Introduction

The basic premise of human rights is to confer legal protection on all individuals in all types of situations. This implies that human rights apply at all times, including before, during and immediately after a disaster. Moreover, it is in periods of extreme hardship, whether of an economic or political nature, that human rights protections assume their greatest relevance.

Economic and social rights (ECOSOC rights) have often been downplayed in normative discussions about the applicability of human rights, owing to doctrinal objections based on their perceived lower normative status, compared to civil and political (CP) rights, and practical objections relating to their implementation and enforcement. ECOSOC rights are said to require positive State action and allocation of considerable resources, which cannot be expected in times of disaster. Moreover, ECOSOC rights have been construed as aspirational statements rather than as imposing immediate legal obligations on States, in contrast to CP rights. In times of disaster, aspirations are quickly ranked low on the list of priorities. While this orthodox view of ECOSOC rights is no longer tenable, its influence in the drafting of instruments enshrining these rights has resulted in certain conceptual and procedural peculiarities of ECOSOC rights.

This chapter focuses on the applicability and nature of ECOSOC obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), a treaty that sets international standards of global reach. The Covenant comprises a number of provisions relevant to disaster settings, including the principle of non-discrimination (Article 2(2)), the right to work (Articles 6 and 7), the right to social security and assistance (Article 9), the right to an adequate standard of living (Article 11), which includes adequate food, water, sanitation and housing, the right to the highest attainable standard of health (Article 12), and the right to education (Articles 13 and 14).

The first part of this chapter explores the nature of the obligations imposed on States Parties to the ICESCR, including the distinction between obligations of immediate effect and rights which may be realized progressively. The second part examines the applicability of ICESCR obligations in disaster situations, including the relevance of resource constraints and the limitations clause in Article 4 ICESCR.
Obligations under the ICESCR

Article 2(1) ICESCR—a programmatic provision?

Today, it is widely recognized that the distinction between CP rights and ECOSOC rights in terms of positive and negative obligations is invalid, as the realization of all human rights requires State action, and that parts of ECOSOC obligations can be achieved through abstention. Still, the understanding of ECOSOC rights that motivated their treatment in a separate Covenant also produced some peculiarities in the provisions of the ICESCR, most notably in Article 2(1). Article 2(1) ICESCR defines the nature of State obligations under the Covenant. It provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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.

Located in Part II of the Covenant, Article 2(1) forms part of the general provisions of the Covenant which address the understanding of all substantive provisions laid down in Part III (Articles 6–15). Article 2(1) is unique in that it defines a State’s obligations and guarantees respect for all substantive rights, similar to the principle of non-discrimination in Article 2(2). The Committee on Economic, Social and Cultural Rights (CESCR)—the international treaty body created to oversee implementation of the ICESCR—has confirmed this understanding, explaining that Article 2(1) has a dynamic relationship with all of the substantive provisions of the Covenant and thus serves a fundamental importance for a full understanding of the ICESCR. The vague formulation of the general obligation in Article 2(1) has lent itself to a wide range of interpretations, some arguing for a legal obligation, others not. In the latter camp, it has been maintained that Article 2(1) implies that the Covenant as a whole merely lays down programmatic objectives as to how ECOSOC rights are to be realized, leaving implementation entirely up to States. This is in contrast with the ICCPR, which imposes direct and enforceable legal obligations.

Defending the normative import of Article 2(1), Alston and Quinn have emphasized that the ICESCR is ‘a treaty that gives rise to formal obligations on the part of ratifying or acceding States’ relying on the principle of good faith in treaty interpretation, articulated in Article 31(1) Vienna Convention on the Law of Treaties (1969), that argued that to dismiss the legal significance of the ICESCR is to suggest that States ratifying the Covenant did not act in good faith. ‘To this view, these States have gone through the formal motions of ratifying a treaty that, appearances to the contrary notwithstanding, gives rise to no obligations on their part to do anything of substance’.

The CESCR has referred to a number of rights of the ICESCR as being self-executing, that is, capable of being applied by courts without further elaboration. The adoption of the Optional Protocol to the ICESCR in 2008 and its entry into force in May 2013, which envisages the CESCR considering complaints and making inquiries into alleged violations of the Covenant, is further confirmation of the general understanding that the ICESCR is comprised of concrete obligations which States can breach and which can lead to certain claims for individuals.
Categories of obligations under the ICESCR

