

“The right to continuous improvement of living conditions and human rights of future generations – a circle impossible to square?”

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1. Introduction

The right to continuous improvement of living conditions (CILC) is provided for in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is one of the rights mentioned as part of the concept of a right to an adequate standard of living. As detailed by Jessie Hohmann, the right – as a distinct part of Article 11 – has not received much attention from states, the UN Committee on Economic, Social and Cultural Rights (‘the Committee’ or CESCR), or from the academic community.² Consequently, what the right entails from a normative perspective, and the corresponding obligations have not been developed in any detail, compared to that of the other rights in the ICESCR.³

Another concept emerging within human rights circles is ‘the human rights of future generations’,⁴ referring to the rights of current youth and children when they grow into

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² J Hohmann, *The Forgotten Right To Continuous Improvement Of Living Conditions In Article 11(1) Of The International Covenant On Economic, Social And Cultural Rights: Seeking The Roots Of The Right In International Law* (on file with author, 2019). *I’m not sure how to reference ‘on file with the author’*

³ Most of the rights provided for in International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 93 UNTS 3 (ICESCR) have been subject to General Comments (GCs) adopted by the CESCR. These include the right to adequate food as a human right (CESCR ‘General Comment No. 12: The Right to Adequate Food (Art. 11)’ (12 May 1999) UN Doc E/C.12/1999/5); the right to adequate housing (CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1)) of the Covenant’ (13 December 1991) UN Doc E/1992/23); the right to health (CESCR ‘CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (11 August 2000) UN Doc E/C.12/2000/4); and the right to water (CESCR ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)’ (20 January 2013) UN Doc E/C.12/2002/11). However, it should be noted that the right to an adequate standard of living has not been subject to such scrutiny by the Committee, hence uncertainty about the link between the adequate standard of living on the one hand and CILC on the other remain. All General Comments are available through the Committee’s website Office of the United Nations High Commissioner for Human Rights (OHCHR) ‘Committee on Economic, Social, and Cultural Rights’ <<https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>>.

⁴ In a statement in 2019, the UN High Commissioner held that, “the principle of intergenerational equity recognized in the Paris Agreement places a duty on us to act as responsible stewards of our environment, and ensure that future generations can fulfil their human rights.” See also, M Bachelet ‘ONE UN Side event: SDG 16 and realising the right to participate – empowering people as agents of more effective climate change’ (25th

adulthood, as well as other people who will live in the future.⁵ Unlike the CILC, this concept is not codified in any human rights treaties. However, growing attention is being paid to this concept, both in the context of human rights related to environmental degradation (right to a clean environment, and human rights effects of climate change, for instance), and in a broader sense of intergenerational justice. While lacking international codification as a right, as of 2019, 120 countries' constitutions make some reference to environmental posterity protection provisions,⁶ with a few making explicit mention of the rights of future generations to the environment.⁷ In a world facing exhaustion of finite resources, radical changes to our climate that will significantly impact upon the ability to grow food, and to preserve fishing resources; where increased flows of refugees and internally displaced people are predicted due to rising sea levels and other climate related causes; and where technological advances may affect our way of life in fundamental manners, it is pertinent to ask whether we are paying sufficient attention to how future generations may be able to enjoy their human rights.

In this chapter, I will address one of the junctures between these two concepts, namely whether or how the right to continuous improvement of living conditions can be complied with, while at the same time addressing the rights of future generations. This will be done with a focus on the requirement in the ICESCR Article 2(1) that State Parties undertake to use the 'maximum of available resources' to implement the rights in the Covenant. There may clearly be tensions related to resource use when we address these two human rights issues. How much resources do we use to comply with the human rights of current generation, while at the same time secure resource availability in the future? What the right to continuous improvement of living conditions and maximum of available resources have in common is that the attention (to the extent it has been given) tends to be focused on the access to and spending of financial and natural resources, and increasing material consumption. Addressing the human rights of future generations, this attention to increased spending may need to be rethought. Analysing the right to continuous improvement of living conditions and the human rights of future generations together necessitates attention to questions such as sustainability, retrogression, planetary boundaries and a human rights floor and ceiling.

Session of the Conference of the Parties, Madrid, 9 December 2019) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25413&LangID=E>>.

⁵ R Künnemann 'Human Rights of Future Generations – Draft Research Paper' (on file with author, 2019) 1.

⁶ J Tremmel, 'Whose Constitution? Constitutional Self-Determination and Generational Change' (2019) 32(1) *Ratio Juris* 49, 61.

