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**Background paper prepared for consultation on progressive realization of the human rights to water and sanitation**

**Consultation convened by the Special Rapporteur on the human rights to safe drinking water and sanitation**

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# Background

1. The Special Rapporteur on the human rights to water and sanitation, Léo Heller, will submit his last report to the 45th session of the Human Rights Council in September 2020 on the progressive realization of the human rights to water and sanitation. The present paper outlines preliminary research for the report and is circulated with the purpose of stimulating contributions for the improvement of the approaches initially developed.

## Purpose and objective of the report

1. In line with article 2(1) of the International Covenant on Economic, Social and Cultural Rights (the ICESCR), State parties have committed to an obligation 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.” This obligation has a number of constituent parts, the achievement of each of which is necessary to satisfy the obligation as a whole. These parts can be identified as to “progressively realise” the rights contained within the ICESCR, and to do so using the “maximum of its available resources”. Furthermore, whilst the operation of article 2(1) only requires that State parties achieve the rights in the ICESCR progressively, some elements of those rights must be guaranteed immediately, with these being known as the “minimum core obligations”. In accordance with article 2(2) of the Covenant, States must fulfil these obligations, whether progressive or immediate, in a non-discriminatory manner.
2. However, there is a notable absence of clarity regarding how these international legal obligations are, or can be, translated into national realities in relation to the water and sanitation sector, and how States parties’ adherence to these obligations can be properly monitored in the specific context of the human rights to water and sanitation. This report seeks to address these issues by clarifying the concepts in the context of the water and sanitation sector so that it may guide States to implement and report their human rights obligations. It further seeks to support civil society to understand the obligations, as well as how the compliance of duty-bearers can be assessed .
3. In this regard, several questions arise which the Special Rapporteur aims to explore in his report:

* How can the concepts of 'progressive realization', 'maximum of available resources' and 'minimum core obligations' be translated in the context of the human rights to water and sanitation?
* What elements and specificities of the human rights to water and sanitation should be considered in the application of the three concepts?
* To what extent do human rights monitoring bodies (and others such as the UNICEF/WHO Joint Monitoring Programme), which have been assessing the implementation of States’ obligations, adequately apply the three concepts mentioned above? How can those bodies further address those concepts?
* How can compliance with the obligation of progressive realization be assessed? How can the standard of reasonableness (and related standards such as adequacy, appropriateness, and proportionality) be translated in the water and sanitation sector?

## Methodology and approach of the report

1. In assessing the concepts of “progressive realisation”, “maximum of available resources” and “minimum core obligations” in relation to the human rights to water and sanitation, the Special Rapporteur will utilise a wide variety of sources including policy papers, academic research, determinations of the Committee on Economic, Social and Cultural Rights and other treaty and human rights bodies, and his own reports drawn from both his country visits and follow-up analysis of country visits.
2. The last of these sources – the follow-up reports from official country visits – is a [new initiative](https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/FollowUpAnalysisOfficialCountryVisits.aspx) started by the Special Rapporteur to gain a greater understanding of the subsequent actions and inactions of States in relation to his recommendations. The Special Rapporteur submitted follow-up reports on his visits to Botswana, Tajikistan, El Salvador and Portugal to the 42nd session of the Human Rights Council in September 2019 ([See](https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/AnnualReports.aspx)). The follow-up reporting process entails the Special Rapporteur sending a questionnaire to the government of a visited state to enquire about the progress they have made towards implementing the recommendations that were issued within the country visit report. Following this exercise, the government’s progress is assessed against the following categories:

* ‘Good progress’ implies that the government implemented the recommendation made, or will do so in a short period of time.
* ‘Progress on-going’ reflects a situation where the government has made some concerted steps towards the achievement of the recommendation, but has not done so yet in full, or has implemented part of the recommendation and working towards full implementation.
* ‘Limited progress’ is determined as where the government has implemented some related programs, but has not addressed the recommendation itself, where actions have been taken but these do not address the normative content of the rights, where the government has addressed water issues but not sanitation, or vice versa, or where progress is so slow it is doubtful the state is moving as ‘expeditiously and effectively as possible’.
* ‘Progress not started’ is utilised where the government has taken no action towards the implementation of the recommendation, where actions unrelated to the recommendation have been undertaken, where actions have no legal force, or where the government is clearly attempting to obscure its lack of progress by providing patently misleading or false information.
* ‘Unable to assess due to lack of information’ reflects a situation where irrelevant information, or no information at all, has been provided by the government regarding its implementation of a particular recommendation, and no pertinent information has been found through research.
* ‘Retrogression’ is utilised where the government has implemented policies which have rolled back human rights enjoyment, rather than seeking to progressively achieve greater satisfaction of those rights.

## Consultation process for the report

1. The Special Rapporteur will convene a public consultation on 22 October 2019 in New York City and online consultations via Skype for those who cannot attend the physical consultation in New York City.
2. The background paper aims to provide information for both consultations. It sets out and defines each of the identified constituent obligations placed on States parties under the ICESCR, it then established, in brief, how these obligations operate in the context of water and sanitation, before looking at how States’ adherence to those obligations can be monitored. This background paper is a working in progress document and should not be cited.

* For the 22 October 2019 consultation in New York City, please register [here](https://docs.google.com/forms/d/e/1FAIpQLSeZwX34qeNfM9oP33Rf8GslCXNA9BswrG5aV7PQbmvb7zx4ew/viewform?usp=sf_link).
* For the online consultation, please register [here](https://doodle.com/poll/rb4i5wxsyssy69c5).

# Minimum core obligations

## Clarification of scope and objectives

1. It should be clarified that the Special Rapporteur does not attempt to set or suggest minimum core obligations of the human rights to water and sanitation, for instance, setting a minimum amount of drinking water that States should provide to individuals. Particularly, the minimum standard required for an individual differs in context and cannot apply universally across the globe. Instead, the purpose of this section is to provide conceptual and empirical elements to inform State’s processes for complying with these obligations.

## Concept of ‘minimum core obligations’

1. The notion that economic, social and cultural rights offer minimum substantive guarantees has been discussed in the form of minimum core obligations that delimit permissible restrictions of those rights. The minimum core obligation approach can be further illustrated by examining the concept of the minimum core as a tool to clarify the nature of progressive realization and to establish concrete State obligations. The background traces back to the enjoyment of economic, social and cultural rights that depends upon the availability of resources and the challenges posed by progressive realization within resources and the delimited restriction of human rights.
2. Article 2 of ICESCR did not indicate when limitations could be legitimate, leaving too many loopholes for States parties wishing to evade their obligation by pleading lack of resources and it became necessary to clearly state that limitations would be permissible in certain circumstances under certain conditions. Minimum core obligations set an independent guideline aimed at closing the loophole within progressive realization by distinguishing exigent State obligations from otherwise progressive implementation of the economic, social and cultural rights.[[1]](#footnote-1)
3. The CESCR has affirmed that States parties have a core obligation to ensure the satisfaction of at least minimum essential levels of each of the Covenant’s rights and this is considered as a common element of all Covenant rights and the *raison d'être* of the ICESCR:

“[T]he Committee is of the view that a minimum 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. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être.”[[2]](#footnote-2)

