

## THE STUDENT SCHOLARSHIP BLOG

### Concretizing “progressive realization”- A new perspective on assessing the state fulfillment on economic and social rights obligations

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**ABSTRACT:**

*There is a growing demand for a widely vetted and broadly accepted indicator to measure achievements in the progressive realization of economic, social and cultural rights due to the ambiguity and uncertainty on the principle of 'progressive realization' embedded on article 2(1) of the ICESCR. Different indicators have been developed, such as the Maastricht Violation principle, the Minimum Core Obligation and the Social and Economic Rights Fulfillment Index (SERF). In this essay, I propose that the existing indicators are neither adequate nor accurate in concretizing the gist of "progressive realization". I aim to propose a new indicator to measure the state fulfillment on ESC rights obligation, which is called the "Progressive Obligations Standard".*

## INTRODUCTION

The International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), form the pillars for the international human right protections.<sup>1</sup> The ICESCR recognizes the inherent dignity and equality embedded in every individual, and has been adopted by the General Assembly Resolution 2200 (XXI) since 1966.<sup>2</sup>

Unlike political and civil rights, which are negative in character (e.g. No one shall be arbitrarily deprived of his life); the full realization of all economic, social and cultural (ESC) rights requires progressive implementation to the maximum available resources. The international human rights community recognizes the fact that the implementation of ESC rights are generally unable to be achieved in a short period of time.<sup>3</sup> As stated in Article 2(1) of the ICESCR, state parties to the Covenant undertake the obligation to take steps to achieve progressively the full realization of the rights to the maximum of its available resources.<sup>4</sup> This begs the question as to, (1) how should the state fulfillment on its ESC rights obligations be measured and, (2) how should the idea of “progressive realization” be concretized.

In light of the ambiguity and uncertainty on the notion of “progressive realization”, there is a growing demand for a widely vetted and broadly accepted indicator to measure the achievements in the progressive realization of ESC rights. In January 1993, the special Rapporteur on the Realization of ESC rights, Danilo Türk, suggested a seminar to consider the need in establishing an appropriate indicator.<sup>5</sup> Subsequently,

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<sup>1</sup> Available at <https://www.escr-net.org/resources/section-5-background-information-icescr> (visited 9 March 2016)

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights 1966, Preamble

<sup>3</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 3: The nature of States parties’ obligations”, (1990)

<sup>4</sup> United Nations, “International Covenant on Economic, Social and Cultural Rights”, (1966)

<sup>5</sup> Judith V. Welling, “International Indicators and Economic, Social and Cultural Rights”, (2008) 4

different indicators have been developed. These include, the Maastricht Violation principle, the Minimum Core Obligation, and the Social and Economic Rights Fulfillment Index (SERF). I propose that these indicators are neither adequate nor accurate in concretizing the gist of “progressive realization”.

In this essay, I propose a new indicator to measure states’ fulfillment on ESC rights obligation by using a “Progressive Obligations Standard”. I shall also critically evaluate the shortcomings of the aforementioned existing indicators. This essay is divided into five parts. Part I shall discuss the benefit of establishing a universal indicator for ESC rights. Part II shall introduce a set of criteria for an appropriate universal indicator. Part III shall critically evaluate the existing ESC rights indicators. Part IV shall explain the idea of “Progressive Obligations Standard” and apply it into context of China. Part V shall talk about the limitations on the “Progressive Obligations Standard”, followed by a conclusion.

## **PART I: BENEFITS OF ESTABLISHING A UNIVERSAL INDICATOR**

The benefits of establishing a universal indicator can be classified and analyzed in three levels. These include (1) benefits to the international human rights system, (2) to the states parties and (3) to individuals.

### **International human rights system**

For the international human rights system, a universally accepted indicator for measuring the states fulfillment on ESC rights obligation will strengthen the efficiency of the international ESC rights monitoring system. Aiming at identifying whether the state obligations on realizing ESC rights has been complied with, the core duty to the Committee on CESCR is to normatively assess the data presented to them in the state party report and other available sources.<sup>6</sup> A standardized and broadly accepted indicator can allow the Committee to effectively evaluate each state fulfillment on a partial and objective basis since the same indicator is applied to all state parties.

Further, a universal indicator can serve as a “high-profile reinforcement of the claim that those human rights set out in international law (ICESCR) are indeed universal”.<sup>7</sup> In other words, since the ESC rights to be assessed and evaluated are globally recognized as “the inherent dignity and the equal and inalienable rights of all members of the human family”,<sup>8</sup> a universal indicator is hence developed to monitor states parties in realizing their ESC rights obligations. The indicator communicates to the international community, or precisely the state parties, to reinforce their state obligations on ESC rights.

