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Better Development Decision-making: Applying International Human Rights Law to Neoclassical Economics

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This paper aims to demonstrate that a human rights-compliant normative approach offers solutions to some of the specific areas of concern for economic decision-making in the context of development, as well as for meeting the requirements of human rights. The authors, an international lawyer and economist respectively, draw on the doctrines that inform international human rights law in the area of socio-economic rights and by providing a careful construction that meets the didactic demands of a cross-disciplinary inquiry, reveal how the externally-generated ethical criteria of international human rights law provide welfare economics with the justice-centred guidance it lacks, moving it beyond the conventional premises of economic efficiency and aggregate social utility. The merits of this study transcend that of academic pursuit: most international organisations favour mainstream economics with development economists adopting the value judgments and allocation efficiency principles of neoclassical welfare economics. Integrating the normative demands of human rights into mainstream economic thinking and decision-making may thus offer international development and financial institutions insights that help set alternative norms and value judgments that can act as an integral complement to welfare economic analysis.

Keywords: Economic Efficiency; Neoclassical Economics; Social Welfare Function; Value Judgments; Welfare Economics; Distribution; Socio-economic Rights; International Legal Principles and Doctrines; Process; Competing Interests; Compensation; Reconciling Disciplines

1. Introduction: Informing a Discipline

In the absence of stated social welfare functions, mainstream development economists state their own decision criteria, with the default usually framed within the Paretian premises of economic efficiency and aggregate social optimality. Although claiming to be objective, analytical economics produces outcomes dependent on normative considerations, and these in turn depend on the ethical criteria that get plugged in. Put differently, development economics is only as good as the value judgments that inform them – in development economics it might be growth maximisation but it could also be greater distributional equity. Amartya Sen's work on capabilities was seminal in showing that there can be alternative norms and value judgments to those conventionally adopted by welfare economics; in his estimation the objective should be to increase the capabilities of people to choose a life that

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they themselves have reason to value. This paper explores the significance of integrating the normative demands of international human rights law in order to produce better economics, and does so in two ways: by offering solutions to some of the specific areas of concern for current economic decision-making, and for meeting human rights obligations in the area of socio-economic rights.

In order to examine what international human rights principles and doctrines might require of mainstream economics, and how they could complement and supplement the broadening range of development concerns,[1] it is important to put economic and social decision-making in the context of welfare economic theory. Welfare economics is concerned with the aggregate social utility of society, and an understanding of human rights objectives potentially offers development economics new approaches to social decision-making and resource allocation. To explain this hypothesis, the paper examines whether, and with what implications, social and economic justice principles and norms are embodied in mainstream welfare economics generally; to what extent they reflect human rights objectives; and whether international human rights law can help provide normative direction that overcomes some of the shortcomings of welfare theory. These are not purely academic questions; most international organisations favour mainstream economics with development economists adopting the value judgments and allocation efficiency principles of neoclassical welfare economics (see McNeill and St Clair 2009, 20). Integrating human rights into mainstream economic thinking and decision-making may therefore face particular challenges when attempted by international development and financial institutions such as the World Bank.

In particular, this paper will consider whether a rights-compliant normative approach offers solutions to some of the specific areas of concern for economic decision-making while meeting the obligations of human rights. Human rights objectives potentially offer welfare economics alternative norms and value judgments to incorporate into welfare decision-making that could prioritise greater distributional equity over simple growth maximisation, or change the economist's treatment of aggregation, distribution and compensation which are at the heart of economic evaluation and decision-making. These norms and value judgments can be drawn from the central legal doctrines in the area of economic, social and cultural rights that bring normative guidance, but also international legitimacy, to the setting of value judgments. Further, the human rights framework provides a measure against which policy options and resource allocation outcomes can be assessed, including those of equity and equality, in achieving redistributional objectives.

II. Welfare Economics and Human Rights

A. Understanding Mainstream Economics

Who are the economists that are referred to when the tensions between economics and human rights are tabled? The focus is invariably on so-called "mainstream" economists who represent the dominant neoclassical school of thought within academia, government, and the media (Branco 2009, 3). It is worth recognising at the outset however, that mainstream economists do not represent the entirety of the discipline and, as Balakrishnan, Elson and Patel point out, there have always been progressive, critical welfare economists committed to the creation of socially just economies yet sceptical of securing such economies through mainstream economic policies (Balakrishnan *et al.* 2009, 1–2). One such clearly non-neoclassical school of economic thought that has been influential in international development institutions in recent years has been "institutional economics". Institutional economics focuses on the role of "institutions" and "organisations" in shaping economic

behaviour and rejects the exclusive market focus of neoclassical economics.[2] Chang highlights in this regard that "the market is only one of the many institutions that make up what many people call the market economy … including the markets as institutions of exchange, the firms as institutions of production and the state as the creator and regulator of the institutions governing their relationships … as well as other informal institutions such as social convention. Thus focusing on the market, as neoclassical economics does … we lose sight of a large chunk of the economic system" (Chang 2002, 546).

The human rights analysis of economics that forms the basis of this paper would thereby not necessarily apply to other non-neoclassical schools of economic thought, such as institutional economics or other progressive economic orientations;[3] the interactions that are investigated in this paper are premised on the approaches taken by mainstream economists in particular, given the pervasive influence of this approach over the whole evolution of analytical economics, including applied disciplines such as development economics.

1. Mainstream Neoclassical Economics

Neoclassical and mainstream economics can be treated as synonymous. Neoclassical economics is the bedrock for most modern economic analysis of market-based economies. So all encompassing, neoclassicism defies definition but is essentially a description of the equilibrium of supply and demand of goods and services in a market of consumers and firms regulated by prices.[4] It is easier to recognise the key principles and assumptions of neoclassical analysis of the market including equilibrium, perfect competition, scarcity, utility maximisation by consumers, profit maximisation by firms, market clearance through prices and competition, factors of production, marginal analysis (of costs, revenues, utility, productivity), etc. It is these neoclassical concepts which led economics to develop on from classical political economy to become an analytical social science. Nearly all subsequent developments in mathematical economics and modern econometrics are built on these neoclassical foundations.

It is important to recognise, however, that neoclassical economics is an evolving school and that most advances and developments have come through (sometimes quite fundamental) critiques of the neoclassical concepts whilst still using the basic structures. From time to time these critiques have been described as different or competing schools of economics but, insofar as they employ the same marginal analysis of market economies (that is, focusing on how rates of change in market factors affect the efficiency of outcomes), they are essentially neoclassical and are invariably reabsorbed back into the "mainstream". This is the case with, for example, Keynesian economics.[5]

This broad definition of neoclassical economics is also frequently taken to include – and in some cases to be the same as – so-called "neoliberal economics" and as such has also figured significantly in the disagreements between economists and human rights proponents.[6] In our view, neoliberal economics and policies should not be mistaken for mainstream or neoclassical analytical economics. Neoliberalism represents a distinct school of political economy emphasising the importance of some of the free market mechanisms of neoclassical economics expressed in policy terms – most particularly private enterprise (expressed in privatisation), free trade (and the spread of globalisation) and property rights and laissez faire (expressed in deregulation) and was a direct response to the spread of Keynesian economic intervention policies and socialist economic planning. As Chang rightly argues, neoliberalism in fact requires a critique of neoclassical economics, in particular the rejection of market failure which has become an important principle for neoclassical

economic analysis and macro-economic management.[7] However it is the neoclassical assumptions of market primacy and property rights which neoliberals rely upon and which has led human rights proponents practically to conflate the two in their critique.

While much of the human rights critique of economics has actually focused on neoliberal economic policies such as privatisation, low tax and public expenditure, and deregulation, as some commentators have correctly identified there is a fundamental failure to translate the requirements of human rights into the principles and assumptions that guide neoclassical/mainstream economics (including neoliberal economics in so far as it is underpinned by the same economic principles and assumptions). The underlying problem for neoclassical economics is the reliance on consumers and businesses interacting in competitive markets to achieve efficient outcomes. In these markets, consumers' "needs" or "wants" (but certainly not their rights) are measured by the utility of the goods and services they need as expressed by the consumer's individual "revealed preferences" (that is, how they actually behave) usually using money. It is immediately apparent that satisfying socio-economic rights using these neoclassical rules and structures alone is doomed to failure. As the institutional economists have made clear, reliance on the market ignores the rules, structures and norms of other important institutions such as the state, laws, communities and, importantly in the context of human rights and development, international organisations.

Branco illustrates the weakness of mainstream economic analysis for human rights by reference to the right to water, the satisfaction of which is a basic human right which any economic system should be able to ensure a satisfactory availability and distribution (Branco 2009, 55–59).[8] Branco finds that reliance on the market to do this fails in many developing economies for the most fundamental of reasons: first, the market does not express social preferences and suppliers are satisfied if they can find a price to sell the water available irrespective of who is excluded at that price; secondly, the market is anonymous and unaccountable and therefore disinterested in allocating rights to water; and thirdly, the market produces an inefficient social allocation of water between different uses (for consumption, industry, agriculture) because a competitive market allocates water in accordance with the laws of economic efficiency. Branco uses the allocation and distribution of water to illustrate a basic problem for neoclassical economics, that it "does not concern the distribution that best equates with justice, but simply the calculation of the arithmetic distribution which derives from the application of the principles of efficiency and rationality, regardless of any value judgment" (*ibid*. 23). Though this analysis of water rights illustrates how the neoclassical market fails to translate the requirements of human rights into economics, Branco's final reference to the lack of an appropriate "value judgment" highlights a gap in his critique. It is *welfare economics* which specifically provides neoclassical economics with value judgments, or norms, to make social decisions about the distribution of goods and services. It is to this consideration that we now turn.