⁷ *Ibid.*

Before addressing the requirement of employing the ‘maximum of available resources’ it is necessary to dwell on the content of CILC (Section 2), and how we understand the ‘rights of future generations’ (Section 3). Section 4 will then be devoted to the tension between CILC and the rights of future generations on a general level, while focusing on how we can address the concept of ‘maximum available resources’, in light of the CILC as well as human rights of future generations, and how this concept may be applied to cater for both rights. As the two concepts (CILC and human rights of future generations) both lack specific interpretation and appear as new in the international human rights debates, this paper does not aspire to give the ultimate answers, but rather to identify questions that need to be asked and researched to enable us to understand the relationship between CILC and human rights of future generations. The chapter will argue that we need to approach the ‘maximum of available resources’ differently from what has been done before, to enable a possible joint approach to CILC and human rights of future generations.

2. The understanding of the ‘right to continuous improvement of living conditions’ as a human right

As has been thoroughly addressed by Jessie Hohmann in her paper,⁸ the right to continuous improvement in living conditions has not been subject to much attention or scrutiny by the international human rights community up to now. This is the case for the UN human rights system, as well as civil society and the academic community.⁹ Consequently, it is at this stage very hard to determine specifically what is meant by the concept, and indeed its limitations. But some reflections can be made as to the understanding of ‘continuous’, ‘improvements’ and also ‘living conditions’. We should also consider the extent to which CILC is limited by its connection to the overarching concept in Article 11, namely the right to an adequate standard of living.

⁸ Hohmann n2 above.

⁹ It is telling that in B Saul, D Kinley, and J Mowbray’s seminal work on the ICESCR, a 100-page chapter on ICESCR article 11, the right to continuous improvement of living conditions is mentioned only once and has no discussion on the right. See B Saul, D Kinley, J Mowbray *International covenant on economic social and cultural rights: commentary, cases and materials* (Oxford University Press, 2016) 861.

A key question is how we understand ‘improvement’, as improvement related to human rights enjoyment does not necessarily imply more material goods. There are other aspects of quality of life that can be considered improvement, even if material goods are not increased. This point may seem as highly ‘academic’ in a world where three quarters of a billion people live in extreme poverty¹⁰ and where many others lack access to essential material goods such as food, water, housing, and education to reach an adequate standard of living. This question relates closely to recent debates over the human rights impact of increasingly unequal societies,¹¹ and this is clearly of relevance to the discussion on CILC. Alston holds that it is necessary to ‘clearly recognize that there are limits to the degree of inequality that can be reconciled with notions of equality, dignity and commitments to human rights for everyone.’¹²

Closely linked to our understanding and interpretation of ‘improvement’ is our understanding of ‘living conditions’. Living conditions do not only relate to access to adequate food, clothing, housing, and water, but also to personal security, working conditions, rest, leisure time, and other aspects of our lives covered by the provisions in international human rights law more broadly. However, it goes even further than that and cover aspects such as social interaction with family and friends, and the opportunity to enjoy nature, art and culture.

The third concept in the provision to be considered is ‘continuous’. This could be seen as an indefinite concept; that there is never a point at which the living conditions are of such a standard that the continuation may no longer be applicable. However, such an approach would be utopian and not take into account the necessary limitations imposed upon us by finite resources and the human rights of the generations coming after us.

One way of addressing this tension would be to address CILC in light of the overarching right in Article 11, namely the right to an ‘adequate standard of living’. In other words, do we have

¹⁰ According to the UN, 736 million people lived below the international poverty line of US\$ 1.90 a day in 2015. See UN, ‘Ending Poverty’ <<https://www.un.org/en/sections/issues-depth/poverty/>>.

¹¹ P Alston, ‘Extreme inequality as the antithesis of human rights’ (*Opendemocracy*, 27 October 2015) <<https://www.opendemocracy.net/en/openglobalrights-openpage/extreme-inequality-as-antithesis-of-human-rights/>>; S Moyn, ‘Human Rights and the Age of Inequality,’ (*Opendemocracy*, 27 October 2015) <<https://www.opendemocracy.net/en/openglobalrights-openpage/human-rights-and-age-of-inequality/>>; M Leach, K Raworth and J Rockström ‘Between social and planetary boundaries: Navigating pathways in safe and just space for humanity’ *OECD – World Social Science Report 2013* (OECD, 15 November 2013 Chapter 6, 84 – 89; W Vandenhole ‘De-Growth and Sustainable Development: Rethinking Human Rights Law and Poverty Alleviation’ (2018) 11 *Law and Development Review* 647.