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<sup>6</sup> Abo Akedemi University, “Report of Turku Expert Meeting on Human Rights Indicators” (2005)

<sup>7</sup> Kate Raworth, “Measuring Human Rights”, (2006) 1 *Ethnics & International Affairs* 403

<sup>8</sup> See n 2 above.

Lastly, a broadly accepted indicator will increase the interstate peer pressure, which will motivate the States to improve the domestic ESC rights and the quality of information provided for international assessment when parties are placed on a transparent playing field where similar phenomena are measurable across States with the same standard.<sup>9</sup> In fact, a standardized indicator makes interstate comparison relatively straightforward and impartial. Therefore, when neighbouring states parties sharing similar features are doing better in fulfilling its ESC rights obligation (i.e. well-developed medical system and low mortality rate below five), it exerts pressure on the States to strike for betterment.

### **States parties**

Being the duty-bearer of the ESC rights obligation under the ICESCR, a widely accepted indicator benefits the state parties by serving as a benchmark, a minimum threshold that reveals the domestic status of the particular human right situation.<sup>10</sup> Given that States are often lack of technical and substantial information on ESC obligations either for the purpose of assessing their compliance on ESC rights internally or implementing policies, the indicator would be helpful in directing the state's attention to a particular area of human rights in need and corresponding policy amendments to satisfy the ESC commitments.

### **Individuals**

Similar to the aforementioned benchmark function, a universal indicator will be beneficial to individuals in the sense that it reveals the status of a particular human right situation and hence identifies the marginalized individuals and illuminates their situation. Therefore, the indicator and the deviation serve as a weapon for individuals to call for increased resources while drawing attention to areas of need.

In addition, a standardized indicator encourages individual participation in the

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<sup>9</sup> See n 5 above, p 941.

<sup>10</sup> See n 7 above, p 395.

monitoring process against their government on ESC rights obligation compliance. Given an objective and standardized indicator, comparison between the level of enjoyment (outcome indicator) and state compliance (flow indicator) becomes straightforward.<sup>11</sup> Individuals or NGOs can supervise their State on fulfilling the ESC rights obligations by conducting a rolling base comparison to see if particular ESC right is progressively realizing. As a result, it encourages individuals to actively participate in the process of monitoring states compliance in fulfilling their ESC rights obligation.

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<sup>11</sup> In general, an outcome indicator measures on the outcome of specific issue (i.e. how much rights are substantially enjoyed by individuals) while a flow indicator focuses on the process of how a issue is approached (i.e. what have been done by the government to fulfill its ESC rights obligation)

## **PART II: CRITERIA FOR A UNIVERSAL ESC RIGHTS INDICATOR**

Despite of the benefits for developing a universal indicator to assess whether a State is progressively realizing its ESC rights to its maximum available resources; per Green, a universal indicator should satisfy the following **three** criteria before it is qualified as an appropriate one. By definition, criteria refer to “the characteristics that are used in determining whether a particular indicator is appropriate for use in a particular context.”<sup>12</sup>

### **Encourage and motivate ESC rights development**

Apart from measuring the states fulfillment regarding their ESC rights obligations, the indicator itself should be capable of motivating and encouraging the State to improve ESC rights within its territory. With reference to Article 2(1) of the ICESCR, the ultimate objective of the Covenant is the full realization of the rights recognized in the present Covenant. Therefore, while the indicator is serving as a complement to concretize the notion of “progressive realization to its maximum available resources”, it should contribute to the achievement of the ultimate objective.

### **Measurement on the individual enjoyment of rights**

Per Green, there are generally two directions from which to design a human rights indicator and it is possible to have an indicator for human rights from either direction given that it is the different side of the same coin. The indicator can either focus on the government compliance (whether a government is fulfilling its obligation) or on the individual enjoyment perspective (whether each person is enjoying the right guaranteed under the Covenant).<sup>13</sup> However, such proposition is inaccurate and has overlooked the gist of the ICESCR. In fact, the indicator for ESC rights must consider

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<sup>12</sup> Maria Green, “What we talk about when we talk about indicators: current approaches to human rights measurements”, (2001) 4 *Human Rights Quarterly* 1086

<sup>13</sup> See note 12 above, p 1085-1086.



the individual enjoyment perspective.

Unlike political and civil rights advocated in the ICCPR, the term “progressive realization” is the first time in the contemporary history used in international law drafting because the international human right community has recognized that ESC rights can hardly be realized in full in a short period of time.<sup>14</sup> Since political and civil rights can and should be realized and respected in full shortly, the indicator of political and civil rights can emphasize on whether there are any violations of the State (obligation compliance) or deviation from enjoyment because any violations or deviation would directly constitute a breach of the ICCPR.