2. Mainstream Welfare Economics

In order to consider fully the contribution of human rights requirements to mainstream economics it is important to put economic decision-making and resource allocation in the context of neoclassical welfare economic theory more broadly. Welfare economics is defined as the branch of neoclassical economics concerned with the aggregate social utility of the members of society as a group. It extends the neoclassical concept of individual "utility" (or, in non-economic terms, "satisfaction") to social utility, recognising that this is the result of decisions of all individual members and agencies and that it affects the distribution of the

benefits and costs resulting from economic activity among members of society. Welfare economics therefore sheds light on the governance of public interest – such as the impact of human rights policy – by considering the impact of decisions made by governments as well as the governance of the entire economic system.

In any social or economic policy debate, welfare economics seeks to provide a comparative measure of optimal social utility derived from alternative policy or investment options such that the option with the optimal social utility can be chosen. Whilst classical utilitarians accepted the idea of interpersonal comparisons which could be aggregated into a measure of social utility, neoclassical "new welfare economics" believed they lacked a normative or empirical basis and broke with classical utilitarianism to offer an ordinal measure of efficiency that does not require interpersonal comparisons – the Pareto value judgment – which, put at its simplest, holds that the welfare of society is considered to have increased if one person is made better off and no one is worse off. So-called new welfare economists such as Kaldor and Hicks subsequently developed and promoted the principle of "potential compensation" which effectively operationalised Pareto optimality as the value judgment of choice for analytical welfare economics. This movement developed a series of alternative compensation tests which admit and expand the practical range of solutions to the Pareto criterion under which winners make sufficient gains to be able, hypothetically, to compensate losers and move the economy toward Pareto efficiency. Any change usually makes some people better off and others worse off, so these tests consider what would happen if gainers were to compensate losers, leaving everyone at least as well off as they were before. In practice therefore, public policy analysis is often undertaken using a narrow range of cost-benefit analysis tools and other methods which are an application of the Kaldor–Hicks criterion but still require only a very limited range of essentially Paretian evaluation criteria.

It is also important to recognise that satisfaction of the conditions of Paretian efficiency require efficiency in distribution as well as in production and exchange before a particular decision or policy is the best attainable from an economic welfare standpoint. This is achieved when goods and services are allocated to those who derive the greatest utility from them. The Paretian value judgment is then fully satisfied when it is not possible to make one person better off without making at least one person worse off.

Welfare economics and human rights law therefore apparently share similar concerns. Policy assessments based on a welfare economics methodology necessarily rely on normative judgments about whose welfare interests to count and how to weigh the competing welfare interests of different individuals against one another, and these are precisely the questions that fairness and rights-based claims address. Some have even suggested that rights-based claims should be reformulated and presented using the language and analytical framework of welfare economics. In his careful study on the subject, Harvey argues, however, that the virtues of welfare economics are circumscribed by significant conceptual and measurement difficulties, precisely around the normative principles that regulate the aggregation of individually experienced welfare effects. He acknowledges that the attraction of utility maximisation using the Pareto or some other normative principle as a single purpose public choice criterion is strong because it allows – at least in principle – for policy choices to be made scientifically. However human welfare is multi-dimensional and Harvey points out that "welfare economics contains no mechanisms for choosing among competing distributional rules" and "it is doubtful that anyone would think it a good idea to try to reduce all the benefits and detriments of a particular policy to a single metric". He adds: "Neo-classical welfare economics may be well suited for assessing only certain kinds of welfare effects – specifically those in … money income or prices – while other welfare effects are better

analyzed using the balancing tests associated with traditional legal analysis" (Harvey 2002, 411 and 429).

3. Alternative Approaches to Social Decision-making

The lack of a willingness among neoclassical economists to use mechanisms in welfare analysis to consider the distribution effects of economic policies to inform social decision-making and in considering social and economic justice appears on the face it to be a significant shortcoming in applying the requirements of international human rights law to economics. In fact this weakness has always been a concern for analytical welfare economists – not least in the field of development – and is usually addressed, at least theoretically, by reference to the "social welfare function" which is the sum of individual utilities. For social decision-making which concerns the distribution of outcomes, there must be some concept of a social welfare function so that we can recognise what are benefits and costs, what weight to attach to each item, and which among the many possible solutions is the most distributionally efficient. However, while social welfare functions can produce rank orderings of possible outcomes they do so only through the introduction of externally-generated ethical criteria. To the dismay of many economists, the function is never explicitly stated by the policymaker[9] – for example, it could treat all individuals the same, or assign larger weights to the utility of the least well off – and the analyst is left to her own devices to state the objective as necessary, usually within the confines of Paretian premises.

In this context, Reddy has called for "the fuller integration of normative (including rights) considerations with empirical analysis and speculative imagination [to] produce better economics" (2011, 69) and it is development economics that has perhaps made the most progress in addressing these shortcomings. Amartya Sen has been the most important welfare economist applying human rights norms to the setting of development economic decision-making and, in so doing, changing the whole discipline of welfare economics. By emphasising the "entitlements, capabilities and functionings" of individuals over self-interested utility maximisation as a predictor of individual and social behaviour, Sen is said to have "rescued welfare economics" both from free-marketeers, who argued that individuals should be left to choose whatever the market made available in response to their choices, and from statists, who concluded that choices had to be made by governments on the people's behalf.

Sen's critique challenges "welfarism" itself – the equation of rational behaviour with utility maximisation and its use as a predictor of individual and social behaviour, preferences and values, together with utility-based interpretations of economic efficiency and social optimality based on Pareto efficiency. The importance of his work in the last 30 years, however, has been in the development of alternative approaches and variables that should be accommodated in theoretical and empirical economics – and he has done so specifically in the context of development economics by incorporating freedoms and rights into economic analysis and social choice. He argued the need to go beyond the assessment of utility, growth and income to take account of "entitlements" (defined by Sen (1984, 497)as "the set of alternative commodity bundles that a person can command in a society using the totality of rights and opportunities he or she faces'), and "capabilities". It is his concept of "capability" – relating to a person's ability to achieve different combinations of functionings (the things a person values doing or being) and reflecting the opportunity to choose the life that a person herself values – which has been most influential in challenging the concept of utility and

replacing "preferences", widely recognised to date as an appropriate variable for evaluations and decision-making exercises concerning human interests.

What has come to be known as Sen's Capability Approach has been widely reviewed and applied since in the human rights and development context. Sen himself advocated in the United Nations (UN) Human Development Report of 2000 that "a more integrated approach (between capabilities and human rights) can … bring significant rewards and facilitate in practical ways the shared attempts to advance the dignity, well-being and freedom of individuals in general" (2000, 19). Applied research on the Capability Approach has set out to measure participants' capabilities empirically, to increase their capabilities so that participants are able "to choose a life that they themselves have reason to value" and improve "the design and appraisal of poverty alleviation programmes [to] focus on the freedoms created for participants and not simply on any extra goods or commodities provided by donors" (Schischka, Dalziel and Saunders 2008, 229). In the context of human rights and development, Sen's research highlighted the central idea that, in the final analysis, market outcomes and government actions should be judged in terms of valuable human ends.

Sen has also challenged the informational basis of welfarism, arguing it is too narrow to reflect the intrinsic value of freedom and rights – particularly when expressed as entitlements, functionings and capabilities – arguing for pluralist informational frameworks which are sensitive to processes as well as outcomes and are more participatory.[10]

Although debates on Sen's capabilities approach and informational frameworks for rejecting neoclassical "welfarism" and applying human rights norms to the setting of development economic decision-making continue, it is clear that Sen's work has provided the case for the introduction of externally-generated ethical criteria that the social welfare function – and decision-making in welfare economics in general – has always required but shied away from. As Seymour and Pincus rightly assert, "human rights theory can help provide a normative framework that avoids some of the pitfalls of welfare theory" (2008, 387).

But do these contributions go far enough to overcome the weaknesses of social welfare theory and translate the requirements of human rights into the principles and assumptions that guide mainstream economics? Although Sen's work offers the most significant bridge, it is not easy for the two disciplines to identify how his approach might address their more specific theoretical and practical concerns. Once affirming the status of human rights, this paper will highlight the general contours of the debate from the perspective of the two disciplines, then move on to detail the doctrines and principles in the area of socio-economic rights. In Part 3 we drill down to examine whether the more developed normative approach of international human rights law offers solutions to some of the specific areas of concern when it comes to mainstream economics generally, and welfare economics in particular. This includes, notably, the economist's treatment of aggregation, compensation and distribution, and the primacy human rights place on process over outcome, and on equity and equality.

B. Understanding Human Rights

For the purposes of this exercise, we are interested in human rights as defined by international human rights law (as opposed to moral rights). This is deliberate. While on the one hand we are thus essentially limited to those rights found in treaties,[11] and their interpretation and application as determined by international judicial (and quasi-judicial) bodies, we seek to demonstrate how the particular value judgments of international law in this area can, and indeed should, inform economic decision-making. Of course a related

benefit would be to limit violations of socio-economic rights and to facilitate their realisation within the mainstream processes of development. In fleshing out the content of socio-economic rights and obligations, we capture below some seminal elements, including the fact that the norms to which we refer embody legal commitments and impose obligations on states; non-compliance as such is not merely unfortunate but can give rise to state responsibility. More specifically, we expose implications that come from recognising that international human rights law comprises minimum standards of dignity. We bring to the fore how the detailed content of these human rights norms can provide explicit value judgments in specifying the social welfare function that development economics requires. The further we explore these rights, the better we can evaluate the significance to economics of such doctrines as the meeting of the minimum essential level of rights as a policy priority; the state's burden of proof regarding rights retrogression, and the requirement that policy choices should always be those that least restrict rights. We can also learn something about how international human rights law has dealt with the competing interests of securing socio-economic rights on the one hand and the state's right to act in the public interest on the other. This legal methodology developed to resolve conflicts as they present themselves could fill a lacuna in economic decision-making.

