

Monitoring the progressive realisation of socio-economic rights:

**Lessons from the United Nations Committee on Economic, Social
and Cultural Rights and the South African Constitutional Court**

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Executive summary

Socio-economic rights form an integral part of human rights law. These rights have been guaranteed in various international law instruments and national constitutions. Similar to the African Charter on Human and Peoples' Rights (African Charter), the South African Constitution (the Constitution) is internationally renowned for its inclusion of socio-economic rights alongside civil and political rights. The full realisation of socio-economic rights is crucial to overcoming the challenges of poverty, marginalisation and underdevelopment. This is because these rights, among other things, provide people especially those living in poverty with access to certain basic needs including resources, opportunities and services that are necessary for them to lead a dignified life.

The implementation of socio-economic rights is, however, subject to the qualifications of 'availability of resources' and/or 'progressive realisation', contained in both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Constitution of South Africa. These qualifications could be used by states to delay implementation if they do not properly understand the meaning of the limitations. Monitoring the progressive realisation of these rights therefore becomes vital. In carrying out this exercise, a key question is how to ascertain whether sufficient and efficient steps have been taken to progressively realise socio-economic rights.

This research is therefore aimed at providing guidance as to the meaning and interpretation of progressive realisation, drawing largely from the jurisprudence of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) and the South African Constitutional Court. The research paper first clarifies the socio-economic rights obligations of states and then explains what progressive realisation entails, in relation to issues such as resources, minimum core and reasonableness. Such understanding would be useful to the state and right-holders and also in the development of a tool for monitoring progressive realisation. Accordingly, the paper further examines various approaches in monitoring progressive realisation and suggests aspects to be considered in the development of a tool for measuring progressive realisation of socio-economic rights in the South African context.

The obligations of states

The ICESCR requires states to take all appropriate steps to the maximum of their available resources to achieve progressively the full realisation of socio-economic rights. In a similar vein, the South African Constitution requires the state to adopt reasonable measures, making use of its available resources, to achieve the progressive realisation of these rights. States also have an obligation to respect, protect, promote and fulfil socio-economic rights. The steps to be taken are not limited to legislative measures but also appropriate financial, administrative, educational and social measures as well as effective remedies; and must be aimed at achieving a specified result.

Compliance with the above obligations is generally dependent on the availability of resources except the duty to respect that is seen as resource-barren and obligations that are of immediate effect such as prohibition of non-discrimination, prohibition of retrogressive steps, and the obligation to take steps and to provide certain essential elements of a right. The interpretations of the obligation on a state by the CESCR and the South African Constitutional Court illustrates that the steps have to be taken within a reasonably short period of time, must be deliberate, concrete, targeted towards meeting the state's obligation, rational, effective and reasonable. The South African Constitutional Court and the CESCR have set out factors useful in ascertaining whether measures adopted are reasonable. In adopting the measures, the government must also ensure that certain key elements of socio-economic rights are guaranteed, including availability, accessibility, adequacy, acceptability, among others.

Progressive realisation

Both the CESCR and the South African Constitution Court have emphasised that 'progressive realisation' implies a recognition that the full realisation of socio-economic rights will generally not be able to be achieved over a short period of time. However, a state is required to move as expeditiously and effectively as possible towards meeting this goal. Progressive realisation further implies that deliberate retrogressive measures are not allowed, as this would amount to a violation of a state's obligation to progressively realise socio-economic rights. Any retrogressive measures have to be fully justified with reference to the totality of rights. The CESCR has set out a number of issues it would consider when retrogressive measures are being justified. In relation to some rights such as education and water there is a strong presumption of impermissibility of any retrogressive measure.

Progressive realisation also goes beyond achieving the minimum essential level of a right. States must strive to provide the widest possible enjoyment of a right on a progressive basis even in the face of resource constraints. In relation to vulnerable and disadvantaged groups, a state must do more than just abstain from taking measures that might have a negative impact on the enjoyment of socio-economic rights. It must take positive action to reduce structural inequality and to give appropriate preferential treatment to the vulnerable and marginalised, including adopting specially tailored measures. These groups must also be protected even in times of severe resource constraints.

Furthermore, progressive realisation requires states to take full advantage of their available resources, which includes resources both within a state and those available through international assistance and co-operation.

Monitoring progressive realisation

The obligation to monitor the progressive realisation of socio-economic rights is contained in various treaties, documents and national constitutions. This research establishes that monitoring is a complex and demanding task, and can be carried out by the state itself, civil society or institutions of democracy. The CESCR, for instance, is responsible for monitoring the implementation of the ICESCR. It has

used the reporting mechanism - through which states have to submit reports regularly to the Committee on their implementation of the rights in the ICESCR - to monitor the compliance of states with their obligations. With the recent adoption of the Optional Protocol to the ICESCR, the complaints and inquiry procedures would also be other mechanism through which compliance can be monitored. The South African Human Rights Commission has also been tasked with monitoring, on a yearly basis, the implementation of the socio-economic rights in the South African Constitution. The Constitutional Court of South Africa also plays an important role in ensuring that states comply with their socio-economic rights obligations through its consideration of cases. Because different bodies can carry out monitoring, the challenge is often to construct a monitoring tool that is robust to scrutiny and at the same time accessible to non-experts and relatively simple to populate with data.

Various methodologies have been used to assess state's compliance with their obligation to progressively realise socio-economic rights. These include indicators and benchmarks, analysis of budget/expenditure or resource allocation, identifying violations, econometric tools and methodologies that combine some of these approaches. This research establishes that the South African Constitutional Court and the CESCRC have used the first three methodologies in their jurisprudence. An assessment of the various methodologies shows that the use of a combination of approaches is relevant in measuring progressive realisation.

In addition, developing a tool to measure progressive realisation of socio-economic rights in the national (South African) context is seen as vital, especially in the face of the recent global economic crisis that has made the mobilisation of resources for the realisation of these rights challenging. Such a tool would ensure that the government does not use progressive realisation as an excuse for failing to realise these rights. It would also be useful in identifying achievements, detecting failures, gaps and retrogression, identifying discriminatory laws, policies, programmes and practices and, where needed, re-orienting state action. Drawing from the general comments and concluding observations of the CESCRC, the jurisprudence of the South African Constitutional Court and various monitoring methodologies, this paper suggests aspects that should be incorporated in a monitoring tool.

Conclusion

This research finds that ratifying human rights treaties or adopting a constitution that enshrines socio-economic rights as well as relevant legislation and policies is relatively simple in comparison to its subsequent implementation and government's compliance with the obligations contained therein. Access to and enjoyment of socio-economic rights has to be continuously broadened. A state cannot thus use progressive realisation as an excuse for not realising these rights. A clear understanding of the obligations of government and the components of socio-economic rights is necessary in ensuring progressive realisation and in carrying out effective monitoring. With regard to the latter, a methodological framework is necessary since it would provide a framework through which government can be held accountable for its policies and practices that impact on the enjoyment of socio-economic rights.

1 Introduction

Various international human rights treaties and documents as well as some national constitutions recognise socio-economic rights as human rights.¹ Socio-economic rights were first recognised in the Universal Declaration of Human Rights, 1948 (Universal Declaration), which guaranteed the rights to property, work, social security, education and an adequate standard of living including food, clothing, housing, medical care and social services, among other rights.² Subsequent human rights treaties provided for these rights, with the key treaty on socio-economic rights at the international level being the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). At the African regional level, the key treaty is the African Charter on Human and Peoples' Rights, 1981 (African Charter), which is known for its uniqueness in recognising socio-economic rights on the same footing with civil and political rights. Socio-economic rights therefore form an integral part of international (including African) human rights law.

Socio-economic rights are crucial in addressing poverty and ensuring a dignified life for all. They provide a framework through which accountability for poverty can be strengthened, as these rights speak directly to the material conditions of the lives of those living in poverty. They establish positive duties on the state to ensure that everyone has access to the various socio-economic goods and services. They also have the potential to challenge unequal power relationships and recast the relationship between people experiencing poverty, and the state.

However, for socio-economic rights to be effective in achieving the above and promote the dignity of those living in poverty, they have to be effectively implemented; in other words, they have to be translated into concrete benefits, especially for the poor and disadvantaged individuals and communities. The United Nations (UN) High Commissioner for Human Rights (OHCHR) has defined implementation in the context of international human rights law as 'moving from a legal commitment, that is, acceptance of an international human rights obligation, to realization by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations'.³ Effective implementation would therefore require the ratification and domestication⁴ of international treaties, recognition of the rights as justiciable or enforceable rights - as is the case with South Africa - development and implementation of policies and laws that give effect to these rights, and the provision of remedies for violations.

Despite the guarantees of access to socio-economic rights in various instruments, access is not always provided as universal from the outset. In various instruments,

¹ See Mariek Piechowia, 'What are Human Rights? The Concept of Human Rights and their Extra-legal Justification' in Raija Hanski & Markku Suksi (Eds.) *An Introduction to the International Protection of Human Rights* (2000) 3-14, 3.

² See articles 17, 22, 23, 25 & 26 of the Universal Declaration.

³ United Nations, *Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights*, UN doc. E/2009/90, 8 June 2009, para 3.

⁴ To make a treaty a part of a national legal system.

the full implementation or realisation of socio-economic rights is, however, subject to the qualifications of 'availability of resources' and/or 'progressive realisation'. The ICESCR and the South African Constitution recognise that socio-economic rights have to be realised over time and the progress towards full realisation is dependent on the availability of resources. However, not all socio-economic rights are qualified by progressive realisation.⁵ The African Charter, which South Africa has ratified, does not also employ the terminology of 'progressive realisation' or 'within available resources'. It, however, engenders the duties to respect, protect, promote and fulfil, which are discussed subsequently in this paper. Notwithstanding the qualifications, **progressive realisation requires a state to strive towards fulfilment of socio-economic rights to the maximum extent possible, even in the face of resource constraints.** A state's performance in terms of the progressive realisation of socio-economic rights would thus depend on, among other things, both the actual socio-economic rights people enjoy at a given moment as well as the society's capacity of fulfilment (in terms of the resources available to the state).⁶

The qualification of progressive realisation could be used by states to delay the implementation of these rights. Consequently, monitoring progressive realisation is crucial, as it provides feedback for implementation of socio-economic rights. Monitoring requires the 'systematic gathering of information with a view to evaluating compliance with human rights commitments'.⁷ It uses information to measure the achievement of defined targets and objectives within a specified time frame, and provides feedback on the implementation process and on implementation problems.⁸ Monitoring has been underscored in various international human rights treaties, general comments of treaty bodies, and in national constitutions, where specific bodies, institutions or courts have been tasked with monitoring implementation of obligations. As discussed subsequently, the UN Committee on Economic, Social and Cultural Rights (CESCR) has also emphasised the importance of monitoring the implementation of these rights. If the progress made in fulfilling socio-economic rights is not closely monitored, they might just end up as mere paper rights.

1.1 Socio-economic rights in the ICESCR

As noted above, the key treaty on socio-economic rights at the international level is the ICESCR.⁹ At the time of writing, South Africa had signed but has not yet ratified

⁵ Some provisions under the ICESCR are capable of immediate implementation (discussed subsequently under section III). Also, some rights in the Constitution do not use these qualifications, such as detained persons and children's socio-economic rights, and the rights to be protected against arbitrary evictions, to emergency medical treatment, to basic education, and to an environment not harmful to health or well being.

⁶ Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment' (2008) *Department of Economics Working Paper Series 22*, University of Connecticut, 7. Available at <http://www.econ.uconn.edu/working/8.pdf> (accessed 12 March 2010)

⁷ United Nations, UN doc. E/2009/90, para 5.

⁸ *Ibid.*

⁹ For further reading on the ICESCR, see Matthew Craven, 'The International Covenant on Economic, Social and Cultural Rights' in Hanski & Suksi (2000) 101-123.

the ICESCR. South African courts have, however, referred to the ICESCR and its general comments when interpreting the South African Constitution, 1996 (the Constitution).¹⁰ This is because international law provides a framework within which the rights in the Constitution can be evaluated and understood, and would include 'non-binding' as well as binding law.¹¹

The rights protected in the ICESCR include: the rights to work, health, education, social security including social insurance, and an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.¹² In addition, equality and dignity are major elements of these rights. The ICESCR, as well as the Universal Declaration and other international treaties, recognise that inherent dignity is the source of all human rights and require that rights be guaranteed without discrimination.¹³ The ICESCR also spells out the obligations of states in relation to the realisation of socio-economic rights, which are discussed in section II of this paper.

The body responsible for monitoring the implementation of the rights in the ICESCR is the CESCR.¹⁴ To date, this monitoring has been done mainly through examining reports submitted to it by states. Article 16 of the ICESCR requires states parties to submit reports on the measures which they have adopted and the progress made in achieving the realisation of the rights in the ICESCR. States must report initially within two years of the entry into force of the ICESCR for the state concerned, and thereafter, every five years. The reports may also include factors and difficulties affecting the degree of fulfilment of obligations under the ICESCR.¹⁵ States are also required to report on the progress made since the last reporting period. The guidelines on state reporting under the ICESCR specifies that periodic reports should also contain information on the progress achieved, including information on the steps taken to address issues raised by the CESCR in the concluding observations on the state's previous report.¹⁶

The CESCR has observed that this reporting obligation provides a basis on which it can discharge its responsibilities for monitoring states parties' compliance with their obligations and for facilitating the realisation of the socio-economic rights in the

¹⁰ Section 39(1) of the Constitution requires the courts to consider international law when interpreting the rights in the Constitution. Section 233 of the Constitution also requires every court, when interpreting any legislation, to give preference to any reasonable interpretation of the legislation that is consistent with international law.

¹¹ See *S v Makwanyane and Another* 1995 (3) SA 391 (CC), para 35. This case concerned the constitutionality of the death penalty.

¹² See articles 6-15 of the ICESCR.

¹³ See, for instance, articles 1 & 2 of the Universal Declaration and articles 2(2) and 3 of the ICESCR.

¹⁴ Established by the UN Economic, and Social Council through Resolution 1985/17 of 28 May 1985.

¹⁵ Article 17 of the ICESCR.

¹⁶ See CESCR, *Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 And 17 of the International Covenant on Economic, Social And Cultural Rights*, UN doc. E/C.12/2008/2, 24 March 2009, para 2.

ICESCR.¹⁷ Compliance with the reporting obligation depends largely on political will. However, a state will be in violation of the ICESCR if it fails to submit reports as required under the Covenant.¹⁸ For states that have never submitted a report under the ICESCR and whose reports are overdue, the CESCR accepts a one-time submission of up to three reports consolidated in a single document, as a means of bringing the states up to date with their reporting obligations.¹⁹ The CESCR has resorted to proactive measures where reports remained overdue. Where a state's report is very significantly overdue and the state has failed to respond to the CESCR's reminders in this regard, the CESCR has proceeded to review the implementation of the ICESCR in respect of the state in the absence of a state report.²⁰

After the examination of reports, the CESCR informs the state of its concerns and recommendations in the form of 'concluding observations'. The concluding observations provide a clearer vision of the normative contents of the ICESCR. For instance, the CESCR has provided clarity on the prohibition of discrimination under article 2(2) of the ICESCR when it urged a state party to extend subsidised health-care system to asylum seekers without discrimination.²¹ This thus made it clear that the scope of article 2(2) also prohibits discrimination against asylum seekers. Other examples are considered later in this paper. The concluding obligations also provide assessment of compliance or non-compliance with the obligations contained in the ICESCR. A number of guiding principles on monitoring progressive realisation of socio-economic rights or ascertaining whether sufficient steps have been taken by the state can be drawn from these concluding observations, as seen subsequently in this paper.

The CESCR has also interpreted the rights in the ICESCR and the nature of the obligations imposed on states in the form of 'general comments', which we too rely on in seeking guidance in relation to monitoring the progressive realisation of socio-economic rights. The general comments of the CESCR have enjoyed a great degree of acceptance by states.²²

¹⁷ CESCR, General Comment No. 1, *Reporting by States Parties*, UN doc. E/1989/22, 24 February 1989, para 1. The reporting obligation is also designed to achieve other objectives that are outlined in the General Comment. Thus reporting is not merely a procedural requirement.

¹⁸ See the Limburg Principles on the Implementation of the ICESCR, UN doc. E/CN.4/1987/17, Annex, para 72; reproduced in (1987) 9 *Human Rights Quarterly* 122–135. See also Economic and Social Council Official Records, Supplement No. 2, *Committee on Economic, Social and Cultural Rights: Report on the Fortieth and Forty-First Session*, UN doc. E/2009/22, 2009, para 39.

¹⁹ Economic and Social Council Official Records, UN doc. E/2009/22, para 41.

²⁰ Economic and Social Council Official Records, UN doc. E/2009/22, para 40. The CESCR has in fact been receiving information from international and national non-governmental organisations on the status of the implementation of the rights in the ICESCR in relation to states that have not submitted any report since ratification and entry into force of the ICESCR or states with long overdue periodic reports (para 45).

²¹ See CESCR, *Concluding Observations on the Third Periodic Report of Italy*, UN doc. E/C.12/1/Add.103, 14 December 2004, para 32.

²² Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 42.

It should be noted that though the concluding observations and general comments of the CESCR are not legally binding, they do carry considerable legal weight. The CESCR is the most authoritative body to determine the scope of the rights and obligations under the ICESCR. Moreover, its approach to interpretation is in line with the general principles of treaty interpretation and the CESCR's work has enjoyed an acceptable degree of legitimacy. States are therefore required to comply with the CESCR's interpretations, based on article 26 of the Vienna Convention on the Law of Treaties, 1969, that requires compliance in good faith with the obligations imposed by a treaty.²³

Similar to the reporting obligation, compliance with the concluding observations of the CESCR depends on political will. Notwithstanding this, with the adoption of the Optional Protocol to the ICESCR, 2008, a complaint can be brought to the CESCR by a state party if it considers that another state party is not fulfilling its obligations under the ICESCR.²⁴ The inter-state communication procedure, however, applies only to states that have, upon ratification, accepted the competence of the CESCR to receive and consider such communications.

It should be noted that with the adoption of the Optional Protocol to the ICESCR, the CESCR would now be able to also monitor states' compliance with their obligations under the ICESCR through the complaints and inquiry procedures. In addition to the inter-state communication procedure, the Protocol establishes an individual communications procedure which allows the CESCR to consider complaints 'submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party'.²⁵ The protocol further empowers the CESCR initiate an inquiry into alleged grave and systematic violations of the socio-economic rights in the ICESCR, based on reliable information it has received in this regard.²⁶

1.2 Socio-economic rights in the South African Constitution

The South African Constitution is characterised by its extensive commitment to socio-economic rights. It enshrines almost all the socio-economic rights protected in the ICESCR and even goes further to incorporate other rights, such as access to water and to a clean and healthy environment, not explicitly stated in the ICESCR.

²³ Sepúlveda (2003) 91-112.

²⁴ Article 10 of the Optional Protocol to the ICESCR. The Protocol will enter into force after 10 ratifications.

²⁵ Article 2 of the Optional Protocol to the ICESCR.

²⁶ Article 11 of the Optional Protocol to the ICESCR. The CESCR does not have to receive a complaint to conduct an inquiry. For further reading on the Optional Protocol, see Lilian Chenwi 'Correcting the Historical Assymetry between Rights: The Optional protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 *African Human Rights Law Journal* 23-51.