¹² Alston n11 above.

an unlimited right to improvement in our living conditions, or is this right only relevant to the point where we have achieved what is considered an adequate standard of living? As has been pointed out by Hohmann, the travaux préparatoires only gives limited indication of the intentions of the drafters, apart from expressing the need for achieving continuous improvement in living conditions.¹³

As is the case with CILC, the right to an adequate standard of living has not received the specific attention of a General Comment related to its normative content and corresponding obligations from the Committee. However, it may be reasonable to argue that through the fulfilment of the composite rights (food, clothing, housing, and water), combined with the fulfilment of the rights to the highest attainable standard of health,¹⁴ and the right to education,¹⁵ much of what would commonly be considered to be part of an adequate standard of living would be addressed. On the other hand, with such an emphasis on the material aspects, we may not be reflecting the wider content of the concept of ‘continuous improvement of living conditions’, which includes non-material elements such as clean air, leisure time, access to art and culture, etc. These are values that are not as easily measured as material goods, but still essential for our living conditions, and a life lived in dignity.¹⁶

Yet, in situations where we are looking at CILC from an access to material goods perspective, there are still a number of questions to be raised: do people whose living standards comply with the material understanding of adequacy still have a right to continuous improvement of their living conditions? Will there be priority for CILC for people whose living standards are not adequate according to the above definition, or does this right have an independent understanding so that people whose living standard has reached adequacy can still claim their CILC? Will states fail in their obligations if their population enjoy the adequate standard of living as defined above, but are unable to ensure that the population can continue to improve their living conditions?

¹³ Hohmann n. 2 above; M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995) 294-295.

¹⁴ ICESCR n3 above article 12.

¹⁵ Ibid article 13.

¹⁶ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 1

The Committee has consistently emphasised that the various economic, social and cultural rights have a minimum core content with corresponding core obligations.¹⁷ This has been specified in a number of General Comments by the Committee.¹⁸ However, the Committee has not been consistent in its terminology (sometimes using ‘core content’, sometimes ‘minimum core content’, and sometimes ‘core obligations’). It would lead too far to go into this discussion in any detail, but it can reasonably be argued that this core content may represent a human rights ‘floor’ below which no-one should be living. In the context of CILC, is there a similar human rights ‘ceiling’ above which the CILC would no longer apply? This may come across as a rhetorical question, and the answer may be ‘of course’. After all, most people would accept that Bill Gates, Richard Branson, and other (multi)billionaires could legitimately see a significant decline in their living conditions before it becomes a human rights problem. In practical terms though, if we have a right to ‘continuous improvement of living conditions’, at what point do we draw the line and argue that the ‘continuous improvement’ does no longer apply? This is a major question for our understanding of CILC, and in particular if we see living conditions as representing material wealth. However, if CILC is considered to go beyond material wealth and encompass non-material elements as mentioned above, CILC would still have relevance for people whose material standard of living measures up to ‘adequate’ in the understanding of the ICESCR.

From the material wealth perspective, these questions really concern whether we address human rights implementation from a minimum or a maximum perspective; or indeed, whether there are spheres beyond what would be considered complete fulfilment of rights. It is evident that there are huge numbers of individuals in the world who do not live in conditions that can be considered to reflect the above definition of adequate standard of living, and for them, the right to continuous improvement of living conditions is certainly highly relevant and pertinent. But what about those that have living standards that are fully adequate – and beyond. Do we still have the right to the continuous improvement of living conditions? From a moral-philosophical perspective, this is a far more difficult question to respond to in the affirmative.

¹⁷ D Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *The South African Law Journal* 484; K G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113; A Chapman and S Russell *Core Obligations: Building a framework for economic, social and cultural rights* (Intersentia, 2002).

¹⁸ See generally CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant),’ (14 December 1990) UN Doc E/1991/23 para 10; GC No. 12 n3 above paras 6, 8 and 33; GC No. 14 n3 above paras 19, 43 and 44; GC No. 15 n3 above paras 6 and 37.

Writing in the context of environment and the right to development, Löfquist holds that if ‘some people have a vastly better situation than other people, there is something wrong with the idea that both those who are very well off and those who have very little can have the same right to development.’¹⁹ On the contrary, it may be pertinent to argue that given the finite resources in the world, and the excessive use of resources by a minority of the world’s population,²⁰ the right to a continuous improvement of living conditions no longer apply to them. In essence, this part of the world’s population has reached the level of adequacy and more, and therefore they may have reached a human rights ceiling beyond which the CILC no longer features.

The understanding of CILC as reflected above, and in particular the concept of ‘continuous improvement’ and a possible human rights ceiling have not been directly addressed by the Committee, but relate to the understanding of retrogression or retrogressive measures taken by states, and how they impact upon the CILC.

The Committee have consistently held that retrogressive measures by States contravene their obligations, and should only be taken as a last resort and States have to explain why such measures were necessary.²¹ However, for whom are retrogressive measures prohibited? Is this for everyone, or only for those whose adequate standard of living (and other ESC rights) are not fulfilled? Are retrogressive measures that target those beyond the human rights ceiling permissible?

