia' (2015) E/C.12/GMB/CO/1 para 31.

⁴⁶ CESCR, 'CO: Thailand' (2015) E/C.12/THA/CO/1-2; para 25(c); CESCR, 'CO: Bangladesh' (2018) E/C.12/BGD/CO/1 para 28; CESCR, 'CO: Costa Rica' E/C.12/CRI/CO/5 para 67.

⁴⁷ 'General Comment No. 23' (n 37) para 66.

⁴⁸ *ibid* para 67.

⁴⁹ *ibid*.

⁵⁰ CESCR, 'CO: Australia' (2017) E/C.12/AUG/CO/5 para 30; CESCR, 'CO: Canada' (2016) E/C.12/ para 20(e); CESCR, 'CO: Burkina Faso' (2016) E/C.12/BFA/CO/1 para 22; 'CO: Gambia' (n 45) para 19.

⁵¹ CESCR, 'CO: Mexico' (2018) E/C.12/MEX/CO/5-6 para 33(d); CESCR, 'CO: South Korea' (2017) E/C.12/KOR/CO/4 para 37; CESCR, 'CO: North Macedonia' (2016) E/C.12/MKD/CO/2-4 para 32.

adopt UN treaties or soft law instruments, such as the UN Declaration on the Rights of Indigenous People⁵² and World Health Organization standards.⁵³ The one outlier to this trend is that CESCR routinely advocates that States adopt the UN Food and Agriculture Organization Voluntary Guidelines on National Food Security.⁵⁴ Although there are a wealth of regional human rights agreements, CESCR only encourages relevant States to adopt the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence.⁵⁵

CESCR strongly advocates that States seek guidance from international organisations. There are also trends to this aspect of cooperation. There are numerous instances where CESCR encourages States to collaborate with the Office of the High Commissioner of Human Rights (OHCHR).⁵⁶ It recommends that States seek OHCHR technical guidance on implementing CESCR's recommendations, in reducing maternal morbidity and mortality, and in developing human rights indicators.⁵⁷ There are a few examples of CESCR encouraging States to cooperate with the UN High Commissioner on Refugees, UNESCO and the ILO.⁵⁸ There are only a handful of occurrences of CESCR encouraging cooperation with the UN Special Mandate holders.⁵⁹ There are only three cases of CESCR recommending that the State cooperate with a regional human rights regime. It encourages Kenya to implement the African Commission decision on *Endorois* and that Namibia and Angola re-instate the right of access of natural and legal persons to the new protocol on the Southern African Development Community Tribunal.⁶⁰

Through international cooperation, CESCR is seeking to integrate human rights within the work of international organisations, particularly financial organisations (IFIs), such as the International Monetary Fund (IMF). CESCR emphasises that States 'participating in decisions as members of international organizations cannot ignore their human rights obligations'.⁶¹ It goes so far as

⁵² 'CO: Canada' (n 50) para 20(d); CESCR, 'CO: Honduras' (2016) E/C.12/HND/CO/2 para 12(b); CESCR, 'CO: Philippines' (2016) E/C.12/PHL/CO/5-6 para 14(a); CESCR, 'CO: Guyana' (2015) E/C.12/GUY/CO/2-4 para 15.

⁵³ CESCR, 'CO: Uruguay' (2017) E/C.12/URY/CO/5 paras 39, 49; 'CO: Costa Rica' (n 46) para 45.

⁵⁴ CESCR, 'CO: UK' (2016) E/C.12/GBR/CO/6 para 54.

⁵⁵ CESCR, 'CO: Slovakia' (2017) E/C.12/SVK/CO/3 para 28; 'CO: North Macedonia' (n 51) para 40.

⁵⁶ 'CO: Gambia' (n 45) para 31; CESCR, 'CO: Sudan' (2015) E/C.12/SDN/CO/2 para 59.

⁵⁷ CESCR, 'CO: Namibia' (2016) E/C.12/NAM/CO/1 para 79; 'CO: Burkina Faso' (n 50) para 45; CESCR, 'CO: Dominican Republic' (2016) E/C.12/DOM/CO/4 para 60(b); 'CO: Sudan' (n 56) para 58; CESCR, 'CO: Morocco' (2015) E/C.12/MAR/CO/4 para 52.