The Constitution guarantees the following socio-economic rights: environmental rights; land rights; rights to have access to adequate housing, health care services including reproductive health care, and to sufficient food and water; children's right to basic nutrition, shelter, basic health care services and social services; and right of detained persons, at state expense, to adequate accommodation, nutrition, reading material and medical treatment.²⁷ In addition, the Constitution explicitly requires the state to take action to realise these socio-economic rights.²⁸

Socio-economic rights were included in the Constitution so as to make the Constitution relevant to the majority of South Africans, particularly the previously oppressed.²⁹ This inclusion was thus in recognition of the fact that a lack of access to social and economic resources and services constitutes a major impediment to people's ability to participate as equals in a democracy.³⁰ The socio-economic rights in the Constitution provide people with access to certain basic needs, including resources, opportunities and services necessary for them to live a dignified life.³¹ They are also necessary to guarantee other rights such as civil and political rights,³² based on the indivisibility and interdependence of all human rights.

South African courts, and the Constitutional Court in particular, have played a major role in enforcing socio-economic rights.

Other rights such as the fundamental and non-derogable rights to equality, dignity, and life as well as access rights such as the right to just administrative action have been relevant in enforcing socio-economic rights at the South African level.³³ Hence, similar to the ICESCR, the South African Constitution recognises equality, freedom and dignity as key elements of socio-economic rights.³⁴ Section 39(1)(a) in fact mandates a court, tribunal or forum to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' when interpreting the rights in the Constitution. In *Government of the Republic of South Africa and Others v Grootboom and Others*,³⁵ the Constitutional Court stated as follows in

²⁷ See sections 24 -29 & 35(2)(e) of the Constitution.

²⁸ Section 7(2) of the Constitution.

²⁹ Richard Goldstone 'A South African Perspective on Social and Economic Rights' (2006) 13(2) *Human Rights Brief* 4-7, 4.

³⁰ Sandra Liebenberg, 'Socio-Economic Rights under a Transformative Constitution: The Role of the Academic Community and NGOs' (2007) 8(1) *ESR Review* 3-9, 3.

³¹ Sibonile Khoza, 'Introducing Socio-Economic Rights' in Sibonile Khoza (Ed.) *Socio-Economic Rights in South Africa* (2007) 13-48, 20.

³² Civil and political rights include the rights to life, movement and assembly, a fair trial, vote and freedom of speech.

³³ For further reading on the intersection between equality and socio-economic rights in relation to the South African socio-economic rights jurisprudence, see Sandra Liebenberg, 'Adjudicating Social Rights under a Transformative Constitution' in Malcolm Langford (Ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75-101, 87-89.

³⁴ See section 1 of the Constitution.

³⁵ 2001 (1) SA 46 (CC) [*Grootboom*]. The case concerned a group of people, including children, who had been evicted from a land they occupied illegally and had camped in a sports field for lack of housing.

relation to the importance of dignity, equality and freedom in the realisation of socio-economic rights:

'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'³⁶

In addition, the right to equality has been used to argue for the extension to others of a socio-economic benefit provided to one class in the case of *Khosa v Minister of Social Development*,³⁷ in which the provisions of the Social Assistance Act 59 of 1992 were challenged for excluding people with permanent residence status from accessing social assistance. The Court upheld this challenge on the grounds that the exclusion violated the right to access social assistance and unfairly discriminated against permanent residents in violation of the right to equality, in particular, the right not to be unfairly discriminated against. The case of *Hoffman v South African Airways* is also illustrative of the importance of human dignity and equality as fundamental constitutional values in relation to socio-economic rights.³⁸

Another key feature of the Constitution, in addition to including socio-economic rights as justiciable rights, is the inclusion of an institutional mechanism for monitoring their implementation. The South African Human Rights Commission (SAHRC) is mandated to monitor and assess the progressive realisation of the socio-economic rights in the Constitution.³⁹ The Commission is mandated to require relevant organs of states to provide it, every year, with information on the measures that they have taken towards the realisation of the rights to housing, health care, food, water, social security, education and the environment. Although the respective section of the Constitution omits land rights, the SAHRC has read the section purposively and expansively to include monitoring the measures taken to realise land rights. It should be noted that although the Constitution places a direct obligation on the SAHRC to monitor the implementation of socio-economic rights, it also provides the same but less direct responsibility on other institutions.⁴⁰

³⁶ Grootboom, para 23.

³⁷ 2004 (6) SA 505 (CC) [*Khosa*]. The *Khosa* case concerned a challenge to the provisions of the Social Assistance Act 59 of 1992 for excluding people with permanent residence status from accessing social assistance.

³⁸ 2000 (11) BCLR 1235 (CC). The case concerned the constitutionality of South African Airways' practice of not employing people living with HIV as cabin attendants, which the Court found to be an infringement of the constitutional right not to be unfairly discriminated against. The Court also emphasised the importance of affording special protection to vulnerable and disadvantaged groups in society (see para 28).

³⁹ Section 184(3) of the Constitution.

⁴⁰ Section 184(3) of the Constitution. For example, the Commission on Gender Equality (CGE), arguably, has an implicit obligation to monitor socio-economic rights. Advancing substantive equality, which is the CGE's main objective, cannot be achieved without adopting positive measures to promote access to socio-economic rights and freedoms, especially for the disadvantaged and vulnerable groups. Therefore, the CGE would naturally be expected to monitor progress in ensuring that no one faces discrimination in terms of access to socio-economic rights.

1.3 Objectives of the research

A key question to be answered in monitoring the progressive realisation of socio-economic rights is: how to ascertain whether sufficient and effective steps have been taken to progressively realise socio-economic rights? Based on a review of the general comments and concluding observations of the CESCR as well as other UN documents, and a review of the socio-economic rights jurisprudence of the South African Constitutional Court, this paper aims to:

- Provide an understanding of the socio-economic rights obligations of states;
- Provide an understanding of progressive realisation, how it relates to issues such as resources, minimum core and reasonable plan, and how it can be monitored;
- Identify guiding principles on measuring progressive realisation of socio-economic rights;
- Recommend aspects to be considered in developing a tool for monitoring progressive realisation in the South African context.

1.4 Methodology

Various methodological preconditions for the systematic monitoring of socio-economic rights have been identified. In this regard, the CESCR and the South African Constitutional Court, as well as other human rights bodies and writers have interpreted the concept of progressive realisation and endeavoured to provide guidance in relation to monitoring progressive realisation of socio-economic rights. This research was essentially desktop research, comprising a comprehensive review of the general comments and concluding observations of the CESCR, a review of other relevant UN documents, and a review of the socio-economic rights jurisprudence of the South African Constitutional Court, as well as other writings on the subject.

1.5 Outline of the paper

Section I introduces the research by sketching the broad background to implementation and monitoring of socio-economic rights. It introduces socio-economic rights in international law (particularly the ICESCR) and South African law (particularly the Constitution). It also sets out the key question and objectives of the research and methodology used.

Section II of the paper explains the nature of the socio-economic rights obligations of government under international and South African law. It explains obligations of result and obligations of conduct, obligations of immediate effect and obligations of progressive realisation. The section thus introduces progressive realisation, minimum core, reasonable plan (reasonableness) and resource availability.

Section III expands in detail on what progressive realisation entails and how it relates to resources, minimum core and reasonableness. It first looks at the definition and interpretations of progressive realisation, as provided by the UN CESCR and the

South African Constitutional Court. The section then considers the link between progressive realisation and resources, immediate obligations and reasonableness.

Section IV looks at how progressive realisation can be monitored. It examines existing approaches, typologies or methodologies for measuring progressive realisation, arising from the general comments and concluding observations on state reports of the UN CESCR and the jurisprudence of the South African Constitutional Court. The section also examines, albeit briefly, other methods that have been proposed in writings of academics and others in relation to measuring and monitoring the progressive realisation of socio-economic rights.⁴¹

Section V, based on the discussions in the previous sections, suggests aspects that should be considered in the development of a tool for monitoring progressive realisation of socio-economic rights in the South African context.

Section VI is the conclusion to the paper.

2 The socio-economic rights obligations of government

When states ratify or accede to a treaty, they assume a range of binding obligations. Even where a state has signed but not ratified a treaty, as is the case with South Africa in relation to the ICESCR, the state is obliged to refrain from acts that would defeat the object and purpose of the treaty.⁴² In order to monitor the progressive realisation of socio-economic rights, especially the performance of government, it is important to first understand what government is required to do. A monitoring tool would need to reflect the obligations states have committed themselves to fulfilling.

2.1 Obligation to take steps to achieve the realisation of socio-economic rights

The main provision on the obligations of states parties arising from the ICESCR is article 2(1), which provides 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 undertakings in article 2(1) of the ICESCR have been elaborated upon in general comments of the CESCR, particularly General Comment No. 3.⁴³ States

⁴¹ Seeking guidance from the writings of academics and others is important as it identifies some of the limitations of the existing approaches and proposes approaches that combine aspects in previous methodologies.

⁴² Article 17 of the Vienna Convention on the Law of Treaties, 1969. See also John Dugard, *International Law: A South African Perspective* (2001) 330.

⁴³ CESCR, General Comment No. 3, *The Nature of States Parties Obligations*, UN doc. E/1991/23, 14 December 1990.

have an obligation under article 2(1) to take steps to give effect to the rights in the ICESCR. The steps that states have to take must be taken within a reasonably short period of time after the coming into force of the ICESCR for the state concerned, and must be as deliberate, concrete and targeted as possible towards meeting the state's obligations.⁴⁴

These steps taken must be effective and not of negligible impact, should not take an unreasonable amount of time to create effects, they should be rationally connected with clearly identified ends that are identified in reference to implementing the full scope of the right in question.⁴⁵ Moreover, legislative measures are by no means exhaustive of the obligations on states.⁴⁶ In addition to legislation, states have to adopt other appropriate means. The phrase 'all appropriate means, including particularly the adoption of legislative measures' illustrates that legislative measures are not exhaustive. Other means include the provision of judicial or other effective remedies and financial, administrative, educational and social measures.⁴⁷

A state has the discretion to decide the appropriate means to be taken but final determination of its appropriateness rests with the CESCR.⁴⁸ Accordingly, when reporting to the CESCR on the implementation of the ICESCR, states must not only indicate measures that have been taken but also the *basis* on which they considered the measures to be the most appropriate under the circumstances.⁴⁹ Furthermore, the obligation to take measures is qualified by progressive realisation and availability of resources, which are explained in section III of this paper.

The Constitution of South Africa, similar to article 2(1) of the ICESCR, requires the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of specific socio-economic rights, such as housing, health care, food, water, social security and equitable access to land.⁵⁰ In the *Grootboom* case for instance, the Constitutional Court found the state to be in breach of its obligation to put in place a reasonable programme, subject to available resources, to realise the right of access to adequate housing, based on the fact that the state's housing programme made no provision for people in desperate need. Similar to the ICESCR, the measures to be taken as stipulated in the South African Constitution are not limited to legislative measures. Also, administrative decisions that bear on the realisation of a right, as seen in *Minister of Public Works v*

⁴⁴ CESCR, General Comment No. 3, para 2

⁴⁵ See Malcolm Langford & Jeff A. King, 'Committee on Economic, Social and Cultural Rights' in Malcolm (2008) 477-516, 499.

⁴⁶ CESCR, General Comment No. 3, para 4. See also Limburg Principles, para 18.

⁴⁷ CESCR, General Comment No. 3, paras 5 & 7.

⁴⁸ CESCR, General Comment No. 3, para 4

⁴⁹ CESCR, General Comment No. 3, para 4

⁵⁰ Sections 25(5), 26 & 27 of the Constitution. There is a difference in terminology between the ICESCR and the South African Constitution in relation to resources. While the former uses 'to the maximum of its available resources', the latter uses 'within its available resources'. The implication of this distinction is discussed briefly in section III of this paper.

Kyalami Ridge Environmental Association, must promote its realisation.⁵¹ The Court further held in this case that the obligation includes the need to facilitate access to temporary relief for people who are living in intolerable conditions and for people who are in crisis due to natural disasters.⁵² The Constitutional Court has assessed the state's compliance with this obligation in other cases, as seen subsequently in sections II and IV of this paper.

In addition, states are also under an obligation to ensure that key elements of socio-economic rights, which are not exhaustive, are guaranteed in whatever measures they adopt. These elements include availability, adequacy, accessibility and acceptability, and may vary according to the different rights and conditions. In relation to education, the CESCR also refers to *adaptability*, which requires flexibility in the provision of a right so as to ensure that it responds to the needs of changing societies and communities.⁵³ In relation to housing, the CESCR also looks at components such as *location, habitability* and *legal security of tenure*, among others.⁵⁴

The CESCR considers the above elements when assessing state's compliance with their obligation to progressively realise socio-economic rights; and the South African Constitutional Court has also considered these elements in some of its judgments. The subsequent paragraphs elaborate on the first four components.

Availability requires states to ensure that the necessary goods and services and institutional arrangements needed to enjoy a right are practically available to an individual regardless of how this is achieved. Functioning institutions and programmes for the realisation of a right has to be available in sufficient quantity.⁵⁵ In relation to the right to social security, the CESCR has stated that availability requires that a system, whether composed of a single scheme or a variety of schemes that are sustainable, be available and in place.⁵⁶ Availability thus requires sustainable

⁵¹ 2001 (3) SA 1151 (CC) [*Kyalami Ridge*]. This case was a challenge to the government's decision to house people who had been displaced by severe floods. As a temporary measure, the government wanted to assist the affected people by establishing a transit camp on a state-owned land, with the aim of moving the people to permanent housing once it becomes available. This decision was made without discussions with residents near the area of the transit camp. The residents' association in the vicinity where the flood victims were to be housed challenged the government's plan on the ground that it was not supported by legislation, it contravened a town planning scheme, land and environmental legislation, and infringed their constitutional right to just administrative action and to certain environmental rights. The Constitutional Court found the government's decision to be lawful, as it was intended to give effect to its constitutional obligation to take reasonable legislative and other measures aimed at the progressive realisation of rights.

⁵² *Kyalami Ridge*, paras 38-40. See also the discussion in section III of this paper on reasonable plan and progressive realisation for other cases that emphasise this point.

⁵³ CESCR, General Comment No. 13, para 6(d).

⁵⁴ CESCR, General Comment No. 4, para 8.

⁵⁵ CESCR, General Comment No. 13, *The Right to Education*, UN doc. E/C.12/1999/10, 8 December 1999, para 6(a).

⁵⁶ CESCR, General Comment No. 19, *The Right to Social Security*, UN doc. E/C.12/GC/19, 4 February 2008, para 11.

access.⁵⁷ In relation to water, for instance, the CESCR has stated that availability requires that '[t]he water supply for each person must be sufficient and continuous for personal and domestic uses', which includes drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. In addition, health, climate and work condition might necessitate the provision of additional water for certain groups and individuals.⁵⁸

Adequacy requires that the goods and services provided to the individual are sufficient to meet all the requirements of the right. For instance, social security benefits must be adequate in amount and duration and should be monitored regularly to ensure that beneficiaries are able to afford goods and services they require to realise their rights.⁵⁹ In its Concluding Observations on the initial to third periodic report of Angola, the CESCR expressed concern over the fact that the amount of social security benefits does not enable workers and other families to enjoy an adequate standard of living. It then requested the state to progressively increase the amounts of social security benefits.⁶⁰ It should be noted that adequacy of socio-economic goods or services would depend on the specific context taking into consideration the needs and opportunities for enjoyment of a right. In ascertaining what is adequate, the CESCR has observed that '[t]he precise meaning of "adequacy" is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions'.⁶¹ Adequacy is also linked to sustainability, which 'incorporates the notion of long-term availability and accessibility'.⁶²

Accessibility relates to both physical and economic accessibility especially for vulnerable and disadvantaged groups. Economic accessibility of a right should not be at the detriment of the enjoyment of other rights.⁶³ The right must thus be affordable. In relation to accessibility as well as adequacy, the CESCR has raised concerns in its concluding observations about the inadequacy of social housing for low-income groups and the unaffordability of housing due to high rents in relation to its monitoring of France,⁶⁴ the inadequacy of education measures and social security and the lack of accessibility to safe water in relation to Cameroon,⁶⁵ the lack of accessible and appropriate mechanisms to guarantee access by all workers to social

⁵⁷ See also, CESCR, General Comment No. 4, *The Right to Adequate Housing*, UN doc. E/1992/23, 13 December 1991, para 8(b).

⁵⁸ CESCR, General Comment No. 15, *The Right to Water*, UN doc. E/C.12/2002/11, 20 January 2003, para 12.

⁵⁹ CESCR, General Comment No. 19, para 22 & General Comment No. 13, para 6(b).

⁶⁰ CESCR, *Concluding Observations on the Initial to Third Periodic Report of Angola*, UN doc. E/C.12/AGO/CO/3, 1 December 2008, para 23.

⁶¹ CESCR, General Comment No. 12, *The Right to Adequate Food*, UN doc. E/C.12/1999/5, 12 May 1999, para 7.

⁶² CESCR, General Comment No. 12, para 7.

⁶³ See also CESCR, General Comment No. 4, para 8(c).

⁶⁴ CESCR, *Concluding Observations on the Third Periodic Report of France*, UN doc. E/C.12/FRA/CO/3, 9 June 2008, para 23.

⁶⁵ CESCR, *Concluding Observations on the Initial Report of Cameroon*, UN doc. E/C.12/1/Add.40, 8 December 1999, paras 15, 21 & 22.

security benefits in the case of Nicaragua,⁶⁶ and the poor location of housing and the need to provide culturally acceptable housing in relation to Kosovo.⁶⁷

In addition, in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*, the South African Constitutional Court stated that the right to health care services includes the right of access to medicines that are affordable, thus placing an obligation on the state to promote access to medicines that are affordable and of good quality. The Court added that 'there can be no adequate access to medicines if they are not within one's means'.⁶⁸ Accessibility in relation to the right to health requires regulating not just public but also private provisioning of health services in order to ensure that they are based on the principle of equity, are affordable for all, including poor households and socially disadvantaged groups.⁶⁹

Also, in relation to availability and accessibility, the South African Constitutional Court stated with reference to international law in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*,⁷⁰ that the content of the right to food comprises these two elements. It stated that availability 'refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally'. The Court also noted that it further 'requires the existence of opportunities for individuals to produce food for their own use'. Accessibility 'requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use'.

The Court then stated that there is an overlap between the state's obligation to take reasonable measures within its available resources in order to facilitate access to land on an equitable basis in section 25(5) of the Constitution and its obligation to protect the environment in section 24 of the Constitution. It stated that excessive fragmentation of agricultural land may result in an 'inadequate availability' of food.⁷¹ Drawing from this decision, government would therefore be in breach of its obligation to progressively realise the right to food if it fails to facilitate, or takes any measures that limit, the availability and accessibility of food.

In *Mazibuko and Others v City of Johannesburg and Others*,⁷² the Court dealt with the sufficiency of free basic water, which is a component of the element of

⁶⁶ CESCR, *Concluding Observations on the Second, Third and Fourth Periodic Reports of Nicaragua*, UN doc. E/C.12/NIC/CO/4, 28 November 2008, para 19.

⁶⁷ CESCR, *Concluding Observations on the Document Submitted by the United Nations Interim Administration Mission in Kosovo*, UN doc. E/C.12/UNK/CO/1, 1 December 2008, para 29.

⁶⁸ 2006 (8) BCLR 872 (CC), paras 514, 704 & 706 [*New Clicks*]. This case challenged the validity of regulations made by the Minister of Health to give effect to a pricing system for the sale of medicines.

⁶⁹ See *New Clicks*, paras 515, 706 & 781; and CESCR, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, UN doc. E/C.12/2000/4, 11 August 2000, para 12(b).

⁷⁰ 2008 (11) BCLR 1123 (CC) [*Wary Holdings*]. This case, however, did not focus on the right to food *per se* as it was an appeal against a Supreme Court Appeal judgment concerning a proviso added to the definition of agricultural land as contained in the Subdivision of Agriculture Land Act 70 of 1970.