1. Human Rights as Legal Rights

Human rights are not merely normative frameworks on par with other value systems. Human rights are grounded in international law and are meant to be given effect in domestic legal orders (CESCR 1998). The provisions of a state parties' internal law cannot be invoked as justification for its failure to perform a treaty.[12] In other words, international human rights condition the national environment, which requires that states modify the domestic legal order as necessary in order to give effect to their treaty obligations (*ibid*., para. 3). Human rights are the product of negotiated consensus among states, each with equal voice and one vote. Within the UN there are today 194 states and they all have the opportunity to participate in the drafting of human rights treaties and then to offer their consent to being bound by their precepts. As such, human rights tend to possess a preeminent international legitimacy and where a state has given its consent to be bound, the treaty has the force of law. Human rights treaties have been widely ratified and a ratified treaty is legally binding on all branches of government. As part of the minimum standards of human rights, basic economic, social and cultural rights might also be guaranteed under customary international law thereby binding all states, and arguably other subjects of international law as well, such as international organisations (CESCR 2003, para. 31).

International judicial bodies are charged with the interpretation of the treaties in which the rights and the state parties' corresponding obligations are found. For decades, the content of rights and the nature and scope of obligations have been fleshed out, offering a considerable degree of normative specificity and, notably, a general consensus among the international community of states as to what constitutes minimum standards of dignity for everyone. This is in contrast to some of the basic tenets in neoclassical welfare economics where, as has already been made clear, an efficient equilibrium does not imply that the outcome is in any sense desirable or just, and aggregating costs and benefits or anticipating compensation may not be adequate to ensure the rights to which "everyone" is entitled. After a brief mapping of the tensions traditionally identified between economics and human rights, it is to a detailed look at the alternative value judgments provided by the doctrines and principles of international human rights law which we will turn.

2. The Debate: Background and Context

Much of the literature on human rights and economics narrates a debate between human rights proponents and mainstream economists. At a general level, this debate highlights a number of possible tensions in light of the fact, as one commentator has put it, that scholars and practitioners in both fields present specific and seemingly contrasting views as to how society should be organised and why (Reddy 2011, 63).

Mainstream economists might suggest that human rights offer merely broad principles but no tools with which to make specific policy choices or to assist in setting priorities, that they are concerned only with the realisation of human rights as an end in itself, that human rights represent intrinsic values and as such make necessary compromise difficult. The idea of "universal" human rights to a discipline premised on utilising scarce resources in the most efficient way would seem to represent a clear tension (even if the notion of universality is largely misunderstood, as addressed below). For similar reasons, economists might be uncomfortable with the legal formulation that all human rights – civil and political, economic, social and cultural rights – are indivisible, that is, that they are of equal importance and that it is impermissible to promote certain rights at the expense of other rights, and that they are interdependent in that they are mutually reinforcing and perhaps causally linked.[13] The implication here is that while human rights are inherently systemic, that is, a whole body of human rights laws and principles are to be considered in policy-making (Archer 2006, 82), economic thinking focuses on choice in a world of scarcity.[14] At first glance, the former feature suggests negotiation would be difficult, and that the latter might allow too easily for trade-offs that are not consistent with human rights standards. On this understanding of the systemic nature of human rights, economists might query whether the way in which human rights are framed is unrealistic, or perceived to be unrealistic by duty-bearers, appealing to strategies and economic policies that are not feasible.

Further, Seymour and Pincus remark that the recognition of rights does not specify the means through which they can be realised (Seymour and Pincus 2008, 395), nor, it has been suggested, do rights-based approaches offer "a specific metric for making trade-offs" (Gauri 2004, 472; see also Uvin 2004, 184: "The human rights edifice provides no tools for making choices or setting priorities"). Human rights proponents, their approach shaped by the general parameters of law in this area, have been accused of thinking only in the present tense (concerned about violations here and now), and allowing only unidirectional progress (condemning progress that takes one step back in order to go two steps forward) (Archer 2006, 83–84). A human rights approach is also often seen as being unable to direct choice when it comes to two goods (e.g. education and health).

For their part, human rights proponents might argue that economists lack concern for the ethical consequences of their policies and for the negative consequences of growth for those left behind (Seymour and Pincus 2008, 403). They might query whether economists are interested – in so far as they integrate human rights into their work[15] – with merely the instrumental value human rights might bring to decision-making. A notable uneasiness in this regard is that priority could be determined on the basis of those rights that facilitate economic growth and achieve poverty reduction, diluting the basic tenets of human rights and watering down the scope of legal obligations (Sarfaty 2009, 677). A more extreme position would have certain so-called "rights" singled out, rights which are in fact no more than economic freedoms, i.e. those that are needed to satisfy the conditions of efficiency in production and exchange and maximise profits and growth. On this account, "rights" are understood as: personal choice, voluntary exchange, freedom to compete, and protection of

persons and property (Chauffeur 2009).[16] This libertarian delineation of rights has been contested by human rights lawyers.[17]

A closer look at the actual content of the international law of human rights reveals a far more detailed and nuanced disciplinary contribution to development economics than the perceived limits of a human rights approach might initially suggest. Reflecting on the "value judgments" provided by relevant international legal doctrines, we uncover important economic and social norms that can offer a basis for specifying the social welfare functions that development economics requires and assist in just economic decision-making where there are competing interests.

3. Human Rights Doctrines and Principles: The Content of Alternative Value Judgments

(a) *Obligations to Respect, Protect and Fulfil Socio-economic Rights*

To assist states in meeting their obligations, the UN Committee on Economic, Social and Cultural Rights (CESCR) applies a tripartite model to monitor compliance by state parties with the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the treaty it oversees.[18] These are obligations to respect, protect and fulfil the rights codified in the Covenant (see, for example, CESCR 1999, para. 15; 2000, para. 33). This interpretative tool provides that the obligation to "respect" human rights imposes an obligation on states and all their organs and agents to refrain from interfering either directly or indirectly with the enjoyment of rights. For example, a violation of the obligation to respect the right to food occurs if the government arbitrarily evicts people from their land, especially if the land was their primary means of feeding themselves, or by denying access to essential healthcare to particular persons, for example minorities, detainees, or asylum-seekers. The obligation to respect human rights does not necessarily involve significant state involvement, but positive action may be required (e.g. the provision of legislation, the training of officials). The obligation to "protect" human rights requires that states and their agents take the measures necessary to prevent any individual or entity within their territory or subject to their jurisdiction from violating human rights. The obligation to protect requires the government to protect the enjoyment of the right from interference by third parties, for example corporations. The obligation to "fulfil" requires that states take positive measures to assist individuals and communities to enjoy their rights. This would require that states adopt measures including, for example, appropriate low-cost techniques and technologies to ensure essential goods are affordable; appropriate pricing policies, for instance free or low-cost access to goods such as water and services such as healthcare; as well as income supplements (see CESCR 2002, para. 27). States are obliged to fulfil a right when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal (*ibid*., 25). The obligations to protect and to fulfil rights require positive measures, including through legislative, administrative and budgetary means, and in the latter case "to facilitate, provide and promote" the enjoyment of these rights as part of the state's broader obligation to see them fulfilled (CESCR 2007, para. 7)

(b) *Progressive Realisation of Rights*

While ICESCR provides for progressive realisation and as such acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.[19] The "undertaking to guarantee" that relevant rights "will be exercised without discrimination", as per ICESCR article 2(2), is not subject to progressive realisation.[20] Notably, the prohibited grounds of discrimination include the economic and

social situation of individuals and groups (*ibid*., para. 35) as well as their property status or lack thereof (*ibid*., para. 25). Further, states are required to undertake to ensure the equal right of men and women to enjoy the Covenant rights (Art. 3 ICESCR; CESCR 2009a). The prohibition on discrimination applies also to indirect discrimination i.e. "laws, policies or practices which appear neutral… but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination" (CESCR 2009a, para.10(b)). Finally, giving effect to various aspects of socio-economic rights that may not be resource-dependent would impose obligations of an immediate nature.

When it comes to the progressive realisation of rights, CESCR has pointed out that the undertaking in article 2(1) "to take steps" is not qualified or limited by other considerations – steps towards that goal must be taken within a "reasonably short time" after the Covenant's entry into force for the states concerned and should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant" (CESCR 1990, para. 2; 2002, para. 17).

(c) *"Minimum Essential Levels" of Rights and Corresponding "Core Obligations"*

There is another obligation of immediate effect. Under its mandate to interpret the Covenant, the Committee established in 1990 that, progressive realisation notwithstanding, "a core obligation" to ensure the satisfaction of, at the very least, "minimum essential levels" of each of the rights is incumbent upon every state party. The realisation of the minimum essential levels of economic, social and cultural rights are of an immediate nature (i.e.: not subject to progressive realisation) (CESCR 1990, para. 10). A state party in which any significant number of individuals is deprived of basic needs such as essential foodstuffs, essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. The burden of proof thus lies with the state to demonstrate it has done all it can to ensure the minimum essential levels of rights for its people, lest it be found in violation of its obligations under the Covenant (*ibid*., also CESCR 2001, para. 16; 2000, para. 47 (core obligations are "non-derogable")).

