




Report by the Special Rapporteur on the
human rights to water and sanitation,
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**HUMAN RIGHTS TO
WATER AND SANITATION**


THE OBLIGATION OF
 **PROGRESSIVE
REALIZATION**
 **IN THE CONTEXT OF
THE HUMAN RIGHTS TO
WATER AND
SANITATION**
 **SANITATION**

INTRODUCTION


The fulfilment of the human rights to water and sanitation cannot be accomplished in a short time frame and is often dependent on the availability and use of resources. In other words, States are required to take steps aimed at the progressive realization of those rights. In simple terms, the progressive realization can be defined and dissected by asking questions such as:



Where do we stand now?



What steps need to be taken to overcome challenges?



In what time frame? Mobilizing what resources?

In the context of water and sanitation, the obligation of progressive realization requires analysing how the country has progressed in terms of service provision and what plans are in place, envisioning the expansion and improvement of those services while being compliant with the human rights to water and sanitation. It does not, however, simply mean a gradual improvement in and expansion of service levels but also calls for decreasing inequalities, as expeditiously and effectively as possible, between different groups and populations.



IMPROVE AND EXPAND WASH SERVICES

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DECREASE INEQUALITIES IN ACCESS TO WASH SERVICES

Progressive realization does not mean that States can implement their obligations in a piecemeal fashion by choosing selected elements of the normative content or human rights principles. As illustrated in the present report, human rights are contextual and do not provide the clear-cut solutions that many are searching for; nonetheless, they do provide a framework for compliance with their standards. What is correct for one country may not be the best solution for another and, therefore, the role of a United Nations human rights expert is not to prescribe a standard solution but, rather, to provide guidelines for States, practitioners and civil society to implement the progressive realization of human rights to water and sanitation taking into account the specific national and local contexts.



TOWARDS HIGHER LEVELS OF WASH SERVICES: VERTICAL REALIZATION

What does a higher level mean? The answer is not left entirely to the discretion of States themselves but, rather, has been authoritatively determined through recognition of several criteria, known as the normative content of the human rights to water and sanitation.

Steps that States can take to progressively realize some of those criteria – namely, availability, accessibility and quality – are reflected in the Sustainable Development Goals framework through the “ladders” adopted by WHO and UNICEF the Joint Monitoring Programme for Water Supply, Sanitation and Hygiene. It is important to clarify that the levels reflected on the ladders do not include some elements of the normative content, namely affordability, acceptability, privacy and dignity.

There are no perfect water and sanitation services and many types can be adequate if they comply with human rights standards, taking into account their “appropriateness” to the specific circumstances.

TOWARDS EQUAL ACCESS TO WASH SERVICES: HORIZONTAL REALIZATION

With its focus on the levels of water supply, sanitation and hygiene services, the ladder alone is insufficient to assess all elements of the human rights to water and sanitation.

Rather, progressive realization points towards the need for States to take stock of the current situation of compliance with the human rights to water and sanitation and identify how best to achieve the adequate level of services for all without discrimination. Such a horizontal approach implies devising plans and schemes that aim to reduce the gaps in access to water and sanitation among individuals and groups.

GUIDING QUESTIONS FOR HORIZONTAL REALIZATION

To identify those steps towards equal access, the Special Rapporteur recommends that States take into account the social, economic, political, cultural and environmental context in assessing the best strategy from a human rights perspective. Specifically:

Q1: What groups and areas have been left behind and do not have adequate access to water and sanitation?

Q2: What inequalities have emerged related to access?

Q3: What steps are being taken to address these inequalities and discrimination through national policies, programmes and other decision-making processes?

Q4: Are the water and sanitation services actively contributing to reducing inequalities?

Q4: What are the relevant social, economic, political, cultural and environmental elements that affect the extent to which different types of services comply with human rights?

Q5: Do these elements inform policies and plans?

Q6: In what ways are the human rights to water and sanitation integrated into the choice of water and sanitation services, so as to ensure that the services are available, safe, acceptable, accessible and affordable to all and that they uphold privacy and dignity?

Q7: Have the current water and sanitation services been established with the free, prior and informed consent and with active, free and meaningful participation?

Q8: Does the population using the service have access to information regarding the management and costs of the services, and how the services were chosen?