⁷¹ *Wary Holdings*, para 85.

⁷² 2010 (3) BCLR 239 (CC) [*Mazibuko*], paras 40 & 67. The case also concerned the constitutionality of pre-paid water metres.

availability, as well as accessibility of water in terms of non-discrimination.⁷³ In *Minister of Health and Others v Treatment Action Campaign*,⁷⁴ the Court dealt with the availability of the ARV drug, Nevirapine, in the public health sector and physical accessibility of testing and counselling facilities.

A third dimension of accessibility is non-discrimination.⁷⁵ This means that the right must be accessible to everyone without discrimination. The South African Constitutional Court case of *Minister of Education v Harris*⁷⁶ is illustrative in this regard. The case was a challenge to a notice by the Minister of Education which stated that a learner may only be admitted to grade one at an independent school if he or she turns seven in the course of that calendar year. It was challenged on the grounds of discrimination on the basis of age. The Constitutional Court found it best to decide the case on whether the Minister had the power under the National Education Policy Act 27 of 1996 to issue the notice that he did and not on the broad constitutional questions raised. It then held that the Act only gave the Minister power to determine policy and not to impose binding law.⁷⁷

An important point to note is that accessibility also requires that beneficiaries are able to *participate in the administration of a measure* aimed at realisation of a right. This must also ensure the right of individuals and organisations to seek, receive, and impart information on the entitlements in a clear and transparent manner.⁷⁸

Acceptability requires that the manner in which socio-economic rights are provided respects societal and cultural norms that are consistent with human rights.⁷⁹ In General Comment No. 13, the CESCR stated in relation to education that acceptability implies that 'the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents'.⁸⁰ The system of education must also protect the rights of learners on issues such as discipline of learners, language rights and parental choice.⁸¹ Where societal or cultural norms are inconsistent with human rights, a restriction of those norms would be permissible. For example, in *Christian Education South Africa v Minister of Education*, the South

⁷³ In General Comment No. 15, the CESCR defined availability to mean that water supply for each person must be sufficient and continuous for personal and domestic uses, and identified non-discrimination as one of the dimensions of accessibility. See CESCR, General Comment No. 15, para 12.

⁷⁴ 2002 (5) SA 721 (CC) [TAC]. The TAC case concerned a challenge to the state's policy on the prevention of mother-to-child transmission of HIV, which was challenged as inconsistent with the right to have access to health care services.

⁷⁵ CESCR, General Comment No. 13, para 6(b).

⁷⁶ 2001 (11) BCLR 1157 (CC) [Harris].

⁷⁷ Harris, para 11.

⁷⁸ CESCR, General Comment No. 19, para 26.

⁷⁹ CESCR, General Comment No. 4, para 8(g).

⁸⁰ CESCR, General Comment No. 13, para 6(c).

⁸¹ See Faranaaz Veriava & Fons Coomans, 'The Right to Education' in Danie Brand & Christof Heyns (Eds.) *Socio-Economic Rights in South Africa* (2005) 57-83, 71.

African Constitutional Court found the ban on corporal punishment, though a restriction on the ability of parents to practice their religion and culture, to be justifiable on the basis that it was inconsistent with values underlying the Bill of Rights such as human dignity, freedom and equality.⁸²

2.2 Obligations of conduct and of result

In General Comment No. 3, the CESCR stated that the ICESCR includes both obligations of conduct and obligations of result.⁸³ Obligations of conduct require states to take or refrain from taking certain legislative, executive, judicial or other measures. Obligations of result, on the other hand, require a state to achieve a specified result through a means chosen by the state.⁸⁴ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, explains the obligations of conduct and of result as follows:

'The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.'⁸⁵

The CESCR observed further in General Comment No. 3 that the principal obligation of result reflected in article 2(1) of the ICESCR is the obligation to take steps 'with a view to achieving progressively the full realisation of the rights recognized' in the ICESCR.⁸⁶ It should be noted that the obligation to 'take steps' in itself is an obligation of conduct.

It should be noted further that the obligations of conduct and obligations of result contain elements of *progressive realisation* and obligations of *immediate effect*.⁸⁷ The obligations to respect, protect and fulfil, discussed below, also contain elements of obligation of conduct and obligation of result. Furthermore, there is a link between obligations of conduct and the adoption of a reasonable plan, also discussed below, as the former requires action that is reasonably calculated to realise the enjoyment of a particular right. Despite the CESCR's use or assertion of both obligations of

⁸² 2000 (10) BCLR 1051 (CC) [*Christian Education*]. The case was a challenge to the ban of corporal punishment in the South African Schools Act 84 of 1996.

⁸³ CESCR, General Comment No. 3, para 1.

⁸⁴ Sepúlveda (2003) 185-186.

⁸⁵ Maastricht Guidelines, para 7. The guidelines are reproduced in (1998) 20 *Human Rights Quarterly* 691-705.

⁸⁶ CESCR, General Comment No. 3, para 9.

⁸⁷ Fukuda-Parr, Lawson-Remer & Randolph have observed that obligations of result include progressive realisation and non-retrogression, and elimination of discrimination and equal protection of the rights of all; and obligations of conduct include undertaking policies to achieve the obligations of result, and applying principles of participation in decision making. See Fukuda-Parr, Lawson-Remer & Randolph (2008) 6.

conduct and of result in General Comment No. 3, it has not developed the typology further nor incorporated it in subsequent general comments.

2.3 Obligations of progressive realisation and of immediate effect

The CESCR observed in General Comment No. 3 that the ICESCR imposes obligations of progressive realisation and obligations of immediacy (or minimum core obligations).⁸⁸ This typology of obligations has been referred to in various general comments. The obligations of immediate effect include the ‘undertaking to guarantee’ that the rights in the ICESCR ‘will be exercised without discrimination of any kind’⁸⁹ and the obligation ‘to take steps’⁹⁰ that is not qualified or limited by other considerations. The obligations of progressive realisation and obligations of immediate effect are considered in detail in section III below.

2.4 Obligations to respect, protect, promote and fulfil

Compliance with the socio-economic rights obligations is generally dependent on the availability of resources, except for obligations that are of immediate effect as explained in section III below. Consequently, a distinction is often made between negative and positive obligations. The obligation to respect is classified as a negative obligation and the obligations to protect, promote and fulfil are classified as positive obligations. Negative obligations are often seen as abstention-bound and resource barren. For instance, in General Comment No. 7, the CESCR stated that the state’s obligation to ensure respect for the rights to be protected against arbitrary or unlawful interference with one’s home is not qualified by considerations relating to its availability of resources.⁹¹ Positive obligations, on the other hand, are fulfilment-bound and resource-dependent. However, it should be noted that the enforcement of both negative and positive obligations have resource consequences. For instance, the element of the obligation to respect relating to mitigating the impact of interference in the exercise of a socio-economic right often requires significant resources and adjustments in policy.

The CESCR has also employed the typology of *respect, protect and fulfil*. In General Comment No.12 on the right to food, the CESCR explained that human rights impose three levels of obligations – respect, protect and fulfil;⁹² and the latter obligation further incorporates obligations to *facilitate* and to *provide*.⁹³ In its subsequent General Comment No. 13 on the right to education, the CESCR maintained the same approach, stating that ‘[s]tates have an obligation to respect, protect and fulfil each of the “essential features” (availability, accessibility,

⁸⁸ CESCR, General Comment No. 3, para 1.

⁸⁹ Article 2(2) of the ICESCR.

⁹⁰ Article 2(1) of the ICESCR.

⁹¹ CESCR, General Comment No. 7, para 8.

⁹² Sepúlveda has explained what these obligations mean, drawing from the general comments of the CESCR. See Sepúlveda (2003) 197-200.

⁹³ CESCR, General Comment No. 12, para 15.

acceptability, adaptability) of the right to education'.⁹⁴ In General Comment No. 14 on the right to the highest standard of health,⁹⁵ General Comment No. 16 on the equal right of men and women in the enjoyment of socio-economic rights,⁹⁶ and General Comment No. 19 on the right to social security,⁹⁷ the CESCR added a third sub-obligation to the obligation to fulfil, that is, the obligation to promote.

The *obligation to respect* requires states to desist from taking any measures that result in the denial or limitation of access to the enjoyment of specific rights. The adoption of laws or policies that are contrary to the standards in the ICESCR, other international standards or domestic law or that enforce discriminatory practices would be a contravention of this obligation. The *obligation to protect* requires states to take all measures that are necessary to ensure that individuals are protected from violations of their rights by third parties. The *obligation to fulfil* requires the state to adopt reasonable legislative, administrative, budgetary, judicial, promotional and other measures within its available resources to achieve the progressive realisation of socio-economic rights. The CESCR has interpreted this obligation to incorporate the obligations to *facilitate*, *provide* and *promote*. At the South African level, the obligation to *promote* is not stated as a subset of the obligation to fulfil, but as a distinct obligation.

The *obligation to facilitate* requires a state to pro-actively engage in activities intended to enable and assist individuals and communities to enjoy their socio-economic rights. The *obligation to provide* requires a state to provide a specific socio-economic right to individuals or groups who are unable, for reasons beyond their control, to realise that right by the means at their disposal. However, in General Comment No. 13, the CESCR made it clear that there might be instances where there is an obligation to provide even when people have the means to satisfy the obligation themselves such as in the case of primary education.⁹⁸ The *obligation to promote* requires states to undertake a variety of different actions, **including research on socio-economic rights, provision of information on socio-economic rights to individuals, and support to people in making informed choices about enjoyment of these rights.** This obligation also requires the state to raise awareness of socio-economic rights and the mechanisms of enforcement, and to create an enabling environment that will advance their realisation.

The South African Constitution employs the typologies of respect, protect, promote and fulfil.⁹⁹ Section 7(2) of the Constitution provides that '[t]he state must respect,

⁹⁴ CESCR, General Comment No. 13, para 50.

⁹⁵ CESCR, General Comment No. 14, para 33.

⁹⁶ CESCR, General Comment No. 16, *The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN doc. E/C.12/2005/4, 11 August 2005, paras 17.

⁹⁷ CESCR, General Comment No. 19, para 47.

⁹⁸ CESCR, General Comment No. 13, paras 47-48.

⁹⁹ The African Commission on Human and Peoples' Rights, the supervisory body of the African Charter has also referred to the obligations to respect, protect, promote and fulfil when enforcing socio-economic rights. See *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No. 155/96, 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003), paras 45-47 [SERAC].

protect, promote and fulfil the rights in the Bill of Rights'. The interpretation of these obligations at the South African level is similar to that at the international level.¹⁰⁰ For instance, the obligation to respect implies that the state must not limit or take away people's existing access to a right without good reason and without following proper procedure; and where limitation is unavoidable, the state must take steps to mitigate the interference, such as providing alternative accommodation in the context of an eviction.

Thus, in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*,¹⁰¹ the Constitutional Court found provisions of the Magistrates' Courts Act 32 of 1944 that allowed for the sale of execution of a person's home to satisfy a judgment debt, without adequate judicial oversight, to amount to a breach of the duty to respect the right to have access to adequate housing. Also, in *Port Elizabeth Municipality v Various Occupiers*,¹⁰² the Constitutional Court dealt with mitigating the impact of interference in the exercise of the right to have access to adequate housing in the context of an eviction. The Court denied the eviction order based on the lack of a reasonable alternative land upon eviction.¹⁰³ The case of *Mashava v President of the Republic of South Africa* also illustrates that the state would be in violation of the duty to respect if it makes it impossible for people to gain access - or fails to enhance their existing access - to a socio-economic right.¹⁰⁴

3 Understanding progressive realisation

3.1 Defining progressive realisation

The term 'progressive realisation' has been defined by the CESCR in its General Comment No. 3. The CESCR stated as follows:

'The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one

¹⁰⁰ See Danie Brand, 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand & Heyns (2005) 1-56, 9-10.

¹⁰¹ 2005 (1) BCLR 78 (CC) [*Jaftha*]. The case concerned a challenge to the constitutionality of the Magistrates' Court Act that permitted the sale in execution of people's homes in order to satisfy debts.

¹⁰² 2004 (12) BCLR 1268 (CC) [*PE Municipality*]. The case involved an eviction application by the state (in particular, Port Elizabeth Municipality) against people, including children, who had illegally occupied private undeveloped land within the Municipality's jurisdiction

¹⁰³ See also *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC) [*Modderklip*], concerning a private land owner's efforts to execute an eviction order granted against unlawful occupiers who, as a result of overcrowding and shortage on land near their informal settlement, illegally moved onto his land.

¹⁰⁴ 2004 (12) BCLR 1243 (CC). The case concerned the inability of the provincial government to properly administer social grants, which impaired access to social assistance.

hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.¹⁰⁵

Progressive realisation thus introduces an element of some flexibility in terms of the obligations of states. In a nutshell, the phrase recognises that the full realisation of socio-economic rights would not generally be achieved in a short period of time. The obligation it therefore imposes on states is an obligation to move as *expeditiously and effectively* as possible towards full realisation.¹⁰⁶

Notwithstanding, progressive realisation does include some tangible obligations on states. As stated in the previous section, the CESCR has observed that steps towards progressive realisation 'must be taken within a reasonably short time' after the entry into force of the ICESCR for the state concerned. In relation to the right to education, however, there is less flexibility in terms of progressive realisation. States have an obligation to adopt a plan of action 'within a reasonable number of years' and the timeframe must 'be fixed in the plan'. Hence, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.¹⁰⁷

Progressive realisation also implies that deliberate retrogressive measures are not permissible and have to be fully justified by reference to totality of rights. In this regard, the CESCR has stated that there is a strong presumption of impermissibility of any retrogressive measures taken in relation to rights such as education and water; retrogressive measures should in principle not be taken in relation to the right to work; and any retrogressive measures would have to be fully justified.¹⁰⁸ In relation to the right to social security, the CESCR has listed a number of issues it would consider when retrogressive social security measures are being justified:

- Whether there was reasonable justification for the action;
- Whether alternatives were comprehensively examined;
- Whether there was genuine participation of affected groups in examining the proposed measures and alternatives;
- Whether the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security

¹⁰⁵ CESCR, General Comment No. 3, para 9.

¹⁰⁶ See also CESCR, General Comment No. 13, para 44; General Comment No. 18, *The Right to Work*, UN doc. E/C.12/GC/18, 6 February 2006, para 20.

¹⁰⁷ CESCR, General Comment No. 11, *Plans of Action for Primary Education*, UN doc. E/C.12/1999/4, 10 May 1999, para 10.

¹⁰⁸ CESCR, General Comment No. 13, para 45; General Comment No. 15, para 19; and General Comment No. 18, para 21.

rights or whether an individual or group is deprived of access to the minimum essential level of social security;

- Whether there was an independent review of the measures at the national level.¹⁰⁹

In relation to justifying retrogressive measures, Liebenberg states that such measures may be justifiable where, for example, a state can show that the retrogressive measures are necessary to achieve equity in the realisation of the right or a more sustainable basis for adequate realisation of the rights. She however cautions that where retrogressive measures result in depriving marginalised and vulnerable groups of access to basic social services, weighty justifications should be required.¹¹⁰

The CESCR has further interpreted progressive realisation in other general comments. For example, in relation to the right to education, with reference to General Comment No. 3, the CESCR stated that progressive realisation of this right means that states have a specific and continuous obligation to move as expeditiously and effectively as possible towards its full realisation.¹¹¹ The CESCR observed further that progressive introduction of free education implies that states must not only *prioritise* the provision of *free primary education* but must also take concrete steps towards achieving *free secondary and higher education*.¹¹²

Progressive realisation thus goes beyond achieving the minimum essential levels of a right. In addition, progressive realisation of the right to social security requires that a state has a comprehensive social security system in place and carries out regular reviews of it to ensure that it is consistent with the right to social security.¹¹³

Furthermore, in relation to vulnerable and disadvantaged groups, progressive realisation of the rights of these groups requires that states do more than abstain from taking measures that might have a negative impact on the enjoyment of their rights. The obligation on the state is to take **positive action to reduce structural inequality** and to give appropriate preferential treatment to vulnerable and marginalised groups. Positive action includes specially tailored measures or additional resource allocation for these groups.¹¹⁴

The Limburg Principles on the Implementation of the ICESCR also contain important points on progressive realisation. It states that progressive realisation cannot be interpreted under any circumstance to imply for states the right to defer indefinitely efforts to ensure full realisation. States are required to begin immediately to take

¹⁰⁹ CESCR, General Comment No. 19, para 42.

¹¹⁰ Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 190.

¹¹¹ CESCR, General Comment No. 13, para 44.

¹¹² CESCR, General Comment No. 13, para 14.

¹¹³ CESCR, General Comment No. 19, para 68.

¹¹⁴ See CESCR, General Comment No. 5, *Persons with Disabilities*, UN doc. E/1995/22, 9 December 1994, para 9.

steps to fulfil their obligations under the Covenant.¹¹⁵ As provided in the Maastricht Guidelines, the burden is on the state to show that it is making measurable progress towards the full realisation of socio-economic rights. The state cannot use 'progressive realisation' as a pretext for non-compliance nor justify derogations or limitations of rights on different social, religious and cultural backgrounds.¹¹⁶

The Constitutional Court of South Africa has endorsed the CESCR's understanding of the phrase 'progressive realisation'. With reference to General Comment No. 3, the Constitutional Court stated in the *Grootboom* case that the term bears the same meaning in the South African Constitution. In the words of the Court:

'Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.'¹¹⁷

Similar to the CESCR, the Constitutional Court observed in the *Grootboom* case that the term 'progressive realisation' means that the right could not be realised immediately. It however means that the state must take steps to achieve the goal of the Constitution, which is that 'the basic needs of all in our society be effectively met'. The Court added that progressive realisation means that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time'. Also, the right must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.¹¹⁸ Progressive realisation as seen in the *New Clicks* case also requires that the state 'must accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation'.¹¹⁹ The use of the phrase in the South African Constitution therefore does not mean that the state can drag its feet in meeting its obligations or providing the necessary measures to realise socio-economic rights. Even where people already have access to socio-economic rights, progressive realisation places a duty on the state to improve the nature and the quality of the services to which people have access.¹²⁰

In the *Modderklip* case, the Court held in relation to the right to adequate housing that '[t]he progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital.'¹²¹ Progressive realisation also requires that measures adopted must be flexible so as to adapt to

¹¹⁵ Limburg Principles, para 21.

¹¹⁶ Maastricht Guidelines, para 8.

¹¹⁷ *Grootboom*, para 45.

¹¹⁸ *Ibid.*

¹¹⁹ *New Clicks*, para 705.

¹²⁰ Liebenberg (2010) 188.

¹²¹ *Modderklip*, para 49.

changing situations.¹²² In addition, in relation to the right to housing, Bilchitz has observed that ‘progressive realization involves an improvement in the adequacy of housing for the meeting of human interests ... it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time’.¹²³

In the *Mazibuko* case, the Constitutional Court stated that ‘[t]he concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved’.¹²⁴ The Court was therefore of the view that the revision of policies over the years is consistent with obligation to ensure progressive realisation of rights.¹²⁵ This is in line with the CESCR’s view in its general comments, for instance on social security mentioned earlier, and in its concluding observations. Thus it has requested Senegal to ‘undertake a systemic and comprehensive review of its relevant legislation, administrative policies and procedures’ to ensure compliance with the guidelines of the CESCR on the right to housing and evictions,¹²⁶ and the Committee asked the Philippines ‘to undertake, as a matter of priority, a comprehensive review of its legislation’ so as to ensure equality between men and women.¹²⁷

The Constitutional Court in *Mazibuko* was also of the view that progressive realisation requires increasing access to a right on a progressive basis, especially for the poor and disadvantaged groups.¹²⁸ The Court noted in this case that the municipality had continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city of Johannesburg. Accordingly, the Court held that the policy measure was flexible.¹²⁹ Thus, **progressive realisation requires that access be continuously broadened and policy measures should be flexible**. The Court stated further that ‘[a] policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.’¹³⁰ The Court found the continual revision of the policy in question in the ensuing years to have improved

¹²² *Modderklip*, para 49.