However, ESC rights emphasize on “progressive realization to its maximum resources available”. It is a flow concept that requires a rolling evaluation on how much individuals are enjoying on the ESC rights guaranteed on the Covenant rather than whether there are states compliances or not. Even if the State has been responsibly complying with its undertakings at the ICESCR, it does not necessarily mean that the ESC rights conditions are progressively improving or there is full realization. There are some factors that may affect the degree of ESC rights realization despite the effort of the State, for instance local bureaucracy, poor resources management and cultural effect (i.e. Caste system in India) etc. As a result, only if one measures the level of individual ESC rights enjoyment, it is capable of reflecting the true status of ESC rights in a State.

I shall use the right to food as an example to further my argument. Say, a member state is attempting to fulfill their ESC rights obligation to the right of food for its people, by improving its food-subsidizing program to reduce the population of underweight children. However, these subsidized foods may drop into the pocket of local bureaucracy rather than people in need, as corruption is not uncommon in less

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<sup>14</sup> See n 3 above.

developed countries. Subsequently, actual progress on realizing the right to food is absent, despite of the state's policy implementation.

As a result, only if an indicator can measure and identify how much food individuals are enjoying, then it is possible to identify progressions on the State in realizing ESC rights. In other words, an indicator for ESC rights must be capable of and focused on measuring individual enjoyment.

### **Idea of minimum core standard**

As aforementioned, an indicator for ESC rights shall be capable of assisting with the derivation of the minimum core requirement attached to a right.<sup>15</sup> In this context, the minimum core requirement refers to a minimum threshold or a benchmark that state parties shall meet so as to satisfy the minimal compliance obligation. Per Audrey Chapman and Sage Russell, “the standard of progressive realization also provides a loophole large enough in practical terms to nullify the Covenant’s guarantees - *the possibility that States will claim lack of resources as the reason they have not met their obligation*”.<sup>16</sup> As a result, the indicator on ESC rights shall be capable of deriving a minimum core standard, which affirms that even in highly straitened circumstances, a State still has an irreducible obligation that it is assumed to meet.<sup>17</sup>

That being said, this criterion shall be read in conjunction with the requirement on encouraging ESC rights development. One of the major concerns associated with deriving a minimum core standard is the risk that the minimum core standard may possibly become a “ceiling”, which the State will do nothing after complying with the minimum requirement. The minimum core standard will then shift from a “floor” to a “ceiling”. Therefore, in order to prevent the situation from happening, the indicator

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<sup>15</sup> Danilo Türk, “Realization of Economic, Social and cultural Rights, First Progress Report”, (1990)

<sup>16</sup> Audrey Chapman & Sage Russell (eds), *Core Obligation: Building for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 15<sup>th</sup> edn, 2002). p 19.

<sup>17</sup> See n 16 above, p 24.

shall itself encourage further development on ESC rights on one hand while deriving a minimum core standard on the other hand.

In short, a widely accepted ESC rights indicator should thus satisfy the abovementioned three criteria before it is qualified as appropriate one.

### PART III: EVALUATION ON EXISTING ESC RIGHTS INDICATORS

Before I discuss the Progressive Obligations Standard, I shall first critically evaluate several existing ESC rights indicators and identify their shortcomings in concretizing the idea of “progressive realization” under the ICESCR. I propose that the existing indicators are inadequate in performing their duties, thus a whole new indicator should be used instead. In this session, **three** indicators will be evaluated. These are (1) the Maastricht Violation Principle (the Violation Principle), (2) the Minimum Core Obligation and (3) the Social Economic Rights Fulfillment Index (SERF).

#### The Maastricht Violation Principle

*“Where there is a right, there is a duty, and where the duty is not met, there is a violation.”*<sup>18</sup>

In 1986, when the Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights (the Limburg Principle) was adopted by a group of international law experts, the preliminary idea of Violation Principle is already in existence. In other words, the Limburg Principle has had an early start in identifying the issue of violation of economic, social and cultural rights.<sup>19</sup> With reference to Article 70 of the Limburg Principle, “a failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.”<sup>20</sup> Then, in 1997, the international human rights community had launched another workshop, which officially adopted the Violation

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<sup>18</sup> Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspective* (Aldershot: Dartmouth Publishing Company Ltd. 1996)

<sup>19</sup> Victor Dankwa, Cees Flinterman & Scott Leckie, “Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, (1998) 3 *Human Rights Quarterly* 707

<sup>20</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987)

Principle as a universal ESC rights indicator to measure the states fulfillment on ESC rights obligations.