Q9: How are the services being monitored? Are all relevant actors held to account for any violations of the human rights to water and sanitation?

MAXIMUM AVAILABLE RESOURCES

The concept of maximum available resources operates as a qualifier of how States are fulfilling the obligation to progressively realize economic, social and cultural rights. It qualifies both why a State has failed to meet that obligation and how States should progressively realize them. Firstly, limited available resources may constitute constraints to the progressive realization of rights, particularly for developing States. Secondly, the concept functions as a framework and a methodology for States to operationalize and implement the obligation of progressive realization.

WHAT ARE "RESOURCES"?

The primary resources for the realization of the human rights to water and sanitation are usually considered to be financial resources, including revenues collected from water and sanitation services, through tariffs, taxes and transfers. The architecture of financial resources, namely revenues collected for the water and sanitation, also includes budgetary allocations, expenditures and domestic and international macroeconomic policies.



Contrary to widespread understanding, the word "resources" does not refer solely to financial resources; other types of resources, such as natural, workforces, technological, institutional and informational resources, that are available to States are crucial in achieving the rights enshrined in the International Covenant on Economic, Social and Cultural Rights.

AVAILABLE

HOW CAN STATES MAXIMIZE THE AVAILABILITY OF RESOURCES?

States should maximize their financial resources by making efforts to create more resources to ensure the enjoyment of human rights to water and sanitation. The obligation to maximize available resources requires States to adopt fair and redistributive taxation and tariff policies and to create a greater pool of resources without affecting the affordability of services for people in poverty.

States are also required to increase the availability of non-financial resources, such as institutional, technical and workforce resources. Given the range of services that exist outside the formal system, States must pay particular attention to maximizing non-financial resources, for example through capacity-building, to support informal providers, as an interim measure.

Where domestic resources are insufficient, it is incumbent on States to seek help from outside sources. States that are in a position to assist may be regarded as bound to do so as part of their own duty to utilize the maximum of their available resources to progressively realize rights.

MAXIMUM

WHAT IS “MAXIMUM ALLOCATION”?

Owing to the disparities in the spending powers of States and the reality that the necessary level of budgetary allocation for water and sanitation will depend on context, the human rights framework does not prescribe the precise proportion of the total domestic budget, nor does it give an indicative amount. States should move away from fetishizing numbers in budget allocations and move towards comprehensively assessing all the elements pertaining to such allocations. Specifically, making effective allocations includes identifying those responsible for the provision of water and sanitation services and making sure that the resources are allocated on the basis of their needs.

WHAT IS “MAXIMUM USAGE”?

Budget allocations, even those which might on the face of it seem satisfactory and maximal, do not always provide evidence that States are, in fact, utilizing the maximum of their available resources to achieve a particular right. To focus solely on allocations fails to capture the detrimental impact on the actual spending of those resources by inefficiency and corruption, for example. Once available resources have been allocated, States must ensure that they are indeed fully and effectively spent for the progressive realization of the human rights to water and sanitation, taking into account the life-cycle costing of the provision of water and sanitation services, which is relevant to the human rights principle of sustainability. From a human rights perspective, effective usage means that States specifically target resources towards populations in vulnerable situations and underserved areas.

MINIMUM CORE OBLIGATIONS

All human rights are fundamental, and each right gives rise to inviolable entitlement, namely, the most basic, lowest levels of rights that all people should be afforded in all circumstances.

In simple terms, the minimum core content of each right can be compared to a floor below which the conditions should not be permitted to fall and a house providing feasible structure and an enabling environment for people to enjoy entitlements as part of their rights.

THE FLOOR: MINIMUM STANDARDS

The minimum standard required by each individual differs according to the context and cannot apply universally. It therefore follows that the core minimum obligations need to be set taking into account that context. Human rights require a transformation of the quantitative approach and moving towards questions centred on people and the social and economic environment in which they live and work. Therefore, the Special Rapporteur does not attempt to set or suggest minimum core obligations of the human rights to water and sanitation. Instead, he provides conceptual and empirical elements to inform States' processes for complying with the minimum core obligations of the human rights to water and sanitation.

GUIDING QUESTIONS FOR MINIMUM STANDARDS

AVAILABILITY

Q1: What is the minimum essential amount of water and what is the minimum essential level of sanitation needed for a specific person or group in a specific social, economic and environmental condition to avoid intolerable health risks and provide privacy and dignity?