1. General Comment no. 3 of the CESCR does not define the content of the minimum essential level for the human rights to which it pertains but the General Comments dedicated for each individual right confirm that the core obligation related to those rights are non-derogable. For instance, in relation to the human right to safe drinking water, the CESCR viewed that “at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect: […] To ensure access to the *minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease*”.[[3]](#footnote-3) Another example is in relation to the right to the highest attainable standard of health, which the CESCR confirmed that “States parties have a core obligation to ensure the satisfaction of, at the very least, *minimum essential levels* of each of the human rights enunciated in the Covenant, including *essential primary health care*”.[[4]](#footnote-4) These obligations include “to ensure access to the minimum *essential food* which is nutritionally adequate and safe, to ensure freedom from hunger to everyone”.[[5]](#footnote-5)
2. Thus, if any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter and housing or of the most basic forms of education, the State is, *prima facie*, failing to discharge its obligations under the ICESCR. In the absence of minimum core, a State party should be considered to be in violation of its international obligation:

“Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...] Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant”. Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.”[[6]](#footnote-6)

1. According to commentators that see the core concept as a legal standard that binds States, the concept of core posits that there are degrees of human rights fulfilment and that one of these degrees is a definable, basic threshold – a minimum legal content – for socio-economic rights.[[7]](#footnote-7) The State is bound to provide the minimum legal content to sustain basic standard of living. However, similar to several human rights stipulated in the ICESCR, it is not possible to identify all appropriate means to realize the rights and a list of every minimum standard for each provision. Such exercise will depend on context which changes over time such as with technological or medical developments. Further development of the core concept requires going considerably beyond the status quo to develop each constituent component of entitlements, content and duties.[[8]](#footnote-8)
2. The minimum core obligations approach developed under the ICESCR combines the consequences of immediate effect, immunity from the excuse of insufficient resources, non-retrogression, and direct applicability. The CESCR has elaborated upon the ‘minimum core content’ intrinsic to numerous human rights, which is not subject to progressive realization and States have an immediate obligation to satisfy:

“While the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”[[9]](#footnote-9)

1. The immediate obligation to ensure minimum essential levels of Covenant rights includes actions to devise and implement a national plan of action to realize those rights in full, utilizing indicators and benchmarks to monitor and report on their progress.[[10]](#footnote-10) A critical component of States parties’ immediate obligation to take ‘deliberate, concrete and targeted’ steps to fulfil Covenant rights is the adoption of ‘a detailed plan of action’ that elaborates ‘carefully targeted policies’ and priorities.[[11]](#footnote-11) Such plans should outline policies, programmes, legislation and ‘appropriate budgetary provisions’,[[12]](#footnote-12) among other measures, and should “identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources”.[[13]](#footnote-13)
2. The State cannot evade its obligation under the pretext of lack of resources. Immediate obligations such as the ‘strategic obligation’, to adopt and implement a strategy and plan of action to implement schemes and to monitoring the extent of the realization of the right, is not conditioned by the possible lack of resources. For a State party of the ICESCR “to be able to attribute its failure to meet at least its minimum 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, these minimum obligations”.[[14]](#footnote-14) Further, General Comments make clear the absolute prohibition of any retrogressive measures that are considered incompatible with the core obligations determined for each right.[[15]](#footnote-15)

## Minimum core obligations and the human rights to water and sanitation

1. According to the CESCR, it its General Comment 15, there are nine core obligations in respect of the human rights to water and sanitation. These are:

“(a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

(b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

(c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;

(d) To ensure personal security is not threatened when having to physically access to water;

(e) To ensure equitable distribution of all available water facilities and services;

(f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;

(g) To monitor the extent of the realization, or the non-realization, of the right to water;

(h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

(i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.”[[16]](#footnote-16)

1. McGraw notes that the core obligations can be divided into three areas of action which all States parties to the ICESCR must fulfil. Firstly, States parties must provide everyone with immediate access to the core content of the right to water. Secondly, they must do this in a ‘non-discriminatory way in line with Arts 2(2) and 3 of the ICESCR’. Lastly, they must continue to work towards the full realisation of the right to water through proper planning and monitoring.[[17]](#footnote-17)
2. The General Comment makes clear that these obligations are of immediate effect and are non-derogable, and States parties may not justify their non-compliance with these obligations, except in so far as they are completely unable to do so due to lack of resources.[[18]](#footnote-18) The Committee also notes that States parties and international lenders and development actors that are in a position to provide assistance to other States parties should look to do so with a view to enabling ‘developing countries to fulfil their core obligations.’[[19]](#footnote-19) In addition, it is noted that the presence of the minimum core obligations is a guideline for the design and operation of States parties’ water infrastructure, as it must be ensured that this is capable of meeting, at the very least, these requirements.[[20]](#footnote-20)
3. In regard to the obligation ‘to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease’, in specifying what the ‘minimum essential amount’ of water that is necessary is, the General Comment refers to two sources, a WHO study and an independent report. From these studies, ‘both authors concur that whilst 20-25 litres per person per day is enough to ensure human survival, the amount poses a high health risk as hygiene cannot be assured. As basic hygiene forms part of the human rights’ minimum core, however, it is generally agreed that somewhere between 25-50 litres per person per day is sufficient to avoid intolerable risks to human health across geographical and social contexts.”[[21]](#footnote-21) Whilst the obligation specifies that the water provided as part of the minimum essential amount must be ‘safe’, no specifics are provided regarding what this means in the context of the minimum core, and therefore it is unclear whether the standard for safety is the same or different to the standard set out in the normative content of the right, under ‘quality’, or, indeed, whether the standard differs depending on whether the water is designated for personal or domestic uses. Vandenhole and Wielders have suggested that it would be inefficient from a monitoring perspective to have multiple different standards of water safety, and therefore the standard should be ‘determined by the requirement for human consumption’. To this end, ‘the minimum requirement … would be that the most vulnerable parts of the population, people with low immunity such as infants and the elderly, should be able to consume water safely.’[[22]](#footnote-22)

## Monitoring of the minimum core obligations of the human rights to water and sanitation

1. Little has been explored about how the States’ compliance with minimum core obligations should be monitored, and even less specifically about the monitoring of the minimum core for the human rights to water and sanitation. Tasilous has argued that indicators and benchmarks might be a useful tool in assessing compliance with the minimum core obligations.[[23]](#footnote-23) However, in order to do so, it is noted that it is vital that the following three conditions are met. Firstly, indicators must be ‘anchored’, wherein the specific content of the minimum core obligations must be clearly identified, and indicators devised that properly reflect that content.[[24]](#footnote-24) Secondly, all monitoring must be done in a contextual way. In this regard, even though the minimum core obligations are ‘irreverent’, approaches to fully implementing them might ‘demand somewhat different measures depending on contextual factors that vary from one State to another. Therefore, indicators and benchmarks for the implementation of the minimum core obligations must reflect this and also vary depending on the context of the State being assessed.[[25]](#footnote-25) Finally, indicators and benchmarks should avoid the ‘fetishization’ of the minimum core obligations. This can occur when compliance with the minimum core obligations is so emphasised that other non-core obligations become ‘downgraded’ or ‘displaced’.[[26]](#footnote-26)

## Questions for discussion

1. How can the concept of minimum core obligations be translated into the implementation of the human rights to water and sanitation? What elements and specificities of the human rights to water and sanitation should be considered in the application of the concept?
2. How can the obligation of ensuring adequate access to water and sanitation services be reconciled with the obligation relating to equality and non-discrimination?
3. In what ways and to which extent do existing human rights bodies and global bodies (such as Joint Monitoring Programme) monitor the implementation of minimum core obligations of the HRtWS by States?