According to Guideline 6 of the Violation Principle, states parties have three levels of obligations, including the duty to respect, protect and fulfill.<sup>21</sup> Failure to perform any one of these obligations will then result in a violation of such right. In other words, for the sake of evaluating whether a state party is complying with its ESC rights obligations, the Violation Principle places its focus on identifying violations of the rights enumerated in the Covenant. It has been argued that “identifying the violation in order to end and rectify abuse constitute a higher priority given that monitoring of human rights aims at reducing human suffering that result from serious violation of international standard.”<sup>22</sup> Further, the gist of the Violation Principle lies on the assertion that there would be no dispute on the fact that full realization of all ESC rights (no violation) will invariably be a progressive undertaking.<sup>23</sup>

I propose that the Violation Principle is narrowly focused on the compliance obligations and has neglected the significance of individual enjoyment. According to the aforementioned criteria for an appropriate ESC rights indicator, emphasis has been put on the ability to measure the individual enjoyment. While it is the obligation of member States under the ICESCR to promote universal respect of ESC rights, state compliance itself is insufficient to serve as an indicator to reflect the degree of ESC rights realization in domestic level. Hence, the Violation Principle is inadequate in reflecting the progressiveness in realizing ESC rights.

As an example, in relation to the right to housing, a government has increased the financial provision to improve the sanitation facilities in rural area, but it does not

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<sup>21</sup> The Maastricht Guideline on Violation of Economic, Social and cultural Rights (1997)

<sup>22</sup> Audrey R. Chapman, “A “Violation Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights”, (1996) 1 *Human Rights Quarterly* 36-37

<sup>23</sup> Scott Leckie, “Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights”, (1998) 1 *Human Rights Quarterly* 93

necessarily lead to a progressive conclusion in the sense that one should indeed examine whether the number of people accessible to clean water has increased or not. Thus, there is no progression in realizing ESC rights if all the sanitation facilities are placed in remote areas and thus there are no actual changes in the percentage of the population accessible to clean water sources. In other words, the assertion that “full realization is invariably be a progressive undertaking” is untenable. This is due to, even if there is no violation, there can still be no progressive realization. The correlation is neither absolute nor conclusive.

### **The Minimum Core Obligations**

*“States are obliged, regardless of the level of economic development, to ensure to respect for minimum subsistence rights for all.”<sup>24</sup>*

Together with the Violation Principle, the idea of Minimum Core Obligations was adopted in 1997 in the Maastricht Guidelines<sup>25</sup> to “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”<sup>26</sup> In short, the minimum core obligations are incumbent on every states parties to protect the minimum essential levels of each rights found in the ICESCE,<sup>27</sup> whereas any failure in satisfying these core obligations would prima facie constitute a violation to the Covenant.<sup>28</sup> There is a widespread support for the Minimum Core Obligation. For instance, in 1998, the Inter-American Commission on Human Rights declared that *“the obligation of member States to observe and defend the human rights of individuals within their jurisdiction...obligates them to guarantee a minimum*

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<sup>24</sup> Danilo Türk, “Realization of Economic, Social and cultural Rights, Second Progress Report”, (1991)

<sup>25</sup> The Minimum Core Obligation has been included in Guideline 9 of the Maastricht Guidelines of Economic, Social and Cultural Rights

<sup>26</sup> See n 2 1above; n 2 above, para. 10

<sup>27</sup> See n 19 above, p 717

<sup>28</sup> It is a prima facie breach rather than an absolute breach of the minimum core obligation if the State party is able to show that it has taken all necessary steps and every effort has been made to use all resources that are at its disposition in an effort to satisfy those minimum obligations. See n 3 above.

*threshold of these rights*”<sup>29</sup>

However, similar to the Violation Principle, the Minimum Core Obligation approach inclines to focus on the state compliance side (whether the state party has meet the minimum core threshold or not) while completely overlooking the evaluation on the individual enjoyment. Again, it fails to measure the degree of progressiveness in states fulfillment on realizing their ESC rights obligation. (Detail explanation on “Part III: The Maastricht Violation Principle”)

Second, the Minimum Core Obligations approach fails to spot the resources issues. According to Robert E. Robertson, “at the heart of the problem of realizing ESC rights is the question of resources.”<sup>30</sup> The Minimum Core Obligation has assumed that the States have access to the resources needed to meet their core threshold<sup>31</sup> but is it the truth? The answer is negative. There are two possible situations. First, poor States fail to get access to adequate resources, either domestic or international, to meet the minimum core obligation. Second, wealthier States disregard the obligation despite the adequateness of resources available. Take Syria as an example, the primary completion rate in both sexes drops from 107% in 2012 to 64% in 2013<sup>32</sup> and strictly speaking, there is little doubt that *prima facie*, Syria will be blamed for violating the Minimum Core Obligation on the right to education.<sup>33</sup> In fact, the international accusation is inaccurate when resources available have been taking into consideration. Due to the internal political instability and frequent warfare, there is not much resource accessible to the ESC rights protection, like the right to education.