Having affirmed that the ICESCR imposes legally binding obligations on States Parties, the CESCR has further identified different categories of obligations under the Covenant. This has enabled the Committee to move beyond the vague formulation of Article 2(1) to concretize and operationalize Covenant obligations in different contexts. First, a distinction is drawn between obligations of conduct and obligations of result. According to the International Law Commission (ILC), obligations of conduct are those where an organ of the State is obliged to undertake a specific course of conduct, whether through an act or omission, which represents a goal in itself, while obligations of result are described as requiring a State to achieve a particular result through a course of conduct that is left to the State's discretion. Second, the CESCR has distinguished between obligations of immediate effect and long-term obligations that are subject to progressive realization. These obligations will be discussed below. Finally, the CESCR has invoked the tripartite typology of obligations to respect, protect and fulfill ECOSOC rights. The obligation to respect requires States not to arbitrarily interfere with the enjoyment of rights. The obligation to protect requires States to take measures to prevent third parties from interfering with the rights. The obligation to fulfill requires that States adopt appropriate legislative, administrative, budgetary, promotional and other measures towards the full realization of the rights. While this framework assumes that obligations become more resource-costly as you move from the obligation to respect to the obligation to fulfill, it emphasizes that the implementation of all human rights obligations, including negative obligations, requires the creation and maintenance of an institutional machinery and the resources necessary to sustain it.

Obligations of immediate effect

The consensus view is that the obligations of non-discrimination in Article 2(2) and the principle of equality between women and men in Article 3 are of immediate application and enforceable by judicial and other organs. In addition, the CESCR has provided an indicative list of substantive provisions of the ICESCR capable of immediate application. These include Article 7(a)(i) on equal pay, Article 8 on the right to form trade unions and strike, Article 10(3) on the obligation to take special measures of protection and assistance on behalf of children and young persons, Article 13(2) on free and compulsory primary education for all and Article 13(3) on the freedom of parents to choose the type of education provided for their children. Moreover, while Article 2(1) sets out the general obligations of progressive realization of all ECOSOC rights, not every aspect of a particular right is conditioned on progressive achievement. Each right can be broken down into a series of obligations, some of which are of immediate and others of progressive nature. In terms of the tripartite typology of respect, protect and fulfill, it is generally agreed that the duty to respect entails obligations of immediate effect. It requires States parties to avoid measures that impede or prevent the enjoyment of ECOSOC rights. This includes a number of negative obligations, which apply fully and immediately. While negative in nature, these obligations – like any human rights obligations – imply the adoption of positive measures to prevent interference with rights, including establishing the required institutions and an effective system of administrative justice to investigate and remedy any deprivation by State agents. The duty to protect – understood to require a State to prevent third or private parties from interfering with the enjoyment of rights – can also entail obligations of immediate effect and long-term obligations that are subject to progressive realization. These obligations will be discussed below. Finally, the CESCR has invoked the tripartite typology of obligations to respect, protect and fulfill ECOSOC rights. The obligation to respect requires States not to arbitrarily interfere with the enjoyment of rights. The obligation to protect requires States to take measures to prevent third parties from interfering with the rights. The obligation to fulfill requires that States adopt appropriate legislative, administrative, budgetary, promotional and other measures towards the full realization of the rights. While this framework assumes that obligations become more resource-costly as you move from the obligation to respect to the obligation to fulfill, it emphasizes that the implementation of all human rights obligations, including negative obligations, requires the creation and maintenance of an institutional machinery and the resources necessary to sustain it.

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measures and measures to prevent, investigate and punish actions by third parties that impede the enjoyment of rights. 21

In addition, the general obligation ‘to take steps’ in Article 2(1) has been construed as imposing obligations of immediate effect to take deliberate and targeted steps and use all appropriate means. 22 According to the CESCR, these steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. 23 Consequently, the undertaking ‘to take steps’ is an obligation of conduct ‘to move as expeditiously and effectively as is reasonably possible towards reaching the final result (full realization of the rights).’ 24

Another important set of immediate obligations pertains to the ‘minimum core’ of each of the rights protected under the ICESCR. 25 This minimum core can be understood as a universally defined baseline that must be guaranteed for all individuals in all situations and on the basis of which States should pursue progressive achievement. This minimum core has been referred to by the CESCR as ‘non-derogable,’ 26 suggesting an absolute obligation that cannot be further restricted. With respect to the content of this ‘minimum core,’ it has been noted in general terms that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every State Party. 27 Over the years, the CESCR has attempted to define this minimum core by referring, for instance, to essential foodstuffs, essential primary health care, basic shelter and housing or the most basic forms of education. 28 Rather than elaborating on the minimum core content of ECOSOC rights in a theoretical or qualitative notion of the essence of a right, 29 the CESCR has focused on the term ‘core obligations.’ To give the example of the right to the highest attainable standard of health, the CESCR has identified a number of core obligations of immediate application that must be complied with in all circumstances, including:

• To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
• To ensure access to the minimum essential level of nutritionally adequate and safe food so as to ensure freedom from hunger for everyone;
• To ensure access to basic shelter, housing and sanitation and to an adequate supply of safe and potable water;
• To provide essential drugs, as defined under the World Health Organization (WHO) Action Programme on Essential Drugs;
• To ensure equitable distribution of all health facilities, goods and services; and
• To adopt and implement a national public health strategy and plan of action. 30