As early as 1990, the Committee referred to retrogression in its General Comment no. 3 on the Nature of State Parties Obligations. In this General Comment it was held that

... any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the

¹⁹ L Löfquist, ‘Climate change, justice and the right to development’ (2012) 7(3) *Journal of Global Ethics* 251, 251.

²⁰ “An average consumption rate per person means the amount of oils and other resources that the average person consumes a year. In rich countries those rates are up to 30 times as high as they are in poor countries:” J Diamond, ‘High consumption by some nations puts all of us at risk’ (*National Geographic Magazine*, December 2018) < <https://www.nationalgeographic.com/magazine/2018/12/inequality-rich-poor-essay-jared-diamond/>>.

²¹ CESCR has referred to the non-permission of retrogressive measures, *inter alia* in GC 3 n18 above. For an in-depth analysis of the Committee’s approach see B T C Warwick ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) 19 *Human Rights Law Review*, 467.

rights provided for in the Covenant and in the context of the full use of the maximum available resources.²²

Even though this paragraph mentions that any retrogressive measures need to be taken with the ‘most careful consideration’, justified by the reference to the totality of the rights provided in the Covenant, and ‘in the context of the full use of the maximum available resources’, this sentence has been interpreted ‘as establishing a doctrine which forbids the erosion of progress made by States (a ‘prohibition on backwards steps’)’.²³ A statement from the Committee in 2016, contain a somewhat more nuanced approach:

If the adoption of retrogressive measures is unavoidable, such measures should be necessary and proportionate, in the sense that the adoption of any other policy or failure to act would be more detrimental to economic, social and cultural rights. They should remain in place only insofar as they are necessary; they should not result in discrimination; they should mitigate inequalities that can grow in times of crisis and ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected; and they should not affect the minimum core content of the rights protected under the Covenant.²⁴

As is clear from these quotes, the concerns of the Committee have (rightly) been to focus on retrogression or backward steps that affect vulnerable groups in society from a comprehensive perspective of fulfilment of economic, social and cultural rights as a whole. The second quote from 2016 includes a reference to non-discrimination, and that states should ‘mitigate inequalities’ and the need to avoid that the rights of ‘disadvantaged and marginalized individuals and groups are not disproportionately affected.’ Consequently, the attention is on the negative effects on the most deprived in society, and the passages quoted and indeed the many other instances where the Committee refers to non-retrogression, they do not – understandably - consider the position of the wealthiest parts of the population.

As will be seen in the next section of this paper, the question of a ‘human rights ceiling’, and the related concerns of retrogression do not only affect our understanding of continuous improvement of living conditions, it is also highly relevant for the discussion on human rights of future generations, and the ‘planetary boundaries’ that we are facing.

²² GC 3 n18 above para 9.

²³ Warwick n21 above 468.

²⁴ CESCR ‘Statement: Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights’ (22 July 2016) UN Doc E/C.12/2016/1 para. 4.

3. Human Rights of future generations

As specified in the introduction, when we use the term ‘human rights of future generations’ we are considering the rights of current youth and children, and other people who will live in the future.²⁵ A child is a human being currently protected by general human rights law, in addition to the specific rights of the child. However, children will grow up and become adults in a world that may face significant challenges related to individuals’ human rights enjoyment due to the conduct of people acting today, over whom the children of today have no say.²⁶

There are a number of challenges to future generations’ human rights enjoyment that stem from the conduct of the present generation. For instance, the ongoing environmental degradation through pollution and climate change will have significant impact upon future generations’ abilities to enjoy their human rights.²⁷ The environmental change is likely to cause degradation of agricultural land and the ability to grow sufficient and nutritionally sound food will be significantly reduced;²⁸ the availability of land on which to live and work will be reduced due to sea level rises;²⁹ a large number of people will be internally displaced, which may result in conflict and struggles over limited resources;³⁰ the development and use of technology may have significant impact upon future generations’ rights to privacy;³¹ to receive and impart information, and to take part in the government of their own countries; to mention but a few of the potential human rights challenges. In essence, many of the consequences of current action or inaction will have direct impact upon future generations’ human rights – including the right to an adequate standard of living, and its composite rights.

²⁵ Künnemann n5 above.

²⁶ T Skillington ‘Changing perspectives on natural resource heritage, human rights, and intergenerational justice’ (2019) 24(3) *International Journal of Human Rights* 615, 615; M Düwell and G Bos ‘Human rights and future people — Possibilities of argumentation’ (2016) 15(2) *Journal of Human Rights* 231, 239.

²⁷ B Lewis ‘Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice’ (2016) 34(3) *Netherlands Quarterly of Human Rights* 206, 209-213.