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<sup>29</sup> See n 28 above

<sup>30</sup> Robert E. Robertson, “Measuring State Compliance with the Obligation to Devote the “Maximum Available Resource” to Realizing Economic, Social and Cultural Rights”, (1994) 4 *Human Rights Quarterly* 694

<sup>31</sup> See n 16 above, p 29

<sup>32</sup> World Bank, “World Development Indicators Table 2.13”, (2013)

<sup>33</sup> “Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, or basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligation under the Covenant.”, Committee on Economic, Social and Cultural Rights, “General Comment No. 3: The nature of States parties’ obligations”, (1990), para 10

Last but not least, the Minimum Core Obligation is not an appropriate ESC rights indicator because of the possibility that it may become a ceiling capping further development on the ESC rights. The State will do nothing after complying with the minimum threshold by arguing that they have already in compliance with the minimum requirements and lack of further resources to proceed further. (Detail explanation on “ Part II: Idea of minimum core standard”) It is likely to serve as a universal justification to avoid ESC rights obligations rather than an indicator.

### **Social Economic Rights Fulfillment Index (SERF)**

*“The SERF Index assesses the level of economic and social rights enjoyment in a country relative to the level of the country’s obligation”<sup>34</sup>*

The SERF is a new ESC rights index proposed by Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph in 2015. Generally, the SERF Index assesses the level of economic and social rights enjoyment in a country relative to the level of the country’s obligation, which is to be measured by the Achievement Possibilities Frontiers (APFs) that benchmark each country’s level of obligation with regard to each substantive economic or social right. In fact, the APFs reflect what is feasible to achieve when a country allocates the maximum of available resources to fulfill specific economic and social right and uses those resources effectively.<sup>35</sup> In addition, the SERF index considers six substantive rights enumerated in the ICESCR and measures the progressive realization on ESC rights by comparing the level of rights enjoyed by a country’s residents and the level of a duty-bearing state’s obligation with

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<sup>34</sup> Fukuda-Parr, Sakiko, Terra Lawson-Remer, and Susan Randolph. 2015. “Making the Principle of Progressive Realization Operation: The SERF Index, an Index for Monitoring State Fulfillment of Economic and Social Rights Obligations”. In *Closing the Right Gap: From Human Rights to Social Transformation*, edited by LaDawn Haglund and Robin Stryker, 1<sup>st</sup> ed. 239-264. University of California Press.

<sup>35</sup> *Ibid.*



regard to the resources constraints, which is measured by the APFs.<sup>36</sup> A country's performance in fulfilling its ESC rights obligation is revealed by the gap between the country's actual performance on each rights indicator and its feasible performance as determined by the evidence-based APFs.<sup>37</sup> By doing so, the SERF Index is capable of measuring whether the State is doing to the utmost in promoting ESC rights while tracing on the progressiveness. If the actual performance falls short of the feasible performance level, the country is not fulfilling its ESC rights obligations undertaken in the ICESCR.

Theoretically, the SERF Index is much more comprehensive in reflecting the core idea of "progressive realization to its maximum available resources" than the Violation Principle and the Minimum Core Obligation approach. It satisfies most of the criteria aforementioned for an appropriate ESC rights indicator (except to derive a minimum core standard). However, the SERF Index is still not appropriate because it is too complex for a layperson or civil society to understand the underlying advanced mathematical calculations. If a layperson or an NGO wishes to evaluate the degree of state compliance on ESC rights obligations, he or she can rarely apply the SERF Index.

In summary, most of the prevailing ESC rights indicators are neither adequate nor comprehensive in measuring the progressive realization of ESC rights and hence a new indicator is needed. The Progressive Obligation Standard, which is to be elaborate in detail, overcomes all these problems and offers additional advantages.

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<sup>36</sup> *Ibid.*, p 243 - 247

<sup>37</sup> Fukuda-Parr, Sakiko, Terra Lawson-Remer, and Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford: Oxford University Press, 2015), p 45

## PART IV: PROGRESSIVE OBLIGATIONS STANDARD

*“The project aims to come up with a set of indicators to measure the extent to which government claims of economic prosperity have actually translated into the enjoyment of economic, social and cultural rights by the people... to assess government’s responsibility and monitor its performance with regard to the realization of those rights.”<sup>38</sup>*

Setting up a broadly accepted ESC rights indicator has been a universal political project since the establishment of the ICESCR in 1966. However, due to the absence of an appropriate indicator in the current battery of available measurement tools, the Progressive Obligations Standard is constructed to take the leading role.