While the notion of minimum core obligations is accepted in legal doctrine and entrenched in the practice of the CESCR, questions arise about the feasibility of determining an internationally defined minimum core that is important to the realization of human rights. It is questionable whether even the implementation of the strict minimum core obligations regarding essential foodstuffs or primary health care is affordable for many poor countries, to say nothing of those experiencing a disaster. It might also be considered reasonable that developed States should have to meet a higher ‘minimum’ standard than developing countries that begin at a much lower level of rights realization. 31 Furthermore, Article 2(1) is a general provision that informs the interpretation of all substantive obligations of the Covenant. It would therefore seem to follow that the qualifier of ‘maximum available resources’ in Article 2(1) is applicable to all obligations under the Covenant, including the ‘minimum core.’ 32 Yet, this is in direct contradiction to the very notion of ‘non-derogable’ minimum core obligations and the objectives of identifying obligations of immediate effect that must be ensured by States in all circumstances. This question is still unresolved. 33
Progressive realization

The concept of progressive realization has been described as the "soul" of the ICESCR. It reflects the idea that most of the Covenant rights depend to varying degrees on the availability of resources and thereby "mirrors the inevitably contingent nature of State obligations". This does not, however, mark a difference in kind between rights under the ICCPR and the ICESCR. The full realization of CP rights, such as the rights to fair trial and to free and fair elections, is also heavily dependent on available resources and the development of necessary societal structures. Nor does progressive realization postpone obligations. It has already been demonstrated that States Parties to the ICESCR have obligations of immediate effect, including the duty to immediately start taking steps towards the full realization of the rights. Instead, progressive realization implies a certain flexibility by accommodating the economic realities of each State Party.

The obligation on States Parties to move as expeditiously as possible towards the full achievement of ECOSOC rights can be expressed in terms of the obligation to "fulfil" these rights. This requires States to take positive measures aimed at enabling and assisting individuals to enjoy ICESCR rights. While the exact contours of the duty will depend on the specific circumstances of the State, this requires an active role by the State in adopting the necessary measures and devoting material resources to the full realization of ICESOC rights. Failure to take appropriate measures may result in the application of the so-called "positive" obligations under the ICESCR, which require States to create legal, institutional, administrative and procedural conditions and provide resources for the realization of the rights without discrimination. Moreover, the obligation to provide requires the State to provide the right directly whenever an individual or group is unable, for reasons beyond their control, to provide for themselves. For example, inadequate provision of emergency aid to the civilian population in a disaster setting exemplifies a failure of the duty to fulfil the right to an adequate standard of living.

An implication of the notion of progressive realization is that retrogressive measures – that is, measures that imply a step back in the level of rights enjoyment – are impermissible. The CESCR has stated that there is a "strong presumption of impermissibility of any retrogressive measure taken in relation to substantive rights," which constitute prima facie violations of the ICESCR. As a result, States have the burden of proof to justify the legality of any such measure. The CESCR provides two justifications for taking retrogressive measures, namely for the purpose of improving the situation with regard to the "totality of the rights in the Covenant" and an economic crisis, which renders progressive realization of all ECOSOC rights impossible. In general, measures must be reasonable and effective and produce results compatible with the obligations of the Covenant. Moreover, they must be in place for a limited period of time and may not be renewed unless such conditions exist. The CESCR has also set out a list of minimum core obligations that States Parties are required to ensure the realization of ECOSOC rights.

In conclusion, the progressive realization of ECOSOC rights involves a combination of immediate obligations and long-term commitments, requiring States to adopt a strategic approach to human rights implementation, taking into account the specific circumstances and capabilities of each State Party. The CESCR has emphasized the importance of a "case-by-case" approach, recognizing that human rights obligations are not static and may evolve over time, necessitating ongoing assessment and adjustment of States' obligations. The development of human rights indicators and benchmarks, as well as the use of international standards and guidelines, can facilitate this process and provide a basis for accountability and monitoring of States' progress in fulfilling their obligations.

ECOSOC rights in times of disaster

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Maximum available resources

The obligation on States Parties to take steps toward the full realization of the Covenant rights is an obligation to the maximum of available resources. In the preparatory work, it was stressed that having insufficient resources should not be considered as a ground to circumvent obligations. However, the CESCR appears to have treated the phrase ‘maximum available resources’ as a justification for noncompliance. In addition, the minimum core obligations of each right must be realized at all times, although as mentioned, the CESCR has not always been consistent in this respect, and the actual feasibility of discharging the minimum core obligations is not evident for all countries, including those experiencing disaster.