International human rights law is not meant to be unworkable, and any assessment as to whether a state has discharged its minimum core obligation takes account of resource constraints within the country concerned (CESCR, 1990, para. 10). The parameters are provided in ICESCR article 2(1) which requires that each state party takes the necessary steps "to the maximum of its available resources" (a doctrine explored below). In order for a state party to be able to attribute its failure to meet its core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations (*ibid*.). Notably, "maximum available resources" refers both to the resources existing within a state as well as those available from the international community through "international assistance and cooperation" (*ibid*., para. 13; see also CESCR 2001, para. 16; 2000, para. 45 (on core obligations giving rise also to international obligations for those states "in a position to assist")). This might also imply that commitments by international development agencies to ensure that additional resources are available, or available directly to the government rather than, for example, via civil society, would be conditional on the recipient state making progress on relevant human rights obligations. CESCR has concluded in its Statement on Poverty: "When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect … If a national or

international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party" (CESCR 2001, para. 17).

Finally, even where the available resources remain demonstrably inadequate, the obligation remains for a state party (a) to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances, (b) monitor the extent of the realisation, and especially of the non-realisation, of economic, social and cultural rights, (c) devise strategies and programmes for their promotion (CESCR 1990, para. 11), and that (d) even in times of severe resource constraints, whether caused by a process of adjustment, of economic recession, or other factors, the most disadvantaged and marginalised individuals and groups can and indeed must be protected by the adoption of relatively low-cost targeted programs (*ibid.*, para. 12; also CESCR 2002, para. 16; 2009b, para. 23). Failure to take these steps could also constitute a violation of a state's obligations under the Covenant.

(d) *"Maximum Available Resources"*

ICESCR article 2(1) provides that state's party to the Covenant are to take steps to "the maximum of their available resources" in realising economic, social and cultural rights. There is no definitive guidance from the Committee as to what constitutes maximum available resources, although some direction can be highlighted.

In considering an alleged failure of a state party to take these steps, the Committee indicated in 2007 that it would examine the measures the state had taken on the basis of whether they could be considered "adequate" or "reasonable". This would likely include the extent to which the measures were targeted towards fulfilling rights and were non-discriminatory; whether the state adopted the policy option that least restricts Covenant rights; whether the particular situation of disadvantaged and marginalised individuals and groups had been taken into account; and whether grave situations or situations of risk were prioritised (see further CESCR 2007, para. 8).[21] At the international level, maximum available resources are often equated with the globally endorsed 0.7 per cent of gross national income in official development assistance which now represents an objective standard and its phased achievement is used by the Committee as a yardstick to measure whether a country, other than the right-holders own, is taking steps to the maximum of its available resources.

As per our discussion above on minimum essential levels of rights, "the 'availability of resources', although an important qualifier of the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints justify inaction" (CESCR 2007, para. 4). Moreover, maximum resources are not (or are no longer) limited to financial resources, and could include human, technical, organisational, natural and informational resources, even if financial resources are a significant component as to what constitutes a state's resources (see Balakrishnan *et al*. 2011, 3; see also Skogly 2012, 393). The UN Committee on the Rights of the Child (CRC) that oversees compliance with the Convention on the Rights of the Child – a treaty that also provides for socio-economic rights – has asserted that in order for a state to be able to tell whether it is fulfilling (children's) economic, social and cultural rights "to the maximum extent of … available resources", it must be able to "identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly".[22]

Allocating available resources is a leading example of where economic decision-making could benefit from human rights norms as a basis for specifying social welfare functions, but we should not overlook the significance of maximising resources. As Balakrishnan and Elson make clear, there is a considerable list of requirements when it comes to maximising

resources: determination as to what constitutes maximum available resources would reasonably depend "not only on the level of output of an economy, its rate of growth, and the level and growth of its inflows of resources from other economies. It also depends on how the state mobilises resources from the people living under its jurisdiction to fund its obligation to fulfill human rights" (Balakrishnan and Elson 2008, 5). A proper consideration of the doctrine would thus include fiscal policy, monetary policy, financial sector policy as well as debt and deficit financing.[23]

(e) *Non-retrogression*

There is a strong presumption that retrogressive measures on the part of a state are not permitted (CESCR 2008, para. 42, as elsewhere). Potentially retrogressive measures could include cuts to expenditures on public services that are essential for the realisation of economic and social rights, or cuts to taxes that are critical to funding those services (see Balakrishnan and Elson 2008, 6). Should a state party use resource constraints as a justification for any steps that lead to a retrogression in rights, CESCR indicates that it would consider such information on a country-by-country basis in light of "objective criteria", such as the country's level of development; the severity of the alleged breach, including whether the situation concerned the enjoyment of the minimum essential level of a right; whether the state party had sought to identify low-cost options; and whether it had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason (CESCR 2007, para. 10).

If any deliberately retrogressive measures are taken, the state party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the state party (CESCR 1990, para. 9; 2008, para. 42). In its General Comment on the right to social security for example, the Committee explains that any deliberately retrogressive steps would be considered against whether the state party had reasonable justification for the action; undertook a comprehensive examination of alternatives; ensured genuine participation of affected groups in examining the proposed measures; determined whether the measures were directly or indirectly discriminatory; determined whether the measures would have a sustained impact on the right to social security, an unreasonable impact on the right to social security or deprive an individual or group of the minimum essential level of the right; and whether there was an independent review of the measures at the national level (CESCR 2008, para. 42). It can be assumed that this test would apply to the determination of whether a violation has occurred as a result of a retrogression of any rights in the Covenant.

In addition to the doctrines outlined above, there are a number of principles that underpin the theory and inform the practice of human rights. They apply to all human rights and it is worth briefly recounting them here as we set out the value judgments that human rights law provides.

(f) *Rights as Universal, Indivisible, Interdependent and Interrelated*

The notion of universal human rights points to minimum standards of dignity to which every person in the world is entitled. Human rights are universal, that is, they are universal entitlements. People have legal human rights in so far as they are provided for within their domestic legal systems, and/or provided for on the basis of international law. Notably, the

idea that rights are universal, while significant, does not indicate in and of itself what human rights obligations a particular government might have and as such what obligations it is required to undertake. There are strong arguments to suggest that the minimum level of socio-economic rights (e.g., the right not to be hungry, the right of access to water, the right to adequate sanitation, the right to basic healthcare) are part of customary international law which would make them rights that are truly universal, rights that anyone can, in principle, claim (CESCR 2003, para. 31; and see Alston 2005).

At least since the adoption of the Vienna Declaration on Human Rights in 1993, emphasis has been placed on recognising rights as universal, indivisible, interdependent and interrelated, however any need to prioritise certain rights in a given context does not counter that tenet. The principle of the indivisibility of human rights does not demand that poverty be defined by reference to all the rights set out in the main human rights instruments, and that the various human rights are entitlements of each and every individual and are mutually reinforcing does not negate the fact that there can be many reasons to have to make choices about which rights to prioritise. As such, that human rights are understood as universal and indivisible does not indicate that trade-offs are impossible, but as we will see in section 3.A.3, human rights prescribe certain parameters on the process and outcomes of those trade-offs.

(g) *Non-discrimination and Equality*

Non-discrimination and equality constitute fundamental aspects of states' human rights obligations and human rights treaties prohibit discrimination on a range of grounds. Article 2(2) of ICESCR lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Less attention has been paid to the fact the Covenant prohibits any distinction in the enjoyment of rights on the basis of property[24] and, recently, CESCR has interpreted "other status" to include the economic and social situation of an individual or group. The Committee points out that these additional grounds are recognised because they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation (CESCR 2009a, para. 27). Discrimination matters to development, not least because it "undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination" (*ibid*., para. 1). Policy changes or adjustments as responses to economic and financial crises must, in addition to being non-discriminatory, comprise "all measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected" (CESCR 2012). Development can also be discriminatory in the sense that particular people and communities are marginalised by or through development interventions.

(h) *Participation*

Active, informed and effective participation is a key principle of international human rights law which includes the right to take part in the conduct of public affairs.[25] There is a range of provisions that addresses various aspects of participation rights, including freedom of association (International Covenant on Civil and Political Rights (ICCPR)), the freedom to seek and receive information (ICCPR), and the right to education (CRC, ICESCR,

CEDAW[26]). The Declaration on the Right to Development (DRD) has the prerogative of the state to formulate appropriate national development policies subject to the "active, free and meaningful participation in development" of the population, aimed at the "constant improvement of the well-being of the entire population and of all individuals", and resulting in "the fair distribution of the benefits resulting therefrom".[27] Participation rights also figure prominently among minorities and indigenous peoples,[28] in many cases requiring their "free, prior and informed consent".[29] In its assessment of whether a state party has taken reasonable steps to the "maximum of its available resources to achieve progressively the realisation of the provisions of the Covenant', as required under ICESCR, the Committee places great importance on transparent and participative decision-making processes at the national (CESCR 2007, para. 11) as well as the international levels (CESCR 2011a, para. 6). This would apply also to transparency in budgeting and in the allocation of resources (Hunt, Nowak and Osmani 2004, 2; HRC 2011, para. 3).

There is information available on how to translate participation rights into the practice of economists and what would give effect to a "deep participatory approach", including "a shift towards a more equitable power balance between service providers and users" (Uvin 2004, 138). In his thoughtful analysis on the delivery of health and education services, Gauri remarks that "the economic approach views those processes instrumentally: they could in principle be reconciled with authoritarian styles in medicine and school governance if those lowered mortality and raised literacy" (Gauri 2004, 471).[30] Human rights require that "the functioning of any system, including a market-based one, is subject to the judgment and limitations that come from the fact that all human beings have inalienable human rights … [P]rocesses of accountability, participation, inclusion, justice, and social guarantees have to underlie both the market and the state …" (Uvin 2004, 139). In short, as Uvin highlights, "the human rights approach attaches as much importance to the processes which enable developmental goals to be achieved as to the goals themselves" (Hunt, Nowak and Osmani 2005, para. 23). The importance of participation in economic decision-making also demonstrates how civil and political rights and socio-economic rights are mutually supporting, and why human rights recognise them to be interrelated, indivisible and interdependent.