### **What is Progressive Obligations Standard?**

The Progressive Obligations Standard suggested linking the degree of economic development of a particular State positively with its ESC rights obligation. The obligation inflates in accordance with the degree of economic development. That is to say, the better the economy is doing, the higher the standard and expectation on the ESC rights obligations. The idea is premised on the postulate of economic development, which assumed that economic growth is the common national objective shared among different countries, regardless of the stage of economic development. When the economy is doing well, more resources will be available for ESC rights fulfillment and vice versa. As a result, a higher standard on ESC rights realization shall be imposed to motivate “progressive realization”. Generally, the Progressive Obligations Standard operates by measuring the level of individual enjoyment on particular ESC rights and comparing the observation to the state obligation standard establishing in accordance with the economic development.

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<sup>38</sup> The Philippine Human Rights Information Center, *Monitoring Economic, Social and Cultural Rights: The Philippine Experience* (Manila: Philippine Human Rights Information Center, 1997)

First of all, countries in the world are classified into FOUR different economies in according to their GNI Per capita, Atlas method (current US\$), which is the latest method on measuring economic performance adopted by the World Bank. The GNI per capita, Atlas method (current US\$) measures the level of economic development of a country accurately because it considers the production level of all its citizens, regardless of where the actual production process is taking place while reducing the impact of exchange rate fluctuation caused by inflation.<sup>39</sup> With reference to Table 1, countries are categories into low income economies (\$1,045 or less), lower-middle income economies (\$1,046 to \$4,125), upper-middle income economies (\$4,126 to \$12,735) and high income economies (\$12,736 or more).

<b>GNI per capita, Atlas method (Current US\$)</b>	<b>Corresponding economies classification</b>
\$1,045 or less	Low income economies
\$1,046 to \$4,125	Lower-middle economies
\$4,126 to \$12,735	Upper-middle economies
\$12,736 or more	High income economies

**Table 1 - Economies classification based on GNI per capital, Atlas method (current US\$)<sup>40</sup>**

Inspired by the SERF, the Progressive Obligations Standard will focus on the major substantive ESC rights, which are generally considered to be the right to food, health, housing, education and work. With reference to Table 2 to 6, there will be a specific indicator to measure the degree of individual enjoyment for each particular ESC rights (i.e. percentage of malnutrition on children below 5 for the right to food). However, the state obligation standard varies at different income economies. There is a different ESC rights standard for different income economies. Again, the better the economy is

<sup>39</sup> World Bank, 2014, *GNI per capital, Atlas method (current US\$)*, D.C.: World Bank.

<sup>40</sup> World Bank, 2014, *World Bank GNI per capital Operational Guidelines & Analytical Classifications*, D.C.: World Bank.

doing, a higher ESC rights obligation standard will be imposed. In fact, each standard is calculated by taking the average level of individual enjoyment among all countries within the same income economies. (See Appendix 1)

<b>Income Groups</b>	<b>Percentage of malnutrition on children below 5<sup>41</sup></b>
Low income economies	37.6
Lower-middle economies	33.5
Upper-middle economies	7.5
High income economies	3.3

**Table 2 - Indicator for right to food**

<b>Income Groups</b>	<b>Percentage of primary school completion rate<sup>42</sup></b>
Low income economies	66
Lower-middle economies	91
Upper-middle economies	103 <sup>43</sup>
High income economies	99

**Table 3- Indicator for right to education**

<b>Income Economies</b>	<b>Mortality rate under 5<sup>4445</sup></b>
Low income economies	76.1
Lower-middle economies	52.8

<sup>41</sup> World Bank, 2014, *World Development Indicators Tables 1.2*, D.C.: World Bank.

<sup>42</sup> World Bank, 2013, *World Development Indicators Table 2.13*, D.C.: World Bank.

<sup>43</sup> The rate may possibly exceed 100% due to over-aged and under-aged children who enter primary school late/early and/or repeat grades.

<sup>44</sup> Under-five mortality rate is the probability per 1,000 that a newborn baby will die before reaching age five.

<sup>45</sup> World Bank, 2015, *World Development Indicators Table 5.8.2*, D.C.: World Bank.

Upper-middle economies	19.1
High income economies	6.8

**Table 4 - Indicator for right to health**

<b>Income Groups</b>	<b>Percentage of population with access to improved sanitation facilities<sup>46</sup></b>
Low income economies	28.2
Lower-middle economies	52
Upper-middle economies	80
High income economies	96

**Table 5 - Indicator for right to housing**

<b>Income Groups</b>	<b>Poverty headcount ratio at \$1.90 a day (2011 PPP)(% of population) (2012 Data)<sup>47</sup></b>
Low income economies	47.2
Lower-middle economies	18.7
Upper-middle economies	5.42
High income economies	0

**Table 6 - Indicator for right to work**

As a whole, the Progressive Obligations Standard functions by comparing the level of individual enjoyment on specific ESC rights to the corresponding obligation standard. Ultimately, when a State has proceeded to the high income economy and satisfied the corresponding ESC rights standard, it is said to be a full realization of ESC rights because the State has already done its best at protecting ESC rights at its maximum

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<sup>46</sup> *Ibid.*

<sup>47</sup> World Bank, 2012, *World Development Indicators Table 2.8*, D.C. World Bank.

resources available.