²⁸ European Environmental Agency, ‘Soil, Land and Climate Change’ (2019) <<https://www.eea.europa.eu/signals/signals-2019-content-list/articles/soil-land-and-climate-change>>

²⁹ International Panel on Climate, *Change Climate Change 2014: Synthesis Report* (2014) <https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf> 4.

³⁰ B Thompson, ‘Climate change and displacement’ (*United Nations High Commissioner for Refugees (UNHCR)*, 15 October 2019) <<https://www.unhcr.org/uk/news/stories/2019/10/5da5e18c4/climate-change-and-displacement.html>>.

³¹ L Rainnie and J Anderson, ‘The Future of Privacy,’ (*Pew Research Centre Internet & Technology*, 18 December 2014) <<https://www.pewresearch.org/internet/2014/12/18/future-of-privacy/>>

In the emerging debate on human rights of future generations, a number of issues are being discussed, such as whether individuals who do not yet exist may have *rights*,³² whether they may have legal standing,³³ and how their rights can be claimed.³⁴ While important for our understanding of legal rights of future generations, this article will not enter into this debate, but rather focus on some specific concepts that have relevance for our understanding of the link to CILC.

Just as the question of who is covered by the right to continuous improvement of living conditions relates to the universality of human rights, so does the question of human rights of future generations. The understanding of universality is not limited to geographic reach, or a reach to all people irrespective of race, sex, language, religion, etc., but it also has a temporal element in that the human rights protection and enjoyment as envisaged in the UN Charter and the Universal Declaration of Human Rights apply to current as well as future people. This is a logical continuation of life – we as a current generation enjoy our human rights, which were proclaimed and codified before our birth. The conduct of past generations has enabled us to enjoy human rights as a future generation. The Preamble of the Universal Declaration on Human Rights, provides the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...’.³⁵ Weiss holds that ‘the reference to all members of the human family has a temporal dimension which brings all generations within its scope. The reference to equal and inalienable rights affirms the basic equality of such generations in the human family.’³⁶

This temporal universality of human rights is linked to the understanding of intergenerational justice. Shelton uses this term and holds that the humans who live today have special obligations as ‘custodians or trustees’ of the planet and that these obligations pertain to the

³² Skillington n26 above 616-620. See also Lewis n27 above 206-226.

³³ B Mank, ‘Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?’ (2009) University of Cincinnati College of Law, Faculty Articles and Other Publications Paper 272 <http://scholarship.law.uc.edu/fac_pubs/272>.

³⁴ Düwell and Bos n26 above.

³⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Preamble.

³⁶ E B Weiss ‘In Fairness to Future Generations and Sustainable Development,’ (1992) 8(1) *American University International Law Review* 19, 21.

survival of humans as a species.³⁷ This would mean that as rights holders, future generations should be able to ‘inherit the Earth in as good a condition as did their ancestors and with at least comparable access to its resources.’³⁸ The other side of this coin, would mean that the current generation would be under an obligation to ensure that the Earth’s conditions and resources are such that future generations are able to live their lives with full enjoyment of their human rights.

In light of this temporal universality and intergenerational justice approach, the debate on the human rights of future generations addresses how the decisions and behaviour of current people (individuals, corporations, as well as governments) may impact upon the ability of future generations to enjoy human rights in an equal manner to current populations. There is, of course, a clear tension regarding these questions in that many people within the current populations do not have their human rights fulfilled, including their adequate standard of living. There is a real concern that addressing human rights of future generations may take the attention away from the plights of current generations, or may indeed be used as arguments for limiting the rights’ enjoyment of current generations.³⁹ Consequently, when addressing the right to continuous improvement of living conditions for current generations in light of the rights of future generations, care needs to be taken not to trade human rights enjoyment for those that are currently lacking with those of future generations.

4. Tensions between CILC and human rights of future generations

From the discussion in the two previous sections, it becomes clear that there are tensions between the two concepts of CILC and the rights of future generations. One of the key tensions concerns the use of resources, and how we interpret the requirement of Article 2(1) of the ICESCR to use the ‘maximum of available resources’ to implement economic, social and to improve current living conditions even if we are only focusing on people whose living standards are not adequate according to a human rights approach, will require the use of further

³⁷ D Shelton ‘Describing the Elephant: International Justice and Environmental Law’ in J Ebbesson and P Okowa (eds) *Environmental Law and Justice in Context* (Cambridge University Press, 2009) 62. See also Weiss n36 above 20.

³⁸ Weiss n36 above 21.