Q2: How long does it take individuals to collect the minimum amount of water they need?

ACCESSIBILITY

Q1: Who is travelling to collect water or to use the toilets and what are their physical and social characteristics?

Q2: What types of water and sanitation facilities ensure access to all those concerned, including older persons, children and persons with disabilities?

Q3: What is the surrounding environment like and what are the characteristics of the path between the home to the destination?

Q4: Are threats or risks prevalent in the area?

AFFORDABILITY

Q1: What are the specific economic circumstances in which the individuals and groups concerned live?

Q2: What impact does the cost of water and sanitation have on the enjoyment of other rights?

Q3: Do national policies and programmes include specific and targeted measures to protect people living in poverty, such as subsidies, protection floors and social tariffs? Do those measures have sufficient specificity and sensibility to target those most in need?

SAFETY

Q1: Are there laws or regulations that establish drinking water standards in line with the most recent international guidelines?

Q2: Is there a government body, within the health sector, with the mandate to comply with water quality surveillance?

Q3: Are there clear requirements for water providers to conduct water quality controls?

Q4: Are there laws or regulations on the safe disposal of excreta, wastewater and sludge? Is there a government body with the mandate to oversee such safe disposal procedures?

THE HOUSE: AN ENABLING ENVIRONMENT

POLICIES, LAWS AND REGULATIONS

The minimum core obligations under the International Covenant on Economic, Social and Cultural Rights include initial and immediate steps that States need to take in order to adopt and implement a national water and sanitation strategy and plan of action addressing the whole population, with a specific focus on those in vulnerable situations.

They also include efforts to make the human rights to water and sanitation justiciable by explicitly recognizing the human rights to water and sanitation in the domestic legal system. These are of immediate effect and constitute part of the State's minimum core obligations.

In the water and sanitation sector, creating an enabling environment involves building and maintaining institutions, regulations and processes that ensure a sustainable provision of services.

NON-DISCRIMINATION AND EQUALITY

The Committee on Economic, Social and Cultural Rights has stated that States' minimum core obligations encompass the obligation to ensure equitable distribution of all available facilities and services. In other words, water and sanitation services must be provided on a non-discriminatory basis and it is not adequate to proceed as if all are departing from an equal baseline in terms of their likelihood to get access to services.

Rather, those who are unserved or underserved must be afforded greater attention to ensure that the disparity between the unserved and served is progressively eliminated.

IMPLEMENTING THE OBLIGATION OF PROGRESSIVE REALIZATION

FREQUENTLY ASKED QUESTIONS

FAQ 1: HOW DO YOU BALANCE VERTICAL AND HORIZONTAL REALIZATION?

As part of the balance between vertical and horizontal realization, an issue is whether to first improve horizontally, ensuring universal coverage of a basic level of services, or to improve vertically, ensuring a higher level of services by putting in place, for instance, piped networks. This trade-off is more complex and nuanced when addressed in depth. Firstly, the option of prioritizing horizontal realization is not only related to extending services but also involves defining the level of services to be provided to all. Secondly, vertical realization involves not only defining the level of services to be achieved but also specifying which groups will benefit from service improvements – in other words, to which extent inequalities will be addressed.

While some States may consider themselves to be making progress in terms of increasing access to services, they may actually be generating greater inequality. Therefore, they may not be directing their efforts fully in line with human rights principles. Given the sometimes competing requirements of reaching more people and achieving a level of service that fully meets human rights standards, the crucial question for States is how to set priorities.

GUIDELINE: NON-DISCRIMINATION AND EQUALITY

States should take a comprehensive approach when implementing water and sanitation projects and move towards increased quantitative and qualitative coverage while also eliminating inequality and discrimination. Therefore, a greater focus on human rights within plans and projects would help to rebalance provision, ensuring that increases in access do not have the effect of increasing inequalities between groups, prioritizing not leaving anyone behind.

To this end, States must envision providing universal access to the highest level of services and plan the pathway towards this goal. States need to have a long-term vision and plan how extension and improvement of services will progress in time, ensuring that no discrimination takes place in the process and that the requirements of different individuals and groups are met, paying special attention to the needs of people in vulnerable situations.