Also, significant deviation from the standard serves as a signal for the State itself and the international human rights community that the State is not taking necessary steps to realizing the ESC rights to its maximum resources available given that the States with similar levels of resources are capable to doing better. With no doubt, a minor deviation (i.e. +/- 1%) from the established state obligation standard is acceptable and unavoidable. As long as the level of individual enjoyment substantially coincides with the standard, a is unlikely to be accused for non-compliance absolutely.

### **Advantages of Progressive Obligations Standard**

Not only overcoming all the shortcoming of the existing ESC rights indicators, the Progressive Obligations Standard offers additional advantages on top of them.

To begin with, the Progressive Obligations Standard fulfills all the aforementioned criteria for a broadly acceptable universal ESC rights indicators. First, the Progressive Obligations Standard emphasizes on the comparison between individual enjoyment and the established standard at a particular income economy. Unlike the Violation Principle and the Minimum Core Obligation, the Progressive Obligations Standard satisfies the requirement on measuring individual enjoyment. Second, by establishing a “progressive” ladder of standard, the standard at each level of income economy serve as a de facto minimum core standard that a State is obliged to satisfy. However, unlike the traditional Minimum Core Obligation approach, the minimum threshold set at each income economy will not become a cap that bars the ESC rights development because the Standard inflates with the level of economic development. That is to say, as long as there are economic developments, the State will be subjected to a higher ESC rights standard. As a result, the Progressive Obligations Standard performs as a “floor” rather than a “ceiling” that encourages States to continuously work for ESC rights.

Furthermore, in contrast to the SERF, the Progressive Obligations Standard is relatively easy and straightforward, which is more likely to be understood by the layperson and human rights institutions. Given that it is the duty of individual and human rights institutions to strive for the promotion and observation of the rights recognized in the ICESCR<sup>48</sup>, the indicator itself should at least be comprehensible and applicable. In fact, there is no complicated mathematical calculation in the Progressive Obligations Standard. So far as data for the particular indicator (i.e. mortality rate below 5) is readily available, every individual in the society will be able to do the comparison between the established standard and the State performance.

Most importantly, the Progressive Obligations Standard performs better than all other existing indicators in reflecting the gist of the ICESCR. According to Article 2(1) of the ICESCR, the core of the state obligation is to “to the maximum of its available resources to achieve progressively the full realization of the rights recognized”. By linking economic development with the standard to each particular ESC rights, the Progressive Obligations Standard considers the level of resources available for State to work for ESC rights. The better the economy is doing, the more resources will be available and hence a higher standard will be expected. Moreover, the ladder-style indicator serves as a clear illustration on progressive realization. While the standard inflates correspondingly with the economic development (when a State moves from one income group to another), progression in realizing ESC rights can therefore be comprehensively demonstrated by satisfying the new standard imposed. In short, if a State advances from upper-middle income economy to the high income one and later satisfy the new ESC rights standard imposed, progression exit.

### **Application and Case Study on China**

This part aims at applying the Progressive Obligations Standard into the context of

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<sup>48</sup> See n 4 above.

China and see how it operates. The entire application can be divided into two parts. Part 1 focuses on changes in income economies standing of China and the corresponding ESC rights standard at different period of time since 1996 and Part 2 will analyze whether the ESC rights enjoyed by Chinese citizens coincides with the standard or not. The right to work will be examined in detail.

	<b>Income Economies<sup>49</sup></b>	<b>Obligation Standard<sup>50</sup></b>	<b>Poverty headcount ratio at \$1.90 a day (2011 PPP)(% of population) <sup>51</sup></b>
<b>1996</b>	Low	70	42.4
<b>1997</b>	Low	/	/
<b>1998</b>	Lower-middle	/	/
<b>1999</b>	Lower-middle	67.6	40.5
<b>2000</b>	Lower-middle	/	/
<b>2001</b>	Lower-middle	/	/
<b>2002</b>	Lower-middle	65.5	32
<b>2003</b>	Lower-middle	/	/
<b>2004</b>	Lower-middle	/	/
<b>2005</b>	Lower-middle	59.2	18.8
<b>2006</b>	Lower-middle	/	/
<b>2007</b>	Lower-middle	/	/
<b>2008</b>	Lower-middle	56.2	14.7
<b>2009</b>	Lower-middle	/	/
<b>2010</b>	Upper-middle	8.48	11.2
<b>2011</b>	Upper-middle	6.38	/
<b>2012</b>	Upper-middle	5.42	/

<sup>49</sup> See note 40 above, World Bank, 2015, *Metadata on GNI per capita, Atlas method* (current US\$), D.C.: World Bank.