The scope of what constitutes ‘maximum’ available resources is left open-ended, which reflects the fact that the nature of resources can change over time and differ depending on the context. The CESCR has generally refrained from providing concrete guidance on this issue, fully respecting the authority vested in relevant State organs to adopt what it considers to be its most appropriate policies. Yet Alston and Quinn concluded, based on the preparatory work, that it was the intention of the drafters not to leave the determination of what constitutes adequate resource allocation entirely to a State Party’s subjective determination.

Certain guidance on how resource allocation should be oriented in relation to ECOSOC rights enjoyment can be found in the CESCR’s Statement on resources in 2007 that ‘in order for a State Party to be able to attribute its failure to meet at least its minimum core obligation to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’ This suggests that Covenant rights should be given priority in the allocation of resources, although it remains unclear how different sectors should be prioritized (e.g. health versus education). Moreover, the CESCR requires that resources be ‘adequate’ or ‘reasonable’ when assessing compliance with Covenant obligations. For this purpose, it will inter alia consider:

• Whether the State Party’s decision (not) to allocate available resources is in accordance with human rights standards;
• Where several policy options are available, whether the State Party adopts the option that least restricts Covenant rights; and
• Whether the steps taken into account the precarious situation of disadvantaged and marginalized individuals or groups, whether they were non-discriminatory and whether they prioritized grave situations or situations of risk.

These considerations have led courts to conclude that the obligation to use the maximum available resources implies a prohibition against diverting resources from ICESCR-related issues. However, a different interpretation is possible, namely that the adequacy of resources allocated to ICESCR rights will be judged against other expenditures. This more nuanced approach, which permits consideration of other demands on State resources, seems consistent with the below...
factors identified by the CESCR in relation to assessing a State's compliance with its obligations to take steps to the maximum of available resources in the context of the Optional Protocol:

- The country's level of development;
- The severity of the alleged breach, in particular whether the situation concerned enjoyment of the minimum core content of the Covenant;
- The country's current economic situation, in particular whether the country was undergoing a period of economic recession;
- The existence of other serious claims on the state party's limited resources, for example resulting from a recent disaster or armed conflict;
- Whether the state has sought to identify low-cost options; and
- Whether the state party has sought cooperation and assistance on the basis of offers of resources from the international community for the purpose of implementing the provisions of the Covenant without sufficient means.

International assistance

Article 2(1) ICESCR refers to taking steps 'individually and through international assistance and co-operation'. In addition, international assistance and cooperation is implicit in the phrase 'maximum of its available resources', which has been interpreted to include whatever resources are available nationally as well as internationally. Further to the general provision in Article 2(1), States Parties have also agreed under Article 11(1) to 'take appropriate steps to ensure the realization of this right to an adequate standard of living, recognizing in this effect the essential importance of international co-operation based on free consent' and in Article 11(2) to 'take individually and through international co-operation the relevant measures regarding the right to be free from hunger'. These provisions could be read as imposing an obligation on developing and developed States to accept and offer international assistance, respectively, to ensure compliance with Covenant obligations. Alston and Quinn posit that 'in the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant'. In elaborating on the right to the highest attainable standard of health, the CESCR in General Comment No. 14 states that States Parties have joint and individual responsibility in accordance with the Charter of the United Nations and the relevant resolutions of the UN General Assembly and World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and IDPs. Each State should contribute to this task to the maximum of its capacities.

However, the exact nature and scope of an international obligation to accept and to offer international assistance have not been fully elaborated. A statute is in essence 'a set of rules' and the CECSR has not been able to offer a comprehensive list of all obligations. At the very least, the concept of 'international co-operation' in the ICESCR requires international assistance and cooperation and the notion of 'maximum available resources' suggests that not having sufficient resources for realizing ICESCR rights can only be introduced as a justification for non-compliance when a State has shown that it has sought international assistance. When a State claims that it has not been able to carry out its obligations for reasons beyond its control, it has the burden of proving that this is the case and that it has been sufficiently sought to obtain international support. Proof that such assistance has been sought demonstrates that the State is willing but unable to meet its obligations.
obligations. This reading is consistent with the comment made by several States that ‘if an affected State cannot discharge its obligations to provide timely relief to its people in distress it must have an obligation to seek outside assistance’. Where an unable State requests assistance, it has the further obligation ‘to refrain from obstructing international organizations in their legitimate efforts to gain access to individuals under the jurisdiction of the State in order to assist them in the enjoyment of economic, social and cultural rights’.

**ECOSOC rights in times of disaster**

**Applicability of the ICESCR in disaster settings**

From a legal standpoint, there is no relevant difference between disasters and other situations with respect to the applicability of human rights. ECOSOC rights included. The applicability of human rights to disaster settings is affirmed in Article 5 ILC’s Draft Articles on the Protection of Persons in the Event of Disasters, which provides that ‘persons affected by disaster are entitled to respect for their human rights’.

In terms of the applicability of the ICESCR, the CESCR has underscored that it is precisely in situations of crisis, that the Covenant requires the protection of all economic, social and cultural rights, in particular of the most marginalized and disfranchised groups of the society, to the full of its ability under the prevailing adverse conditions.