# Progressive realization

## Clarification of scope and objectives

1. In this section the Special Rapporteur intends to clarify the concept of progressive realization of the human rights to water and sanitation. In doing so, his approach is to expand from the quantitative assessment of progress and to identify ways to incorporate qualitative dimensions of progressive realization and to assess qualitative aspects. By ‘quantitative dimension’, he refers to the assessment of temporal changes of indicators such as the proportion of population with access, and other related elements, improvements in water quality parameters, proportion of the population enjoying affordable services or number of persons involved in participatory initiatives. Qualitative dimensions include the way affected populations access information, acceptability of water and sanitation services, how people participate, how users feel contemplated by accountability mechanisms and to what extent women and girls feel that their privacy and dignity are ensured.
2. His position stems from the argument that the basis of statistical indicators alone is not sufficient to assess the progressive realization of the human rights to water and sanitation. Social policy choices are not simply assessed against statistical indicators, but more directly, against the experiences of rights holders and human rights value of inherent dignity. Indicators, benchmarks and timelines remain important to assessing progress, but these must be constantly referenced to and informed by engagement with rights-holders.

## Concept of ‘progressive realization’ and standard to assess ‘progressive realization’

1. Article 2(1) of the ICESCR articulates what is generally referred to as the obligation of progressive realization, clarifying that “Each State Party to the present Covenant undertakes to take steps […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.” In economic social and cultural rights, the principle of progressive realization, along with its associated concept of maximum available resources, discussed below, is often used by the State to justify its inactions.
2. The evolution of the concept of progressive realization provides background on how the limitations of economic, social and cultural rights can or cannot be justified. Up until the mid-1990s, the unique provision for progressive realization of economic, social and cultural rights was seen by many as proof that economic, social and cultural rights should be understood as aspirational goals of social and economic policy in contrast to obligations of immediate application.[[27]](#footnote-27) This view of progressive realization left socio-economic rights entirely to governments to define and implement according to their own priorities, which did not remedy the patterns of exclusion of the most powerless and marginalized groups.
3. The principle of reasonableness is proposed as the standard to assess the nature of States’ obligation under ICESCR, particularly what measures States must adopt and what level of resources they must dedicate to progressively realize human rights. A ‘reasonableness’ standard of review imposes a limit on government discretion, and the breadth of that limit determines the extent to which a supervisory body can examine and prescribe the measures adopted by policymakers to implement their legal obligations. Two common threads of ‘reasonableness’ in all treaties can be seen as building the principle: its use as a criterion ‘relating to the time frame for carrying out an action’ and ‘for legitimate restrictions on rights’.
4. The reasonableness review was adopted as a standard for reviewing economic and social rights cases in the *Grootboom* decision of the South African Constitutional Court, the first successful case under the constitutional guarantee of a right to housing. The case involved a group of homeless people who had recently been evicted by a local authority from their informal settlements in Oostenberg, Western Cape, South Africa, and who sought an order from the High Court to oblige the State to provide them with temporary shelter until such time as they were able to find more permanent housing. Relying on the constitutional right of everyone to have access to adequate housing (Section 26(1)), the Court held that the State had to put in place a comprehensive and workable plan to meet its housing rights obligations. The Court established that in deciding how to comply with these obligations, three elements must be considered by the authorities: the need to take reasonable legislative and other measures, the need to achieve the progressive realization of the right and the requirement to use available resources.[[28]](#footnote-28)

“The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.”[[29]](#footnote-29)

1. Regarding the ‘reasonableness’ of the measures adopted, the Constitutional Court said that “[i]n determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.”[[30]](#footnote-30)
2. The Committee on Economic, Social and Cultural Rights has identified a number of factors to consider in assessing reasonableness. Measures must be deliberate, concrete and targeted towards the fulfilment of the right; implemented within a reasonable timeframe; allocate resources in accordance with international human rights standards; address the precarious situation of disadvantaged and marginalized individuals or groups; and ensure that decision-making is transparent and participatory.[[31]](#footnote-31) The concept of reasonableness is stipulated in article 8 of the Optional Protocol to ICESCR, which establishes legal enforcement mechanism:

“4. 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.”

1. In its statement, the CESCR identified a number of possible factors to be considered in determining whether steps taken by a State party meet the reasonableness standard for compliance with the obligation of progressive realization. In considering an alleged failure of a State party to take steps to the maximum of available resources, the Committee will examine the measures that the State party has effectively taken, legislative or otherwise. In assessing whether they are “adequate” or “reasonable”, the Committee may take into account, the following considerations:

“(a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;

(b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;

(c) Whether the State party’s decision (not) to allocate available resources was in accordance with international human rights standards;

(d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;

(e) The time frame in which the steps were taken;

(f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.”[[32]](#footnote-32)

1. As emphasized in the above list, the principle of reasonableness embodies the several elements found in the principle of proportionality. The principle of proportionality and reasonableness are analytically similar in the way they heighten the demand for justification according to the seriousness of the rights infringement. Young notes that like proportionality analysis, reasonableness review presses for a justification in order to enhance the accountability of official decision makers and the transparency of their decisions.[[33]](#footnote-33) Indeed, judges usually assess the course of action undertaken by the duty-bearer in terms of legal standards such as ‘reasonableness’, ‘proportionality’, ‘adequacy’, ‘appropriateness’ or ‘progression’.