FAQ 2: SHOULD THERE BE PRIORITIES WITHIN THE MINIMUM CORE OBLIGATIONS?

The fact that a State is experiencing an emergency or financial crisis does not alter the nature or content of its core obligations, which must still be met immediately. Given the imperative and immediate nature, however, States may decide to fulfil only the levels required for the minimum core without progressing towards the full realization of the human rights to water and sanitation. For example, meeting the needs for both sufficient and safe water has shown to cause conflicts. In certain situations, water quantity is explicitly prioritized over water quality; in others, water availability is prioritized over other factors. The question arises as to whether, in some exceptional situations, a certain element of normative content should be prioritized over others.

GUIDELINE: PRIORITIZATION OF THOSE IN THE MOST VULNERABLE SITUATIONS

The human rights framework does not provide any definitive answers to questions of prioritization, as each question needs to be answered given the particular context in which it arises. It does, however, provide guidance on the basis of human rights concepts, in particular the obligation to target and prioritize the most disadvantaged in order to realize the right to equality. In applying this guideline to the specific situation of the COVID-19 pandemic, for example, responses should be focused on providing access to water and hygiene facilities to persons in homelessness, migrants and asylum seekers living in public spaces and to those living in informal settlements where access to water and sanitation is inadequate.



FAQ 3: IS FULFILLING MINIMUM CORE OBLIGATIONS A PREREQUISITE TO PROGRESSIVE REALIZATION?

The minimum core obligations are the foundation for the progressive realization of rights, setting the baseline from which States should work towards fully meeting their human rights obligations. This means that even when a State has, in an ideal situation, met all of its minimum core obligations, it has to move beyond this to ensure the full realization of the human rights to sanitation and water. That obligation may present a dilemma for States: is fulfilling their minimum core obligations a prerequisite for taking additional steps for the progressive realization of the human rights to water and sanitation?

A theoretical approach to the interplay between the two concepts answers in the positive but, in reality, the chronological order of fulfilling the minimum core obligations first and then taking further steps is rarely straightforward and involves a myriad processes. States have rural and urban populations, formal and informal settlements, indigenous groups, migrants, refugees, people who are homeless, hard-to-reach populations, among others. The way each element of the normative content and the human rights principles are implemented for the entire population over time can be extremely variable.

GUIDELINE: A CONTEXTUAL AND COMPREHENSIVE APPROACH

The minimum core obligation and the obligation of progressive realization do not imply following a step-by-step process with a recipe or a set of rigid elements and instructions. Unlike the recipe for a specific dish, reconciling the duty to achieve both the minimum core obligations and the obligation of progressive realization is more like orchestrating an entire kitchen, looking over and keeping an eye on all aspects.

Similarly, States, while ensuring that the whole population enjoys the minimum core of the human rights to water and sanitation, should concurrently plan how they will progressively realize the rights and start to implement them. States need to extend the minimum core obligation to all, but this should not stop them from simultaneously improving services to some.



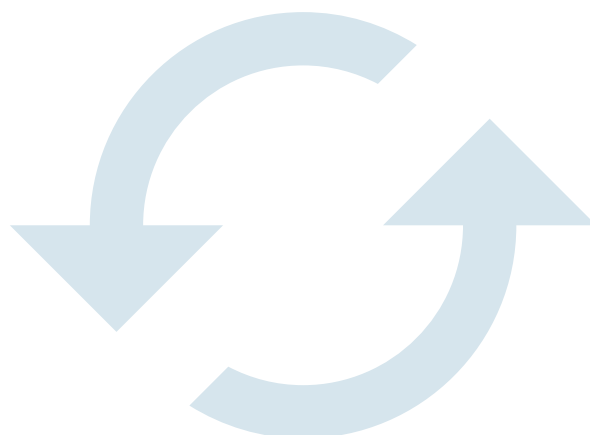
FAQ 4: HOW DOES THE CONCEPT OF PROGRESSIVE REALIZATION ADDRESS THE ISSUE OF RETROGRESSION?

Retrogression refers to direct or indirect measures that lead to backward steps in the enjoyment of human rights. A clear example of direct retrogression and a violation of human rights to water and sanitation is the disconnection of water services because of the inability to pay. Another example is when unjustified or disproportional decisions taken by the State in public expenditures devoted to water and sanitation translate into retrogression in access to services. This can occur as a result of a deterioration of the infrastructure, a degradation of the water quality or a decrease in safety of sludge management.