⁵⁸ CESCR, 'CO: Ecuador' (2019) E/C.12/ECU/CO/4 para 60(a); 'CO: Thailand' (n 46) para 16; CESCR, 'CO: Greece' (2015) E/C.12/GRC/CO/2 para 11–para 12; 'General Comment No. 23' (n 37) para 68; CESCR, 'CO: Angola' (2016) E/C.12/AGO/CO/4-5 para 38.

⁵⁹ 'CO: Namibia' (n 57) para 16(c); 'CO: Mexico' (n 51) para 11; CESCR, 'Public Debt and Austerity Measures' (2016) E/C.12/2016/1 para 11.

⁶⁰ CESCR, 'CO: Kenya' (2016) E/C.12/KEN/CO/2-5 paras 15–6; 'CO: Namibia' (n 57) paras 8–9; 'CO: Angola' (n 58) paras 11–12.

⁶¹ 'General Comment No. 25' (n 20) para 83; 'General Comment No. 23' (n 37) para 71; 'Public Debt and Austerity' (n 59) para 9.

to hold that States would be in violation of ICESCR if States ‘were to delegate power to IMF or other agencies and allowed such powers to be exercised without ensuring that they do not infringe on human rights’.⁶² Through their influence within the organisation and their voting power, States should ensure the international organisations uphold socio-economic rights.⁶³ Cooperating through influencing international organisations applies also to financial instruments such as lending policies, credit agreements and fiscal adjustment.⁶⁴ Cooperating via international organisations connects to the power-influence component of the triggering criteria to provide cooperation. For instance, CESCR regrets that Germany has not used ‘its great leverage’ to ensure that the IMF loan conditionalities ‘do not result in unjustified retrogression’ in socio-economic rights by borrowing States.⁶⁵ CESCR recommends that Germany use its position to influence high-level policy and ensure that IFIs undertake human rights impact assessment to loan provisions.⁶⁶

There are also obligations on the States receiving support from IFIs. Lebanon is encouraged to dialogue with the IMF on debt servicing and to develop a legal framework to ensure transparency and accountability in loan negotiating and debt management.⁶⁷ However, the CESCR’s guidance is not always sufficiently attentive to the different abilities of States and IFI to negotiate terms of financial support. CESCR warns that borrowing States should ensure that any financial assistance should not include conditions that ‘unreasonably reduce its ability’ to implement ICESCR.⁶⁸ These recommendations, however, arguably ignore the power imbalances between States and IFIs, and borrowing States may have limited ability to ensure loans are designed to fulfil socio-economic rights. In 2020, when reviewing IMF-imposed conditions on Ukraine, CESCR appears to have recognised these imbalances and it only requires the State to conduct a human rights impact assessment on the fiscal consolidation programme.⁶⁹ This is also one of the exceptionally rare incidents where CESCR has adopted an intersectional perspective to cooperation, expressing concern that IMF policies disproportionately affect ‘women living in poverty or [people] in rural areas’.⁷⁰ Although CESCR rarely frames these discussions in terms of ‘continuously improving’, mainstreaming human rights into high level international and domestic law and policy could improve living conditions. In the future, CESCR could make more explicit how the right to continuous improvement of living

⁶² ‘Public Debt and Austerity’ (n 59) para 9.

⁶³ *ibid.*

⁶⁴ ‘General Comment No. 23’ (n 37) para 71.

⁶⁵ CESCR, ‘CO: Germany’ (2018) E/C.12/DEU/CO/6 paras 16–17.

⁶⁶ *ibid.*

⁶⁷ CESCR, ‘CO: Lebanon’ (2016) E/C.12/LBN/CO/2 para 13; ‘CO: Sudan’ (n 56) para 18.

⁶⁸ ‘Public Debt and Austerity’ (n 59) para 4; CESCR, ‘CO: Ireland’ (2015) E/C.12/IRL/CO/3 para 35.

⁶⁹ CESCR, ‘CO: Ukraine’ (2020) E/C.12/UKR/CO/7 paras 4–5.