³⁹ Skillington n26 above provides a detailed analysis of the debates between those who favour rights fulfilment of current generations, and those who argue that this would be contrary to intergenerational justice and rights of future generations.

resources, both financial and material. However, the use of further resources, and in particular natural resources, will be highly detrimental for the ability of future generations to realise their human rights. Research clearly shows that current resource use (even without increasing it) is beyond what the Earth can sustain. In an article from 2018, Watt refers to research that shows that ‘we have consumed a year’s worth of carbon, food, water, fibre (sic.), land and timber in a record 212 days.’⁴⁰

Consequently, one of the significant challenges when we seek convergence between CILC and the human rights of future generations will be to find a way in which living conditions can be improved within existing resource limits, many of which have already been exceeded.⁴¹ This shows a serious challenge related to sustainability of standards of living. However, this tension also shows, as was alluded to above, that we may need to consider the improvement in living conditions only for those segments of the world population who have not yet achieved an adequate standard of living. This may also challenge our approach to economic growth. Vandenhoe holds that ‘economic growth does not necessarily lead to economic development, let alone human development, and has typically come at a huge environmental cost.’⁴² Such environmental cost is likely to have significant impact upon future generations’ ability to enjoy their human rights.

There are therefore two specific areas of concern that need to be addressed if the tension between CILC and human rights of future generations may be eased: the question of how we use resources, and what this will mean in terms of sustainable development.

a. The application of ‘maximum of available resources’

As already mentioned, the approach to ‘the maximum of available resources’ when implementing economic, social and cultural rights often focuses on the availability of financial resources. Hence, richer countries will have more resources to devote to such implementation than poorer countries. This approach has often been taken by the Committee,⁴³ and is

⁴⁰ J Watts ‘Earth’s resources consumed in ever greater destructive volumes’ (*The Guardian*, 23 July 2018) <<https://www.theguardian.com/environment/2018/jul/23/earths-resources-consumed-in-ever-greater-destructive-volumes>>.

⁴¹ See generally K Raworth *Doughnut Economics* (Random House Business Books, 2017)

⁴² Vandenhoe n11 above 650.

⁴³ It should be noted that in recent years the Committee has shown a more nuanced approach to resources and the impact their use may have on economic, social and cultural rights. For instance, in their recent Concluding

understandable: focusing on financial resources can be done relatively easily using available ‘objective’ data, and applying such data may be considered less of a political interference than commenting on the use of other resources. However, some commentators have taken a different approach. In an article from 1994, Robertson carefully interpreted the concept of resources to go beyond a state’s financial means,⁴⁴ including natural, human and technological resources.⁴⁵ Building on Robertson’s arguments, I have previously held that resources and their use for implementation of economic, social, and cultural rights need to be considered on the basis of their quality as well as quantity.⁴⁶ In essence, it is not only the amount of resources dedicated to human rights implementation that is of importance, but also *how* such resources are being used and deployed. It is essential that resources are targeted to those that are in most need of support, that the deployment of resources are carried out in a transparent, participatory, non-discriminatory and accountable manner. There are too many examples where financial resources are committed, but that less concern is devoted to ensuring that the outcome is one where the human rights situation is actually improved. In other words, it is essential to ensure that resources are used in a manner that comply with the obligation of result as well as the obligation of conduct.⁴⁷ However, at the time of publishing the article I did not consider the application of resources from a sustainability or intergenerational justice perspective. In the close to a decade that has passed, the need to reconsider what is understood by *available* resources, and indeed what can be considered *maximum* has become far more important.

In this context, the *availability* of resources needs to be considered based on what can reasonably be used currently, without jeopardizing what will be available in the future. For

Observations on Norway’s report, the Committee held that it “is concerned about the licences the State party has issued in recent years for the exploration and exploitation of petroleum and natural gas reserves in the Arctic Ocean and the Barents Sea and the impact of those activities on global warming (art. 2 (1)).” See OHCHR ‘Concluding Observations on the sixth periodic report of Norway’ (2 April 2020) UN Doc E/C.12/NOR/CO/6 para 10. In earlier Concluding Observations related to Australia, the Committee “recommends that the State party revise its climate change and energy policies, as indicated during the dialogue. It recommends that the State party take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases, and pursue alternative and renewable energy production. The Committee also encourages the State party to review its position in support of coal mines and coal exports:” OHCHR, ‘Concluding Observations on the fifth periodic report of Australia’ (11 July 2017) UN Doc E/C.12/AUS/CO/5 para 12.

⁴⁴ R E Robertson, ‘Measuring State Compliance with the Obligation to Devote the ‘Maximum of Available Resources’ to Realizing Economic, Social and Cultural Rights’ (1994) 16 *Human Rights Quarterly* 693.

⁴⁵ *Ibid* 695-696.

⁴⁶ S Skogly, ‘The requirement of using the “maximum of available resources” for human rights realisation: a question of quality as well as quantity?’ (2012) 12(3) *Human Rights Law Review* 393.