¹²³ David Bilchitz, *Poverty Reduction and Fundamental Rights: The justification and Enforcement of Socio-Economic Rights* (2007) 193.

¹²⁴ *Mazibuko*, paras 40 & 67.

¹²⁵ *Mazibuko*, paras 40, 67, 162 & 163.

¹²⁶ CESCR, *Concluding Observations on the Second Periodic Report of Senegal*, UN doc. E/C.12/1/Add.62, 24 September 2001, para 52.

¹²⁷ CESCR, *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Philippines*, UN doc. E/C.12/PHL/CO/4, 1 December 2008, para 18.

¹²⁸ *Mazibuko*, para 97.

¹²⁹ *Ibid.*

¹³⁰ *Mazibuko*, para 162.

the policy in a manner entirely consistent with an obligation of progressive realisation.¹³¹

3.2 Resources and progressive realisation

In taking concrete and targeted steps to achieve the progressive realisation of socio-economic rights, states have to take full advantage of their available resources to ensure that socio-economic rights are fully realised without discrimination of any kind. The pace at which socio-economic rights are progressively realised therefore depends on the resource availability to a state. However, a state cannot escape the obligation to adopt a plan of action on the grounds that the necessary resources are not available.¹³²

‘Available resources’ refers to the resources both within a state and those available through international assistance and co-operation.¹³³ The obligation to use the maximum of available resources entitles a state to receive resources offered by the international community.¹³⁴ Failure to do so would amount to a violation of this obligation. Where international cooperation aid is provided to a state, as seen from the CESCR’s Concluding Observation on the combined second to fourth periodic reports of the Democratic Republic of the Congo (DRC), a sustainable institutional framework on the use of such aid must be adopted. Failing which, the state would be in breach of its obligation to take steps to the maximum of its resources towards the progressive realisation of socio-economic rights. Also, development aid must be allocated to priority sectors and a state must ensure that it uses such aid for the progressive realisation of rights.¹³⁵ Furthermore, resources are also not limited to financial or human resources; information and technology, for example, are also resources essential in fulfilling most of the rights in the ICESCR.¹³⁶ In addition, progressive realisation and resource availability, as Felner has observed, implies that some states’ obligations under the ICESCR may vary from one state to another. Also that in relation to the same state, some obligations may vary over time.¹³⁷

The Limburg Principles provide that the obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.¹³⁸ Also, progressive realisation can be affected not only by increase in

¹³¹ *Mazibuko*, para 163.

¹³² CESCR, General Comment No. 11, para 9.

¹³³ CESCR, General Comment No. 3, para 13; Limburg Principles, para 26.

¹³⁴ CESCR, *An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant*, UN doc. E/C.12/2007/1, 10 May 2007, para 5.

¹³⁵ CESCR, *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo*, UN doc. E/C.12/COD/CO/4, 16 December 2009, paras 16 & 29.

¹³⁶ See Robert E. Robertson, ‘Measuring State Compliance with the Obligation to Devote the Maximum Available Resources’ to the Realizing Economic, Social, and Cultural Rights’ (1994) 16(4) *Human Rights Quarterly* 693-714, 695-697.

¹³⁷ Eitan Felner ‘Closing the “Escape Hatch”: A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights’ (2009) 1(3) *Journal of Human Rights Practice* 402-435, 406.

¹³⁸ Limburg Principles, para 23.

resources but also the development of societal resources necessary for the realisation of rights.¹³⁹ Attention is paid to equitable and effective use of and access to the available resources in determining whether adequate measures have been taken for the realisation of the rights in the ICESCR.¹⁴⁰ The Limburg Principles further state that '[i]n the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services'.¹⁴¹

In General Comment No. 3, the CESCR emphasised that even where the available resources are demonstrably inadequate, the obligation remains for a state to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.¹⁴² The CESCR added that even in times of severe resource constraints, vulnerable members of society must be protected by the adoption of relatively low cost programmes.¹⁴³ The CESCR further stated that 'the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints'.¹⁴⁴

Resource constraints alone cannot justify inaction.¹⁴⁵ In its Concluding Observations on DRC, while recognising the difficulties faced by the state, the CESCR stated that 'budgetary constraints should not be invoked as the only justification for the lack of progress towards the establishment of a social security system'.¹⁴⁶ The essential needs of members of vulnerable and disadvantaged groups must thus be prioritised in all resource allocation processes.¹⁴⁷ In this regard, in relation to the right to social security, the CESCR has stated that even where there is limited capacity to finance social security, it is important for social security schemes to cover disadvantaged and marginalised groups. Low-cost and alternative schemes could be developed to cover immediately those without access. Policies and legislative frameworks could be adopted for the progressive inclusion of those in informal economy or who are otherwise excluded from social security.¹⁴⁸

The CESCR has also in its concluding observations on reports of Angola and Chad, requested the states to allocate sufficient budgetary resources to ensure the

¹³⁹ Limburg Principles, para 24.

¹⁴⁰ Limburg Principles, para 27.

¹⁴¹ Limburg Principles, para 28.

¹⁴² CESCR, General Comment No. 3, para 11.

¹⁴³ CESCR, General Comment No. 3, para 12.

¹⁴⁴ CESCR, General Comment No. 3, para 11.

¹⁴⁵ CESCR, UN doc. E/C.12/2007/1, para 4.

¹⁴⁶ CESCR, UN doc. E/C.12/COD/CO/4, para 24.

¹⁴⁷ See CESCR, General Comment No. 3, para 10; General Comment No. 14, paras 43-47; General Comment No. 15, paras 37-38; Limburg Principles, paras 25-28; Maastricht Guidelines, paras 9-10.

¹⁴⁸ CESCR, General Comment No. 19, para 51.

implementation of a comprehensive housing plan and policies especially for low-income groups and marginalised individuals and groups.¹⁴⁹ It has also requested Cambodia to ensure that the maximum available resources are allocated to the protection and fulfilment of socio-economic rights, especially to the most vulnerable and marginalised individuals and groups.¹⁵⁰

As mentioned above and subsequently, any retrogressive step is a violation of a state's obligation to progressively realise socio-economic rights. It is important to note that any tax reform, even in times of economic crisis, should not be regressive by nature and effect. For instance, general tax cuts (as opposed to targeted tax relief at the poor and low-income workers for instance) could be seen as regressive if it discriminates or pulls resources away from fulfilling socio-economic rights. Tax reductions, especially for the wealthy, results in the rich generally benefitting proportionately more than the poor and also results in a decrease in a government's resources available to realise rights. Also, general fiscal reforms aimed at increasing the tax base across the board might also have negative human rights impacts, especially if regressive in nature.¹⁵¹

The prohibition of retrogression is an immediate obligation not subject to the availability of resources; and any retrogression, as stated above, have to be fully justified not only with reference to the totality of rights but also with reference to the full use of available resources. The CESCR has stated that if a state uses resource constraints as an explanation for retrogressive steps, such information would be assessed taking into consideration a number of criteria including:

- (a) the country's level of development;
- (b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
- (c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession;
- (d) the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
- (e) whether the State party had sought to identify low-cost options; and
- (f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purpose of implementing the provisions of the Covenant without sufficient reason.¹⁵²

Unlike the ICESCR which uses the phrase 'to the maximum of its available resources', the South African Constitution employs the phrase 'within available resources', which implies that the obligation placed on the state does not require

¹⁴⁹ CESCR, UN doc. E/C.12/AGO/CO/3, para 30; CESCR, *Concluding Observations on the Combined Initial and Second and Third Periodic Reports of Chad*, UN doc. E/C.12/TCD/CO/3, 16 December 2009, para 27.

¹⁵⁰ CESCR, *Concluding Observations on the Combined Initial and Second to Fourth Periodic Reports of Cambodia*, UN doc. E/C.12/KHM/CO/1, 12 June 2009, para 38.

¹⁵¹ See generally, Aldo Caliarì et al. *Bringing Human Rights to Bear in Times of Crisis: A human rights analysis of government responses to the economic crisis* (2010). A Report Submitted to the High-Level Segment of 13th Session of the United Nations Human Rights Council. Available at http://www.escr-net.org/usr_doc/HRResponsestoEconCrisis_Final.pdf (accessed 11 June 2010).

¹⁵² CESCR, UN doc. E/C.12/2007/1, para 10.

more than its available resources. McLean notes that the phrase as used in the South African Constitution could refer to the resources that the state has made available or all resources that are potentially available to meet the state's obligations; and adds that the latter would require an assessment by the courts as to whether the state has made suitable budgetary allocation to realise the right in question.¹⁵³ Mbazira has however pointed out, and quite correctly so, that the differences in the phrase as used in the ICESCR and in the South African Constitution is at best nomenclature.¹⁵⁴ Notwithstanding, an understanding of the phrase is crucial to monitoring progressive realisation of socio-economic rights in South Africa.

In *Soobramoney v Minister of Health (KwaZulu Natal)*,¹⁵⁵ the Constitutional Court held that the obligations imposed on the state to progressively realise the right to have access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.¹⁵⁶ This therefore implied that an unqualified obligation to meet these needs would not presently be capable of being fulfilled, as one of the limiting factors to the attainment of the rights guaranteed in the Constitution is that of limited or scarce resources.¹⁵⁷

In addition, in the *Grootboom* case, the Constitutional Court stated that the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.¹⁵⁸ In the *TAC* case, the Court held that the obligation does not require the state to do more than is achievable within its available resources or to realise the rights immediately.¹⁵⁹

The *Khosa* case illustrates that in the absence of clear evidence to show that additional cost of providing a right to an excluded group (in this case permanent residents), a state cannot rely on resource constraints as an excuse for not realising the right of that group.¹⁶⁰ The Court was also of the view that the importance of realising the rights of permanent residents outweighed the financial considerations the state relied on; this is because a denial impacts on their life and dignity.¹⁶¹

¹⁵³ Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 195.

¹⁵⁴ Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 91.

¹⁵⁵ 1998 (1) SA 765 (CC) [*Soobramoney*]. This case concerned a challenge to the resource rationing policy of a state hospital, according to which Soobramoney, who suffered from chronic renal failure, was excluded from a renal dialysis treatment programme due to his general state of health and the fact that his condition was irreversible.

¹⁵⁶ *Soobramoney*, para 11.

¹⁵⁷ *Soobramoney*, paras 11 & 43.

¹⁵⁸ *Grootboom*, para 46.

¹⁵⁹ *TAC*, paras 32.

¹⁶⁰ *Khosa*, para 62.

¹⁶¹ *Khosa*, para 82.

In *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*¹⁶² the Constitutional Court stated that the state cannot go beyond the extent to which available resources allow, in the realisation of rights.¹⁶³ It however added that the concerned municipality had the duty to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses.¹⁶⁴

3.3 Immediate obligations and progressive realisation

Though states have an obligation to progressively realise socio-economic rights, some of the obligations imposed on states are of immediate effect as stated above. In General Comment No. 3, the CESCR cited the following rights in the ICESCR that are capable of immediate implementation: equal right of men and women (article 3); equal remuneration for work of equal value (article 7(a)(i)); right to form and join trade unions and the right to strike (article 8); protection of children and young persons, particularly their protection against economic and social exploitation (article 10(3)); right to compulsory primary education, liberty of parents to choose the school of their children, and freedom to establish educational institutions (article 13(2)(a), (3) and (4)); freedom for scientific research and creativity activity (article 15(3)).¹⁶⁵

Immediate obligations include the obligation to take steps, the prohibition of retrogressive steps, the obligation to prevent discrimination and minimum core obligations. In General Comment No. 3, the CESCR clarified that the obligation to take steps is not qualified or limited by other considerations,¹⁶⁶ hence not subject to progressive realisation. States therefore have an immediate obligation to take steps in accordance with a measurable plan of action towards the realisation of socio-economic rights.¹⁶⁷ In relation to the right to education, for instance, states have an immediate obligation to take steps towards the realisation of secondary, higher and fundamental education for all, which requires at a minimum, the adoption and implementation of a national educational strategy that includes the provision of secondary, higher and fundamental education in accordance with the ICESCR.¹⁶⁸ Though the obligation to take steps is qualified by the availability of resources, the

¹⁶² 2008 (5) BCLR 475 (CC) [*Olivia Road*]. The case was a challenge of several aspects of the City of Johannesburg's practice of evicting residents of so called 'bad' buildings for health and safety reasons, the Constitutional Court elaborated on the notion of meaningful engagement.

¹⁶³ *Olivia Road*, para 18.

¹⁶⁴ *Olivia Road*, para 44.

¹⁶⁵ CESCR, General Comment No. 3, para 5.

¹⁶⁶ CESCR, General Comment No. 3, para 2.

¹⁶⁷ See, for instance, CESCR, General Comment No. 13, para 43; General Comment No. 14, para 30; General Comment No. 15, para 17; 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*, UN doc. E/C.12/GC/17, 12 January 2006, para 39(a); General Comment No. 18, para 19; and General Comment No. 19, para 40. See also African Commission on Human and Peoples' Rights, *Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2009) 9.

¹⁶⁸ CESCR, General Comment No. 13, para 52.

CESCR has stated that this *does not alter the immediacy of the obligation*. In the words of 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 emphasized 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.¹⁶⁹

If steps that must be taken immediately are beyond the maximum resources available to a state, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11(1), 22 and 23 of the ICESCR. The CESCR should also be informed of this.¹⁷⁰

States parties are also obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.¹⁷¹ Retrogressive measures are *prima facie* in violation of the ICESCR. As stated above, deliberate retrogressive measures are not permissible and have to be fully justified by reference to totality of rights.

States are further required to ensure enjoyment of socio-economic rights to all, without discrimination of any kind.¹⁷² It is an immediate and cross cutting obligation in the ICESCR.¹⁷³ Non-discrimination and equality are essential to the exercise of socio-economic rights.¹⁷⁴ This obligation is not subject to progressive realisation or to the availability of resources. The CESCR has observed that ‘[a] failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority’. The CESCR has stated that discrimination must be eliminated both formally and substantively.¹⁷⁵ In order to eliminate formal

¹⁶⁹ CESCR, UN doc. E/C.12/2007/1, para 4.

¹⁷⁰ CESCR, General Comment No. 4, para 10.

¹⁷¹ Limburg Principles, para 25.

¹⁷² Article 2(2) of the ICESCR. See also section 9 of the South African Constitution.

¹⁷³ CESCR, General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights*, UN doc. E/C.12/GC/20, 10 June 2009, para 7. See also CESCR, General Comment No. 11, para 10; General Comment No. 13, paras 31 & 43; General Comment No. 14, para 30; General Comment No. 15, para 17; General Comment No. 16, para 1; General Comment No. 17, para 39(d); General Comment No. 18, paras 19 & 31; General Comment No. 19, para 40; and Limburg Principles, para 35.

¹⁷⁴ CESCR, General Comment No. 20, para 2.

¹⁷⁵ Similarly, though not in the context of minimum core, the need for the state to not just aim at achieving formal equality but to go beyond this so as to achieve substantive equality, can be seen in the decision of the South African Constitutional Court in, for example: *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); and *Brink v Kitshoff* 1996 (6) BCLR 752 (CC).

discrimination, states must ensure that the constitution, laws and policies do not discriminate on prohibited grounds. Eliminating discrimination in practice requires states to pay specific attention to groups of individuals that suffer historical or persistent prejudice. States must *immediately* adopt necessary measures to prevent, diminish and eliminate the conditions and attitudes that cause or perpetuate substantive or de facto discrimination.¹⁷⁶ Adoption of legislation (but not the only measure to be adopted) that prohibits discrimination in the field of socio-economic rights is indispensable in complying with article 2(2) of the ICESCR.¹⁷⁷

The CESCR has also stated that states have a *minimum core obligation*¹⁷⁸ to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights.¹⁷⁹ If, for instance, a significant number of people within a state are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, the state is *prima facie* failing to meet its obligations under the ICESCR.¹⁸⁰ Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.¹⁸¹ Notwithstanding, resource constraints are taken into account in assessing whether a state is meeting its minimum core obligations.¹⁸² However, for a state to attribute failure to meet minimum core obligations to resources, it must show 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 the minimum obligations.¹⁸³

Unlike the CESCR, the Constitutional Court of South Africa has been reluctant to recognise minimum core obligations based on the diversity of people's needs and contexts. In *Grootboom*, the Court stated that 'it is not possible to determine a minimum threshold for the progressive realisation of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right'.¹⁸⁴ This difficulty, as the Court observed, is compounded by the fact that groups are differently situated and have varying social needs.¹⁸⁵ In the *TAC* case, the Court

¹⁷⁶ CESCR, General Comment No. 20, para 8.

¹⁷⁷ CESCR, General Comment No. 20, para 37.

¹⁷⁸ The minimum core approach is aimed at protecting the most vulnerable groups of society. Generally, the approach involves identifying such subsistence levels in respect of each socio-economic right and insisting that the provision of 'core' goods and services enjoys immediate priority. It thus represents a 'floor' of immediately enforceable entitlements from which progressive realization should proceed (See Marius Pieterse 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to health care Services' (2006) 22 *South African Journal on Human Rights* 473-502 at 481). For further reading on minimum core obligations, see Danie Brand & Sage Russell (Eds.), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

¹⁷⁹ CESCR, General Comment No. 3, para 10.

¹⁸⁰ *Ibid.*

¹⁸¹ Maastricht Guidelines, para 9.

¹⁸² CESCR, General Comment No. 3, para 10.

¹⁸³ *Ibid.*

¹⁸⁴ *Grootboom*, para 32.

¹⁸⁵ *Grootboom*, paras 32-33.

did not explicitly reject minimum core but stated that the socio-economic rights in the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them, without considerations of progressive realisation and resource availability.¹⁸⁶ It added that it is impossible to give everyone access even to a core service immediately; and all that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights on a progressive basis.¹⁸⁷ However, while in the Court's view it might not be possible to give everyone access to a core service immediately, the state must ensure that, at the very least, a significant number of individuals have access. This would be in line with the CESCR's interpretation in General Comment No. 3 of the obligations of states in relation to socio-economic rights stated above. In the *Mazibuko* case, the Court was again reluctant to set a minimum core content for the right to have access to water based on, among others, the fact that 'what the right requires will vary over time and in context'.¹⁸⁸

Despite its reluctance to endorse the minimum core concept, the Constitutional Court has not explicitly rejected it. The Court, however, acknowledged that 'there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable'.¹⁸⁹ Also that 'evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable'.¹⁹⁰ The Court further observed that, though not a self-standing right conferred on everyone, minimum core is possibly relevant to reasonableness.¹⁹¹ Moreover, the Court's reluctance to endorse the concept was also based on institutional and democratic concerns – the Court saw itself as not equipped to determine what the minimum core standards should be.¹⁹² Notwithstanding, through the reasonable plan approach discussed below, the Court thus sets minimum standards to be met in the progressive realisation of socio-economic rights.

It should be emphasised that minimum core obligations should be understood within the broader framework of progressive realisation, as it does not imply that governments should fulfil the bare minimum and then do nothing. The South African Court in the *Mazibuko* case, though not endorsing the minimum core obligations approach of the CESCR, did state that it will be reasonable for municipalities and provinces to strive first to achieve the prescribed minimum standard then proceed to provide beyond this standard for those to whom the minimum is already being supplied.¹⁹³ Bilchitz provides insight into the relationship between minimum core and

¹⁸⁶ *TAC*, paras 34 & 39.