⁷⁰ *ibid.*

conditions requires an enabling legal framework and respect for the international human rights system.

ii. Cooperation between States

Along with cooperating with international organisations, CESCR encourages cooperation between States. This is a crucial step forward as it more clearly delineates the identity of the duty bearer and addresses the critique that the duty of cooperation is held in a generic manner by the international community. CESCR has yet to pinpoint that State Y must legally assist State X. Instead, it more obliquely encourages States to cooperate with regional neighbours; however, this is still a higher degree of clarity than previously articulated. Italy should seek cooperation from other Member States in the EU to protect the socio-economic rights of migrants.⁷¹ Thailand is advised to engage with ‘countries in the region’ to address the Rohingya refugee crisis. Beyond the rights of migrants, CESCR recommends that Iraq seek cooperative agreements with neighbouring States to ensure fair use of the river courses within its territories.⁷² In response to Covid-19, CESCR is also encouraging stronger cooperation between States. It encourages States to share research, medical equipment and supplies; to coordinate action to reduce economic and social impacts; and work together in pursuing recovery efforts.⁷³ CESCR also provides examples of non-cooperation, such as imposing limits on the export of medical equipment, or unilateral border measures or economic sanctions that hinder the flow of health equipment and staple foods.⁷⁴

iii. Business and Human Rights

CESCR has an increasingly sophisticated approach to cooperation, relying heavily on the typology of duties (respect, protect and fulfil), to regulate businesses to protect human rights across territorial boundaries.

When a State owns, controls or subsidises an enterprise acting in another State it accrues obligations to respect human rights beyond its geographic territory.⁷⁵ The obligation of respect flows through the supply chain of the State-controlled enterprise and requires the State to mitigate risks of violations of ICESCR by subcontractors etc.⁷⁶ The home-State should not actively undermine the working conditions in host-States.⁷⁷ If the home-State has a stronger

⁷¹ CESCR, ‘CO: Italy’ (2015) E/C.12/ITA/CO/5 para 19.

⁷² CESCR, ‘CO: Iraq’ (2015) E/C.12/IRQ/CO/4 para 52.

⁷³ ‘Statement on the COVID-19 pandemic’ (n 22).

⁷⁴ *Ibid* paras 20–22.

⁷⁵ ‘General Comment No. 23’ (n 37) para 69.

⁷⁶ ‘CO: South Korea’ (n 51) para 18(a).

⁷⁷ ‘General Comment No. 23’ (n 37) para 69.

legislative framework than the host-State, it must maintain the higher labour standards from the home-State when operating within the host-State, as far as practicable.⁷⁸ CESCR does stress that the obligation to protect human rights through international cooperation cannot infringe the sovereignty or diminish the obligations of the host-State.⁷⁹ At the same time, it explicitly hopes the home-State regulation of working conditions of businesses operating beyond its borders will act as a ‘boot-strap’ for improving labour regulation in the host-State.⁸⁰

In negotiating bilateral, multilateral and regional trade, tax, investment or financial agreements States must respect human rights across borders. These types of agreement must not restrict the ability of any State to implement socio-economic rights, and human rights must be given weight and directly referred to in these agreements.⁸¹ In the context of scientific progress, States must ensure when negotiating international agreements or adopting domestic laws on intellectual property that ‘traditional knowledge is protected, contributions to scientific knowledge are ... credited and that intellectual property regimes foster the enjoyment’ of rights.⁸² This is an acknowledgement that cooperating via international agreements there is a requirement to approach scientific practice from an Indigenous perspective. Investor-State dispute settlement procedures must not create obstacles to the realisation of ICESCR.⁸³

Home-States also have a due diligence cooperative obligation to protect individuals in host States through legislative and administrative measures from violations of human rights by business domiciled within the home-State.⁸⁴ Again, as further illumination of the special responsibility on developed States, the obligation to protect is particularly pronounced for States with an advanced labour law architecture.⁸⁵ CESCR has begun to flesh out ‘legislative and administrative measures’ from the perspective of both home- and host-States.⁸⁶ Home-States should investigate violations of rights,⁸⁷ formally monitor businesses,⁸⁸ strengthen embassies in host-States,⁸⁹ remedy violations⁹⁰ and facilitate communication between law enforcement in home- and host-States.⁹¹

⁷⁸ *Ibid.*

⁷⁹ General Comment No. 24’ (n 29) para 25.

⁸⁰ *Ibid* para 70.

⁸¹ *Ibid* para 72.

⁸² ‘General Comment No 25’ (n 20) para 83.

⁸³ ‘CO: Canada’ (n 50) para 16; CESCR, ‘CO: France’ (2016) E/C.12/FRA/CO/4 para 10(c).