⁴⁷ CESCR General Comment no. 3 n18 above, para 1.

instance, we may have significant resources of fish ‘available’ in our oceans, but we can only consider the maritime resources available to us to be the amount that can be used while at the same time securing the reproduction of these resources, i.e. avoiding over-fishing. Thus, what is available is not only a matter of what we can access, but equally what we can use without depleting resources. This is a huge challenge, and even more difficult with resources that are finite and are not renewable or do not renew themselves. There is an added complexity in that such resources are often found in poorer parts of the world, but claimed by richer states in conjunction with multinational corporations. Consequently, there is an added challenge to consider availability from a redistributive perspective: it is not only a matter of what may be available, but equally important, who gets to benefit from it.⁴⁸

Similarly, the way we understand *maximum* is not only a matter of the total amount of resources, but what amount can be used without prejudice to the next generation. However, the human rights benefits from the use of the maximum available resources may be enhanced by investing financial resources in human rights conducive policies (such as health, food, education), rather than in less human rights productive spending. This is in line with the current approach to maximum available resources by the Committee and other human rights bodies in the UN system. Furthermore, the investment in the use of natural resources should be done to ensure that the benefits from the exploration and exploitation of these resources are used to improve the human rights situation of the population, and at the same time that such exploration and exploitation is limited to sustainable levels to secure the availability of resources for future generations. It should also be mentioned that the amount of resources available for human rights implementation, including CILC, can be increased through redistribution policy decisions by governments, such as taxation policy, investment in renewable energy,⁴⁹ and the fight against corruption.

b. Sustainability

Furthermore, the question of CILC and the concern for human rights for future generations overlap with the issue of sustainable development. According to the Brundtland report *Our*

⁴⁸ For instance, Laura Spinney discusses how deforestation in the global south has time-limited benefits for the local population, while carries significant long-term detrimental effects for them. L Spinney “The colonialist thinking that skews our view of deforestation” (2020) *The Guardian*, 22 December.

⁴⁹ See Alston n11 above.

Common Future, from 1988, sustainable development is defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.⁵⁰ The report did not use this concept in a human rights framework, but rather that of human needs. Nevertheless, sustainability is considered in light of the needs of current and future generations. Hence, it can be argued that the understanding of the World Commission on Environment and Development more than 30 years ago saw sustainability as a concept that would limit the freedom of manoeuvre for current development policies by the needs of future generations.

This can be translated into human rights language. By applying the word ‘rights’ rather than ‘needs’, the Brundtland quote would read: sustainable development is development that meets the *rights* of the present without compromising the ability of future generations to *enjoy their own rights*. To make the enjoyment of economic, social and cultural rights sustainable for future generations, there is clearly a limitation added to the concept of the application of resources. This has been recognised, *inter alia*, in the UN General Assembly Agenda 2030 Resolution, which contains the Sustainable Development Goals, where it is stated that

We are determined to protect the planet from degradation, including *through sustainable consumption* and production, *sustainably managing its natural resources* and taking urgent action on climate change, so that it can support the needs of the present and future generations.⁵¹

If we see resources to go beyond financial resources and include natural resources such as minerals that are mined, land that is used for agriculture, oceans used for fisheries, and the air that is used for travel, it is clear that the use of these resources to the ‘maximum’ is difficult to align with the above understanding of sustainability and the possibility of future generations to enjoy their economic and social rights, including the right to an adequate standard of living. Rather, the depletion of mineral resources through excessive consumption; destruction of land as a result overly intensive agricultural production; overfishing in our oceans; and significant air pollution represents direct destruction or overuse of our resources. Such destruction or overuse means that future generations will be unable to secure their rights to food, water, and health. In short, they will be unable to secure their right to an adequate standard of living.

⁵⁰ UN, ‘Report of the World Commission on Environment and Development: Our Common Future’ (1987) UN Doc A/42/427 (Annex) chapter 2, para 1 <<http://www.un-documents.net/ocf-02.htm>>.

⁵¹ UN General Assembly, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, 21 October 2015, A/RES/70/1, Preamble (emphasis added).

If we accept that we need to restrict the use of resources to levels that are sustainable for future generations, this will necessarily impact upon what is available to ensure continuous improvement of living conditions for all currently, at least if CILC is considered to mainly address material consumption. However, if we address CILC in the understanding of it being limited by the fulfilment of an adequate standard of living as addressed above, the opportunity to use resources in a more sustainable manner is more feasible. Some authors address these issues from the perspective of de-growth,⁵² and argue that sustainable development needs a balance of ‘economic growth with environmental and social considerations’.⁵³ Vandenhole challenges the way in which international human rights law has tried to work within the parameters of the current high growth approach and argues that

‘only if human rights law undergoes a paradigmatic shift in the understanding of socio-economic human rights and its role in development, beyond growth assumptions and with a stronger focus on redistribution, it may keep [the] transformative potential in post-growth or growth agnostic economies’⁵⁴

Hence, Vandenhole here sees the need for redistribution to enable sustainable development.