The CESCR has referred explicitly to duties applicable in the event of disasters. For example, the obligation ‘to take the necessary action to mitigate and alleviate hunger’ in Article 11(2) applies ‘even in times of natural or other disaster’; and the requirement of physical and economic access to adequate food or means of its procurement applies ‘at all times’. Regarding the duty to respect the right to food, the Committee has stated that a violation can occur by ‘the prevention of access to humanitarian food aid in internal conflicts or other emergency situations’. Concerning the duty to fulfil, it has been observed that whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are the victims of natural or other disasters.

Several ECOSOC rights including the rights to food, shelter, sanitation, water and health care, are of direct relevance during the different stages of a disaster cycle. Relevant to the preparedness stage, the CESCR has stated concerning the right to water that States should adopt comprehensive and integrated strategies and programs to ensure that there is sufficient and safe water, which may include ‘emergency mechanisms for emergency situations’. Failure to adopt mechanisms for emergency relief is considered a violation of the right to water. Similarly, regarding the right to adequate housing, the CESCR provides that ‘people living in disaster prone area should be made of priority consideration’.

Concerning the right to health care, the CESCR has stated that States Parties should ensure that health services can respond in times of an emergency, for example during a pandemic.
ECOSOC rights in times of disaster

and after a natural disaster, armed conflict and crop failure. 74 With respect to the right to health, this
includes an obligation to create a system of urgent medical care in the case of accidents, accidents
and sudden heart attacks. 75 Compliance with these and similar obligations is a critical component to
ensure the State’s ability to secure enjoyment of ECOSOC rights should a disaster strike. 76

Relevant to the immediate disaster response stage, the CESCR refers to a duty to ensure that
‘groups facing difficulties with physical access to water, such as . . . victims of natural disasters . . .
are provided with safe and sufficient water’. 77 On the right to adequate housing, the CESCR spec-
ifies that the legal security of tenure must also apply to emergency housing. 78 Moreover, housing
must be “habitable”, which implies protection from “cold, damp, heat, rain, wind or other threats
to health, structural hazards, and disease vectors”, 79 and must be “accessible”, which requires special
attention for “victims of natural disasters” and people living in disaster-prone areas who can be con-
sidered a “disadvantaged group”. 80 The right to the highest attainable standard of health requires,
extra attention, the provision of disaster relief and humanitarian assistance in emergency situations. 81

In the reconstruction phase, there will arguably be an immediate positive obligation on the
affected State to repair damaged structures and institutions, such as health care facilities, necessary for
the realization of ECOSOC rights. As the State recovers from the disaster, there will continuously
be an increased focus on the necessary steps it must take towards full realization of these rights.
In accordance with the principle of non-discrimination in Article 2(2) ICESCR, these meas-
ures must be undertaken without discrimination. 82 In this respect, concern has for example been
expressed over the disparate impact of Hurricane Katrina in the US on low-income African
American residents 83 and the situation of women affected by the Indian Ocean Tsunami. 84

Resource constraints

Having sufficient resources for the realization of human rights may prove particularly challenging
for a State that is experiencing a disaster. 85 The CESCR acknowledges this, stating that “a country
incurring these disasters that particular circumstances will be taken into account when assessing
compliance with Covenant obligations”. Specifically, the CESCR recognizes that “external factors
may affect the right to a continuous improvement of living conditions”. However, despite exter-
nally caused problems, the obligations under the Covenant continue to apply. 86

As noted, some of the obligations of immediate effect presuppose certain institutional struc-
tures. For instance, the immediate application of the right to free primary education is contingent
on the existence of well-equipped educational systems. In times of disaster, such a system might no
longer be available. In this case, States would arguably have an immediate positive obligation to
make sure that such educational systems are repaired as soon as possible, where performance is measured against a reasonableness standard. 87

If a disaster constrains the affected State’s ability to comply with even its minimum core obli-
gations under the ICESCR, the State must demonstrate that it has done everything in its power
to obtain resources, including by recourse to international cooperation and assistance. As for the
minimum core content of the right to food, the CESCR provides that

A State, claiming that it is unable to carry out its obligations for reasons beyond its control
therefore has the burden of proving that this is the case and that it has unreasonably sought to obtain international support to ensure the availability and accessibility of the
necessary food. 88

As for the obligations to take steps towards the full realization of the rights,Sommarin con-
siders that the obligations might be heavily conditioned in the presence of disaster that severely