(i) *Accountability*

There is a general obligation in international human rights law to provide a prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of human rights. Accountability mechanisms can be judicial in nature, such as courts and tribunals, and judicial review of executive acts and omissions; quasi-judicial, for example, ombudspersons and international human rights treaty bodies; administrative, illustrated by the preparation, publication and scrutiny of human rights impact assessments; and political, such as those found in parliamentary processes (*ibid*., para. 77). As has often been pointed out in discussions on human rights and development, the principle of accountability is what distinguishes the voluntarism of charity from the requirement of duty, and renders poverty not merely a matter of misfortune but a matter of injustice. For its part, the development literature highlights that different and complementary institutions (political, economic, legal etc.) are necessary for achieving accountability and efficient resource allocation (MacKay and Vizard 2005, 9). The value of greater accountability for economic decision-making should be uncontroversial.

Ensuring accountability requires monitoring, the objective is both to contribute to the attainment of targets and the realisation of rights as well as to enable a right-holder to hold a

duty-bearer to account for the failure to discharge its duties. In the former instance, the aim is to assist in the realisation of human rights and to prevent their violation; the latter case includes ensuring that where human rights obligations are breached, responsibility ensues. When it comes to addressing poverty and development, it may not always be easy to link each rights claim with a clear duty and duty-bearer, however obligations that do not easily lend themselves to specifying exact duties of particular agents, that is, rights for which the right-duty correspondence is not clear-cut does not determine its status as a right, although the exercise of rendering imperfect obligations perfect is of course important (see Sen 2000, 496). Advances in the work on human rights indicators can be important in addressing this gap and strengthening accountability (see *Using Indicators* 2011). Finally, monitoring and accountability procedures are also expected to extend to global actors – such as the donor community, intergovernmental organisations, and transnational corporations – whose actions invariably affect the enjoyment of human rights (see CESCR 2011b; Hunt, Nowak and Osmani 2005, para. 77; *Maastricht Principles* 2011).

4. The Contribution of Human Rights Law to Resolving Competing Interests

In presenting the content of doctrines and of human rights principles relevant for our subject matter, we have sought to illustrate not only what may be required of welfare economics but also that human rights law develops with an eye to its practicability. Human rights norms have not been interpreted in the abstract, decoupled from the demands of their implementation, on the contrary, they are tested regularly through their concrete application and are able to evolve. They compel and circumscribe the action of governments (and ideally other actors) through the values they contain, but they do so alive to the choices that real-life decision-making presents. It is the currency and transparency of the values of human rights norms which contrast with the apparent objectivity, but actual opacity, of economic value judgments which makes them potentially important in making better economics. A specific example of the contribution of international human rights law to decision-making is found in the proportionality requirement.

At the level of theory, human rights have been argued to represent trumps, however in practice human rights are only rarely treated that way. Few rights are insulated entirely from "interference" justified by a legitimate general interest objective. Moreover, international human rights law anticipates the need to resolve competing interests when it comes to a number of rights. Certain civil and political rights – the right to privacy, freedom to manifest one's religion or beliefs, freedom of expression, freedom of assembly and association – provide for express limitations, subject to certain qualifying conditions being met.[31] Thus, the right to respect for private and family life requires there be no interference with the exercise of this right except when in accordance with the law and necessary in a democratic society in the interests of, *inter alia*, national security, public safety or the economic well-being of the country, or for the protection of the rights and freedoms of others (article 8(2) European Convention on Human Rights).

Where a state seeks to rely on a limitation in justifying an interference with qualified rights, international courts apply a three-part test: whether the interference is "prescribed by law" (the legality requirement); whether it "pursues a legitimate aim" (the legitimacy requirement, e.g. whether it is in the interest of national security or the economic well-being of the country); and whether the restriction is "necessary" or "proportionate" (the proportionality requirement).[32] To satisfy this latter test, it must be demonstrated that the restriction fulfils "a pressing social need" and that it is "proportionate" to the aim of

responding to that need, since only the minimum interference with the right which secures the legitimate aim will be permitted.[33] Proportionality requires not only that a fair balance is struck between, for example, an individual interest and the collective interest, but also that the limitation does not impose a disproportionate and excessive burden on individuals or on a particular sector of the population (see further, Salomon 2007b, 438–439). These "public interest exceptions" reflect the need to balance the interests of the wider community against the interests of the individual. Where this is not made explicit in the provision itself, the case-law may reflect the need to balance competing interests. This can be seen in the area of minority rights where the collective right of the minority group to its culture and livelihood may be considered in light of a national economic development objective, such as the granting of mining concessions. This is an area of development decision-making in which economic analysts believe they have the tools to resolve competing interests but require the clearer values, norms and guidance which human rights law and practice can provide.

In so far as socio-economic rights are concerned, ICESCR provides at article 4 that: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". A multi-part test is applied also to the limitation of socio-economic rights, and as affirmed by CESCR: "Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society" (CESCR 2000, paras. 28–29). In the implementation of austerity measures as a response to rising public deficit and poor economic growth following from economic and financial crises, CESCR has held that any policy must be necessary and proportionate by which the Committee means that "the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights" (CESCR 2012). Thus, not only do the least rights-restricting options need be pursued but the burden of justifying limitations on rights as a result of policy decisions rests with the state (*ibid*., para. 28).[34] Notably, CESCR highlights that this limitation provision "is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States" (*ibid*.).

What does this brief coverage on qualifying rights indicate for our purposes? First, it may help dispel the idea that rights-talk is absolute and thus of little significance to economists charged with making choices as to the allocation of resources. Secondly, human rights-based claims rarely constitute absolute trumps, however they do possess a pre-eminent value against which the merit of other values (e.g. national economic development or austerity measures) have to be justified. As such, actions that are supported by the majority of the population, and even where the action in question would increase the total utility of the population as a whole, it may be illegal in that the interference constitutes a violation of human rights.[35]

It would seem clear that the status of human rights that affords them what one commentator has referred to as "special deference without treating them as absolute trumps" is consistent with the view that "both utility-maximization and the protection of fundamental rights are legitimate public policy goals" (Harvey 2002, 428). That said, a discussion about competing interests, choices, and trade-offs is essentially about priorities and the process by which decisions are taken and any interference with socio-economic rights must be subject to careful consideration and rigorous justification, including a suitable variation of the proportionality requirement. At a general level, a human rights approach, as Uvin points

out, also "demands that we question the status quo, render explicit the concerns of the oppressed and the poor when thinking through policies, and not take resource constraints as natural givens but treat them as the result of past choices" (Uvin 2004, 191). Human rights are alive to exploitation both past and present (*ibid.*; Seymour and Pincus 2008, 389 and 401),[36] and expect that their impacts are addressed where trade-offs are considered. To revisit our earlier point, policy assessments based on a welfare economics methodology necessarily rely on normative judgments about whose welfare interests to count and how to weigh the competing welfare interests of different individuals against one another and against public policy choices, and these are precisely the questions that human rights doctrines and the balancing tools of international human rights law seek to address.

III. Situating Human Rights in Economic Decision-making

A. Confronting the Meta-narratives of Neoclassical Economics

So far we have considered the theoretical and normative basis of mainstream economics and of international human rights law in the context of development, along with the central debates and tensions that the disciplines encounter in their understanding of each other. The aim was to foreground the potential for greater integration of human rights doctrines to produce better economics. We will now drill down into a selection of core issues in order to examine how the norms of human rights law and practice offer solutions to some of the specific areas of concern for economic decision-making and for meeting the obligations of human rights. These include the economist's treatment of aggregation, efficiency in production and exchange, consequentialism, equity, and compensation which are at the heart of economic evaluation and decision-making – particularly for development economics.

1. Aggregation

Human rights proponents might question whether welfare economics loses sight of individuals by focusing on aggregate outcomes: it is argued that maximising the aggregate welfare of society in the manner of mainstream neoclassical economics may be contradictory with guaranteeing individual rights (see among others, Branco 2009, 5), notwithstanding that human rights and classical utilitarian economic approaches both draw from the Enlightenment in that they recognise individuals, not societies, or other collective entities as the principal locus of moral value in the world (Gauri 2004, 471).[37]

However, the human rights focus on the worth of every human being is concerned with distribution in outcomes and not only averages; thus for example it emphasises the need for disaggregated data among ethnic and religious minorities, women, the poor and others (*ibid.*, 471–472). While the development field is an example of economic and social policy making which in fact often does focus on the collection of disaggregated empirical data rather than relying on what is often unreliable national economic and social data, significantly, it does not always use this to measure distributional outcomes or consequences of policies. The suggestion that "there is nothing inherent in economic theory that conflicts with normative concern for excluded groups, or with the development of new behavioural assumptions regarding women and ethnic groups" (*ibid.*, 472) may provide a start to reconciling economics with the human rights approach.

2. Efficiency in Production and Exchange

In practice, in mainstream neoclassical economics, Paretian efficiency has come to mean satisfaction of the conditions of efficiency in production and exchange only. It usually ignores efficiency in distribution which occurs when goods and services are allocated to those who derive the greatest utility, or satisfaction, from them. Thus human rights proponents can correctly claim that the default position of neoclassical welfare is that if people and businesses interact in competitive markets, then the most efficient outcome will be achieved, affirming that the development community overvalues efficiency in production and exchange – that is those activities (or rights) that will have the highest pay-off or will bring about the highest rate of economic growth – and ignores distribution (or even "almost always disfavoring redistribution", Uvin 2004, 191–192). In traditional economic theory, efficiency and equity are dealt with separately and while the separation has undoubtedly been questioned by economists (see Stiglitz 2008, 47), as Branco points out: "the fact is that economic resources can be unequally allocated … without economic efficiency being the least bit troubled (Branco 2009, 18). That "efficiency" has come to be measured in terms of outputs in goods and services only and that distribution can be considered separately finds adherents within international economic organisations who take the view that the role, for example of the WTO, is to focus on efficiency and growth alone and that distribution should be left to actors such as the World Bank and national governments working within the development domains. We argue that bifurcating efficiency and equity ignores the contribution that a properly executed welfare analysis – explicitly including efficiency of distribution based on alternative value judgments which include human rights objectives on equity – can make to achieving optimal distributional outcomes of policies.