## Progressive realization and the human rights to water and sanitation

1. In the context of the human rights to water and sanitation, the obligation of progressive realization reflects the need of States to move beyond the minimum levels of water and sanitation service provision, specified as necessary immediately in accordance with States’ minimum core obligations, to a ‘higher level’ of improved service provision.[[34]](#footnote-34) In doing so, the CESCR has stated that States parties must take ‘deliberate, concrete and targeted steps’ which should be as expeditious and effective as possible.[[35]](#footnote-35) In requiring States parties to move forward with their efforts to extend to all people the full enjoyment of the human rights to water and sanitation, the principle of progressive realisation creates a “strong presumption” that any retrogressive steps that are deliberate or anything but wholly necessary in consideration of all the circumstances are prohibited.[[36]](#footnote-36) Accordingly, in relation to the human rights to water and sanitation, the notion of progressive realization, ‘acknowledges that the ultimate goal of universal coverage cannot be achieved overnight. Yet States have obligations to demonstrate tangible progress … . Progressive realization rules out deliberately retrogressive measures … that impede the gradual extension of the rights to all, in particular those that contribute to a further deepening of inequalities.’[[37]](#footnote-37)
2. As noted by Bos, progressive realization of the human rights to water and sanitation requires that governments do not work towards improving services in some abstract manner, but rather do so in light of the normative framework of the human rights, which defines what people should be able to expect from human rights-compliant water and sanitation provision. As stated: “the principle of progressive realization foresees tangible progress against all criteria. Public authorities have to set targets for each of the criteria and look at synergies between actions to attain them. Clearly, if, for example, availability of safe drinking water is improved, it makes sense to build on this and invest in improving accessibility – the two would be mutually reinforcing.”[[38]](#footnote-38)
3. The notion of the ‘progressive’ realization of the human rights to water and sanitation implies the existence of a starting point wherein ‘deliberate, concrete and targeted’ efforts will be directed in order to move on from the minimum levels of provision prescribed by international human rights law. In this regard, General Comment 15 makes clear that the priority should always be those who are marginalized or who are living in vulnerable situations, noting, for instance, that ‘States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.’[[39]](#footnote-39)
4. However, despite representing a central facet of States’ obligations with regards to the human rights to water and sanitation, several commentators have noted the inadequacies of the concept in the particular light of its application to those human rights. McCaffery, for example, has criticized the lack of any temporal end point for the progressive realization of the human rights to water and sanitation, which, it is suggested, makes the notion devoid of any particular strength, in terms of its status as an obligation. He notes that this has been somewhat mitigated by the presence of the MDGs and SDGs, which set a time limit on States’ achieving full access to water and sanitation, but argues that a time limited approach should also be reflected as part of the legal obligation of the progressive realisation of the human rights to water and sanitation, so as to compel States to be more active in their approach to the realisation of the rights.[[40]](#footnote-40)
5. In rather more critical terms, Ulrich, has argued that where, as is the case with the human rights to water and sanitation, the enjoyment of particular human rights is wholly essential for the maintenance of life, requiring States to achieve those rights progressively, rather than immediately, is inappropriate and is likely to lead to serious harm being caused to people – which evidently goes against the purpose of human rights.[[41]](#footnote-41) This is particularly so, he argues, in light of the putative reality that, as a matter of law, even the minimum core levels required necessary under the human rights to water and sanitation can be not met so long as the State in question can demonstrate that ‘every effort has been made to use all resources that are at its disposition to satisfy, as a matter of priority,’ those minimum obligations.[[42]](#footnote-42) This reality means that government might well be afforded significant periods to provide only the minimum levels of human rights to their citizens, during which time ‘the lack of certain essential and necessary rights can lead to significant harm and, in many circumstances, death.’[[43]](#footnote-43) To this end, he suggests it to be necessary to do away with the concept of progressive realisation of the human rights to water and sanitation entirely, and to instead make those rights ones where full enjoyment is required immediately.[[44]](#footnote-44)

## Monitoring of progressive realization of the human rights to water and sanitation

1. Several methodologies have been proffered as ways in which compliance with the obligation to progressively realise human rights, including the human rights to water and sanitation, can be monitored. In general, the most prominent method of monitoring progressive realisation, as reflected in the SDGs and the MDGs before them, is the use of indicators and benchmarks. Indicators are identified as realities which highlight that a right is being progressively realised. For instance, the indicators that evidence compliance with SDGs 6.1 and 6.2 are the proportion of the population with access to safely managed drinking water and sanitation respectively.[[45]](#footnote-45) Benchmarks work are defined as “targets relating to a given human rights indicator … to be achieved over a period of time” and work alongside indicators to specify what level of a given indicator a state should have achieved by a specific time.[[46]](#footnote-46) For instance, a benchmark might require a state to reduce the number of people who lack access to improved drinking water and sanitation by 20 percentage points per year, with universal access being achieved in year five. The use of both indicators and benchmarks together both helps guide States towards the progressive realisation of human rights, and arguably provides a concrete basis for assessing their compliance with that obligation.
2. Mason Meier et al. have developed an alternative methodology for monitoring progressive realisation in the specific context of water and sanitation, based on the method of ‘frontier analysis’. Frontier analysis requires monitors to evaluate state performance with regards to progressive realisation of the human rights to water and sanitation by comparing it to ‘best-in-class’ performance among States that are at ‘similar levels’ in respect of their water and sanitation development. The ‘best-in-class’ level of progressive realisation acts as the ‘performance frontier’, against which the performance of other States can be assessed. It is noted that only by undertaking such a comparative analysis can a ‘rigorous assessment of state implementation’ as it provides ‘a benchmark for how fast a state could progressively realise rights.’[[47]](#footnote-47) As part of their construction of the methodology, a ‘WaSH Performance Index’ was created which draws on MDG data regarding improved/unimproved water and sanitation and ‘examines how rapidly States are progressing in both coverage for, and equity in, water and sanitation, relative to the performance frontier.’[[48]](#footnote-48) This approach has also been identified as potentially fruitful in assessing progressive realisation by Fukunda-Parr, et al., who put forward an ‘achievement possibilities frontier approach’ wherein the progressive realisation of the human rights to water and sanitation is assessed by looking at the highest level of a particular indicator that has historically been achieved by States that have been separated into different per capita income groups. The highest level in each group determines the ‘maximum level of achievement possible’, which other States in the group can then be assessed against.[[49]](#footnote-49)
3. However, the use of models which are based on indicators and benchmarks have also been criticised as inadequate to accurately measure States’ compliance with the obligation of progressive realisation. This is due, in part, to the fact that accurate monitoring using indicators and benchmarks requires access to detailed data about levels of progress with particular indicators, which will normally have to be collected by the state itself. However, such data is often not available or is inaccurate, and even where it has been collected correctly is typically inaccessible publicly, which significantly hinders its usefulness for monitoring exercises.[[50]](#footnote-50)

## Questions for discussion

1. How can the concept of progressive realization be translated in the context of the human rights to water and sanitation? What elements and specificities of the human rights to water and sanitation should be considered in the application of the concept?
2. What does ‘progressive realization’ mean in both quantitative (change in the proportion of population with access) and qualitative (consulting rights-holders) perspectives?
3. In addition to quantitative aspects of progress, using indicators, how States apply and assess the qualitative aspects of the progressive realization (including access to information, participation, accountability, privacy, among others)?
4. How can we assess a situation where a State is improving access to water and sanitation services but at the same time the inequalities between different groups and population also increase? See figure below.

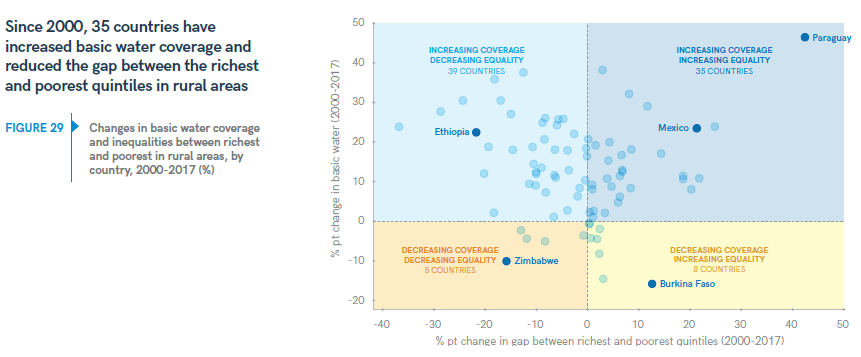


Figure 1 WHO/UNICEF JMP report 'Progress on household drinking water, sanitation and hygiene 2000-2017: Special focus on inequalities'

1. What can be considered retrogression when assessing the State’s obligation to progressively realize the human rights to water and sanitation?
2. Would it be helpful to set a temporal target for the realisation of the human rights to water and sanitation within the human rights framework (i.e. place greater emphasis on the ‘expediency’ element of the CESCR’s determination of States’ obligations)?