¹⁸⁷ *TAC*, para 35.

¹⁸⁸ *Mazibuko*, para 60.

¹⁸⁹ *Grootboom*, para 33.

¹⁹⁰ *TAC*, para 34

¹⁹¹ *Ibid.*

¹⁹² See *TAC*, para 38; *Mazibuko*, para 61.

¹⁹³ *Mazibuko*, para 76.

progressive realisation, observing that states have an obligation to immediately realise a minimum level of provision of a right and then to improve the level of provision beyond the minimum on a progressive basis.¹⁹⁴ He explains that progressive realisation recognises that 'what government is required to do is to provide core services to everyone without delay that will meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect'.¹⁹⁵

This approach accords with the CESCR's approach in General Comment No. 3 of viewing progressive realisation as including the provision of minimum essential levels of a right, which a state is then required to improve on with time. It also accords with the Constitutional Court's view of avoiding viewing minimum core as a self-standing right but one that is relevant to reasonableness as stated above.

In various general comments, the CESCR has made reference to immediate obligations in respect to specific socio-economic rights, in addition to the obligations to take steps and of non-discrimination that cuts across all rights. These include:

Right to adequate housing

- The obligation to provide legal security of tenure that includes legal protection against forced evictions, harassment and threats.¹⁹⁶
- The obligation to effectively monitor the housing situation in the state concerned.¹⁹⁷
- The obligation to refrain from forced evictions ('the reference in article 2.1 [of the ICESCR] to progressive achievement based on the availability of resources will rarely be relevant' with reference to this obligation).¹⁹⁸

Right to education

- The obligation to provide compulsory primary education free of charge;¹⁹⁹ however, article 14 of the ICESCR provides that, if at the time of becoming a party to the ICESCR a state has not been able to secure compulsory primary education, free of charge, the state has an obligation to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all.

¹⁹⁴ David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) *South African Journal on Human Rights* 1-25, 11.

¹⁹⁵ Bilchitz (2003) 12.

¹⁹⁶ CESCR General Comment No. 4, para 8(a)

¹⁹⁷ CESCR General Comment No. 4, para 13.

¹⁹⁸ CESCR, General Comment No. 7, para 8.

¹⁹⁹ CESCR, General Comment No. 13, paras 51 & 55. See also CESCR, General Comment No. 11, para 7.

Right to adequate food

- The CESCR does not list the specific immediate obligations but states generally that some measures at the different levels of obligations of states to respect, protect and fulfil the right to food are of a more immediate nature, while others are more of a long term character, to achieve progressively the full realisation of the right to food in terms of availability, accessibility and acceptability.²⁰⁰
- However, the CESCR states that, at the very least, states must ensure the satisfaction of the minimum essential level required to be free from hunger, and also ensure non-discrimination in access to food and to the means and entitlements for its procurement.²⁰¹ States must also take measures, including special programmes and priority consideration, to ensure that this right is fulfilled for vulnerable groups and individuals, even in times of resource constraints.²⁰² In addition, '[p]riority in food aid should be given to the most vulnerable populations'.²⁰³

Right to health

- The CESCR is also very general here, merely stating that states have immediate obligations in relation to the right to health but does not state other obligations beyond non-discrimination and the obligation to take steps.²⁰⁴

Right to water

- 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;
- The obligation to ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- The obligation 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;
- The obligation to ensure personal security is not threatened when having to physically access water;
- The obligation to ensure equitable distribution of all available water facilities and services;
- The obligation 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

²⁰⁰ CESCR, General Comment No. 12, para 16.

²⁰¹ CESCR, General Comment No. 12, paras 17 & 18.

²⁰² CESCR, General Comment No. 12, paras 13 & 28.

²⁰³ CESCR, General Comment No. 12, para 38.

²⁰⁴ CESCR, General Comment No. 14, para 30.

content, shall give particular attention to all disadvantaged or marginalized groups;

- The obligation to monitor the extent of the realisation, or the non-realisation, of the right to water;
- The obligation to adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups; and
- The obligation to take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.²⁰⁵

*Right to work*²⁰⁶

- The obligation to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- The obligation to avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups; and
- The obligation to adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a *participatory and transparent process* that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.²⁰⁷

Right to social security

- The obligation to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies;
- The obligation to ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;
- The obligation to respect existing social security schemes and protect them from unreasonable interference;
- The obligation to adopt and implement a national social security strategy and plan of action;

²⁰⁵ CESCR, General Comment No. 15, para 37.

²⁰⁶ It should be noted that the South African Constitution does not specifically provide for a 'right to work' but for a 'right to fair labour practices'. However, through its ratification of the Convention on the Elimination of All Forms of Discrimination against Women, 1979, which specifically provides for the right to work (article 11(1)), South Africa has thus recognised this right.

²⁰⁷ CESCR, General Comment No. 18, para 31.

- The obligation to take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups; and
- The obligation to monitor the extent of the realisation of the right to social security.²⁰⁸

3.4 Reasonable plan

The ICESCR does not refer to reasonableness but the recently adopted Optional Protocol to the ICESCR provides that

'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.'²⁰⁹

The Optional Protocol will assist the CESCR in monitoring the implementation of the ICESCR. The Optional Protocol is not yet in force, hence the lack of jurisprudence from the CESCR on a reasonable plan approach in relation to the progressive realisation of socio-economic rights.

However, the CESCR has stated that in assessing state's compliance with the obligations under the ICESCR, it will assess the reasonableness of steps taken. In doing so, the CESCR would take into account a number of factors including:

- (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 is in accordance with international human rights standards;
- (d) where several policy options are available, whether the State party adopts 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.²¹⁰

The wording of article 8(4) of the Optional Protocol to the ICESCR is derived from the South African Constitutional Court's *Grootboom* decision.²¹¹ The Court employs the reasonableness approach in assessing the government's compliance with its socio-economic rights obligations in the Constitution.

²⁰⁸ CESCR, General Comment No. 19, para 59.

²⁰⁹ Article 8(4) of the Optional Protocol.

²¹⁰ CESCR, UN doc. E/C.12/2007/1, para 8.

²¹¹ See Bruce Porter, 'The Reasonableness of Article 8(4): Adjudicating Claims from the Margins' (2009) 27(1) *Nordic Journal of Human Rights* 39-53, 49.

The state's obligation to progressively realise socio-economic rights, as set out in the Constitution, requires it to adopt reasonable legislative and other measures that make it possible for those in need to access socio-economic goods and services and to provide material goods and services when the need arises.²¹² The Court held in *Grootboom* that in reviewing compliance with the state's obligation, a court 'will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been well spent' but will consider whether the measures taken are reasonable.²¹³ In order for measures to be reasonable, the Court held, they must aim at the effective and expeditious progressive realisation of the right in question, within the states available resources for implementation.

The measures must:

- Be comprehensive, coherent and coordinated,²¹⁴ be properly conceived and properly implemented,²¹⁵
- Be inclusive, balance, flexible and make appropriate short-, medium- and long-term provision for people in desperate need or in crisis situations.²¹⁶
- Not ignore those whose housing needs are the most urgent and whose ability to enjoy all human rights is most in peril.²¹⁷
- Clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation.²¹⁸
- Be tailored to the particular context in which it is to apply – what may be appropriate in a rural area may not be appropriate in an urban setting.²¹⁹ It must also take account of different economic levels in the society, including those who can afford to pay for the socio-economic good or service and those who cannot.
- Be continuously reviewed because conditions change.²²⁰
- Be transparent and its contents made known appropriately and effectively to the public.²²¹

²¹² See, for instance, sections 24(5), 26(2) & 27(2) of the Constitution.

²¹³ *Grootboom*, para 41.

²¹⁴ *Grootboom*, paras 39 & 40.

²¹⁵ *Grootboom*, para 42.

²¹⁶ *Grootboom*, para 43. See also *Modderklip*, para 49, in which the Court stated that 'any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable'.

²¹⁷ *Grootboom*, para 44; TAC, para 68. See also *PE Municipality*, para 29, in which the Court held that '[t]he Constitution requires that everyone must be treated with care and concern; if the measures though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test'.

²¹⁸ *Grootboom*, para 39.

²¹⁹ *Grootboom*, para 37.

²²⁰ *Grootboom*, para 43.

²²¹ TAC, para 123.

- Allow for meaningful or reasonable engagement with the public or affected people and communities.²²²

Similar to the South African Constitutional Court, the CESCR places great importance on transparent and participative decision-making processes at the national level, in assessing a state's compliance with the obligation to take reasonable steps to the maximum of its available resources to achieve the progressive realisation of the rights in the ICESCR.²²³ In its general comments, the CESCR has also emphasised the importance of participation of right holders in decision-making processes and genuine consultation in the development and implementation of policies in relation to socio-economic rights, such as social security, water, health and work as well as the socio-economic rights of persons with disabilities.²²⁴ The CESCR has further requested states to take appropriate measures in close consultation with people and to ensure participation of all, including women, in decision making processes in relation to specific rights and issues that hinder enjoyment of rights in its concluding observations on the reports of, for instance, France²²⁵ and Nicaragua.²²⁶

As seen from the Constitutional Court's interpretation of progressive realisation mentioned above, it is clear that the reasonableness approach is influenced by 'progressive realisation' and 'the availability of resources'. However, the basic needs of society have to be effectively met. It should be noted that reasonableness is applied in relation to the positive obligations of the state. When it comes to violations of negative obligations, a more stringent standard is applied as such violations can only be justified in terms of the general limitation clause of the Constitution.²²⁷

²²² See *Olivia Road*, paras 17-18, where the Constitutional Court cited the state's obligation to adopt reasonable measures as one of the basis for meaningful engagement. See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC) para 378 [*Joe Slovo*], where the Court held that meaningful engagement between authorities and those who may become homeless as a result of government activity is vital to the reasonableness of the government activity. This case concerned the eviction of a large informal settlement community to make way for formal housing under the government's housing development project. See further, *Mazibuko*, paras 133 and 134, where the Court considered adequate public consultation in determining the reasonableness of pre-paid water meters and the City of Johannesburg's free basic water policy; *New Clicks*, paras 111, 625 & 627, where the Court held that the Constitution makes provision for the participation of society in decision making processes; and *Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*), where the Constitutional Court held that reasonable engagement is mandated by, amongst others, the obligation on the state to take reasonable legislative and other measures to achieve progressive realisation of the right to have access to adequate housing (para 69). The case was a constitutional challenge to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007.

²²³ CESCR, UN doc. E/C.12/2007/1, para 41.

²²⁴ See CESCR, General Comment No. 4, paras 8 & 12; General Comment No. 5, para 14; General Comment No. 7, paras 13 & 15; General Comment No. 14, para 54; General Comment No. 15, paras 48 & 56; General Comment No. 18, para 42; & General Comment No. 19, para 78

²²⁵ CESCR, UN doc. E/C.12/FRA/CO/3, para 41;

²²⁶ CESCR, UN doc. E/C.12/NIC/CO/4, paras 11 & 21.

²²⁷ Section 36 of the Constitution.

As noted above, the reasonableness approach thus has some elements of minimum core obligations.²²⁸ While emphasising the progressive realisation of socio-economic rights, the Constitutional Court also holds that people in desperate need should not be left without any form of assistance, intrinsically implying recognition of minimum core. The Court in fact states in the *Khosa* case that '[a] society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational'.²²⁹ Based on this, Bilchitz has concluded that in attempting to avoid recognising a minimum core obligation, the Court has in fact incorporated an obligation to meet, at the very minimum, the short-term needs into the notion of reasonableness.²³⁰ The state is thus required to take immediate interim measures of relief for those in desperate need.²³¹

It must be emphasised that requiring a state to take immediate measures or to meet short-term pressing needs, does not release the state of its obligation to provide for medium and long-term needs. Any measure aimed at the progressive realisation of socio-economic rights, as discussed above, must aim at meeting the short-, medium- and long-term needs, in order for it to pass the test of reasonableness. As seen from the Constitutional Court's housing rights jurisprudence, in providing temporary alternative housing, the state cannot ignore its obligation to make provision for permanent housing. Interim alternative accommodation is provided pending the provision of suitable permanent housing by the government in consultation with those involved.²³²

4. Monitoring progressive realisation of socio-economic rights

The CESCR has underscored the obligation to monitor the progressive realisation of socio-economic rights in its general comments, which is part of the minimum core content of the rights and not affected by resource constraints and applies regardless of the level of development of a state.²³³ As mentioned in the Introduction,

²²⁸ For further reading on the reasonableness approach in relation to minimum core, see for instance, Sandra Liebenberg, 'Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate' in Stu Woolman & Michael Bishops (Eds.) *Constitutional Conversations* (2008) 303-329. See also, Sandra Liebenberg, 'Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review' in Johan Squires, Malcolm Langford & Bret Thiele, *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 73-88; and Lilian Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8(1) *Human Rights Law Review* 105-137, 119-122.

²²⁹ *Khosa*, para 52.

²³⁰ Bilchitz (2007) 149.

²³¹ Redson Kapindu, 'From the Global to the Local: the Role of International Law in the enforcement of Socio-Economic Rights in South Africa' (2009) *Socio-Economic Rights Research Series 6*, Community Law Centre, University of the Western Cape, 46.

²³² For example, see generally *Olivia Road* and *Joe Slovo* cases.

²³³ See for example, CESCR, General Comment No. 1; General Comment No. 3, para 11; General Comment No. para 13; General Comment No. 5, para 13; General Comment No. 6, para 18; General Comment No. 12, para 31; General Comment No. 20, para 41. See also United Nations, UN doc. E/2009/90, para 24.

monitoring is a systematic gathering of information with the view to evaluating compliance with human rights commitments.²³⁴ It provides feedback for implementation, as the evaluation of methods adopted and the results achieved comprises valuable information that can be used to either confirm the direction of specific steps or correct them where necessary.²³⁵ Monitoring and implementation are therefore seen as being intertwined. In addition, the OHCHR has stated that in order to evaluate the obligation of progressive realisation, monitoring has to be done so as to measure achievements, detect failures, gaps and retrogression, identify discriminatory laws, policies, programmes and practices, and re-orient state action when needed.²³⁶ Monitoring therefore requires one to come to grips with difficult normative and policy issues on resource constraints and trade-offs and probe data.²³⁷ Due to the fact that the purpose of monitoring varies, it can be carried out by civil society, institutions of democracy or the state itself. The scope and methods of monitoring also varies based on who is conducting the monitoring and its purpose. A conceptual framework that defines what must be monitored is therefore relevant; and an understanding of human rights obligations (discussed above) is crucial in this regard.

The challenge is to construct a monitoring tool that is at the same time robust to scrutiny, as well as accessible to non-experts and relatively simple to populate with data.

4.1 Reporting mechanisms

4.1.1 The ICESCR

The CESCR has used the reporting mechanism, as mentioned earlier, to monitor states' compliance with their obligations under the ICESCR and facilitate the realisation of socio-economic rights contained therein. This process is facilitated by the obligation placed on states under the ICESCR to report regularly to the CESCR.²³⁸ It thus applies only in relation to states that have ratified the ICESCR. In General Comment No. 1, the CESCR stated several objectives of reporting,²³⁹ and emphasised the importance for governments to ensure that non-governmental groups and the public at large make inputs into the preparation of their reports under the ICESCR.²⁴⁰ States are required to report on:

- Whether the state has adopted a national framework law, policies and strategies for the implementation of each right, identifying the resources

²³⁴ United Nations, UN doc. E/2009/90, para 5.

²³⁵ United Nations, UN doc. E/2009/90, para 8.

²³⁶ United Nations, UN doc. E/2009/90, paras 24 & 25.

²³⁷ Felner (2009) 432.

²³⁸ Articles 16 and 17 of the ICESCR.

²³⁹ CESCR, General Comment No. 1, paras 2-9.

²⁴⁰ CESCR, General Comment No. 1, para 5.

available for that purpose and the most cost-effective ways of using such resources;

- Any mechanisms in place to monitor progress towards the full realisation of the rights, including identification of indicators and related national benchmarks in relation to each right;
- Mechanisms in place to ensure that the state's obligations under the ICESCR are fully taken into account in its international actions, so as to ensure that the rights of the most disadvantaged and marginalized groups are not undermined;
- The incorporation and direct applicability of each right in the domestic legal order, with reference to specific examples of relevant case law;
- The judicial and other appropriate remedies in place enabling victims to obtain redress in case their rights have been violated;
- Structural or other significant obstacles arising from factors beyond the state's control which impede the full realisation of rights;
- Statistical data on the enjoyment of each Covenant right, disaggregated by age, gender, ethnic origin, urban/rural population and other relevant status, on an annual comparative basis over the past five years;
- Particular needs for technical assistance and development cooperation.²⁴¹

Through the concluding observations issued after the consideration of reports, the CESCR provides guidance aimed at enhancing the realisation of socio-economic rights. The concluding observations would also be useful in identifying issues that should be incorporated into any monitoring tool. In monitoring the progressive realisation of socio-economic rights through the reporting mechanism, the CESCR has relied on various approaches including indicators and benchmarks, identifying violations and examining resource/expenditure allocation and regressive patterns of social spending. Examples of the CESCR's application of these approaches are considered below in the section on monitoring approaches.

4.1.2 South African Constitution

As noted in the Introduction, the Constitution mandates the SAHRC to monitor the progressive realisation of socio-economic rights. Relevant organs of state are required to report on a yearly basis on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.²⁴² The SAHRC requests data from the various government departments on measures they have taken to advance socio-economic rights. It then compiles a report, which is, amongst others, an information tool on how far the government departments are fulfilling socio-economic

²⁴¹ See CESCR, UN doc. E/C.12/2008/2, 24 March 2009, para 3; and CESCR, General Comment No. 2, *International Technical Assistance Measures*, UN doc. E/1990/23, 2 February 1990, para 10.

²⁴² Section 184(3) of the Constitution. Although this section omits land rights, the Commission read the section purposively and expansively to include monitoring the measures taken to realise land rights.

rights.²⁴³ The SAHRC thus plays a role that is similar to the role the CESCR plays under the reporting mechanism of the ICESCR.

The strategies used by the SAHRC for the collection and verification of information collected include questionnaires (commonly known as 'protocols'), research, fieldwork, and recently, consultation with affected communities and civil society. The SAHRC has relied on statistics and qualitative data as indicators to measure progress, as well as targets set by the specific government departments relating to the realisation of a specific socio-economic right. The content and format of the 'protocols' have evolved over time and generally require government to report on: frameworks, policies, strategies and legislation that have been introduced aimed at the realisation of socio-economic rights; progress that has been made in the implementation of key socio-economic rights programmes and projects; communication strategies adopted; actual outcomes in relation to the state's socio-economic rights obligations; the key challenges faced in aiming to achieve progressive realisation; the indicators used for assessing delivery performance; and the systems for gathering information and monitoring the realisation of socio-economic rights.

The 'capacity and wisdom' of the approach of the SAHRC to monitoring socio-economic rights has been questioned by Klaaren on the basis that it follows a violations approach, which he believes would be misconceived in the South African context.²⁴⁴ He then called for a new model that emphasises the role of information.²⁴⁵ He, however, does not provide much to start with as regards the design, content and format of a new model. The SAHRC is also in the process of developing a new methodological framework, which is considered below under the section on other approaches.²⁴⁶

4.2 Existing monitoring approaches

4.2.1 Indicators and benchmarks

An indicator is a fact that indicates the state or level of something, such as literacy rates.²⁴⁷ It is information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation; and can thus be used as a yardstick to measure results and assess realisation of desired levels of performance in a

²⁴³ The Constitution does not require the SAHRC to compile reports once the information has been collected. But the SAHRC has taken upon itself to compile reports on the basis of the information collected.