To ensure that a particular decision or policy is the best attainable from a neoclassical economic welfare standpoint, Paretian efficiency also requires efficiency in distribution when goods and services are allocated to those who derive the greatest utility from them and when it is no longer possible to make one person better off without at the same time making at least one person worse off – that is, there is no redistribution which would improve one individual's position without worsening that of another. But even this only partially addresses our human rights requirements. At first sight Pareto-efficiency would seem consistent with efforts to meet socio-economic rights because it does not allow worsening the situation of the deprived – or of any other group – to achieve aggregate gains for society as a whole. However, Pareto-efficiency also forbids arrangements that improve the situation of the poor at the expense of the rich since it requires that no one should be made worse off. As our section on legal doctrines has shown, human rights offers a theory of justice that focuses on the poor and therefore requires that we should distinguish between possible "losers" to improve the position of the poor, even at the expense of the rich. The key to the convergence of human rights policy and economic development is therefore an understanding and revisiting of what ethical criteria drives the economics of distribution and redistributive policies.

3. Consequentialism

Even where the conceptual individualistic, equilibrium commitments of neoclassical economics are extended by welfare economists to explaining and predicting the behaviour of society as a whole, it still focuses on outcomes and is therefore primarily concerned with consequences (the view that alternatives must be judged according to the outcomes they generate). A fundamental principle of neoclassical economics is that decisions are usually

measured by reference to the subjective preference satisfaction, or utility, experienced by individual persons. It uses revealed preferences as a proxy for individual welfare because it has no way of assessing individual welfare more directly. Whilst positive, or analytical, welfare economics has enabled us to predict the outcome for society resulting from alternative policies – and does so mainly by disaggregating the marginal impact on individuals or groups in society – the focus of the assessment is of the aggregate outcome for society rather than the process by which it is achieved. Moreover, as noted in our critique of the neoclassical approach, there is also a fundamental weakness in an approach which predicts the behaviour of society as a whole using revealed preferences based on the outcomes of choices individuals "reveal" through their market behaviour.

This poses a problem when juxtaposed against human rights requirements, as Seymour and Pincus quite rightly point out: whereas economists "reject prior reference to rules and norms in favour of rank ordering of market or social outcomes" (Seymour and Pincus 2008, 398), from the perspective of human rights, "actions and choices should be judged on the basis of adherence to particular rules or norms, rather than their outcomes" (*ibid*., 389). Giving effect to socio-economic rights is thus in important ways process-driven. It includes what may be termed (following the work of the UN International Law Commission), both "obligations of conduct" and "obligations of result" (CESCR 1990, para. 1). The initial distinction in international law was one in which the obligations of result tend to be stronger than that of conduct, in that "the mere fact of non-materialization of the result constitutes a violation of the obligation, rather than an obligation to make a bone fide effort with a view to achieving the result, but without guaranteeing its materialization" (Abi-Saab 1980, 173–174). With regard to socio-economic rights (as other areas of international law), obligations of conduct tend to be more stringent than obligations of result, with the emphasis on the determinacy of the conduct (see *Report of the International Law Commission* 1999, para. 133). As we have seen, states are required to "take steps" to realise economic, social and cultural rights and there has been much authoritative consideration on the quality of those steps ("expeditious, deliberate, concrete and targeted as clearly as possible towards meeting the obligations") (CESCR 1990, para. 2). As Alston and Quinn noted in their seminal work on the topic, the undertaking "to take steps" – language that appears throughout the ICESCR – is akin to assuming an obligation of conduct (Alston and Quinn 1987, 167). Obligations of conduct, in particular for rights that may entail progressive realisation, require that action be "reasonably calculated" to realise the enjoyment of a particular right ("Maastricht Guidelines" 1998, 694). International courts have also distinguished situations whereby the duty of the state is to take measures rather than to guarantee the achievement of desirable results. Requirements to adhere to norms give rise to obligations of conduct and this places the notion of "process" at the centre of responsibility: particular conduct (or lack thereof) in and of itself can constitute a breach of an obligation; conversely the obligation of result is not discharged if the particular process is not respected in reaching a given outcome. The privatisation of essential services offers an example: privatisation may successfully increase public revenue among other benefits in a given country, however it can contravene rights if the process results in certain people or groups within the country being rendered unable to afford clean water, healthcare or primary education.

Results are of course also important and, as highlighted above, human rights in this area are concerned with outcomes but, notably, also with the distribution in outcomes. As Gauri has remarked in this regard: "The entire distribution is of concern because rights theories take seriously the idea that every human being is worthy of respect" (Gauri 2004, 472).[38] As Sen has pointed out "the violation or fulfilment of basic liberties or rights tends to be ignored in

traditional utilitarian welfare economics not just because of its consequentialist focus, but in particular because of its 'welfarism', whereby consequent states of affairs are judged exclusively by the utilities generated in the respective states" (Sen 1995, 13). He concludes that "[w]hile processes may end up getting some indirect attention insofar as they influence people's utilities, nevertheless no direct and basic importance is attached in the utilitarian framework to rights and liberties in the evaluation of states of affairs" (*ibid.*). The human rights tension with and contribution to the consequentialism and welfarism of welfare economics is due to the conviction that, for a host of reasons, process matters.

4. Equality and Equity

The twin principles of equality and non-discrimination are among the most fundamental elements of international human rights law. As Hunt, Nowak and Osmani point out, recognition of these principles helps to highlight the fact that poverty often originates from discriminatory practices – both overt and covert. In the latter case, it is therefore important to look at the effects, and not only the intentions, of measures, laws and policies. "Whereas poverty might have been regarded in earlier times as a kind of 'natural phenomenon', today it is looked upon as a social phenomenon aggravated by discrimination, which in turn requires corresponding anti-discrimination or even affirmative action by Governments" (Hunt, Nowak and Osmani 2005, paras. 21, 44–45).

Equality in human rights terms extends significantly beyond non-discrimination to encompass fairness of treatment, dignity, respect, and access to rights which enable participation in a democratic society (Klug *et al.* 2005). Moreover, the achievement of equality allows for the unequal treatment of groups in certain circumstances in order to "correct factual inequalities" between them.[39] This effort at equality of opportunity endorses in part a model of redistributive justice, indicating as it does that measures have to be taken to rectify past discrimination because failing to do so would leave people and groups unfairly at different starting points. However, in limiting the application of full redistributive justice, equality of opportunity has been linked to (and criticised for endorsing) the individualism of libertarianism (Equality Rights Trust 2007, 3).

As for equality of outcome, there is a range of policies and legal mechanisms that aims to support its objectives, including positive discrimination/affirmative action (*ibid.*, 4). While this effort at social redistribution is recognised by international human rights law, it is difficult to argue that international human rights law provides for economic (material) equality – that it offers an egalitarian theory. Human rights law is undoubtedly concerned with poverty and endorses economic redistribution as necessary,[40] but with its focus on meeting universal minimum standards it is less obvious that it is also concerned with the fact that the poor are poorer than others (Salomon 2011). While the principle of progressive realisation in the area of economic, social and cultural rights might be said to offer within its terms and logic more than a minimalist doctrine aimed merely at dignity, because it is set instead at a decency standard, to date this distinction has not been meaningfully developed in international law. The "full realisation" of all socio-economic rights still only provides the universally agreed floor below which no-one should fall (*ibid.*, 2141). Human rights law in the area of development may take us further. The Declaration on the Right to Development provides that states should formulate national development policies that aim, *inter alia*, at the constant improvement of the well-being of the entire population (article 2(3)). While the theoretical conception offered by human rights can be said to endorse equality of outcome (as well as ideas pertaining to equality of opportunity), it has been suggested that it gets there by

focusing, not on treating people equally in the distribution of resources but by treating them as equals, which highlights a right to equal concern, dignity and respect (Equality Rights Trust, 2007, 6, drawing on Ronald Dworkin).

To speak of equity then, one needs first to recognise the roles that discrimination and inequality play in undermining fair processes. Neoclassical economics for its part often contend that perfect competition would achieve optimum welfare if the initial distribution of factor endowments is considered equitable. If two groups of persons have different initial factor endowments, their relative output and incomes will depend on the amount and productivity of the factors held by those groups. Thus the common economic premise that the individual is entitled to personal freedom, private property rights and the fruits of her own labour is actually a value judgment defining the equity of the resulting distribution of output/income. The consequence of a welfare function in this form is that an individual or group is entitled to a certain share of total income because they own certain factors of production. Alternatively, equity can be considered to be an attribute of the resulting distribution of income rather than the initial factor ownership – but the outcome is the same and neither is determined on the basis of whether there is equality of outcome. Moreover, the problem cannot be reduced to a matter of determining the most desirable pattern of distribution of a given aggregate income because economists have also shown that the manner of its distribution will probably affect the total amount to be distributed.[41] Once again, the question here is not what the facts concerning the relationship between equity and output may be, but how to determine a proper balance between them through a welfare value judgment, and, ultimately, whether outcomes can reasonably be considered as equal.

When the power to make these value judgments – including equity principles such as non-discrimination or equality between individuals or groups – is claimed through a process of national or international law then we must accept, or indeed invite, that a resulting distribution of income/output is implied. Therefore one of the first requests that the economist might make of human rights is a criterion for making interpersonal comparisons – in the manner of Sen's "capabilities" and "functionings" – or making judgments of policy that involve the distribution of income.