# Maximum of available resources

## Clarification of scope and objectives

1. The Special Rapporteur intends to dissect the concept of “maximum of available resources” in the context of the human rights to water and sanitation by unpacking and exploring the expressions: “maximum”, “available”, and “resources” separately. The discussion relating to these concepts under the chapeau of “maximum of available resources” is a complex one as the discussion is not merely limited to budget. Rather, the discussion expands and includes areas of revenue collected from water and sanitation services which can be used to fund the progressive realization of the human rights. In this regard, the Special Rapporteur explores the 3Ts (tariffs, taxes and transfer) to identify possible sources of “resources”. Furthermore, he intends to explore resources beyond the financial flows, such as legislation, institutional organization, work forces, technical resources and environmental resources.

## Concept of ‘maximum of available resources’

1. In undertaking to meet its obligations to respect, protect and fulfil the rights contained within the ICESCR, a State party to the Covenant must utilise the ‘maximum of its available resources’. The requirement of maximum available resource utilisation is a positive obligation that combines with the duty to ‘take steps’ to ensure that States parties actively and purposefully work towards the goal of ensuring enjoyment of economic, social and cultural (ESC) rights, which often require significant resources to be fulfilled. Specifying that States parties must utilise as many resources as is possible in this endeavour therefore limits the potential for them to avoid their obligations, or to implement under resourced initiatives that are incapable of meeting these obligations. However, as with the concept of progressive realisation, the principle of “maximum of available resources” also operates as a qualifier, which allows States parties to justify any lack of concerted effort being made towards the realisation of ESC rights. By only requiring States parties to use the maximum of their *available* resources, Article 2(1) enables them to argue that maximum level of resources they are able to spare for the achievement of ESC rights are sufficient only to implement a less comprehensive version of the rights contained within the ICESCR, or to work towards the full realisation of those rights with less expediency than is otherwise desirable.
2. An initial issue in need of clarification is what is, in actuality, meant by the term ‘resources’? Does this phrase refer only to the resources that are available within State in question, or does it also include resources that can be obtained from other States? Equally, does it only mean certain types of resources, particularly financial resources, or should it be understood as encompassing a broader understanding of the term?
3. In relation to the former of these questions, the CESCR has been clear that despite article 2(1) referring to “*its* resources” [emphasis added], the term should not be understood as only referring to those resources that are held by the State in question.[[51]](#footnote-51) Instead, it is noted in General Comment 3 that ‘the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.’[[52]](#footnote-52) The inclusion of resources that are obtainable through international assistance programmes within the scope of the term ‘resources’ is reflective of global resource disparity and putatively helps broaden and strengthen enjoyment of ESC rights by ensuring that, even when people reside in States that are comparatively resource-poor, that reality is not, in and of itself, prohibitive to the fulfilment of their human rights. Instead, States which either permanently or temporarily lack the resources necessary to progressively realise ESC rights are under an obligation to seek additional resources from international partners to help them fulfil these rights.[[53]](#footnote-53)
4. With regards to the latter of these questions, concerning the scope of the term ‘resources’, whilst General Comment 3 does refer to the need for States parties to use ‘*all* resources’ [emphasis added],[[54]](#footnote-54) it does not elaborate on the meaning of ‘all’. Accordingly, it has been suggested that the precise meaning of the term remains vague and little authoritative assistance has been provided to help States understand its parameters.[[55]](#footnote-55) As noted by Skogly:

“the ICESCR requires States parties to use ‘the maximum of available resources” in order to comply with their substantive obligations when ratifying the Covenant. Yet what is actually meant by this provision has never been clearly defined. Does it mean purely financial resources, or could another understanding of resources be relevant? If it is financial resources, are those the ones that are available through public funds, or is there a role to play for private finance resources?”[[56]](#footnote-56)

1. Whilst no conclusive, authoritative answers are evident with regards to these questions, many commentaries on the concept of ‘maximum available resources’ seem satisfied with confining the notion of ‘resources’ to only financial resources.[[57]](#footnote-57) In this regard, Leckie notes that ‘public expenditure has often been viewed as the only major “resources” that a State must use towards securing the rights found in the ICESCR.’[[58]](#footnote-58) However, some writers have suggested that only requiring States parties to utilise the maximum of their *financial* resources in order to comply with the obligation is too limited and fails to recognise the importance of a wide range of other resource types to the achievement of ESC rights. Robertson, for example, notes that ‘while other types of resources might be identified, it appears that financial, natural, human, technological, and information resources are the most important resources in achieving ICESCR rights.’[[59]](#footnote-59) Accordingly, broadening the understanding of the term ‘resources’ to include non-financial resources, such as natural resources, human resources, educational resources, and cultural and scientific resources,[[60]](#footnote-60) may be necessary in order to better ensure ESC rights. Doing so requires States parties to look beyond only their financial investment in rights fulfilment programmes and consider, as well, what other assets and measures they must fully utilise in order to best achieve positive outcomes in terms of rights enjoyment. As such, broadening the scope of the term ‘resources’ introduces a qualitative dimension to the obligation to use the maximum of available resources which, it has been argued, may lead to a more comprehensive approach that can generate greater efficiency, effectiveness and sustainability of ESC rights fulfilment initiatives.[[61]](#footnote-61)
2. In addition to taking a more expansive view of the meaning of the term “resources” under Article 2(1), commentary regarding the “maximum of available resources” obligation has highlighted that not only does this require States parties to use the maximum of their pre-existing resources, but, equally, denotes an additional obligation on governments to take efforts to *maximise* the resources that they have available to them. This may involve both taking efforts to create more resources that could be used to ensure enjoyment of ESC rights, and to use those resources which are available efficiently and effectively so as to make them go further. With regards to the creation of additional resources that can be used to achieve ESC rights, it has been noted that ‘a government must do all that it can to mobilise resources within the country in order to have funds available to progressively realise ESC rights. … [T]he government must make all possible efforts to raise as much revenue domestically as it can, without, of course, undermining the long-term viability of the economy.’[[62]](#footnote-62) In practical terms, the necessity for governments to act to increase resource availability, thereby creating a greater pool of resources that they can use the maximum of, means implementing and maintaining policies such as fair and effective tax collection programmes.[[63]](#footnote-63) Cuts in funding to other, non-human rights related, areas might also be a means by which States can increase the levels of resources they have to achieve ESC rights, however care must be taken in making cuts to undertake a full human rights assessment of the long and short term implications of doing so, to ensure that these do not lead to retrogression. Furthermore, in light of the above discussion regarding taking a broader view of the notion of “resources”, it also must be questioned whether States are required to increase the availability of other forms of resources, such as institutional and technical resources, and workforces.
3. The final point for consideration is the fact that the inclusion of the ‘maximum available resources’ caveat is well recognised as affording a level of flexibility to States in the implementation of economic, social and cultural rights. This is argued to be necessary on the basis that delivering ESC rights progressively is a resource intensive exercise and, accordingly, States, particularly developing States, require such a protective legal clause to prevent claims being made against them for failure to fully respect, protect or fulfil ESC rights when economically they are unable to do so.[[64]](#footnote-64) The presence of the clause is, however, problematic in the context of the lack of a substantive mechanism for use in determining whether States are, indeed, utilising all of the resources it is possible for them to use in the circumstances they find themselves in. Without such an accountability mechanism, it is largely left to States to determine the levels of resources they can make available to achieving ESC rights, and how to prioritise those resources across different rights. Indeed, this discretion has been recognised by the CESCR in its evaluation of the term ‘maximum of available resources’ for the Optional Protocol to the ICESCR, where it reflects that its determination of whether governments have met their obligations under Article 2(1) must be balanced with the necessity to ‘fully respect’ “the authority vested in relevant State organs to adopt what it considers to be the most appropriate policies and to allocate resources accordingly.”[[65]](#footnote-65)
4. However, the existence of the maximum of available resources qualifier does not provide a justification for States parties to avoid acting to fulfil ESC rights in totality, and even when resources are highly limited, they must still show that they have attempted to utilise those resources that they do have to give effect to the rights contained within the ICESCR, as far as is possible. As noted by the CESCR:

“The “availability of resources”, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasised that, even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.”[[66]](#footnote-66)

1. As such, even when resources are highly limited within a particular State, this reality alone is insufficient to justify inaction and efforts must be taken to seek to secure the enjoyment of at least some level of ESC rights guaranteed by the ICESCR. This is particularly true in respect of the “minimum core obligations”.

## Maximum of available resources and the human rights to water and sanitation

1. In realising the human rights to water and sanitation, States are required to utilise the maximum of their available resources. However, as noted above, the parameters of this obligation as specified both with the ICESCR and the General Comments of the CESCR, are somewhat vague, and, accordingly, it is difficult to discern the exact nature of States parties’ duties.[[67]](#footnote-67) In general terms, when seeking to respect, protect and fulfil the human rights to water and sanitation, State are required to utilise as many of the applicable resources they have available, which includes those found inside the State in question, as well as those from outside sources, and is not limited purely to financial resources. However, there remains considerable ambiguity surrounding what exactly these facets of the obligation mean in practice.[[68]](#footnote-68)
2. The former Special Rapporteur, in a handbook on financing the human rights to water and sanitation has sought to develop a greater understanding of how the concept of the ‘maximum available resources’ operates in the context of those rights. She notes, for instance, that the concept requires that States develop their budgets considering ‘what financial resources are required to realise all human rights obligations’, ‘make decisions on how to raise necessary financial resources’, and ‘allocate those resources as required.’[[69]](#footnote-69) Owing to the disparities in the spending powers of different States and reality that the necessary level of budgetary allocation for water and sanitation will depend on context, no guideline amount is specified by the CESCR as being indicative of the allocation of the maximum of available resources within the budgets of States. However, some sources have suggested that States should aim to spend at least 1% of their GDP on water and sanitation provision, maintenance and improvement, whilst others have suggested 0.5% for sanitation alone.[[70]](#footnote-70)
3. It is further noted that the reality of the non-exhaustive nature of States’ resources means that committing the ‘maximum available resources’ to the realisation of the human rights to water and sanitation will sometimes necessitate the provision of different levels of funding for various rights fulfilment initiatives. The CESCR and prominent human rights scholars have recognised that to meet their obligations to utilise the maximum of their available resources, States may be forced to prioritise spending, rather than seek to fund all initiatives equally and concurrently.[[71]](#footnote-71) Accordingly, it has been noted that, ‘States may have to make difficult choices between different rights. The CESCR has suggested that prioritization in allocation can be assessed by comparing the share of the budget devoted to the same rights in similarly situated countries, or to regionally or internationally agreed upon standards.’[[72]](#footnote-72)
4. It has, however, been argued that, in light of the above mentioned understanding that the “maximum of available resources” obligation requires States parties to seek to maximise the resources they have available to them, the funding of initiatives to achieve human rights such as water and sanitation should always be prioritised as the achievement of those rights will almost inevitably lead to high rates of return on that investment. This is due to the reality that it is consistent with human rights law to charge users for access to water and sanitation services, therefore meaning that investment in them is generally repaid, with revenue able to be ring-fenced to fund further improvements to water and sanitation services,[[73]](#footnote-73) and because improving water and sanitation access is shown to decrease healthcare costs for the state, and increase education and employment, which can lead to increased revenue for the State through taxation.[[74]](#footnote-74)
5. Given the importance of revenue raising to enable the maximum of available resources to be invested into the provision of water and sanitation, it has also been suggested that States should, where starting resources are insufficient to facilitate adequate investment, implement cross-subsidisation so as to draw funds from other sectors to boost the ability to provide water and sanitation. This is suggested as being particularly necessary where, owing to the obligation to provide for minimum levels of the human rights to water and sanitation, States might need to provide those services for free, and therefore there are no tariffs which could offset the cost of provision. The argument that cross-subsidisation should be utilised in such instances has, however, been suggested to ignore the pragmatic realities present in many States, wherein the redistribution of wealth might have political consequences. As noted by McCaffrey:

“The availability of funds to meet these water provision demands is constrained by access to capital, the political mandate to redistribute wealth, and the political choices and preferences of the government itself… autonomy in spending decisions is limited in some cases: the support of powerful constituents may be needed to maintain power, and some cross-subsidies are not politically popular. Additionally, there may be municipalities where there are low revenues in many sectors, and thus, even with cross-subsidies, there may be limited funding available for governments to reallocate to the water sector.”[[75]](#footnote-75)

## Monitoring of the use of the maximum of available resources

1. Monitoring how States utilise their resources to achieve human rights, including the human rights to water and sanitation, will, in general, require monitoring bodies to conduct budget and expenditure analysis, wherein how the State in question utilises its funds, both real and potential, to determine whether it is utilising the maximum of its available resources to achieve a particular human right. Clearly, this methodology is weakened by the fact that it assesses only financial resources, which goes against the recognition that the term ‘resources’ should be understood more broadly than in purely fiscal terms.
2. There are two main methods of undertaking budget and expenditure analysis in order to monitor whether States are utilising the maximum of their available resources to achieve the human rights to water and sanitation. Firstly, a ‘static analysis’ can be conducted, whereby a state’s budget is evaluated taking into account how resources have been allocated for the achievement of the rights to water and sanitation in comparison to how they have been allocated to other areas of expenditure. This exercise highlights the priorities of the government and helps evidence whether their expenditure on achieving the human rights to water and sanitation is sufficient in the context of their expenditure as a whole.[[76]](#footnote-76)
3. A second method of undertaking budget and expenditure analysis is through ‘dynamic analysis’. This method is more complicated and less expedient than static analysis, but it may provide a more comprehensive method of evaluating compliance with the obligation to utilise the maximum of available resources. Dynamic analysis involves “comparing the evolution of budgets over time, looking at variations in allocations and spending over different periods.”[[77]](#footnote-77) This data can then be checked against indicators and benchmarks identifying whether States are making adequate progress towards achieving the human rights to water and sanitation. If inadequate progress is being made, and dynamic budget analysis shows that a state has underspent in areas required to realise that right, this would evidence non-compliance with the obligation.[[78]](#footnote-78)
4. However, as with the monitoring of progressive realisation, monitoring resource use by States is also challenging due to the lack of data that governments may make available regarding their budgets, and the fact that figures on expenditure are rarely disaggregated to show exactly how funds were allocated. [[79]](#footnote-79) Furthermore, as noted by Felner, the allocation of budgets, even those which prima facie might seem satisfactory and maximal, to particular sectors does not always provide evidence that States are, in fact, utilising the maximum of their available resources to achieve a particular right. This is because this exercise fails to capture the detrimental impact caused on the actual spending of those resources through realities such as inefficiency and corruption.[[80]](#footnote-80)