²⁴⁴ Jonathan Klaaren, 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' (2005) 27(2) *Human Rights Quarterly* 539-561, 550 & 554.

²⁴⁵ Klaaren (2005) 554.

²⁴⁶ Cameron Lee Jacobs, 'Demystifying the Progressive Realisation of Socio-Economic Rights in South Africa' (2009) 13. Paper Presented at the Public Seminar on Monitoring ESC Rights, Australian National University, 19 October. Available at <http://acthra.anu.edu.au/PESCR/Publications/index.html> (accessed 9 March 2010).

²⁴⁷ Felner (2009) 409.

sustained and objective way.²⁴⁸ Indicators can be conceptualised on the basis of human rights treaties and documents, national constitutions, and legislation and policies. Benchmarks, on the other hand, are targets relating to a given human right indicator, such as child mortality rates, to be achieved over a period of time (for instance, halve the child mortality rate in 10 years).²⁴⁹ Treaty bodies implicitly use qualitative and quantitative indicators as well as benchmarks in monitoring the progressive realisation of socio-economic rights.

The OHCHR sees indicators and benchmarks as important ways to monitor progress, stagnation or retrogression in the realisation of a right over a certain period of time; and the selection of appropriate indicators for each right would facilitate the use of benchmarks as a concrete yardstick to assess progress.²⁵⁰ The High Commissioner also observed that consistent monitoring using indicators and benchmarks allows for progress in the realisation of socio-economic rights to be measured with a more accurate set of conceptual tools.²⁵¹ Tomaševski has further observed, with regard to indicators, that they are important in dissociating unwillingness/the lack of commitment from incapacity.²⁵²

The Vienna Declaration and Programme of Action, adopted in 1993 by the World Conference on Human Rights, calls for the development of a system of indicators to measure the progressive realisation of socio-economic rights.²⁵³ Accordingly, the OHCHR has developed a conceptual and methodological framework for using quantitative indicators to monitor the implementation of human rights, including socio-economic rights.²⁵⁴ The OHCHR observed that for quantitative indicators to be useful in monitoring implementation, they have to be explicitly and precisely defined, based on an acceptable methodology of data collection, processing and dissemination, and have to be available on a regular basis.²⁵⁵ The framework refers to both structural, process, and outcome indicators.

Structural indicators relate to the ratification and adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realisation of a right.²⁵⁶

²⁴⁸ Audrey Chapman, 'Indicators and Standards for Monitoring Economic, Social and Cultural Rights' (nd) 1-2. Available at http://hdr.undp.org/docs/events/global_forum/2000/chapman.pdf (accessed 9 May 2010).

²⁴⁹ Felner (2009) 410. See also Chapman (nd) 2.

²⁵⁰ United Nations, UN doc. E/2009/90, paras 39 & 41.

²⁵¹ United Nations, UN doc. E/2009/90, para 42.

²⁵² Katarina Tomaševski 'Indicators' in Asbjørn Eide, Catarina Krause & Allan Rosas (Eds.), *Economic, Social and Cultural Rights* (2001) 531-543, 532.

²⁵³ Vienna Declaration and programme of Action, UN doc. A/CONF.157/23, 12 July 1993, para 98.

²⁵⁴ United Nations, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, UN doc. HRI/MC/2008/3, 6 June 2008.

²⁵⁵ United Nations, UN doc. HRI/MC/2008/3, para 12.

²⁵⁶ United Nations, UN doc. HRI/MC/2008/3, para 18.

Process indicators are seen as better in capturing progressive realisation, and relate to the various state policy measures with milestones that cumulate into outcome indicators.²⁵⁷ An example of process indicators cited is in relation to the right to health - proportion of school-going children educated on health and nutrition issues (which relates to the corresponding structural indicator - 'time frame and coverage of national policy on child health and nutrition' - and the outcome indicator - 'proportion of underweight children under 5 years of age').²⁵⁸

Outcome indicators capture attainments - individual and collective - that reflect the status of realisation of rights in a given context, and consolidate over time the impact of various underlying processes.²⁵⁹ A list of illustrative indicators for specific rights, including food, health, education, housing, social security and work is then provided.²⁶⁰

The extent to which the framework developed by the OHCHR, if used solely, would be effective in measuring progressively realisation of socio-economic rights over time has been questioned by Felner.²⁶¹ The need for benchmarks to complement indicators has thus been suggested.²⁶² Notwithstanding, any indicators must be linked to the legal obligations of states under international and domestic human rights law. Moreover, the CESCR has asked states, in the identification of indicators and related national benchmarks, to take into account the framework and tables of illustrative indicators outlined by the OHCHR.²⁶³

The CESCR has in fact requested that states provide indicators and benchmarks in framework legislation and plans aimed at the realisation of rights.²⁶⁴ For instance, in General Comment No. 1, the CESCR stated that national or other specific benchmarks can provide an extremely valuable indication of progress; and that it may be useful for states to identify specific benchmarks or goals against which their performance in a given area can be assessed, and include qualitative as well as quantitative data, which is disaggregated and should give priority to the most vulnerable.²⁶⁵ In General Comment No. 12, the CESCR requires states to set verifiable benchmarks for monitoring and adopt framework law, which includes provisions on its purpose, the targets or goals to be achieved and the time frame to be set for achievement of the targets, the means by which the purpose could be

²⁵⁷ United Nations, UN doc. HRI/MC/2008/3, para 19.

²⁵⁸ United Nations, UN doc. HRI/MC/2008/3, para 20.

²⁵⁹ United Nations, UN doc. HRI/MC/2008/3, para 21

²⁶⁰ United Nations, UN doc. HRI/MC/2008/3, Annex I.

²⁶¹ See, for instance, Felner (2009) 409-410.

²⁶² Felner (2009) 410.

²⁶³ CESCR, UN doc. E/C.12/2008/2, para 3.

²⁶⁴ See CESCR, General Comment No. 13, para 52

²⁶⁵ CESCR, General Comment No. 1, paras 3, 6, 7; General Comment No. 16, para 39; General Comment No. 19, para 75.

achieved, among others.²⁶⁶ In General Comment No. 14 and General Comment No.15, the CESCR stated that national health and water strategies should identify appropriate health and water indicators and benchmarks as determined by the content of the right; and the indicators should address the different components of the rights, such as affordability, acceptability and accessibility, among others.²⁶⁷ In addition, the general comments adopted by the CESCR provide specific indicators for specific rights.

In monitoring the progressive realisation of socio-economic rights through the reporting mechanism, the CESCR has in fact looked at whether states have set the appropriate indicators and benchmarks.²⁶⁸ To ensure that states choose appropriate indicators and benchmarks, during the consideration of state reports, the CESCR engages in what is termed a 'scoping exercise', which involves joint consideration by the CESCR and the respective state of indicators and benchmarks set by the state, which also provides target for subsequent reporting.²⁶⁹

In terms of indicators, the CESCR assesses both structural, process and outcome indicators, looking at issues such as ratification and domestication of treaties, adoption of domestic laws, existence of institutional mechanism and the sufficiency of funding for them, in relation to process indicators; rate of illiteracy, especially among vulnerable groups, level of school-drop outs, rate of maternal and infant mortality and standard of living, in relation to process indicators; employment ratio between men and women, and ratio of girls to boys in school and proportion of spending, in relation to outcome indicators. The illustrative indicators developed by the OHCHR referred to above have thus been useful in the CESCR's work. The standards in treaties and general comments, among others, are also used as benchmarks against which a state's performance is measured. This is in addition to specific benchmarks set by states.

In practice, states have failed to meet the obligation to set indicators and benchmarks. Accordingly, the CESCR has noted with concern the lack of indicators and benchmarks as well as disaggregated statistical data in relation to many countries in its concluding observations. In several concluding observations, the CESCR has expressed concern over the lack of comparative statistical data, disaggregated by, among others, sex, age, rural/urban populations, ethnicity and religion, together with indicators and benchmarks, as well as absence of a database to monitor realisation of rights over time or data/indicators on the number and nature of reported cases (violations), people living in poverty, people with HIV and AIDS

²⁶⁶ CESCR, General Comment No. 12, para 29. See also CESCR, General Comment No. 15, para 47.

²⁶⁷ CESCR, General Comment No. 14, paras 57 & 58; and General Comment No. 15, paras 53 & 54. See also, CESCR, General Comment No. 16, para 39; General Comment No. 17, paras 49 & 50; General Comment No. 18, paras 46 & 47; General Comment No. 19, paras 74-76.

²⁶⁸ For further reading on the CESCR's use of indicators, see Asbjørn Eide, 'The use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights' in Asbjørn Eide et al. (2001) 545-551.

²⁶⁹ See CESCR, General Comment No. 14, para 58; General Comment No. 15, para 54; General Comment No. 17, para 50; General Comment No. 18, para 47; General Comment No. 19, para 76.

which will allow CESCR to assess progress. The CESCR then requested that the respective states provide in their next report disaggregated statistical data, and adopt rights based indicators and benchmarks to monitor the progressive realisation of the rights in the ICESCR. Examples include its concluding observations on reports of Angola, Benin, Poland, DRC, Chad, Kenya, Morocco, Zambia, Paraguay, France, Bolivia and India, among others.²⁷⁰

Similar to the CESCR, the South African Constitutional Court has called on the national government, in for instance the *Mazibuko* case, to clearly set targets it wishes to achieve in respect of socio-economic rights as this would 'enable(s) citizens to monitor government's performance and to hold it accountable politically if the standard is not achieved' or is unreasonable.²⁷¹ Also, the Court has in several socio-economic rights cases used the reasonableness standard as a benchmark against which government's performance is measured.²⁷²

Concerns have, however, been raised regarding the use of indicators and benchmarks alone in monitoring the progressing realisation of socio-economic rights. One of the challenges is that information produced by the state is not often publicly accessible, which would facilitate monitoring by civil society organisations and other stakeholders.²⁷³ Hence, the OHCHR has identified challenges such as lack of information, difficulties with respect to disaggregation of data and the risk of understanding only a limited part of the picture of rights that have resulted in the need to use indicators and benchmarks together with other sources of information in assessing progressive realisation.²⁷⁴ Felner has also referred to Siddiqur Osmani's concern that when using indicators and benchmarks, the inevitable question that remains is how to determine what would be realistic and reasonable pace of

²⁷⁰ CESCR, UN doc. E/C.12/AGO/CO/3, paras 8, 19, 24, 32,36; CESCR, *Concluding Observations on the Second Periodic Report of Benin*, UN doc. E/C.12/BEN/CO/2, 9 June 2008, paras 10 & 31; CESCR, UN doc. E/C.12/TCD/CO/3, paras 8, 24 & 27-29; CESCR, UN doc. E/C.12/COD/CO/4, para 7; CESCR, *Concluding Observations on the Third Periodic Report of Morocco*, UN doc. E/C.12/MAR/CO/3, 4 September 2006, paras 13 & 34; CESCR, *Concluding Observations on the Initial Report of Zambia*, UN doc. E/C.12/1/Add.106, 23 June 2005, paras 13, 35, 48 & 54; CESCR, *Concluding Observations on the Initial Report of Kenya*, UN doc. E/C.12/KEN/CO/1, 1 December 2008, paras 22 & 24; CESCR, *Concluding Observations on the Fifth Periodic Report of Poland*, UN doc. E/C.12/POL/CO/5, 2 December 2009, para 35; CESCR, *Concluding Observations on the Second and Third Periodic Reports of Paraguay*, UN doc. E/C.12/PRY/CO/3, 4 January 2008, para 23(i); CESCR, *Concluding Observations on the Fifth Periodic Report of Finland*, UN doc. E/C.12/FIN/CO/5, 16 January 2008, paras 17 & 26; CESCR, UN doc. E/C.12/FRA/CO/3, paras 11 & 31; CESCR, *Concluding Observations on the Second Periodic Report of Bolivia*, UN doc. E/C.12/BOL/CO/2, 8 August 2008, paras 27 & 34; and CESCR, *Concluding Observations on the Second to Fifth Periodic Reports of India*, UN doc. E/C.12/IND/CO/5, 8 August 2008, para 58.

²⁷¹ *Mazibuko*, para 70. See also para 61.

²⁷² See, for instance, *Mazibuko*, paras 78-102; *Khosa*, paras 44, 48-49 & 53-57; and *Grootboom*, para 39-45.

²⁷³ The lack of available and/or reliable statistic, incomplete or out-dated sources have also been cited weaknesses of indicators. See Maria Socorro I. Diokno 'Progressive Realization of Housing Rights' (nd). Available at http://www.hurights.or.jp/asia-pacific/no_16/no_16monitoring.htm (accessed 9 March 2010).

²⁷⁴ United Nations, UN doc. E/2009/90, para 43.

progress in the light of available resources.²⁷⁵ He also states that the lack of a methodology toolbox that explains more specifically how and when to use indicators has contributed to the difficulties of turning indicators into operational tools.²⁷⁶ Also, Anderson and Foresti identify the lack of a 'real guidance' on how to judge whether benchmarks set by governments are sufficiently challenging as a limitation in relation indicators and benchmarks.²⁷⁷

4.2.2 Analysis of budget /expenditure or resource allocation

The OHCHR has identified different ways of conducting budget analysis. These are static or dynamic analysis.

Static analysis evaluates a given budget by itself.²⁷⁸ From a socio-economic rights perspective, this could also involve mapping out the allocation of resources for each right and comparing them with the percentage of other allocations, which provides an indication of the government's priorities.²⁷⁹ Another approach under the static analysis would be to map out the main beneficiaries of some budget allocations. An example of non-compliance cited in the area of education is where a significant percentage of the budget is allocated to subsidise private schools that cater for children from middle to high-income families compared with public schools serving low-income sectors of population, which would show that the priorities of government are not in line with its obligation to pay particular attention to the vulnerable and marginalised.²⁸⁰

Dynamic analysis, on the other hand, compares the evolution of budgets over time, looking at variations in allocations and spending over different periods.²⁸¹ An example of non-compliance cited is underspending in an area where targets have not been met or where indicators show significant gaps in the full realisation of socio-economic rights would imply that government is not meeting its obligation to take steps to the maximum of available resources. Consistent underspending over a number of years in a particular sector would also show that planning is inadequate or funds are not released promptly.²⁸²

²⁷⁵ Felner (2009) 411.

²⁷⁶ Eitan Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability' (2008) 9 *International Journal on Human Rights* 109-153, 112.

²⁷⁷ Edward Anderson & Marta Foresti 'Assessing Compliance: The Challenge for Economic and Social Rights' (2009) 1(3) *Journal of Human Rights Practice* 469-476, 471. See also Edward Anderson & Marta Foresti, 'Achieving Economic and Social Rights: The Challenge of Assessing Compliance' (2008) *Overseas Development Institute Briefing Paper* 2. Available at <http://www.odi.org.uk/resources/download/1584.pdf> (accessed 12 May 2010).

²⁷⁸ United Nations, UN doc. E/2009/90, para 48.

²⁷⁹ United Nations, UN doc. E/2009/90, para 49.

²⁸⁰ United Nations, UN doc. E/2009/90, para 50.

²⁸¹ United Nations, UN doc. E/2009/90, para 48.

²⁸² United Nations, UN doc. E/2009/90, para 54.

In the guidelines on state reporting under the ICESCR, as mentioned above, the CESCR requires states to report the resources available for the purposes of implementing the rights in the ICESCR and the most cost-effective ways of using such resources.²⁸³ Accordingly, it has considered how states have allocated resources in monitoring states' compliance with their obligation to use the maximum of its available resources to progressively realise socio-economic rights. In the consideration of state reports, the CESCR analyses macro-budget information relating to the national budget allocated to a specific sector; and has made several observations in this regard. The CESCR has raised concern over the adequacy/sufficiency of the budget, government's priorities in terms of resource allocation, lack of clear strategic lines in the budget in relation to the vulnerable and marginalised, regressive patterns of social spending and mismanagement of international cooperation aid. It has even gone further to request states to increase their budgets/expenditure in relation to specific socio-economic rights.

In its Concluding Observation on the combined initial and second and third periodic reports of Chad, the CESCR noted with concern that, despite the country's great natural wealth, funding for social services and public infrastructure was far from adequate.²⁸⁴ The CESCR has also raised concern over the fact that the majority of people in Paraguay do not have adequate health care despite the increase in the health care budget, and that the public sector focus is largely on higher-income population.²⁸⁵ The insufficiency of funds allocated to health care in Latvia despite an increase in budget allocation for health including public health, has been an issue of concern to the CESCR. It then requested the government to increase the budget allocation to the health sector.²⁸⁶

In its Concluding Observations on the initial and third periodic reports of Angola, the CESCR raised concern over the decrease in the budget allocated to education between 2004 and 2006, despite the rapidly rising number of children in the school age.²⁸⁷ Hence, budget allocation must take into consideration the changes in the size of beneficiaries of a particular right. The CESCR went further to use macroeconomic growth as a yardstick in assessing the state's compliance with its obligations. It raised concern about insufficient jobs for men and women despite Angola's macroeconomic growth, and the state's failure to take advantage of this growth to promote policies to create jobs especially for the marginalised and disadvantaged.²⁸⁸

²⁸³ CESCR, UN doc. E/C.12/2008/2, para 3.

²⁸⁴ CESCR, UN doc. E/C.12/TCD/CO/3, para 23.

²⁸⁵ CESCR, UN doc. E/C.12/PRY/CO/3, para 12(i).

²⁸⁶ CESCR, *Concluding Observations on the Initial Report of Latvia*, UN doc. E/C.12/LVA/CO/1, 7 January 2008, paras 26 & 51.

²⁸⁷ CESCR, UN doc. UN doc. E/C.12/AGO/CO/3, paras 39.

²⁸⁸ CESCR, UN doc. E/C.12/AGO/CO/3, para 39.

In its Concluding Observations on the second periodic report of Korea, the CESCR was also concerned over the high level of defence expenditure in contrast with shrinking budget for key socio-economic rights areas.²⁸⁹

The CESCR has also been concerned about regressive patterns of social spending.

In the Concluding Observations on Kenya, the CESCR was concerned about the constant decrease in health care expenditure.²⁹⁰ The CESCR was also concerned about the steady decline in state expenditure on health care system in its Concluding Observations on the second periodic report of Algeria. It requested the state to increase its expenditures for health and education and to provide the CESCR with comparative statistical indicators on these over time. Based on its concern over the problem of poverty and the decline in the standard of living, the CESCR requested the government to allocate a large share of the national budget surplus to fight poverty.²⁹¹

Also, in the Concluding Observation on the combined second to fourth periodic reports of DRC, the CESCR noted with concern the continuous decrease over the past decade of the resources allocated to social sectors such as health and social protection, while budgetary allocations to defence and public security have increased considerably and international development aid has been provided. The case of DRC is also illustrative of the various dimensions of budget/resource allocations that the CESCR engages in. The CESCR was concerned about unbalanced budgetary allocations, which it found to constitute serious breaches of the obligations of the state under article 2(1) of ICESCR, and the lack of clear strategic budgetary lines for the most disadvantaged and marginalized groups and provinces. It then requested the government to 'substantially' increase its national spending on social services and assistance such as housing, food, health and education in order to achieve progressive realisation of these rights. It further encouraged the government to use a human rights-based approach in the elaboration of its budget and the use of international development aid with clear strategic budgetary lines for the most vulnerable and marginalised.²⁹² In addition, the CESCR was concerned over the continuous decline in the standard of living and life expectancy; and requested the government to allocate sufficient funds for the implementation of a Poverty Reduction Strategy that fully integrates socio-economic rights.²⁹³ The CESCR was further concerned that despite increase in budgetary allocations to the education sector, access to primary education remained fee-based, thus unaffordable to many; school enrolments were also extremely low, especially for girls, and the low level of

²⁸⁹ CESCR, *Concluding Observations on the Second Periodic Report of the Democratic People's Republic of Korea*, UN doc. E/C.12/1/Add.95, 12 December 2003, para 9.