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undermines the capacity of the authorities to provide even basic assistance'. 91 Sommario therefore considers it ‘unrealistic to require States to fully implement all ECOSOC rights during a disaster situation of extraordinary intensity which eliminates their material assets and seriously strains their economic and financial resources’. 92 The CESCR might indeed take a more flexible approach to mitigating measures when a State is recovering from a disaster. 93 As outlined above, one of the relevant criteria when the Committee assesses compliance under the Optional Protocol procedure is ‘the existence of other serious claims on the State Party’s limited resources, for example resulting from a recent disaster’. 94 This is consistent with the Committee’s practice in considering States’ periodic reports. For instance, in relation to Mexico the CESCR took note of the natural disaster experienced by Mexico and acknowledged the limitations it imposes on the government in guaranteeing implementation of economic, social and cultural rights to its population at all times. 95 Moreover, with respect to hurricanes from 2004 and 2005 in Grenada, the CESCR recognized that ‘three natural disasters, along with the current global financial crisis, have been significant obstacles to the implementation of the Covenant’. 96

This does not mean that the obligation of progressive realization is inapplicable in times of disaster. Before, it meant that the kind of measures that can realistically be asked of a State is limited by the resources available to it, and these measures can be affected by the occurrence of a disaster. 97 The obligations on the State that remain the same to achieve progressive realization in the ministries of its available resources. This is demonstrated in the context of mitigating measures. In relation to budget cuts on allocations for social assistance following the Great East Japan Earthquake and the Fukushima nuclear accident (2011), the CESCR stated that ‘Japan was obliged to ensure that mitigating measures are taken only in the context of the full use of the ministries available resources’. 98 The Committee has taken a similar approach when other external factors that have reduced a State’s capacity to ensure full realization of ECOSOC rights. For example, with respect to austerity measures taken by Greece in response to the economic crisis, the Committee recommended that Greece review its policies and programs ‘with a view to ensuring that measures are progressively removed and the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery’. 99 Moreover, in its Concluding Observations made with regard to Iraq, the CESCR stated that despite the sanctions imposed against Iraq, Iraq still had to ‘work on realizing the rights to food and health to the maximum of its available resources’. 100

As Jansen-Wilhelm observes, the occurrence of a disaster might only partly affect the obligation to take steps towards full achievement, and even immediately after a disaster, some steps could still be feasible, such as making plans of actions and strategies for fuller realization. 101 There is at least an obligation to move forward and continuously improve. In other words, it is the scope rather than the applicability of the obligation to take steps that is affected by the availability of resources. 102 That scope will vary depending on the nature of the disaster and how well equipped the State is to cope with the consequences of a disaster. It is therefore necessary to measure feasible in terms of what kind of protection can reasonably be expected of a State experiencing a disaster. Here, state-identified benchmarks for progress can play a useful function, complementing the internationally defined human rights indicators, allowing consideration of the individual circumstances of the State when measuring compliance with the obligation to take steps. 103

Limitation clauses

Distinct from mitigating measures due to economic constraints under Article 2(1) is the limitation of ECOSOC rights for other reasons. A State’s response to a disaster might involve a range of limitation or restrictions on the enjoyment of ECOSOC rights, including restrictions on access to health.
care, food and shelter. The question is whether the occurrence of a disaster may generate a legitimate reason—other than resource constraints—for limiting ECOSOC rights under the ICESCR.

There is a general presumption that human rights are not absolute in nature.104 With a few exceptions, human rights can be subject to limitations or restrictions under specific conditions. In contrast to derogations, which are considered exceptional,105 limitations are construed as a necessary and essential element to balance individual and community interests. They allow the State a level of flexibility to give effect to human rights while pursuing important objectives aimed at resolving conflicts between rights or protect society for reasons of public interest, such as public order, public health or national security.

A general limitation clause applicable to the substantive rights of the ICESCR is articulated in Article 4:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare of a democratic society.

Guidance on the interpretation of this provision is scant.106 States rarely mention limitations on ECOSOC rights in their domestic legislation, and the CESCR seldom demands justification on the basis of Article 4 in the event of noncompliance with substantive obligations. Instead, the CESCR tends to address prima facie violations of the Covenant in terms of retrogressive measures States may take when faced with serious or multiple resource constraints, that is, by reference to Article 2(1).107

Article 4 ICESCR appears to suggest that the sole legitimate purpose for limiting Covenant rights is promotion of the general welfare of a democratic society. This can be contrasted with limitation clauses in other human rights treaties, notably in the field of CP rights, where other purposes include public interest such as public order, national security, public health or the rights and freedoms of others.108 The preparatory work does not indicate the meaning of 'general welfare', and while the International Court of Justice considered the limitation clause in Article 4 ICESCR in the Wall Advisory Opinion, its reasoning fails to shed light on the meaning of this term.109 The Court simply observed that the construction of the security barrier failed to meet the general welfare test. Typically, 'general welfare' is understood to mean 'furthering the socio-economic wellbeing of the people as a whole'.110