## Questions for discussion

1. How can the concept of maximum available resources be translated in the context of the human rights to water and sanitation? What elements and specificities of the human rights to water and sanitation should be considered in the application of the concept?
2. What do “maximum” and “available” mean in the concept of maximum available resources?
3. What is the scope of “resources” in the concept of maximum available resources? What type of resources, in addition to financial resources, are key for the water and sanitation sector?
4. How can different financial sources (ranging from budget, tariffs, cross-subsidies and international cooperation) be used in line with the ‘maximum available resources’ concept?
5. What types of inefficiencies in funds allocation can result in non-compliance/retrogression of this principle?
6. What type of trade-offs should be considered when resources are allocated to water and sanitation programmes and/or other social policies?
7. How can we address the availability of resources dynamically during a time period, assessing changes in the availability of resources?

1. See, Lisa Forman, Luljeta Caraoshi, Audrey R. Chapman and Everaldo Lamprea, 20 *The International Journal of Human Rights* 531-548. [↑](#footnote-ref-1)
2. Committee on Economic Social and Cultural Rights, *General Comment No. 3: The nature of State Parties' Obligation (Article 2, Para 1)*, para. 10. [↑](#footnote-ref-2)
3. Committee on Economic Social and Cultural Rights, *General Comment No. 15: The right to water (articles 11 and 12 of ICESCR)* , para. 37. [↑](#footnote-ref-3)
4. Committee on Economic Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Article 12)* , para. 43. [↑](#footnote-ref-4)
5. ibid , para. 43. [↑](#footnote-ref-5)
6. Committee on Economic Social and Cultural Rights, *General Comment No. 3: The nature of State Parties' Obligation (Article 2, Para 1)*, para. 10; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 9, See E/C.12/2000/13. [↑](#footnote-ref-6)
7. George S. McGraw, ‘Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence’ 8 *Loyola University Chicago International Law Review*, 154. [↑](#footnote-ref-7)
8. Lisa Forman, Luljeta Caraoshi, Audrey R. Chapman and Everaldo Lamprea, 20 *The International Journal of Human Rights* 531-548, 543. [↑](#footnote-ref-8)
9. Committee on Economic Social and Cultural Rights, *General Comment No. 3: The nature of State Parties' Obligation (Article 2, Para 1)*, para. 10. [↑](#footnote-ref-9)
10. ibid , para. 11 and Committee on Economic Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Article 12)* , paras. 57-58. [↑](#footnote-ref-10)
11. Committee on Economic Social and Cultural Rights, *General Comment No. 1: Reporting by States Parties* , para. 4. [↑](#footnote-ref-11)
12. Committee on Economic Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities* , para. 13. [↑](#footnote-ref-12)
13. Committee on Economic Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Article 12)* , para. 53. [↑](#footnote-ref-13)
14. Committee on Economic Social and Cultural Rights, *General Comment No. 19: the right to social security (article 9)* . [↑](#footnote-ref-14)
15. Committee on Economic Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Article 12)* , para. 32; Committee on Economic Social and Cultural Rights, *General Comment No. 15: The right to water (articles 11 and 12 of ICESCR)* , para. 42; Committee on Economic Social and Cultural Rights, *General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15)*, para. 42; and Committee on Economic Social and Cultural Rights, *General Comment No. 19: the right to social security (article 9)* , para. 64. [↑](#footnote-ref-15)
16. CESCR, General Comment 15, E/C.12/2002/11, para 37 [↑](#footnote-ref-16)
17. George S. McGraw, ‘Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence’ 8 *Loyola University Chicago International Law Review*, 154, 159-160 [↑](#footnote-ref-17)
18. CESCR, General Comment 15, E/C.12/2002/11, para 41 [↑](#footnote-ref-18)
19. CESCR, General Comment 15, E/C.12/2002/11, para 38 [↑](#footnote-ref-19)
20. Robert Bos, ‘Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners’ (IWA Publishing, 2016) 24 [↑](#footnote-ref-20)
21. George S. McGraw, ‘Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence’ 8 *Loyola University Chicago International Law Review*, 154, 159 [↑](#footnote-ref-21)
22. Wouter Vandenhole and Tamara Wielders, ‘Water and a Human Right – Water as an Essential Service: Does it Matter? (2008) 26:3 Netherlands Quarterly of Human Rights, 391, 407 [↑](#footnote-ref-22)
23. Tasilous 8 [↑](#footnote-ref-23)
24. Ibid 38 [↑](#footnote-ref-24)
25. Ibid 39 [↑](#footnote-ref-25)
26. John Tasilous, ‘Minimum Core Obligations: Human Rights in the Here and Now’ World Bank and Nordic Trust Fund Research Paper, October 2017, 39 [↑](#footnote-ref-26)
27. For further background, see, Bruce Porter, ‘Rethinking Progressive Realization: How Should it be Implemented in Canada? Background Paper for a Presentation to the Continuing Committee of Officials on Human Rights’ 4 June 2015. [↑](#footnote-ref-27)
28. *Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)* 4 October 2000 . [↑](#footnote-ref-28)
29. ibid [↑](#footnote-ref-29)
30. ibid [↑](#footnote-ref-30)
31. Committee on Economic Social and Cultural Rights, *General Comment No. 3: The nature of State Parties' Obligation (Article 2, Para 1)*. [↑](#footnote-ref-31)
32. Committee on Economic Social and Cultural Rights, *An evaluation of the oblligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant (E/C.12/2007/1)* , para. 8. [↑](#footnote-ref-32)
33. Kathrine G. Young, ‘Proportionality, Reasonableness, and Economic and Social Rights’ in Mark Tushnet Vicki C. Jackson (ed), *Proportionality: New Frontiers, New Challenges (Comparative Constitutional Law and Policy)* (2018). [↑](#footnote-ref-33)
34. See, CESCR, General Comment 15, E/C.12/2002/11, paras 17-18; see also, O. Flores Baquero & A. Jiménez Fdez. de Palencia & A. Pérez Foguet, 2016. "[Measuring disparities in access to water based on the normative content of the human right](https://ideas.repec.org/a/spr/soinre/v127y2016i2d10.1007_s11205-015-0976-8.html)," [Social Indicators Research: An International and Interdisciplinary Journal for Quality-of-Life Measurement](https://ideas.repec.org/s/spr/soinre.html), Springer, vol. 127(2), pages 741, 754 [↑](#footnote-ref-34)
35. CESCR, General Comment 15, E/C.12/2002/11, paras 17-18 [↑](#footnote-ref-35)
36. Report of the former Special Rapporteur on the rights to safe drinking water and sanitation on retrogression, A/HRC/24/44, para 113 [↑](#footnote-ref-36)
37. Robert Bos, ‘Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners’ (IWA Publishing, 2016) 94 [↑](#footnote-ref-37)
38. Robert Bos, ‘Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners’ (IWA Publishing, 2016) 82 [↑](#footnote-ref-38)