²⁹⁰ CESCR, *Concluding Observations on the State of Implementation on the ICESCR in Kenya*, UN doc. E/C.12/1993/6, 3 June 1993, para 17.

²⁹¹ CESCR, *Concluding Observations on the Second Periodic Report of Algeria*, UN doc. E/C.12/1/Add.71, 30 November 2001, paras 18, 20, 34 & 40.

²⁹² CESCR, UN doc. E/C.12/COD/CO/4, para 16.

²⁹³ CESCR, UN doc. E/C.12/COD/CO/4, para 29. See also paras 30.

birth registration continues to be an obstacle to the enjoyment of the right to education.²⁹⁴

The CESCR has also been concerned about inequality in the distribution of resources. In its Concluding Observations on the combined initial and second to fourth periodic reports of Cambodia, the CESCR was ‘deeply concerned’ about the number of people who live below the poverty line and the low national spending on social services such as housing, health and education, despite the economic growth in the country. The CESCR was also concerned about the ‘significant inequalities in income distribution’, particularly between urban and rural areas, where most of the population live in poverty. It requested the state to increase its national spending on social services and assistance so as to achieve the progressive realisation of socio-economic rights. It also requested that the state allocate sufficient funds for the implementation of its poverty eradication strategy.²⁹⁵ The CESCR has also requested San Marino to increase the amount of social pension to ensure a decent standard of living for pensioners.²⁹⁶

The South African Constitutional Court, on the other hand, has been cautious in undertaking budgetary analysis or scrutinising resource allocation. The *Grootboom* case did not concern resource constraints issues but the Constitutional Court emphasised that financial and human resources must be made available for the implementation of measures aimed at the progressive realisation of socio-economic rights. Otherwise, the government’s actions could be seen as unreasonable.²⁹⁷ The Court also stated that the government is required to plan, budget and monitor the fulfilment of immediate needs and the management of crisis.²⁹⁸

In the *Soobramoney* case, the Court avoided dealing with budgetary issues and simply accepted the state’s contention that resources were limited. What was however clear from the case is that in the face of resource constraints, there must be clear criteria for regulating access to rights. The Court stated that

‘[t]here are also those who need access to housing, food and water, employment opportunities, and social security ... The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society’.²⁹⁹

However, the Court has required the state to justify the way in which resources have been allocated in cases where budgetary issues could not be avoided. For example,

²⁹⁴ CESCR, UN doc. E/C.12/COD/CO/4, para 35.

²⁹⁵ CESCR, UN doc. E/C.12/KHM/CO/1, para 27.

²⁹⁶ CESCR, *Concluding Observations on the Combined Initial, Second, Third and Fourth Periodic Reports of San Marino*, UN doc. E/C.12/SMR/CO/4, 4 January 2008, para 26.

²⁹⁷ *Grootboom*, para 39.

²⁹⁸ *Grootboom*, para 68.

²⁹⁹ *Soobramoney*, para 31.

in *TAC* and in *Khosa*, the Court rejected the state's contention that it did not have the requisite resources.

In the *TAC* case, the Court did not only address financial resources but also human resources. The Court engaged with the state's argument that it did not have the requisite resources to extend the programme to prevent mother-to-child transmission of HIV to facilities other than the pilot sites, and rejected it. Despite the state's argument, in the course of the litigation, some provincial governments had started extending the drug Nevirapine to facilities other than the pilot sites and the state had allocated additional resources to deal with HIV, which demonstrated to the Court that the required political will rather than resources was lacking.³⁰⁰ The Court's order included a request that the state make provision for trained human resource.³⁰¹

The Constitutional Court also referred to human resources in addition to financial resources in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*.³⁰² The Court was of the view that an assertion of resource constraints would require careful consideration. It then stated that

'an organ of State will not be held to have reasonably performed a duty simply on the bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human and financial, in the context of the overall resources of the organ of State will need to be provided'.³⁰³

In the *Khosa* case, the Court engaged in financial considerations and scrutinised projected expenditure of social grants.³⁰⁴ The state had argued that if it extended social grants to permanent residents, the cost would be large and would result in shortfalls in provincial budgets, especially in poorer provinces.³⁰⁵ The Court held that there was no clear evidence to show what the additional cost of providing social grants to permanent residents would be. It added that the cost of including permanent residents in the system would only constitute a small proportion of the total anticipated expenditure on grants.³⁰⁶ The Court also considered budgetary allocations in the case of *Premier, Province of Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, in which it set aside the provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months.³⁰⁷

³⁰⁰ *TAC*, para 118 -120.

³⁰¹ *TAC*, para 135.

³⁰² 2005 (4) BCLR 301 (CC) para 88. This case dealt with the positive duties imposed by the South African Transport Services Act 9 of 1989 to secure the safety of commuters in relation to human dignity, right to life and the right to freedom and security of the person.

³⁰³ *Ibid*.

³⁰⁴ *Khosa*, para 58-67.

³⁰⁵ *Khosa*, para 60.

³⁰⁶ *Khosa*, para 62.

³⁰⁷ 1999 (2) BCLR 151 (CC). This case was a challenge to a decision by Member of the Executive Council responsible for education in the province of Mpumalanga (the MEC) to discontinue paying all bursaries to certain schools in the province of Mpumalanga.

Generally, budget analysis has however been seen as a challenging exercise as socio-economic rights are not always broken down within the state's budget lines, and funds allocated for other rights can be related to or have impact on socio-economic rights. The OHCHR cites the example of birth registration, which is a civil right but also relates to the enjoyment of socio-economic rights such as health, social security and education.³⁰⁸ In addition, Felner has warned that although budget allocation to a specific sector could, in many instances, be an indication of the level of commitment to promoting that sector, it should not be used as the single indicator in assessing compliance with the obligation to progressively realise the relevant right. This is because, other than the budget allocated to a specific social sector, there are several factors related to the availability of resources in a state that bear upon the progressive realisation of socio-economic rights. These include the impact of economic growth on the expenditure spent per person in a given social sector, the impact of extra-sectoral spending on the realisation of socio-economic rights, regressive patterns of social spending, and inefficiency in the use of resources.³⁰⁹ Another challenge with this approach is that most human rights activists do not have the technical skills, time and resources to undertake complex budget analysis.³¹⁰

4.2.3 Violations approach

Progressive realisation of socio-economic rights has also been monitored through the violations approach. The violations approach was first proposed by Chapman.³¹¹ The approach involves identifying (including recording and documenting) violations that signify negative compliance with obligations under the ICESCR. This also includes tracking complaints filed by alleged victims before human rights bodies and national courts in relation to the respective state and the implementation of court orders.³¹² As Chapman notes, the approach does not necessarily require access to extensive statistical data.³¹³ To make it more feasible to identify violations, three types of violations have to be distinguished as seen below.³¹⁴ Chapman has provided several examples of the CESCR's identification of the categories of violations;³¹⁵ the subsequent paragraphs thus provide just a few more recent examples, drawing from the CESCR's concluding observations. It should be noted that the CESCR avoids using the terminology 'violation' in its concluding observations where a state has failed to meet its obligations. Instead, the CESCR merely expresses its concern over a state not meeting its obligations or fulfilling

³⁰⁸ United Nations, UN doc. E/2009/90, para 53.

³⁰⁹ Felner (2009) 412-414.

³¹⁰ Felner (2009) 420.

³¹¹ See Audrey Chapman, 'A "Violations Approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) *Human Rights Quarterly* 23-66.

³¹² United Nations, UN doc. E/2009/90, paras 64 & 67.

³¹³ Chapman (1996) 39.

³¹⁴ See Chapman (1996) 43; Maastricht Guidelines, paras 14-15; and CESCR, General Comment No. 19, para 64.

³¹⁵ Chapman (1996) 49-65.

certain rights, or refers to a 'breach' of obligations, sometimes qualified with the word 'serious'. The choice of words is, however, at best nomenclature as the CESCR has in fact identified violations in its concluding observations as seen below. The South African Constitution Court has also identified violations of socio-economic rights and granted relief in individual cases.

The first type is *violations resulting from state action and policies*, such as the adoption of legislation or policies that are incompatible with pre-existing legal obligations relating to rights or adoption of deliberately retrogressive measures. The CESCR has noted a contradiction between the Constitution of Chad under which treaties take precedence over laws and the government's assertion in its report that there is no provision at the national level for applying the provision of the ICESCR.³¹⁶ Also in relation to Chad, a violation noted is the exclusion of a large number of vulnerable and marginalised groups from the government's social security system. The CESCR then requested the state to ensure their inclusion and give priority to them.³¹⁷ The CESCR has also noted the existence of domestic laws that contravene the ICESCR in the case of DRC.³¹⁸

The South African Constitutional Court has also found the state to be in violation of its obligations as its housing policy measures did not make provision for those whose housing needs are the most urgent and whose ability to enjoy all human rights is most in peril.³¹⁹ In the *Abahlali* case, the Court ruled against legislation that was contrary to the Constitution and housing legislative framework, as it undermined protections against arbitrary evictions.³²⁰

The second type is *violations relating to acts or policies reflecting discrimination*, such as a failure to abolish discriminatory laws that impact on enjoyment of rights. The CESCR has criticised Benin for discrimination in relation to the inheritance rights of children born out of wedlock that have been recognised by their fathers and those that have not been recognised.³²¹ It has been concerned about discrimination in Angola against women, migrants, the poor, people with disabilities and persons affected with HIV and AIDS in terms of access to basic education, adequate housing and health services.³²² The CESCR has also noted the prevalence of customary laws in Zambia that result in discrimination against girls and women, particularly widows, in the exercise of their rights in the ICESCR.³²³ It was 'deeply concerned' about persistent discrimination in the political, social and economic spheres of life against women and discriminatory provisions in law in Algeria.³²⁴

³¹⁶ CESCR, UN doc. E/C.12/TCD/CO/3, para 9.

³¹⁷ CESCR, UN doc. E/C.12/TCD/CO/3, para 18.

³¹⁸ CESCR, UN doc. E/C.12/COD/CO/4, para 8.

³¹⁹ *Grootboom*, para 44.

³²⁰ *Abahlali*, paras 116, 118 & 122).

³²¹ CESCR, UN doc. E/C.12/BEN/CO/2, para 11.

³²² CESCR, UN doc. E/C.12/AGO/CO/3, para 15.

³²³ CESCR, UN doc. E/C.12/1/Add.106, para 14.

³²⁴ CESCR, UN doc. E/C.12/1/Add.71, para 14.

Examples of the second category of violations are found in the South African Constitutional Court's jurisprudence. For instance, in *Bhe and Others v Magistrate, Khayelisha and Others*, the Court found the African customary law principle of male primogeniture, by which only a male could participate in intestate succession (inherit property), to be unconstitutional as it constituted impermissible discrimination against women and girls and violated women's right to dignity.³²⁵ Also, in *Gumede v President of the Republic of South Africa and Others*, it found laws that recognised a husband as the family head, with ownership of and control over all family property in the family home, impacted negatively on women's ability to access property during and upon dissolution of their customary marriages, to be discriminatory and at odds with the right to dignity.³²⁶

The third type is *violations resulting from state's failure to fulfil minimum core obligations*, such as failure to put in place policies to implement rights. The CESCR has noted with concern, in relation to Benin, the lack of a specific law prohibiting discrimination against persons with disabilities.³²⁷ In relation to Chad, the CESCR's concern was with the state's failure to ensure access to minimum essential food that is sufficient, nutritionally adequate and safe to ensure freedom from hunger, which has resulted in chronic food insecurity for a large section of the population.³²⁸ In the case of the DRC, the maintenance of provisions that discriminate against women contrary to constitutional provisions and the failure to prioritise addressing the high level of gender-based violence, which the CESCR reminded the state is an immediate obligation, was grounds for concern.³²⁹ The lack of legal remedies for victims of violation has also been noted in the case of Morocco.³³⁰ The CESCR has further raised concerns over *de jure* and *de facto* inequality that exists between men and women in Senegal.³³¹ As noted earlier, the South African Constitutional Court has been reluctant to endorse minimum core obligations but has gone ahead to find the state to be in violation of its obligations by not providing the basic necessities life such as alternative accommodation in the event of an eviction³³² and social assistance to permanent residents.³³³

³²⁵ 2005 (1) BCLR 1 (CC), *paras 91-93 and 241* (Bhe). The case was a challenge of the African customary law principle of male primogeniture, which hindered women's ability to inherit property.

³²⁶ 2009 (3) BCLR 243 (CC) *paras 34 and 35-36* (Gumede). The case was a challenge of legislation that recognised a husband as the family head, with ownership of and control over all family property in the family home

³²⁷ CESCR, UN doc. E/C.12/BEN/CO/2, para 13.

³²⁸ CESCR, UN doc. E/C.12/TCD/CO/3, para 25.

³²⁹ CESCR, UN doc. E/C.12/COD/CO/4, para 20.

³³⁰ CESCR, UN doc. E/C.12/MAR/CO/3, para 14.

³³¹ CESCR, UN doc. E/C.12/1/Add.2, paras 15 & 40.

³³² See, generally, *Grootboom; Joe Slovo; Olivia Road; Modderklip; PE Municipality*.

³³³ See, generally, *Khosa*.

The violations approach has, however, been criticised by Anderson and Foresti for being punitive rather than facilitative.³³⁴ Olowu, on the other hand, is of the view that the approach over-generalises the elements that would constitute violations and is essentially predicated on the goal of avoiding the complexities of the concept of progressive realisation.³³⁵ Furthermore, with reference to the South African context, Klaaren has observed that the violations approach is a means towards the achievement of the justiciability of socio-economic rights and South Africa has gone beyond this objective of the approach.³³⁶ He also believes the approach detracts attention from the broader state obligations to promote socio-economic rights.³³⁷

If used solely, the violations approach would no doubt be ineffective in the monitoring of the progressive realisation of socio-economic rights, as it does not place much emphasis on 'progressive realisation'. The approach could be incorporated as one of the aspects of a monitoring tool, as it does help to establish negative outcomes in relation to government actions. Moreover, the complaints mechanism under the Optional Protocol to the ICESCR would add more value to this approach, as the CESCR would not only identify violations but also the reasonableness of state measures in line with its obligations under the ICESCR.

4.3 Other approaches

Different approaches to monitor progressive realisation that build on the existing approaches discussed above have been proposed by some writers. Examples considered in this paper are the model currently being developed by the SAHRC³³⁸ and those proposed by Felner³³⁹ and Anderson.³⁴⁰

4.3.1 Progressive Realisation and Constitutional Accountability Model

As mentioned earlier, the SAHRC is in the process of developing the progressive realisation and constitutional accountability model for monitoring state's compliance with its obligation to progressively realise socio-economic rights. As Jacobs explains, the proposed model has three phases.³⁴¹ The first phase involves *identifying the status of the right*, which involves using key quantitative data to identify deprivations and disparities of outcome in respect of the particular right with reference to access, fulfilment, enjoyment and progressive realisation. He notes that the quantitative data

³³⁴ Anderson & Foresti (2009) 471. See also Anderson & Foresti (2008) 2-3.

³³⁵ Dejo Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (2009) 202 [Pretoria: Pretoria University Law Press].

³³⁶ Klaaren (2005) 551.

³³⁷ Klaaren (2005) 552.

³³⁸ Jacobs (2005).

³³⁹ See Felner (2009) 415-430; and Felner (2008) 114-131.

³⁴⁰ See Edward Anderson, 'Using Quantitative Methods to Monitor Government Obligations in terms of the Rights to Health and Education' (2008). Available at www.cesr.org/downloads/Quantitative%20methods%20for%20monitoring%20ESCR.doc (accessed 08 May 2010).

³⁴¹ Jacobs (2009) 13-15.

would answer questions relating to whether South Africa has delivered on its targets, how it compares to other countries and whether South Africa has progressed or retrogressed over time and its extent.

The second phase relates to *causation and accountability*. It involves a determination of the reasons for the status of the right and the deprivations identified in the first phase. An analysis of the social accountability system of the government would also be done in order to (a) determine whether public resources have been utilised efficiently, effectively and with due diligence, and (b) determine whether the manner in which public officials exercise their duties is consistent with the progressive realisation of rights.

The third phase is two-fold: firstly, it is an *assessment of the adequacy of policy efforts* to give effect to the enjoyment of socio-economic rights; and secondly, an *undertaking of legal interventions* in respect of violations identified. The latter would include training interventions where a gap is identified in respect of the status of the right.

The description of the model lacks comprehensiveness as it is still being developed, thus making it difficult to critique at this stage. However, it seems to draw from the existing approaches as it is clear that indicators and benchmarks, analysis of resource allocation and use, and identification of violations would play a role in the model. The legal intervention dimension is quite novel and its effectiveness could be enhanced if there is co-operation between the SAHRC and civil society organisations and human rights institutions in the implementation of this aspect of the third phase.

4.3.2 The three-step methodological framework on using quantitative tools to measure progressive realisation

Based on the need to compare indicators with benchmarks, Felner has proposed a three-step methodological framework on using quantitative tools to measure progressive realisation.

The first step is the *identification of deprivations and disparities in the enjoyment of socio-economic rights*, using outcome indicators. The legal and normative standards of each right are used to determine the relevant outcome indicators. This step measures the essential levels of enjoyment of socio-economic rights, progressive realisation over time, available resources in relation to progressive realisation, and inequality in enjoyment of socio-economic rights in order to ascertain socio-economic rights deprivations and disparities in terms of outcome. This serves as a base line, as the next step analyses the main determinants of these outcomes in order to identify the policy responses that can reasonably be expected of the state. In relation to the first step, Felner provides a sample list of simple tools that use outcome indicators to measure various dimensions of state obligations in relation to socio-economic rights³⁴² that could be useful in the South African context. He, however, warns that not all deprivations or inequalities would amount to a violation or proof of discrimination as some are influenced by factors beyond the control of government.

³⁴² See Felner (2008) 117.

Hence, the South African approach of fair and unfair discrimination becomes relevant.

The second step is to *identify main determinants of deprivations and inequalities*, which helps in assessing the extent to which the state is complying with its obligations. The determinants include supply (provision) and demand (poverty and cultural barriers) factors, and direct (such as participation, quality and capacity) and indirect factors (such as demand factors and performance of right-bearer) that affect outcomes.

The third step is to *assess the adequacy of policy efforts to address the determinants* identified in step two. This would involve: (a) identifying policy failures in providing essential goods and services, using quantitative tools such as measuring availability, accessibility and quality of services; (b) identifying policy failures in the utilization of goods and services essential for the enjoyment of socio-economic rights, looking at the sufficiency of coverage of direct policy interventions and the resources dedicated to such interventions as well as the distribution of the benefits (an examination of indirect policy interventions would also be relevant); (c) monitoring resource allocation, using a basic framework of expenditure and resource allocation ratios to analyse expenditure patterns (explained further in Felner's Basic Framework below).

4.3.3 The Basic Framework

The quantitative methodological framework above would have to be used with qualitative tools. In the process of developing a methodological framework for measuring progressive realisation that involves both quantitative and qualitative tools, Felner has proposed the Basic Framework, which is simplistic and could be used by anyone interested in monitoring progressive realisation of socio-economic rights. The Basic Framework comprises three steps.