5. Compensation

We have seen in our review of mainstream welfare economics that new welfare economists admit solutions to the Pareto criterion such as Kaldor-Hicks compensation tests, under which winners could compensate losers, leaving everyone at least as well off as they were before the policy change. Mainstream welfare economics does not claim that competition will achieve equitable outcomes, but argues that there will be enough gains for winners to compensate losers, should society want this (see Balakrishnan *et al*. 2009, 10).[42] Thus a cost-benefit analysis consists of an enumeration and evaluation of the consequences for individuals or groups of a particular policy or investment. Significantly, however, the outcome is expressed in terms of a single *net* compensation principle whereby if the aggregate benefits exceed the aggregate costs – so gainers could (hypothetically) compensate losers – then the policy or investment would yield a net increase in social welfare and is acceptable irrespective of the actual consequences or outcome for the individuals identified in the evaluation. Moreover, note the analysis only requires that gainers could hypothetically compensate losers – that is, that the aggregate benefits to gainers are greater (usually measured in monetary terms) than the costs to losers. The Paretian principles of the analysis do not require gainers actually to compensate losers and, though in practical terms the

valuation of losers' costs is often used as the basis for state compensation of losers, both gainers and losers will usually be expected to pay taxes or user charges for benefits equally and other windfall benefits such as improved land values are rarely recouped.[43] Some immediate difficulties from a human rights perspective can thus be identified from the scenario just described. A theory of compensation that would (a) anticipate wrongs (policy losers) and consider them acceptable on the basis that (b) aggregate benefits to gainers are more than aggregate costs to losers, and that (c) overall compensation will in principle be forthcoming and will thus right the wrong, are nothing short of anathema to the human rights approach for a number of reasons.

First, as we have discussed above in some detail on our coverage of human rights doctrines, policy decisions that anticipate undermining the exercise by some people of their socio-economic rights constitute *prima facie* violations and, under ICESCR, the state has the burden of proving that they have been introduced after a number of rigorous checks. These would include the most careful consideration of all alternatives; the participation of affected groups in examining the proposed measures; a determination as to whether the measures were directly or indirectly discriminatory; a determination as to whether the measures would have a sustained impact on the exercise of the right; as well as whether the measures were duly justified in the context of the full use of the state's "maximum available resources".

Second, while the human rights approach allows for the prioritisation of rights and recognises that there can be permissible restrictions or limitations to the exercise of rights when accommodating competing interests, compensation as understood by the Paretian welfare criterion would seem to challenge some of the most important precepts of human rights law – that rights are fundamental to human dignity, universal in that they belong to everyone equally, and inalienable in that they should not be taken away, except in specific situations and according to due process. From the perspective of human rights theory, costs and benefits that affect the rights of individuals cannot be aggregated as is the case in mainstream welfare economics.

Third, human rights require compensatory justice in the event of a violation, but the occurrence of a violation is in the first instance unequivocally prohibited, rather than part of an inevitable and acceptable calculation of costs and benefits deemed annulled by remedial action. Moreover, the way in which neoclassical economics commodifies harms ignores the fact that human rights violations are often incommensurable: where losses sustained are of life choices, specific pursuits, or self-determination, full compensation may well be impossible (Shelton 2005, 19). Indeed, it has been argued that the primary goal of remedies when it comes to human rights should be rectification or restitution rather than compensation (*ibid.*, 21). As part of its commitment to the principle of accountability and remedy, international human rights law foresees a place for compensation, including relief for a violation of human rights afforded a successful claimant via judicial and non-judicial proceedings. But it would be inconsistent with that principle to rely on a solution that allows compensation to be provided through, for example, taxes that are drawn also from those who should be the beneficiaries of compensation. The challenges international human rights law raise to the mainstream economic analysis of remedies can be seen as part of a wider criticism levelled against neoclassical economics for its lack of a moral dimension. As Shelton points out, economic analysis "treat[s] human rights as merely another form of social bargaining and trade. Social utility, as its sole normative foundation, is insufficiently justificatory and thus open to serious question" (*ibid.*, 18).

IV. Concluding Remarks: Reconciling Disciplines and Moving Forward

A. Rethinking Mainstream Economics

By putting economic and social decision-making in the context of welfare economic theory, this paper has examined to what extent social and economic justice principles and norms are embodied in the approaches of mainstream economics and whether they reflect human rights requirements. Human rights are often said to represent a challenge to the ideas that underpin economic theory and, as such, are ill-suited to directing the choices that form the basis of the economic evaluation of options. To the contrary however, we have seen that there is a strong case for rejecting neoclassical "welfarism" and applying human rights norms to the making of economic development choices. We have sought to demonstrate that human rights can help provide a normative framework for economists that avoids some of the pitfalls of welfare theory, as well as meeting the requirements of international law in the area of socio-economic rights, and to these ends the paper explored how human rights can be incorporated into some of the more problematic areas of social and economic decision-making.

1. On the Need for Alternative Value Judgments

The paper has shown that the social welfare functions of mainstream economics can produce rank orderings of decision outcomes only through the introduction of externally-generated ethical criteria and, in the absence of these, the mainstream economic analyst is left to set them – usually within the confines of Paretian premises. Building on classical utilitarianism, it is the basic "Paretian" value judgment which has guided neoclassical welfare economics as the most widely-used measure of social utility but it is clear that there is a fundamental problem in adopting this value judgment to assess the economic effects of human rights policies. As long as it is based on the Paretian value judgment, mainstream welfare economic analysis and the resulting resource allocations are relevant only if the objective implied by that value judgment is accepted and that value is efficiency in production and exchange. If human rights require some other belief of what is needed by an individual or group in society – such as a dignity for all – then a Paretian welfare economic analysis cannot be expected to imply policies which will achieve the social objectives of human rights law.

There is as such a need for new explicit welfare economic norms and value judgments that reflect human rights requirements. Sen's work on capabilities has shown that there are alternative norms, value judgments and informational frameworks which reject neoclassical "welfarism" and better reflect human rights concerns in development economic decision-making. By exploring in some detail the doctrines as developed in international human rights law, our analysis has shown that it offers norms and value judgments both to release economic decision-making from the confines of Paretian premises as well as for meeting the legal obligations of human rights. Human rights focus on the worth of every human being and put people at the centre of economic development, focusing on disaggregated/marginal distribution outcomes rather than aggregate/average outcomes. Moreover, international human rights law prescribes what processes are required in economic decision-making, avoiding the limiting consequentialism of welfarist economics. International human rights doctrines also provide tools to balance the competing interests of different individuals and groups against one another and, importantly, against public policy choices. These fundamental shifts in emphasis change everything, from who is prioritised in the allocation of resources to how those decisions are made. They supplement existing approaches maximising the utility of society as a whole in the manner of mainstream economics to align

with the human rights requirements of guaranteeing individual rights as well as prioritising the rights of the most marginalised groups. Finally, they offer a clear and consistent system of values (with international legitimacy) in contrast to the opaque economic value judgments traditionally adopted, which itself makes international human rights law important in the making of better economics.

2. Taking Welfarism out of Distribution and Redistribution

For development, it is perhaps the issue of the distributive implications of policy and investment decision-making – and in particular the need for redistribution to achieve social equity and equality objectives – which best illustrates the need for, and radical scope of, a new approach.

We have noted throughout this paper that mainstream economics focus on efficiency in production and exchange – where the distributional efficiency of welfare economics is ignored – and consistently allows the unequal allocation of resources and the exclusion of individuals from the distribution of development resources, particularly when limited by tight budget constraints. These views sit in contrast with those provided for under international human rights law, concerned as it is with the plight of the poor and disadvantaged and as such in support of significant national and even international redistribution of incomes. Secondly, whereas it is the state's function, and indeed its duty under human rights law, to promote equity and inclusion in the allocation of resources, some economists, applying a neoclassical view of the market, understand this type of state "intervention" as an interference with the optimal functioning of the market and seek to minimise its role.

Human rights would seem to require a broader definition of "efficiency" to include distributional equity as "efficient" when meeting economic policy objectives which explicitly include realising human rights norms. There is a need for new explicit welfare economic norms and value judgments built around distributional equity and redistribution goals that reflect human rights objectives. In line with international human rights law, these value judgments would include prioritising minimum essential levels of socio-economic rights for all, providing both a value judgment about choices on distribution and a means of measuring efficiency in achieving that distribution; the presumption that there will be no retrogression of rights as a result of policy decisions, and as such an avoidance of non-redistributive resource allocation against certain groups; and a definition of "compensation" that provides real remedial justice to those individuals and groups whose rights are violated by economic and social policies.

Analytical welfare economics is still useful to predict the outcome and guide the selection of alternative policies – but the analysis of the best policy depends on the objective (or welfare function) set and it must be accepted that this function is normative and consists essentially of value judgments. Human rights, as developed through international law in the area of socio-economic rights, can help to set alternative norms and value judgments and thus become an integral complement to welfare economic analysis.