In order to ensure consistency between human rights instruments, there is a good reason to construe 'general welfare' as including other purposes such as public order or public health. A narrow interpretation of Article 4 ICESCR could result in a conflict with other human rights treaties. For example, under Article 12(3) ICCPR the right to freedom of movement may be limited to protect national security, public order, public health, morals or the freedoms of others. Such limitations may directly limit the enjoyment of ECOSOC rights, including access to education, health care or work. Yet, how can this be read consistently with Article 4 ICESCR, unless general welfare is read to include those other resources listed in Article 12(3) ICCPR? The CESCR does not seem to take a restrictive approach to the permissible grounds for limiting ECOSOC rights. For instance, in General Comment No. 14 on the right to health, the Committee suggests that a State that restricts the enjoyment of, or imposes serious restrictions on, ECOSOC rights to combat communicable diseases such as HIV/AIDS refrains from doing so in order to prevent discrimination against the community’s rural inhabitants, on grounds such as national security or the preservation of public order, but the burden of justifying such serious measures in relation to each of the elements identified in Article 4.

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Assuming that the disaster-affected State can prove that a limitation on the enjoyment of ECOSOC rights has been imposed in pursuit of the 'promotion of general welfare', the State must moreover prove that the limitation is determined by law, is compatible with the nature of the rights and is proportionate to the legitimate aim pursued. This requirement that the limitation be determined by law entails both formal and substantive requirements. The former specifies that the limitation must have a legal basis in domestic law consistent with the Covenant. The domestic legal provision must be sufficiently precise and adequately accessible. Further, there must be a measure of legal protection and effective remedies against the arbitrary or abusive imposition of limitations on ECOSOC. Regarding the substantive requirements, the domestic provision envisaging limitations on ECOSOC rights must not be arbitrary, unreasonable or discriminatory. In line with the principle of non-discrimination in Article 2(2) ICESCR, any restrictions must have an objective and reasonable justification.

Conclusion

This chapter has demonstrated the context-dependent nature of ECOSOC rights, with the result that specifications of State obligations inevitably remain at a level of abstraction and generality. Yet, it has also been made clear that States Parties to the ICESCR have assumed legal obligations, some of which are of immediate effect and must be complied with in all situations. Most notably, the minimum core obligations of the Covenant have been characterized by the CESCR as non-derogable and are applicable at all times. If a State affected by disaster is unable to comply with these fundamental rights, it faces the burden of proving that it has done all in its power to obtain more resources, including by seeking international assistance.

In addition, States Parties have a positive and immediate obligation to take steps toward the full realization of ECOSOC rights. While it is acceptable that States make less progress immediately after a disaster, States should still make plans of action for the full achievement of these rights and these plans should inform the reconstruction phase. ECOSOC rights obligations also play an important function in the preparedness phase, by requiring the putting into place of emergency plans and structures that enable States to cope with a disaster in a manner consistent with at least the core contents of the rights such as essential health care, basic shelter and housing, water and sanitation, education and the most basic forms of subsistence.

Selected bibliography


Notes

5 Alston and Quinn (n. 1) 197.
6 Ibid 197.
7 Ibid.
12 ICESCR art 12.

The ICESCR art 12 states:

The States Parties to the present Covenant undertake to ensure that the rights enunciated in the present Covenant are not combined with the deprivation of any other rights protected by the present Covenant.

See on this Casolari’s chapter in this volume.

13 ICESCR art 2(2) states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

See on that Casolari’s chapter in this volume.

14 ICESCR art 3 states:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

See generally CESCR General Comment No. 3 (n. 4) para 5.
15 For example, the obligation to respect the right to the highest attainable standard of health (art 12) requires States to ensure access to healthcare and prevent discriminatory practices in health policies. See CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (2000) para 30 and 50.
17 CESCR, General Comment No. 3 (n. 4) para 2.
18 CESCR, General Comment No. 3 (n. 4) para 9.
28 Ibid. See also CESCR, General Comment No. 12 (n. 13) paras 8–13. For example, the Committee noted that immediate and urgent steps must be taken to ensure the fundamental right of freedom from hunger and malnutrition is respected, and that States have a core obligation to take the necessary action to ensure the fulfilment of this right (para 10).

29 Ibid. See also CESCR, General Comment No. 12 (n. 13) paras 8–13. For example, the Committee noted that ‘immediate and urgent steps may be needed’ to ensure the fundamental right of freedom from hunger and malnutrition in art 11(2) and that ‘States have a core obligation to take the necessary action to mitigate and alleviate hunger’ (para 6).

30 CESCR, General Comment No. 13 (n. 29) para 45; CESCR General Comment No. 14 (n. 19) para 32; CESCR General Comment No. 15 (n. 26) para 19; CESCR General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), UN Doc. E/C.12/GC/19 (2008) para 42.


32 The notion ‘maximum available resources’ has been interpreted to include whatever resources are available nationally as well as internationally. For example, CESCR General Comment No. 3 (n. 4) para 13.