⁸⁴ ‘General Comment No. 23’ (n 37) para 70; ‘General Comment No. 24’ (n 29) para 28; ‘CO: Thailand’ (n. 46) para 12; CESCR, ‘CO: Sweden’ (2016) E/C.12/SWE/CO/6 para 12; CESCR, ‘CO: Chile’ (2015) E/C.12/CHL/CO/4 para 11.

⁸⁵ ‘General Comment No. 23’ (n 37) para 70.

⁸⁶ ‘CO: Germany’ (n 65) paras 7–8; ‘CO: Mexico’ (n 51) paras 11–12.

⁸⁷ ‘CO: Canada’ (n 50) para 16; ‘CO: Australia’ (n 50) para 14(d).

⁸⁸ CESCR, ‘CO: Netherlands’ (2017) E/C.12/NLD/CO/6 para 12(a).

⁸⁹ *Ibid.*

⁹⁰ CESCR, ‘CO: Kazakhstan’ (2019) E/C.12/KAZ/CO/2 para 18(c).

⁹¹ ‘General Comment No. 24’ (n 29) para 34.

Home-States are routinely criticised for not having a national action plan for regulating companies acting overseas.⁹² A home-State should also use its soft power to incentivise corporations domiciled within the home-State to protect human rights abroad through the public provision of contracts, loans, grants and subsidies.⁹³ CESCR has zoned in on due diligence obligations in relation to specific industries. The Netherlands was criticised for failing to protect Indigenous peoples in Peru from environmental damage and is encouraged to ‘expedite an overhaul of the oil refinery industry in Curaçao’ to prevent pollution.⁹⁴ This is rare evidence of CESCR exploring the linkages between cooperation, business, intersectional equality and the environment. There are also due diligence obligations on host-States. For example, CESCR encourages Uganda to address illicit financial flows by addressing transfer pricing by foreign investors and is urged to protect local farmers from the adverse effects of leasing land to foreign investors.⁹⁵ Senegal should strengthen its domestic control over fishing by foreign companies through the ‘cooperation of the international community’.⁹⁶

CESCR consistently advocates that home- and host-States undertake human rights impact assessments before proceeding with any economic enterprise.⁹⁷ Germany is encouraged to conduct human rights impact assessments on the ‘overall impact of agricultural exports on developing countries in order to [comply] with its Covenant obligations on international assistance and cooperation’ and ensure that food exports to developing countries do not threaten the local farming sector.⁹⁸ Kenya, through its role in the East African Community, should ensure that negotiations with the EU are not undertaken without both a human rights assessment and consultation process with farmers, fishers and healthcare providers to identify potential negative impacts on socio-economic rights.⁹⁹ CESCR recommends that no farmland be ceded to investors until Sudan completes a full human rights impact assessment.¹⁰⁰ Although these recommendations are not explicitly anchored in Article 11, these cross-border impact assessments are being directed towards food production and export which is a component of continuously improving living conditions under Article 11.

CESCR also encourages cross-border impact assessments in other fields of life. Switzerland and Kazakhstan are encouraged to conduct ‘human rights

⁹² CESCR, ‘CO: Denmark’ (2019) E/C.12/DNK/CO/6 para 19; CESCR, ‘CO: Russia’ (2017) E/C.12/RUS/CO/6 para 12.

⁹³ ‘General Comment No. 24’ (n 29) para 31; ‘CO: South Korea’ (n 51) para 18(c).

⁹⁴ ‘CO: Netherlands’ (n 88) paras 11, 12(d).

⁹⁵ CESCR, ‘CO: Uganda’ (2015) E/C.12/UGA/CO/1 paras 11, 31; ‘CO: Sudan’ (n 56) para 11.

⁹⁶ CESCR, ‘CO: Senegal’ (2019) E/C.12/SEN/CO/3 para 29(b).

⁹⁷ CESCR, ‘CO: Norway’ (2020) E/C.12/NOR/CO/6 para 9.

⁹⁸ ‘CO: Germany’ (n 65) para 13.

⁹⁹ ‘CO: Kenya’ (n 60) para 13.