<sup>50</sup> World Bank 2015, *Metadata on Poverty headcount ratio at \$1.90 a day (2011 PPP)(% of population)*, D.C.: World Bank.

<sup>51</sup> See n 50 above



<b>2013</b>	Upper-middle	/	/
<b>2013</b>	Upper-middle	/	/
<b>2014</b>	Upper-middle	/	/

**Table 7 - Comparison between the standard on right to work and actual degree of individual enjoyment on right to work in China from 2000 to 2014**

In according to table 7, the persisting economic development and prosperity has led China to advance gradually from a low income economy to lower-middle one in 1998 and further proceed to upper-middle income economy in 2010. Hence, under the Progressive Obligations Standard, the standard on right to work will inflate correspondingly. As revealed by table 7, the obligation standard on the poverty headcount ratio drops steadily from 70%(1996) of the population to 67.6%(1999), 65.5%(2002), 59.2%(2005) and 56.2%(2008) since it had become a lower-middle income economy in 1998 and further to 8.48%(2010), 6.38%(2011) and 5.42%(2012) since China has become an upper-middle income economies in 2010. The underlying principle is that, the better the economy, the lesser the percentage of population living under the poverty line (US\$ 1.90 per day).

The Progressive Obligations Standard is applied by comparing the actual poverty headcount to the obligation standard set. In 1999, when China had become a lower-middle income economy, China was able to satisfy its obligation on right to work provided that the actual percentage of the population living under US\$ 1.90 (40.5%) is less than the standard (67.6%). In other words, China was doing far better than other lower-middle income economies in protecting the right to work on average. However, in 2010, when China was advanced to upper-middle income economies, it failed to meet the standard where the actual poverty headcount in 2010 (11.2%) was greater than the standard (8.48%). There was a 2.72% deviation from the standard, which had already exceeded the acceptable range of deviation (aforementioned +/- 1%). As a result, it was likely that in 2010, China had failed to comply with its

obligation to realize the right to work to its maximum available resources. With the level of resources available, China could have done better to improve the poverty headcount ratio in 2010.

## PART V: LIMITATIONS AND POSSIBLE CRITICISMS

Despite all the benefits of adopting the Progressive Obligations Standard, there are a few limitations and possible criticisms that worth addressing.

### **Cultural rights not considered**

The Progressive Obligations Standard does not touch upon the cultural rights recognized in Article 15 of the ICESCR due to the lack of quantitative data on cultural rights. Unlike economic and social rights, which can be substantively quantified by looking at the percentage of children died from malnutrition or the percentage of primary school completion rate for both sexes, cultural rights are relatively abstract. It is difficult to assess how many people have been granted with the right to take part in cultural life or enjoy the benefits of scientific progress. Hence, it is admitted that this essay has left the issue unaddressed, recognizing that cultural rights deserve a thorough and separate analysis.

### **Frequency of review**

The issue on how long should the Progressive Obligations Standard be reviewed has not been discussed in this essay. In fact, it is a core question that has to be separately analyzed. There are two important dependent variables embedded in Progressive Obligations Standards. First, the standard indicator is an average of performance among all countries within the same income economies and second, the threshold GNI per capita for each income economy shifts frequently in according to the global economic development rate. While frequent reviews may weaken the referential ability of the Progressive Obligations Standard (i.e. changing standard every year), infrequent reviews may result in an outdated indicator. There is no conclusive answer yet, but it is suggested some reference could have been made to the review on ICESCR, which is to be taken every 5 years.<sup>52</sup>

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<sup>52</sup> Office of the High Commissioner for Human Rights, “Review of the composition, organization and

## CONCLUSION

The setting up a universal indicator for ESC rights has always been on the top priority of international human rights agenda. Knowing that the absence of a broadly accepted indicator not only frustrated monitoring, but also impeded efforts to measure those programmes that foster fulfillment, there are heat debates on how should the indicator be constructed over the past decades. However, neither of the existing indicators is adequate nor sufficient to serve as an appropriate ESC rights indicator. Therefore, a new indicator to concretize the idea of “progressive realization”, called the Progressive Obligations Standard, has been introduced. Although there are some limitations to the Progressive Obligations Standard, it has overcome all shortcomings prevailing among all existing indicators and reflected the gist of ICESCR accurately. All in all, the Progressive Obligations Standard is proposed in hopes of inspiring further discussions on how should an ESC right indicator be like. Everyone deserves to enjoy their economic, social and cultural rights because they are human and hence we, as a human, should do something to contribute to the protection of our basic rights.

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administrative arrangement of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights”, (1985)