The first step involves *comparing social indicators with gross domestic product (GDP) per capita*, thus enabling one to measure progress over time in accordance with a country's development. In this step, a social indicator such as primary school completion rates as a proxy for the enjoyment of the right to education can be compared with GDP per capita as a proxy for available resources. Where a country simultaneously experiences a reversal in a social indicator and a significant economic growth, this would indicate non-compliance with its obligation to progressively realise the specific right. Felner, however, states that because most countries, more often than not, make some progress over time, this method would not be helpful, thus necessitating the use of a different method when progress is made in order to ascertain the adequacy of the progress in relation to changes in resources. In this regard, he provides the example of measuring the performance of the focus country with that of similar countries. Felner cites the example of India and Bangladesh to explain this point further. In India, the income growth was 58% between 195 and 2005 and during the same period, it lowered child mortality rate. However, comparing this to Bangladesh, which had a significantly lower level of income and lower economic growth than India, Bangladesh's reduction of child mortality rates was greater. This revealed that India was underperforming. Felner further suggests that because the first step does not show the overall current level of

enjoyment as it deals with progress over time, it would be important to combine this with other methods that compare most recent data on indicator levels with GDP per capita levels.

The second step requires an *analysis of resource allocations* (the magnitude, composition and distribution), in order to ascertain whether a state is devoting the maximum of its available resources to the progressive realisation of rights. Due to the challenges linked to budget analysis mentioned above, Felner focuses on the use of simple quantitative tools to assess the adequacy and equitable distribution of resources. He suggests that one could examine the proportion of GDP of a state that is allocated to a social sector in order to determine the extent of a state's commitment to a particular right. Using the right to education as an example, he states that if primary education expenditure ratio of the focus state, which is the relevant indicator, when compared to other countries (in the same region with similar needs and overall income), is lower, then the focus country is not complying with its obligation to devote the maximum of its available resources towards the progressive realisation of the right to education. Another issue to examine is the level of spending on basic social services as set by policy decisions. This would involve looking at the level of aggregate public expenditure as a proportion of GDP, fiscal priority assigned to the relevant social sector, and the priority of basic social services within total social sector expenditure. Felner again uses the right to education as an example to illustrate the three ratios to be considered – public expenditure ratio (percentage of national income that goes into public expenditure), education allocation ratio (percentage of public expenditure allocated to education), and primary education priority ratio (percentage of total education expenditure allocated to primary education).

The third step Felner refers to is an *analysis of expenditure per capita* on specific social sectors. He provides a number of advantages of such analysis: it can help identify common policy problems that hinder progressive realisation of rights; it can assist in establishing types of policy strategies a state should adopt; it could help reveal 'deeply embedded inefficiencies' in the use of resources. If, for instance, a state has a low level of financial commitment to a social sector that also has a low level of expenditure per person in that sector, this would imply a violation of its obligation to devote its maximum available resources to the progressive realisation of the relevant right. Felner, however, cautions that using the level of expenditure per capita in itself as an indicator of compliance or non-compliance would be unfair to poor countries since expenditure per capita is closely linked to a country's level of income and might lead to a conclusion that rich countries are complying. Moreover, the size of population also impacts on the level of expenditure per capita.

With regard to the third step, one can deduce that an effective and accurate analysis of expenditure per capita would require data that is properly disaggregated. For instance, if the poor are not further classified into rural and urban, when using expenditure per capita in relation to the poor in general, it would be difficult to establish if the expenditure is balanced or equitably distributed between the rural and urban poor.

It should be noted that Felner also considers *more sophisticated tools* that could complement the Basic Framework, which he notes are complex. The more sophisticated tools that Felner considers draw from the work of other researchers from various disciplines. The first is *methods to compare social indicators with GDP per capita*, which are more complex and not easy to grasp. Two such methods referred to are: comparing the absolute levels of a social indicator with GDP per capita; and using an Achievement Possibilities Frontier (APF) approach, which determines the maximum level of achievement for a socio-economic rights at a given per capita income threshold based on the highest level of indicator historically achieved by any country at that GDP per capita level.³⁴³ The second method is *budget analysis* that goes beyond the analysis of resource allocation and expenditure per capita, contained in his Basic Framework. The third method he considers is the *analysis of macro-economic policies* such as fiscal and monetary policies, taxation and international trade. One would therefore look at, for instance, the role of counter-cyclical fiscal policies in the promotion of progressive realisation of a specific socio-economic right. Lastly, Felner considers the *use of econometric tools and economic models*, a model proposed by Anderson, which explained below.

4.3.4 Econometric tools

Existing approaches to measure progressive realisation of socio-economic rights have been seen to bypass the economic and fiscal dimensions of compliance; that is, they fail to provide answers to questions relating to, for example, how much it would cost to deliver a socio-economic right, what the potential tradeoffs in prioritizing different rights are, and whether a government can sustain expenditure on a particular right. An econometric analysis is thus seen as being useful in providing such answers and information about factors that limit people's access to socio-economic goods and services.³⁴⁴

An illustration is the econometric analysis approach proposed by Anderson set out in four steps.³⁴⁵ The first step consists of an *analysis of the determinants of relevant indicators* of the specific socio-economic right. This step seeks to identify whose rights are not being fulfilled and why, using a method of multiple regression analysis of household survey data. It considers *outcome* indicators, indicators of the *use* of goods and services which contribute to these outcomes, indicators of the *quality* of those services, and indicators of the *access factors*. Anderson proposes a series of steps to be taken when undertaking this first stage analysis.³⁴⁶

The second step entails identifying, based on the analysis in the first stage, government actions that could potentially raise levels of realisation of a right and/or

³⁴³ For further reading on the APF, see Fukuda-Parr, Lawson-Remer & Randolph (2008) 19-27. See also Susan Randolph, Sakiko Fukuda-Parr & Terra Lawson-Remer 'Economic and Social Rights Fulfillment Index: Country Scores and Rankings' (2009) *Economic Rights Working Paper Series 11*, University of Connecticut, 6-11. Available at <http://www.econ.uconn.edu/working/11.pdf> (accessed 12 March 2010).

³⁴⁴ Anderson and Foresti (2009) 471. See also Anderson & Foresti (2008) 2.

³⁴⁵ Anderson (2008) 16-42.

³⁴⁶ Anderson (2008) 16-29.

attainment of the minimum essential level of the right, and estimating their likely cost. The results of the first step can be used to identify potential government actions. The aim here, as Anderson points out, is not to be prescriptive on specific actions that government must take, but 'to outline at least one action that a government could take (but is not currently taking), and to investigate its cost'.³⁴⁷

The third step involves assessing the constraints to meeting these costs; and the final step consists of an overall assessment as to whether a potential government action would promote realisation of the right to health or education, or attainment of the minimum essential level of the right to health or education. The third and final steps therefore assess the potential revenue constraints facing a government. This requires the consideration of the likely overall effect of the government action on the realisation of the right, the overall effect of the government action on economic growth or on any other important intermediary variables, in the medium to long run, and the effect of economic growth, or of any other important intermediary variables, on future levels of realisation of the right to health and education.³⁴⁸

The final stage is the hardest to undertake as the use of complex mathematical techniques is ideal, and so Anderson proposes three simple 'rules of thumb' that can be used as opposed to a detailed and complex economic model. The first rule of thumb is an assessment of whether the government action would raise the level of realisation of a particular right, at least, in the short term. This can be done using data generated by the first and second steps. The second rule of thumb assesses whether the government action would raise or lower economic growth. The third rule of thumb considers the effects of economic growth on future levels of realisation. It assesses 'whether a reduction in economic growth, or in any other important intermediate variables, is sufficiently large to offset the positive short-run effect of the potential action'. The second and third rules can be done using publicly available econometric evidence.³⁴⁹

While commending Anderson's approach in developing a framework that takes into account scarcity of resources, the related problems of trade-offs, and the need to prioritise, Felner also raises the concern that 'the level of complexity of the methods proposed seems to be well beyond the technical skills of most human rights advocates'.³⁵⁰

5. Developing a tool for monitoring progressive realisation in South Africa

Having a tool to monitor states' compliance with their obligation to progressively realise socio-economic rights has been seen as essential in giving real meaning to these rights for many who are deprived of the most basic needs.³⁵¹ Felner adds that

³⁴⁷ Anderson (2008) 2.

³⁴⁸ Anderson (2008) 39-41.

³⁴⁹ Ibid.

³⁵⁰ Felner (2009) 430.

³⁵¹ Felner (2009) 404.

such tools are more relevant today due to the global economic crisis that has reduced the ability of poor countries to mobilise adequate resources for the realisation of socio-economic rights.³⁵² A tool is therefore relevant to ensure that governments do not use 'progressive realisation' as an excuse for failing to realise these rights. In developing a tool to monitor progressive realisation of socio-economic rights, it is important to bear in mind Chapman's five methodological preconditions to the systemic monitoring of socio-economic rights:

- '(1) conceptualization of the specific components of each enumerated right and the concomitant obligations of states parties;
- (2) delineation of performance standards related to each of these components in the form of indicators and benchmarks, making possible the identification of problems and potential major violations;
- (3) collection of relevant, reliable, and valid data, appropriately disaggregated by sex and a variety of other variables, in a consistent format over time, making it possible to evaluate trends;
- (4) development of an information management system for these data to facilitate analysis of trends over time and comparisons of the status of groups within a country;
- (5) the ability to analyze these data in order to determine patterns and trends'.³⁵³

In addition, Felner has provided constructive insight into developing a monitoring tool.³⁵⁴ He cautions that, due to the link between progressive realisation and the use of maximum available resources, a monitoring exercise should not just assess whether a state has made progress over time in the realisation of a right but also look at the reasonableness of the **pace** of progress in relation to the state's available resources. This is in line with the CESCR and South African Constitutional Court's thinking. It thus requires establishing what levels of progress on socio-economic rights would be sufficient for a country to comply with the obligation of progressive realisation. Felner also emphasises the need to use more than one method of monitoring the obligation of progressive realisation, as no single tool can capture the multiple policy factors that affect the level of resources that a state devotes to progressive realisation.³⁵⁵ This is something that comes across from the discussion of the various methodologies in section IV. The CESCR's example also shows the use of a combination of methodologies; and the same with the experience of the South African Constitutional Court though in varying degrees.

Developing a methodological framework for monitoring progressive realisation of socio-economic rights in the South African context will therefore require taking into consideration relevant aspects in the various approaches discussed in section IV. This would include the use of indicators (structural, process and outcome) and consideration of targets set by government, so as to monitor whether there has been progress, stagnation or retrogression. In addition to any targets set, the reasonableness standard as well as other standards in the Constitution, legislation and jurisprudence could be used as benchmarks. If the tool incorporates the criteria in the reasonableness standard, it would enhance its credibility. The tool should also

³⁵² Ibid.

³⁵³ Chapman (nd) 1.

³⁵⁴ Felner (2009) 414.

³⁵⁵ Felner (2009) 414-415.

allow for the examination of budgets as well as resource allocation and expenditure (including variations in allocation and spending). Since the tool is mainly going to be used by civil society and human rights institutions and advocates, it should not go beyond basic budget analysis, as a rigorous budget analysis could be complex and difficult to undertake by non experts. Identification of violations would also be a relevant component of the tool, as it is important to establish outcomes, both negative and positive, of government measures. In other words, the tool should facilitate the assessment of whether measures adopted result in a denial or limitation of access, or improved access to rights. In addition, because there are various dimensions to the obligations of states as seen in section II, the methodology should be based on both quantitative and qualitative tools. Furthermore, equality/non-discrimination and participatory decision-making cuts across all socio-economic rights, implying that the tool should also allow for one to assess equality/inequality in the enjoyment of socio-economic rights along different groups and their involvement in policy choices and their implementation. The need for statistical data that is disaggregated is crucial in this respect.

Drawing from the general comments and concluding observations of the CESCR, the jurisprudence of the South African Constitutional Court, and the existing and proposed methodologies considered in the preceding section, a tool to monitor the progressive realisation of socio-economic rights should be able to provide answers to a number of questions. For example, in relation to monitoring progressive realisation, it should address questions such as:

- Have steps (legislative, administrative, budgetary, judicial, promotional and other measures) been taken aimed at progressive realisation and were they taken within a reasonable time?
- Are the measures effective, targeted and do they set goals to be achieved?
- Are the measures adequate, accessible, affordable and reasonable?
- Do the measures give priority to the needs of the vulnerable and disadvantaged or are there specially tailored measures and additional resources for these groups?
- Are the measures reasonable (with reference to the guidelines from the CESCR and Constitutional Court)?
- Have the measures been consistently revised and improved over the years?
- Has access to rights been increased over the years?
- Where minimum standards have been achieved, has the government proceeded to fulfil the right beyond this?

It is also appropriate for any monitoring tool to assess the reasonableness of the budgetary priorities in light of human rights standards. The aspect of the tool that measures the government's effective and reasonable use of the available resources towards progressive realisation should be able to respond to questions such as:

- Have resources been used effectively and equitably allocated?
- Are the resource allocations adequate and sufficient?

- Have the essential needs of members of vulnerable and disadvantaged groups been prioritised in all resource allocation processes, even in the face of resource constraints?
- Are there clear strategic lines in the budget in relation to the vulnerable and marginalised?
- Does the budget allocation take into consideration the size of beneficiaries?
- Has there been consistent under spending in a particular area?
- Has there been underspending in areas where targets have not been met?
- Are there any regressive patterns of spending?
- Where there are resource constraints, has the widest possible enjoyment of the right been achieved?
- Has international aid been sought where resources are limited?
- If aid is given, has a framework on its use been adopted?
- Has the aid been allocated to priority areas?

In relation to measuring whether the government is meeting the essential minimum levels of enjoyment, the tool should be able to respond to questions such as:

- Have essential levels of rights been satisfied?
- Are significant people being deprived of essential levels?
- Do measures allow for effective participation in policy and decision-making processes?
- Have those in desperate need been left out without any form of assistance?
- Have steps been taken to prevent unfair discrimination, and inequality (to ensure both formal and substantive equality)?
- If steps that must be taken immediately are beyond the maximum resources available, has a request been made for international cooperation aid?
- Have any retrogressive measures been taken? And if so, was the justification of the action reasonable (for example, with reference to the criteria provided by the CESCR)?

The above are just some illustrative questions. As noted earlier, Felner also provides a list of illustrative questions and the OHCHR has identified issues to be considered when using indicators to measure progressive realisation. In terms of methodology, the approaches discussed in the previous section provide various steps that one could draw from in developing a South African specific tool. A key point to bear in mind is that any tool or methodological framework that is developed would require constant fine-tuning to keep to pace with new relevant thinking on socio-economic rights from various disciplines and human rights bodies.

Incorporating the ability to do cross country comparisons – that is, comparing countries in the same region with similar needs and overall income – in the tool would add value. This is however not a prerequisite, especially in the South African context, as some human rights organisations might not have the means and skills to engage in cross country comparisons. Fukuda-Parr, Lawson-Remer and Randolph have proposed an index (Economic and Social Rights Fulfillment Index – ESRF-I) that evaluates and compares countries on their fulfilment of socio-economic rights and is used to measure the extent to which states, as primary duty bearers, fulfil their

obligations to progressively realise socio-economic rights. The index is an advance in the existing approach of relying on indicators to assess the level of human rights fulfilment. They propose two indices, one for low and middle income countries and another for high income countries, using the ratio approach and Achievement Possibilities Frontier approach.³⁵⁶ In a subsequent paper, they apply the ESRF-I to Brazil.³⁵⁷ Their methodology however seems complex; and as they note, lacks certain important elements such as discrimination and inequality, participatory decision-making and some core rights.³⁵⁸

6. Conclusion

Ratifying a human rights treaty or adopting a constitution that enshrines socio-economic rights as well as relevant legislation and policies is relatively simple in comparison to its subsequent implementation and government's compliance with the obligations contained therein. For decades now, there has been growing advocacy on the effective implementation and enforcement of socio-economic rights. These efforts are however undermined if there is no methodology to monitor and address critical issues relating to the progressive realisation of these rights.

This paper began by posing a fundamental question of how to ascertain whether sufficient and effective steps have been taken to progressively realise socio-economic rights? The question is relevant as governments can be held accountable in practice if their compliance with the obligation to progressively realise socio-economic rights is monitored effectively. It can also assist as a planning tool to assist policy makers in evaluation and the development of future programmes and policies to ensure alignment with their obligations under the South African Constitution. For this to be done, one needs a clear understanding of the obligations of government and the components of socio-economic rights. Then a conceptual framework needs to be developed that defines what is to be monitored, how it would be monitored, taking into consideration 'who' is undertaking the monitoring, as it influences the kind of framework that is developed.

As mentioned in section IV, monitoring the progressive realisation of socio-economic rights is a complex and demanding task. The fact that there are many socio-economic rights with different dimensions and the relevant obligations of states also have various dimensions adds to the complexity of this exercise.

This paper has explained the various dimensions of the socio-economic rights obligations on government with particular reference to the ICESCR and the South African Constitution. Both documents require the state to adopt measures that are

³⁵⁶ See generally Fukuda-Parr, Lawson-Remer and Randolph (2008).

³⁵⁷ See Patrick Nolan Guyer, Sakiko Fukuda-Parr, Susan Randolph & Louise Moreira Daniels, 'Measuring the Progressive Realization of Economic and Social Human Rights in Brazil: A Disaggregated Economic and Social Rights Fulfillment Index' (2009) *Economic Rights Working Paper Series 10*, University of Connecticut. Available at <http://www.econ.uconn.edu/working/10.pdf> (accessed 12 March 2010).

³⁵⁸ Fukuda-Parr, Lawson-Remer and Randolph (2008) 34.

aimed at the progressive realisation of socio-economic rights, while taking into considerations the resources available both within the state and those from international development cooperation. Such steps have to be adequate, accessible, affordable, reasonable and effective in progressively realising socio-economic rights. This paper has shown that, though the term 'progressive realisation' introduces some flexibility in terms of the socio-economic rights obligations of states, it includes tangible obligations that are of immediate effect. These include the obligations to take steps, prohibit discrimination, non-retrogression and the obligation to meet certain minimum essential levels of rights as well as participatory decision-making. Specific attention must also be paid to vulnerable, marginalised and disadvantaged individuals and groups, as a matter of priority.

At the UN level, the CESCR has played a key role in overseeing states' compliance with their obligations under the ICESCR. At the South African level, the Constitutional Court has been instrumental in enforcing these rights and obligations; and the SAHRC has monitored the government's realisation of socio-economic rights though with some challenges. Both the CESCR and the Constitutional Court have clarified what the obligation on states entail. As seen from the jurisprudence from these bodies, though the pace of progressive realisation is dependent on the availability of resources, this does not release states of their obligations, as even in the face of resource constraints, certain components of the rights have to be realised. Moreover, resource constraints alone cannot be used as a justification for non-compliance.

Reverting to the fundamental question posed above and in section I, monitoring is crucial in order to ascertain if the steps taken are sufficient, effective and reasonable, by measuring achievements and detecting failures and gaps, among others, which could result in re-orienting state action when needed. A methodological framework is necessary in this regard. In recent years, there have been significant developments in terms of methodologies for monitoring socio-economic rights. This paper has considered existing and proposed methodologies to monitor the realisation of socio-economic rights, which establishes that a combination of approaches is relevant if monitoring progressive realisation is to be effective. This should therefore be borne in mind in developing a methodological framework for monitoring progressive realisation of socio-economic rights in the South African context.

Moreover, the task of developing such a tool is challenging as there is no precedent at the national level to follow. Hence, the need to rely on models of international human rights monitoring bodies such as the CESCR, the approach used by the South African Constitutional Court, and models proposed by various writers. Such a tool is vital as it would, among other things, advance evidence-based empirical debate on the implementation of socio-economic rights in South Africa. It would also provide a framework through which government can be held accountable for its policies and practices that impact on the enjoyment of socio-economic rights. It could further be a potent tool for social change, as it would also facilitate the re-orientation of state action and policies towards enhanced implementation of socio-economic rights.

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