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Notes

1. World Bank staffers Brahmbhatt and Canuto note that the broadening of development concerns has reached a point where even an organisation such as the World Bank whose original articles of Agreement focused on economic priorities and the "encouragement of the development of productive facilities and resources in less developed countries" now views its primary purpose "as poverty alleviation, seen as a multidimensional concept that encompasses human development, social development, environment, governance and institutions" (Brahmbhatt and Canuto 2011, 1). The authors begin their paper by pointing to ways in which they claim "development thinking and practice have evolved … on issues of key concern for both development and human rights" (*ibid.*, 2). Any convergences notwithstanding, the place of human rights in the work of the World Bank remains a point of some contention and the debate over their compatibility with the political prohibition in the Bank's articles of Agreement has not fully been put to rest. The divergent views of successive General Counsels, Danino and Palacio, are telling: see Danino (2006) and Palacio (2006). See further from the former IMF General Counsel, Gianviti (2005), and Salomon (2007a).
2. While institutional economics focuses on the role of institutions, it is worth noting that there has been a movement in development economics to apply what has been referred to as "*new* institutional economics" which specifically tries to bring institutional economics within the neoclassical framework and, in this form, it is more clearly pro-market. A recent paper demonstrates how the World Bank's Doing Business Indicators lie within the new institutional economics school of thought and are premised on a very particular set of business-friendly regulatory reforms. See the interesting case study on the World Bank in Davis, Kingsbury and Engle Merry (2011, 31–38).
3. As Balakrishnan and Elson highlight (2008, 3): "There are many potential intersections between the concerns of progressive economists and the concerns of human rights experts and advocates".
4. "Equilibrium" in neoclassical economics is simply the set of values achieved for all variables when market forces have worked themselves out. Equilibrium does not imply that the outcome is in any sense desirable. It is the "optimum" which defines the desirable solution – whether or not it is achieved in the market – and is "desirable" only in the sense that it represents an expressed value judgment about the outcome desired.
5. The Keynesian *General Theory* is the most obvious example. It formulated and successfully applied a dynamic critique of static long run neoclassical equilibrium for the economy as a whole and made the case for state and central bank intervention to regulate markets, create demand and control the rate of interest, which still comprise the tools of modern macroeconomic management. Keynesians and neoclassicists were treated as competing schools but later critiques recognised that both employed the same basic neoclassical concepts and both are now described as forming mainstream neoclassical economics.
6. Balakrishnan, Elson and Patel (2009, 28), for example, note that "neo-classical economists do not represent the entirety of the discipline … heterodox economists present diverse alternatives to the neo-liberal orthodoxy".
7. Chang (2002, 540) explains that "neo-liberalism emerged out of an unholy alliance between neoclassical economics which provided most of the analytical tools and what may be called the Austrian-Libertarian tradition which provided political and moral philosophy … neo-liberals could not afford to do without the 'scientific' respectability that neoclassical economics carried (and) in return … supplied the popular appeal that neoclassical economics could never dream of supplying itself (whoever died in the name of Pareto optimality or general equilibrium?)".
8. On the right to water see CESCR (2002), and GA Res. 64/292, 28 July 2010 on the human right to water and sanitation.
9. In international development there is an often repeated (and probably apocryphal) story of the economist who arrived in a developing African state to evaluate a large loan funded

infrastructure project and demanded of the Minister of Finance "first describe to me your social welfare function".

10. For a careful overview of Sen's work in this area see Vizard (2005, 30–32).
11. That said, as addressed below, there are strong arguments to suggest that the minimum level of socio-economic rights are customary international law.
12. Article 27, Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), 1155 UNTS 331, entered into force 27 January 1980, reprinted in 8 I.L.M. 679 (1969).
13. "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms" (article 5 UN World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF 157/23 Pt I (1993))
14. In economics "scarcity" simply means that resources/goods are in limited supply. In this sense no resource is infinite and everything is therefore "scarce". It is not meant to be a value judgment about whether there are enough resources globally or otherwise. That said, the term has come to underpin the question as to why some people do not have enough and as addressed herein regarding obligations of international assistance and cooperation, it is not unusual to see argued, for example, that "globally resources are available to fulfil at least some basic rights without having to confront the most vexing tradeoffs" (Gauri 2004, 473).
15. Reddy remarks: "It should be noted that very few economists of any persuasion have explicitly integrated human rights into their work until the past decade, even if there were human rights related concerns motivating such work" (2011, 63 and note 2).
16. Chauffeur states, "… to the extent that such rights-based approaches rely on positive rights – that is claims on third parties enforced by government coercion – for instance, through regulation and taxation, it is unlikely to provide a new development paradigm. For instance, there is no doubt that providing everyone with the panoply of economic, social and cultural rights, including the rights to food, clothing, housing, health, education, and other social services, would make poverty history and solve the development puzzle" (2006, 14).
17. Grounds for objection have been cogently provided by Alston, such as the delineation risks detaching human rights from their foundations in human dignity, and instead renders them as merely instrumental means in the achievement of economic policy objectives; individuals would become the object of rights rather than the holder of them; the broader range of human rights would be protected through ineffectual institutional arrangements; economic actors, such as corporations, would be empowered far beyond existing practice in the name of advancing human rights; and important limitations on the right to property provided by international human rights bodies would be dramatically curtailed (Alston 2002, 843).
18. International Covenant on Economic, Social and Cultural Rights (1966), entered into force 3 January 1976, GA Res. A/RES/2200A (XXI), 993 UNTS 3.
19. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights reads as follows: "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". The comparable provision in the Convention on the Rights of the Child (CRC) is found at article 4: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".
20. "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; "Non-discrimination is an immediate and cross-cutting obligation in the Covenant".

21. Article 8(4) of the new Optional Protocol to the International Covenant on Economic, Social and Cultural Rights directs the Committee in its examination of communications towards a reasonableness standard of review: "When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant". Optional Protocol to the ICESCR (adopted 10 December 2008), GA Res. 63/117 (2008). UN Doc.A/RES/63/117.
22. Convention on the Rights of the Child (1989), entered into force 2 September 1990, GA Res. A/RES/44/25, annex 44, UN GAOR Supp (No 49) at 167, UN Doc. A/44/49 (1989). CRC (2003, para. 5). The Committee further remarks that: "Some States have claimed it is not possible to analyse national budgets in this way. But others have done it and publish annual 'children's budgets'" (*ibid*.).
23. "Often a narrow interpretation is adopted, assuming that available resources have been fixed by previous policy choices and that the government's main duty lies in efficient administration of these resources. Therefore, the practical applications of MAR [maximum available resources] have tended to limit analysis to budget expenditures and international assistance, while overlooking other determinants of the full set of resources available to realize human rights …" (Balakrishnan *et al*. 2011, 2).
24. "Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement" (CESCR 2009a, para. 25).
25. Article 25(a) ICCPR. International Covenant on Civil and Political Rights (1966), entered into force 23 March 1976, GA Res A/RES/2200A (XXI), 999 UNTS 171.
26. Convention on the Elimination of All Forms of Discrimination Against Women (1979), entered into force 3 September 1981, GA Res. A/RES/34/180, 1249 UNTS 20378.
27. Article 2(3) DRD, GA Res. A/RES/41/128, 4 December 1986, annex 41 UN GAOR Supplement (No. 53) 186, UN Doc A/RES/41/53 (1986).
28. UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992; UN Declaration on the Rights of Indigenous Peoples, GA Res. A/RES/61/295, 2 October 2007.
29. Declaration on the Rights of Indigenous Peoples.
30. Notably, Gauri's point here is to reconcile economic and human rights approaches by arguing that the scenario just described would in fact go against the thrust of microeconomic theory which is to expand consumer choice, and that "contemporary accounts of service delivery endorse reducing information asymmetries among principals and agents." He concludes by stating that, "[T]he processes of service delivery are critical in the economic approach, even if they do not have intrinsic value" (*ibid*.)
31. Articles 8–11, and article 1 of Protocol 1 (right to property) of the European Convention on Human Rights (ECHR); articles 9, 12, 18, 19, 21, and 22 ICCPR, as elsewhere.
32. For a fuller investigation of the topic, see Ducoulombier (2008).
33. "[W]here a limitation is brought to a right, the limitation should only be allowed if it is the least restrictive possible, i.e. if there are no other means available through which the same objective could be achieved, with a lesser cost to the right or the freedom which is infringed upon". See De Schutter and Tulkens (2008, 189).
34. This would help reconcile the doctrine of non-retrogression with the need for governments to make policy choices.
35. On this point and for a thoughtful consideration of the tensions – both real and perceived – between utility maximization as a normative social welfare goal and the protection of socio-economic rights, see Harvey (2002, 428 and 371).
36. On this point, Seymour and Pincus add that incorporating rights in "the minimum institutional set-up for social choice would enable economists to address question of exploitation and power relations that are assumed away in most welfare models" (2008, 389).

37. Modern international human rights law also recognizes group rights, see, for example, the Declaration on the Rights of Indigenous Peoples, but this is in addition to and not instead of individual rights.
38. "The equality of opportunity framework [used in mainstream development thought] overlaps with the human rights framework but there is a wide array of Human Rights concerns that are not reflected in the equality of opportunity framework, and would be better reflected under equality of outcomes" (Masood and Narayan 2011, 14–15).
39. *Belgian Linguistics Case (No. 2)* (1968) 1 EHRR 252. The European Court of Human Rights has long recognized that to avoid discrimination or secure equal rights, it may be necessary at times to treat an individual or group differently precisely because their situation is different from others: *Price v UK* (2001) 34 EHRR 1285 (Sep. Op. Judge Greve).
40. "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance", article 9 ICESCR.
41. The economist's favourite example of this is differential spending and savings ratios. Because those on a low income have a higher propensity to spend and those on a high income have a higher propensity to save, distributing income in favour of those on low incomes puts more in the pockets of those who will spend it, rather than save it, thus growing the economy at a higher rate and increasing the aggregate size of national income accordingly.
42. The Pareto standard requires that no one is made worse off and if government were to act only where no one was made worse off there would be very little it could do. The Kaldor-Hicks test offered by economists thus purports to justify government action even when some persons are left worse off, but requires that the increase in value be sufficiently large that the losers could be fully compensated.
43. "Progressive non-conformist economists outside of the mainstream … question whether it is possible to separate production and distribution. The process of production produces 'winners' who tend to resist any redistribution of their gains to those who are 'losers'" (Balakrishnan and Elson 2008, 3).

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