¹⁰⁰ ‘CO: Sudan’ (n 56) paras 11–12.

and environmental impact assessments before entering into' investment, trade or licensing agreements.¹⁰¹ CESCR is critical of France, as EU trade agreements do not devote sufficient attention to socio-economic rights in other countries.¹⁰² This is a further indication, as discussed in more detail above, that CESCR is holding States, particularly powerful States, to account for their role in international organisation. While the focus on cross-border human rights implications of trade is a step forward, it may also signal the potential thinness of international cooperating via human rights impact assessments. CESCR only recommends that the State conduct the assessment – a procedural obligation – and there is almost never a follow-up recommendation to modify behaviour based on the outcome of the assessment – a substantive obligation. There is an unstated assumption that States will make the necessary modifications in light of the assessment. The connection between procedural obligations and substantive outcomes is far from settled. Questions on the transformative potential of cross-border impact assessment echoes debates on the value of meaningful engagement in realising socio-economic rights or of the legal obligation to have due regard to equality in public decision making.¹⁰³ An arguably stronger approach can be seen in relation to the UK. After recommending that the UK conduct an impact assessment on the arms trade, CESCR urges the State to refuse or suspend a 'license where there is a risk that arms could be used to violate' human rights.¹⁰⁴

iv. Migrant Workers

The rights of migrant workers are ripe for international cooperation.¹⁰⁵ CESCR almost exclusively deals with this aspect of cooperation from the perspective of the State of origin; noting that 'when confronted by large flows of migrants ... some States face a heavier burden than others'.¹⁰⁶ In the last five years, CESCR has not consistently encouraged States of employment or transit to cooperate to protect migrants' socio-economic rights.¹⁰⁷ In General Comment No 23 on just and fair working conditions, there is passing reference to cooperation to protect migrant workers: States must protect their nationals working

¹⁰¹ 'CO: Kazakhstan' (n 90) para 18(e); CESCR, 'CO: Switzerland' (2019) E/C.12/CHE/CO/4 para 14.

¹⁰² 'CO: France' (n 83) paras 9–10.

¹⁰³ S Wilson and J Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in M Langford et al (eds), *Socio-Economic Rights in South Africa* (CUP 2014); S Fredman, 'The Public Sector Equality Duty' (2011) 40 *Industrial Law Journal* 405.

¹⁰⁴ 'CO: UK' (n 54) para 12(c).

¹⁰⁵ Article 33, 64, 65(b), 67 of Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families A/RES/45/15; CEDAW Committee, 'General Recommendation No 28 on women migrant workers' (2008) CEDAW/C/GC/28.

¹⁰⁶ CESCR, 'The Duties of States Towards Refugees and Migrants' (2017) E/C.12/2017/1 para 18.

¹⁰⁷ CESCR, 'CO: Mauritius' (2019) E/C.12/MUS/CO/5 para 33(e) and CESCR, 'CO: Israel' (2019) E/C.12/ISR/CO/4 para 29(c) are exceptions.

abroad through international cooperation.¹⁰⁸ The favoured measure for protection is through bilateral agreements to provide for labour, social and pension protection.¹⁰⁹ States of origin should strengthen consular support services in States of employment;¹¹⁰ support migrant workers returning to the State of origin;¹¹¹ and strengthen the regulation of recruitment agencies.¹¹² In a few instances, CESCR is attentive to the intersectional dimensions to cooperation in relation to migrant workers. Tajikistan should integrate a gender perspective into its labour migration policies;¹¹³ Kenya and Bangladesh should review existing bilateral agreements in relation to women migrant domestic workers;¹¹⁴ and Kyrgyzstan should take all efforts ‘to ensure that the spouses and children of Kyrgyz migrant workers obtain adequate residence permits in the country of employment’.¹¹⁵

v. Budget, Debt and Tax

There is only a small body of jurisprudence on cooperating via domestic economic and financial legislation and policy. Bohoslavsky and Cantamutto’s chapter in this collection considers this aspect of cooperation and its role in continuous improvement in greater detail.¹¹⁶ CESCR makes brief mentions of foreign debt, and some of its discussion on debt is through the lens of cooperating via international organisations, discussed above.¹¹⁷ It does caution that lending States should not coerce other States into violating the ICESCR.¹¹⁸ As best practice guidance it requires lending (and borrowing) States to conduct a human rights impact assessment prior to providing financial assistance.¹¹⁹

The primary focus is on global tax abuse. On the side of developed States, the UK is criticised for having financial secrecy law and permissive rules on corporate tax which negatively affect the ability of other States to mobilise resources for socio-economic rights.¹²⁰ CESCR urges States to ensure that fiscal policy is ‘adequate, progressive and socially equitable’ to increase the available resources and to intensify efforts to address global tax abuse, particularly by corporations and high-net-worth individuals.¹²¹ On the developing States’ side, South Africa

¹⁰⁸ General Comment No 23 (n 37) para 73.