Consequently, the understanding of what we mean by ‘maximum available resources’ in the context of CILC and sustainability for the rights of future generations need to be redefined. We will need to consider not only the actual amount that is available, but more carefully how much of the amount available can sustainably be used currently to ensure that future generations are not negatively affected by excessive use of resources by this generation.

5. Concluding remarks

To conclude, the question then becomes how such a limitation of what can be considered ‘maximum of available resources’ will affect our approach to CILC. Redistribution is increasingly called for by human rights scholars,⁵⁵ and this may be necessary to enable

⁵² In tackling questions related to human deprivation and ecological degradation, Raworth does not argue ‘de-growth’ per se, but advocates an economy ‘that promotes human prosperity whether GDP is going up, down, or holding steady’. Raworth n 41 above 245.

⁵³ Vandenhole n11 above 648.

⁵⁴ Ibid 651.

⁵⁵ P Alston, ‘Report of the Special Rapporteur on extreme poverty and human rights’ (27 May 2015) UN doc A/HRC/29/31 para 56(c); M Leach, K Raworth, and J Rockström, n11 above 89.

sustainable use of resources to give future generations the opportunity to secure their human rights. However, a call for redistribution may be difficult if we approach CILC from an unlimited perspective. Accepting that redistribution is part of the implementation of human rights for all (current and future generations) may involve a more nuanced approach to the content of CILC and also to implementation measures such as the use of resources and the ‘prohibition’ of retrogressive measures. However, caution is necessary to ensure that the redistribution and retrogressive measures are targeted towards those who have reached the human rights ceiling.

While improvement in material well-being and access to better and more food, easier access to clean water, and housing that is compatible with personal health and security, is still a big challenge for many people around the world, it may also be necessary for many of us to reconsider what ‘improvement’ of living conditions is about. If we always equate improvement in living conditions with economic growth (in society and for individuals), we are in danger of falling into (or rather remaining in) a trap highlighted by Robert F Kennedy in 1968. In his famous speech at University of Kansas, he illustrated how the way in which we count our Gross National Product (which is often used as a measure of standard of living) contains many elements that are destructive to society and individuals, such as tobacco and pollution that is a threat to health, the sales of handguns that can kill, while other values that impact on our standard of living are excluded:

[...] the gross national product does not allow for the health of our children, the quality of their education or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage, neither our wisdom nor our learning, neither our compassion nor our devotion to our country, it measures everything in short, except that which makes life worthwhile.⁵⁶

In this quote, Kennedy captures much of what are important, but often ‘invisible’, aspects of our living conditions. In the calls for redistribution and sustainability, it will be necessary to approach the complexities of our societies in a different manner, and use the resources available to enhance the social well-being of everyone. This can for instance take the form of investment

⁵⁶ R F Kennedy ‘Remarks at the University of Kansas, March 18, 1968’ (University of Kansas, 18 March 1968) <<https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/robert-f-kennedy/robert-f-kennedy-speeches/remarks-at-the-university-of-kansas-march-18-1968>>.

in renewable energy to reduce pollution and secure supply for the future; the preservation of natural resources for the enjoyment of broader society; and other forms of improvements that will benefit society in a sustainable manner, such as redistribution of sources of wealth.⁵⁷

In the title of this chapter, I asked if the tension between the right to continuous improvement of living conditions and the human rights of future generations represent a circle that cannot be squared. As has been argued, if we seek to ensure that future generations will be able to enjoy their human rights, while at the same time provide for the right to continuous improvement of living conditions for people that currently live below the ‘human rights ceiling’, it will be necessary to reduce the resource use for those above this ceiling. Furthermore, the resources that are used for current generations should be treated with more care. Depleting finite resources currently available to ensure human rights fulfilment of current generations will not be in accordance with the intergenerational justice. Even more serious is the fact that much of the currently ‘available’ resources are not depleted to ensure current human rights compliance, but rather to enable overconsumption amongst those who have already reached the human rights ceiling.⁵⁸ Consequently, we need to rethink our use of resources, including for the implementation of economic, social and cultural rights. This will mean that what can be considered as ‘maximum’ and ‘available’ will have to be viewed in light of sustainability for future generations.

⁵⁷ Raworth n 41 above 177.

⁵⁸ For a discussion of such a scenario see Düwell and Bos n26 above 235.