39. CESCR, General Comment 15, E/C.12/2002/11, para 25 [↑](#footnote-ref-39)
40. Stephen C. McCaffrey and Kate J. Neville, ‘Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Rights to Water for Developing Countries’ (2009) 21 The Georgetown International Environmental Law Review 679, 685 [↑](#footnote-ref-40)
41. Michael R. Ulrich, ‘The Impact of Law on the Right to Water and Adding Normative Change to the Global Agenda’ (2015) 48 The George Washington International Law Review 43, 53-54 [↑](#footnote-ref-41)
42. CESCR, General Comment 15, E/C.12/2002/11, para 41 [↑](#footnote-ref-42)
43. Michael R. Ulrich, ‘The Impact of Law on the Right to Water and Adding Normative Change to the Global Agenda’ (2015) 48 The George Washington International Law Review 43, 54 [↑](#footnote-ref-43)
44. Ibid at 46 [↑](#footnote-ref-44)
45. A/RES/71/313, at Annex, 6.1 and 6.2 [↑](#footnote-ref-45)
46. Lillian Chenwi, ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) De Jure 742, 759 [↑](#footnote-ref-46)
47. Benjamin Mason Meier, Ryan Cronk, Jeanne Luh, Jamie Bartram and Catarina de Albuquerque, ‘Monitoring the Progressive Realization of the Human Rights to Water and Sanitation: Frontier Analysis as a Basis to Enhance Human Rights Accountability’ (2017) Oxford Handbook of Water Politics and Policy 13 [↑](#footnote-ref-47)
48. Ibid 14 [↑](#footnote-ref-48)
49. Sakiko Fukuda-Parr, Terra Lawson-Remer, Susan Randolph, ‘Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment’ (2008) University of Connecticut, Department of Economics Working Paper Series, Working Paper 2008-22, page 19 [↑](#footnote-ref-49)
50. ibid [↑](#footnote-ref-50)
51. See, Eibe Riedel, Gilles Giacca and Christophe Golay, ‘The Developments of Economic, Social and Cultural Rights in International Law’ in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* 2014, Oxford University Press) 15 [↑](#footnote-ref-51)
52. Committee on Economic Social and Cultural Rights, *General Comment No. 3: The nature of State Parties' Obligation (Article 2, Para 1)*, para 13; see also, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para 26 [↑](#footnote-ref-52)
53. Ann Blyberg & Helena Hofbauer, ‘The Use of Maximum Available Resources: Article 2 & Government Budgets’ (2014) <https://www.internationalbudget.org/wp-content/uploads/Maximum-Available-Resources-booklet.pdf> page 2 [↑](#footnote-ref-53)
54. Committee on Economic Social and Cultural Rights, *General Comment No. 3: The nature of State Parties' Obligation (Article 2, Para 1)*, para 10 [↑](#footnote-ref-54)
55. See, for example, Jennifer Schiff, Measuring the human right to water: An assessment of compliance indicators (2019) 6:1 WIRESs Water 1, 4 [↑](#footnote-ref-55)
56. Sigrun Skogly, ‘The Requirement of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12:3 Human Rights Law Review 393, 398 [↑](#footnote-ref-56)
57. See, for example, Matthew Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (Clarendon Press, 1995) 136-144 [↑](#footnote-ref-57)
58. Scott Leckie, ‘Another step towards indivisibility: identifying the key features of violations of economic, social and cultural rights’ (1998) 20 Human Rights Quarterly 81, 107 [↑](#footnote-ref-58)
59. Robertson, ‘Measuring state compliance with the obligation to devote the ‘maximum of available resources’ to realizing economic, social and cultural rights’ (1994) 16 Human Rights Quarterly 693 [↑](#footnote-ref-59)
60. Sigrun Skogly, ‘The Requirement of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12:3 Human Rights Law Review 393,405-412 [↑](#footnote-ref-60)
61. See, Queens University Belfast, ‘Budgeting for Economic, Social and Cultural Rights: A Human Rights Framework (2010) [↑](#footnote-ref-61)
62. Ann Blyberg & Helena Hofbauer, ‘The Use of Maximum Available Resources: Article 2 & Government Budgets’ (2014) <https://www.internationalbudget.org/wp-content/uploads/Maximum-Available-Resources-booklet.pdf> page 2 [↑](#footnote-ref-62)
63. Ibid [↑](#footnote-ref-63)
64. It is worth noting that this argument is suggested to be flawed in the sense that all rights, including civil and political rights, require substantial and continuous resource investment in order to be fulfilled (for instance, the right to due process requires very high and on-going investment in, inter alia, adequate judicial and non-judicial forums, legal personnel, legal aid services and proper training in legal procedure. Equally, the right to self-determination requires repeated funding of elections [both national, local and other], and the processes that enable these such as electoral commissions.) In this regard, it is argued to be nonsensical that there should be a resource constraint clause in the ICESCR, when there isn’t one in the ICCPR. For this reason, the maximum of available resources clause has been argued to represent politics disguised as pragmatism. See, Michael R. Ulrich, ‘The impact of law on the right to water and adding normative change to the global agenda’ (2015) 48 The George Washington International Law Review 43, 52 [↑](#footnote-ref-64)
65. Committee on Economic Social and Cultural Rights, *An evaluation of the oblligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant (E/C.12/2007/1)* , para 2 [↑](#footnote-ref-65)
66. Ibid, para 4 [↑](#footnote-ref-66)
67. Jennifer Schiff, Measuring the human right to water: An assessment of compliance indicators (2019) 6:1 WIRESs Water 1, 4 [↑](#footnote-ref-67)
68. ibid [↑](#footnote-ref-68)
69. Realising the human rights to water and sanitation: A Handbook by the UN Special Rapporteur Catarina de Albuquerque (2014), page 6 [↑](#footnote-ref-69)
70. Ibid [↑](#footnote-ref-70)
71. See, M. Sepúlveda, The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights (Antwerpen: Intersentia, 2003), p. 317. See also CESCR, Concluding Observations: Dominican Republic (E/1997/22), para. 228. [↑](#footnote-ref-71)
72. Realising the human rights to water and sanitation: A Handbook by the UN Special Rapporteur Catarina de Albuquerque (2014), page 6 [↑](#footnote-ref-72)
73. Ibid at page 20 [↑](#footnote-ref-73)
74. See, S. Devarajan, Rights and welfare economics, World Bank blog, 5 May 2014: http://blogs.worldbank.org/ futuredevelopment/rights-andwelfareeconomics. [↑](#footnote-ref-74)
75. Stephen C. McCaffrey and Kate J. Neville, ‘Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Rights to Water for Developing Countries’ (2009) 21 The Georgetown International Environmental Law Review 679, 701 [↑](#footnote-ref-75)
76. Lillian Chenwi, ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) De Jure 742, 760 [↑](#footnote-ref-76)
77. ibid [↑](#footnote-ref-77)
78. ibid [↑](#footnote-ref-78)
79. Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, E/2009/90, para 43 [↑](#footnote-ref-79)
80. Eitan Felner “Closing the ‘Escape Hatch’: A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights” 2009 J Human Rights Practice 402, 412-414 [↑](#footnote-ref-80)