¹⁰⁹ CESCR, ‘CO: Tajikistan’ (2015) E/C.12/TJK/CO/2-3 para 22(c); CESCR, ‘CO: Moldova’ (2019) E/C.12/MDA/CO/3 para 29(c).

¹¹⁰ ‘CO: Tajikistan’ (n 109) para 22(b).

¹¹¹ ‘CO: Moldova’ (n 109) para 29.

¹¹² ‘CO: Bangladesh’ (n 46) para 39(b).

¹¹³ ‘CO: Tajikistan’ (n 109) para 22(e).

¹¹⁴ ‘CO: Bangladesh’ (n 46) para 39(d); ‘CO: Kenya’ (n 60) para 34.

¹¹⁵ CESCR, ‘CO: Kyrgyzstan’ (2015) E/C.12/KGZ/CO/2-3 para 13.

¹¹⁶ See Bohoslavsky and Cantamutto, chapter five in this volume.

¹¹⁷ ‘CO: Tajikistan’ (n 109) para 11; ‘CO: Lebanon’ (n 67) paras 12–13.

¹¹⁸ ‘Public Debt and Austerity Measures’ (n 59) para 5.

¹¹⁹ *ibid* para 5.

¹²⁰ ‘CO: UK’ (n 54) para 16.

¹²¹ *ibid* para 17; ‘CO: Switzerland’ (n 101) para 13.

should combat tax avoidance by corporations by seeking cooperation with the home-State of the corporation.¹²² CESCR is concerned that Mauritius' low rate of tax on direct investment will encourage a race to the bottom in the region.¹²³ Understandably this has been linked to Article 2(1) and resource mobilisation, but it has potential positive spillover in generating additional resources for the right to continuous improvement of living conditions.

vi. Overseas Development Aid

The transfer of economic resources from one State to another – overseas development aid (ODA) – is perhaps the quintessential and most controversial facet of cooperation. CESCR is holding States to account for a human rights obligation to provide and seek ODA. CESCR regrets that ODA levels are below the internationally agreed commitment to 0.7 per cent of gross national income.¹²⁴ Its recommendations, perhaps unsurprisingly given the resistance to a legal obligation on ODA, are tepid. CESCR only encourages these States to 'accelerate the increase of the level of its [ODA], with 0.7 per cent benchmark'.¹²⁵ This reflects Vandenhole's argument that the obligation to cooperate via the transfer of economic resources is subject to progressive realisation.¹²⁶ There are also obligations to seek ODA.¹²⁷ When reviewing Capo Verde, CESCR notes that financial support from international cooperation has diminished and urges the State to 'continue to seek assistance from relevant international organizations and development agencies'.¹²⁸

CESCR is also exploring more of the nuances of ODA. It must be implemented in a manner that upholds socio-economic rights. For instance, it calls on receiving States to enhance the transparency of the receipt, management and spending of ODA.¹²⁹ Donor States must not exclude particular services from ODA funding.¹³⁰ This implicitly addresses the 'Global Gag Rule', that is, the prohibition, instated under US Republican governments, of providing ODA to organisations that promote, provide or even give information on abortion.¹³¹ ODA should not push receiving States into privatising health care.¹³² Essentially,

¹²² CESCR, 'Concluding Observations: South Africa' (2018) E/C.12/ZAF/CO/1 para 17(d).

¹²³ 'CO: Mauritius' (n 107) paras 13–14.

¹²⁴ 'CO: South Korea' (n 51) para 20; 'General Comment No 22' (n 20) para 50.

¹²⁵ *ibid.*

¹²⁶ Vandenhole, 'Towards a Division' (n 6).

¹²⁷ CESCR, 'CO: Guinea' (2020) E/C.12/GIN/CO/1 para 13.

¹²⁸ CESCR, 'CO: Capo Verde (2018) E/C.12/CPV/CO/1 paras 12–13.

¹²⁹ CESCR, 'CO: Central African Republic' (2018) E/C.12/CAF/CO/1 para 16(b); 'CO: Tajikistan' (n 109) [11]; 'CO: South Korea' (n 51) para 21.

¹³⁰ 'General Comment No. 22' (n 20) paras 41, 52.

¹³¹ A Starrs, 'The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid' (2017) 389 (10068) *Lancet* 485.