34 Alston and Quinn (n. 1) 172.

35 Ibid.

36 Jansen-Wilhelm, ‘A Duty to Accept Humanitarian Assistance under the ICESCR?’ (n. 3) 189.

37 CESCR General Comment No. 3 (n. 4) para 4.

38 Ibid para 9.

39 CESCR General Comment No. 13 (n. 29) para 45; CESCR General Comment No. 14 (n. 19) para 32; CESCR General Comment No. 15 (n. 26) para 19; CESCR General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), UN Doc. E/C.12/GC/19 (2008) para 42.

40 ‘[A]ny deliberately retrogressive measures . . . 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 the context as well as the full extent of the resources available to the States concerned’. CESCR General Comment No. 3 (n. 4) para 4.

41 Ibid para 9. See also Jansen-Wilhelm, Accepting Assistance in the Aftermath of Disasters (n. 10) 141.


43 See CESCR General Comment No. 14 (n. 19) para 57.

44 Jansen-Wilhelm, Accepting Assistance in the Aftermath of Disasters (n. 10) 141.


46 CESCR, ‘Statement on an Evaluation’ (n. 20) paras 4–5; CESCR General Comment No. 3 (n. 4) paras 11–12.

47 Jansen-Wilhelm, Accepting Assistance in the Aftermath of Disasters (n. 10) 141.

48 CESCR, ‘Statement on an Evaluation’ (n. 20) para 2.

49 Ibid para 4.

50 Ibid para 2.


53 CESCR, ‘Statement on an Evaluation’ (n. 20) para 10.

54 For example, CESCR General Comment No. 12 (n. 13) para 13.


56 Alston and Quinn (n. 1) 172.

57 CESCR General Comment No. 3 (n. 4) paras 4–10.

58 However, states have been reluctant to treat human rights issues as urgent responsibilities. See for instance L. South, ‘The Delimitation of the Right to Self-Determination’ (2006) 64 American Journal of International Law 239.


60 See CESCR General Comment No. 3 (n. 4) para 13.

61 CESCR, General Comment No. 12 (n. 13) para 17.
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64 For example, in its Concluding Observations on Indonesia, the Committee stated that on the recommendation made in its Concluding Observations, the State party should ensure that women and children are not excluded from the decision-making process regarding the allocation of emergency relief funds.


66 CESCR General Comment No. 12 (n. 13) para 6.

67 Ibid para 19.

68 Ibid para 15.

69 CESCR General Comment No. 15 (n. 26) para 28.

70 CESCR, General Comment No. 4: The Right to Adequate Housing, UN Doc. E/1992/23 (1991) para 8(e).

For example, in its Concluding Observations on Morocco, the Committee stated that it exhorts the State party to provide assistance to earthquake victims, particularly women and children, and to take preventive action to ensure that housing is built in accordance with the rules applicable to earthquake prone areas. The State party should redouble its efforts to rehouse the disaster-stricken population of Al-Hoceima.


71 CESCR General Comment No. 15 (n. 26) para 16.

72 CESCR General Comment No. 14 (n. 19) para 16. Such a system should take into account the specific needs of women and children. For example, it should include reproductive health. See CommERD, Concluding Observations: United States of America, UN Doc. CEDAW/C/USA/CO/5 (2008) para 31.


For example, see CommEDAW, Concluding Comments: Indonesia (n. 75) para 38.

85 See Jansen-Wilhelm, Accepting Assistance in the Aftermath of Disasters (n. 10) 45.

86 CESCR, 'Statement on An Evaluation of the Obligation' (n. 20) para 10 (d) and (f).

87 General Comment No. 4 (n. 72) para 11.

88 In recognition of this, the Committee made the following comment: 'The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge' (emphasis added). CESCR General Comment No. 11: Plans of Action for Primary Education, (Art. 14 of the Covenant), UN Doc. E/1992/23 (1999) para 10.


90 CESCR General Comment No. 12 (n. 13) para 17.

91 Sommario, 'Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters' (n. 27) 347.

92 Ibid.

93 For example, see Concluding Observations on Honduras, as the country was recovering from Hurricane Mitch: CESCR, Concluding Observations: Honduras, UN Doc. E/C.12/1 Add.57 (2001) para 11.


96 However, it is generally understood that art 4 deals with limitations other than those that can be imposed under art 2(1) relating to resource availability. See A. Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' 9 Human Rights Law Review (2009) 570.


99 Jansen-Wilhelm, Accepting Assistance in the Aftermath of Disasters (n. 10) 159.

100 Ibid 150.

101 For example, see ibid 171–172.

102 Ibid paras 48–56.


106 See 'The Limburg Principles' (n. 110) para 56.


108 CESCR General Comment No. 14 (n. 19) para 28.

109 Ibid.


111 CESCR, General Comment No. 14 (n. 19) para 30.