¹³² 'General Comment No. 22' (n 20) para 52.

ODA should not be used to promote beliefs or ideologies that can jeopardise the realisation of socio-economic rights. Along with sexual and reproductive health, CESCR recommends that donor States contribute to the funding of science in recipient States.¹³³ The cooperation on enhancing the ability of recipient States to pursue beneficial scientific progress could link to cooperation to continuously improve living conditions.

CESCR is critical of the fact that the implementation of ODA is perpetuating rights violations. The UK is criticised for financially supporting private actors in education ‘which may have contributed to undermining the quality of free public education and created segregation and discrimination among pupils and students’.¹³⁴ France is taken to task by CESCR for failing to ensure that ODA does not perpetuate environmental or social harm.¹³⁵ CESCR is also critical of States receiving ODA. It is concerned that Cameroon has no measures to protect rights through development projects.¹³⁶ There is a strong intersectional analysis, as CESCR is worried that these projects are undermining the traditional lifestyles of Indigenous peoples. The critique of Cameroon is also one of the exceptional occurrences where CESCR makes explicit the relevance of Article 11 to ODA. To uphold human rights through ODA, donor and receiving States must undertake impact assessments, including consultation with Indigenous peoples, prior to any ODA project.¹³⁷ These are procedural obligations, akin to impact assessments for business and human rights, and raise similar questions on the transformative potential of assessments and consultation. Donor States should establish effective monitoring mechanisms to assess the human rights impact of ODA policies and projects and embedded complaint mechanisms for violations of socio-economic rights in development cooperation projects.¹³⁸ In respect of Indigenous peoples, if their socio-economic rights are affected by ODA, they ‘should receive compensation for damages or losses’ and more radically ‘receive a share of the profits from’ the projects.¹³⁹ This is also one of the few examples of CESCR considering remedies for failing to cooperate and is evidence of the potential for radical remedies. It also highlights how remedies for failing to cooperate could link back to Article 11 by providing individuals and groups with the resources needed for improving living conditions.

vii. Climate Change

CESCR has recently released two Statements on climate change which call on States to ‘cooperate in good faith’ in devising global responses to climate

¹³³ ‘General Comment No. 25’ (n 20) para 79.

¹³⁴ ‘CO: UK’ (n 54) para 14.

¹³⁵ ‘CO: France’ (n 83) para 17.

¹³⁶ CESCR, ‘CO: Cameroon’ (2020) E/C.12/CMR/CO/4 para 16.

¹³⁷ *ibid* para 17(b); ‘CO: UK’ (n 54) para 15.

¹³⁸ ‘CO: UK’ (n 54) para 15.

¹³⁹ ‘CO: Cameroon’ (n 136) para 17(b).

change.¹⁴⁰ In both of these documents CESCR focuses on the obligations of developed States. Financial incentives or investments to private actors operating extraterritorially, such as the fossil fuel industry, that contribute to climate change should be discontinued, and States should offer protection mechanism for migrant workers displaced by climate change.¹⁴¹ CESCR holds that as part of the duty of international assistance and cooperation, ‘high-income State should support adaption efforts, particularly in developing countries, by facilitating the transfer of green technologies, and by contributing to the Green Climate Fund’.¹⁴² It links these mitigation and adaption efforts to Article 15, not to Article 11. The connections and perhaps transformative and radical re-thinking on what constitute an adequate standard of living and continuous improvement of living conditions in the context of climate change have not yet been unpacked.

There are only a handful of occurrences where CESCR encourages States to cooperate to address the human rights violations inherent in climate change in the Concluding Observations. In one instance, CESCR recognised that Mauritius is bearing the brunt of the impact of climate change ‘despite the fact that the State has made a negligible contribution to climate change’.¹⁴³ This is a textbook example of where and why international cooperation is needed and could, in theory, be a powerful avenue for building greater legitimacy for this duty. In the handful of cases where CESCR engages with climate change and cooperation in the Concluding Observations, it repeats facets of cooperation analysed above. It encourages States to adopt international and regional commitments and frameworks on climate change.¹⁴⁴ CESCR is also exploring how ODA can be harnessed towards redressing climate change.¹⁴⁵

need a period

IV. CONCLUSION: CONTINUOUSLY IMPROVING COOPERATION

So, what can be taken away on the role of international cooperation in the right to continuous improvement of living conditions? On the positive side, CESCR is consistently holding States to account for international cooperation, but on the negative side, it largely ignores cooperation in light of continuous improvement of living conditions. Understanding both the nuances of CESCR’s approach to cooperation and its blind spots, this chapter can hopefully act as a springboard

¹⁴⁰ CESCR and others, ‘Statement on Human Rights and Climate Change’ (2019) HRI/2019/1 [17]; CESCR, ‘Statement on Climate Change and ICESCR’ (2018) E/C.12/2018/1.

¹⁴¹ CESCR and others (n 140) para 15.

¹⁴² ‘Statement on Climate Change and ICESCR’ (n 140) para 7.

¹⁴³ ‘CO: Mauritius’ (n 107) para 9.

¹⁴⁴ CESCR, ‘CO: Argentina’ (2018) E/C.12/ARG/CO/4 paras 13–14; ‘CO: Australia’ (n 50) para 11; CESCR, ‘CO: Ecuador’ (2019) E/C.12/EQU/CO/4 paras 11–12; CESCR, ‘CO: Belgium’ (2020) E/C.12/BEL/CO/5 para 10.

¹⁴⁵ ‘CO: Denmark’ (n 92) paras 14–15; ‘CO: Belgium’ (n 144) paras 14–15.

for further engagement on the role of cooperation in the right to continuous improvement of living conditions.

Understanding the right to continuous improvement in connection with an obligation of cooperation could yield greater clarity on three unanswered questions on international cooperation. First, while CESCR is actively working to build up the legitimacy of a legal duty to cooperate, it has failed to draw on cooperation in the right to continuous improvement. This is a stark example of a missed opportunity to emphasise the centrality of cooperation in ICESCR. Second, CESCR is investigating the conditions upon which a State must cooperate and places obligations on States to seek and provide cooperation. Taking cooperation seriously under a right to continuous improvement raises **serious** challenges on identifying when a State is required to seek cooperation for continuous improvement. As the right is a continual obligation, pinning down theoretically coherent triggering criteria is a **serious** conceptual challenge. On the providing side of the equation, CESCR is recognising that there is a ‘special responsibility’ upon economically developed States. It is only at the beginning of refining what this special responsibility entails. Intriguingly, at this embryonic stage it is focusing on non-financial aspects. States with power or influence have a special responsibility to use this power to influence labour law in host-States or high-level international policy. There is space to understand how States’ power and influence can be directed towards fulfilling the right to continuously improve.

Third, the core of CESCR’s work on cooperation has been on unpacking the myriad of cooperative measures a State must undertake. There is a strong running thread to cooperate via international organisation and by ratifying international instruments. Interestingly, there are patterns to this cooperation as CESCR homes in on certain international organisations and only minimally engages with others. There is also very limited engagement with cooperation via regional human rights instruments. This could be the beginning of understanding the role of the legal and policy frameworks that are necessary to achieve the right to continuously improving living conditions. However, these inconsistencies are ripe for further research on CESCR’s procedures and decision-making processes. CESCR’s monitoring of certain aspects of cooperation is well developed – business and human rights – but only in its infancy in others – overseas development aid, migrant workers and climate change. As mentioned, there is little attention to cooperation being tied to rights to food (with the exception of protecting the land of small-scale farmers), clothing, housing or water or improving these aspects of an adequate standard of living. Although Article 11 explicitly calls on international cooperation to end hunger, to share scientific knowledge on food production and to create a system of equitable food distribution, there is virtually no reference to these aspects of cooperation in the work of CESCR in the last five years. In a similar vein, there are nods to an intersectional approach to cooperation, particularly with respect

to Indigenous peoples, but much more is needed to ensure equality within international cooperation. And lastly, there is a creeping proceduralisation of cooperation through impact assessments and less regularly, through consultation. On one hand, this may be strategic to galvanise support for a legal duty to cooperate and could prompt meaningful engagement and change to improve rights protection, but on the other hand, this may dilute the transformative potential of cooperation.

Greater appreciation of the practice of CESCR is illuminating in continued theorising on cross-border obligations on socio-economic rights. The text of ICESCR recognises that no State acting alone can achieve the right to continuously improvement of living conditions. While cooperation is being taken seriously by CESCR, it is not devoting its energies to unpacking cooperation under Article 11. In the coming years, CESCR will continue to evolve cooperation and it is hoped more attention will be paid to how cooperation can facilitate a right to continuous improvement of living conditions.