Additionally, the prohibition of retrogression may equally place an obligation on States to reduce or mitigate factors that might increase the risk of retrogression in the future. This obligation is well illustrated when we look at the mitigation and adaptation measures that need to be taken in response to climate change, particularly measures aimed at ensuring water availability. If left unchecked, the effects of climate change will continue to have a devastating impact on the people, particularly those in vulnerable situations, to enjoy their rights to water and sanitation. Therefore, it is vital for States to take an active role both in establishing mitigation measures to prevent the effects of climate change and in ensuring that those effects are taken into account when planning how to progressively realize the human rights to water and sanitation.

GUIDELINES: PREVENTION AND SUSTAINABILITY

The principle of sustainability can guide States to avoid taking steps that would amount to retrogression and to reduce or mitigate factors that would lead to a risk of retrogression in the future. In the context of water and sanitation, sustainability is relevant in respect of various dimensions. For water availability, the overexploitation of water resources by agro-industry and in water-intensive megaprojects could lead to a failure to prioritize allocation of water for personal and domestic usage for both present and future generation



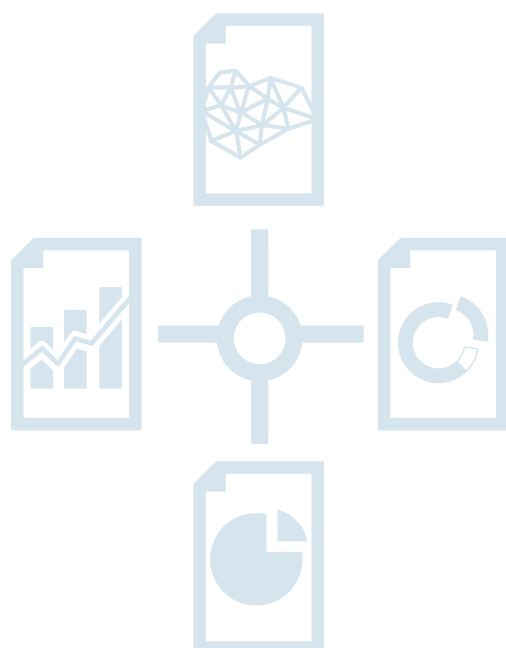
FAQ 5: CAN THERE BE JUSTIFICATION FOR NON-COMPLIANCE?

In certain situations, there may be a justification for the action or inaction of States that amounts to retrogression or a failure to progressively realize rights. There is a strong presumption that retrogressive measures in relation to the human rights to water and sanitation are prohibited under the International Covenant on Economic, Social and Cultural Rights, except when States can show that retrogression was unavoidable despite having utilized all available resources. When States refer to resource constraints as an explanation for the retrogressive steps taken, the Committee on Economic, Social and Cultural Rights considers such explanations on a country-by-country basis in light of certain objective criteria.

It should also be understood, however, that the “maximum of available resources” does not constitute default grounds for all permissible justifications. Even when resources are very limited, States must still show that they have utilized those resources to give effect to rights to the extent possible.

GUIDELINE: TRANSPARENCY AND ACCOUNTABILITY




To avoid misusing or exploiting the principle of the maximum of available resources as a justification for States’ failure to implement their obligations, safeguards must be put in place to ensure that States are indeed using the maximum of their available resources. Several dimensions of maximum of available resources, particularly, maximum allocation and spending, should be accompanied by measures to uphold transparency.



MONITORING

QUANTITATIVE AND QUALITATIVE

The use of indicators and benchmarks has strong acceptance at the international level but it has also been criticized as inadequate to accurately measure States' compliance with the obligation of progressive realization, for the following reasons:

-  monitoring using indicators and benchmarks requires access to detailed data about progress levels, which the State itself collects, raising questions of legitimacy
-  given the amount of data and the scope of coverage, data collection requires a lengthy collection period and the data collected are often published after a long lag
-  as data collection exercises focus on quantitative aspects and take place at the national level, they fail to address the context in which minimum core obligations are identified, i.e. at the subnational level.

STATIC AND DYNAMIC

With respect to resources, a static analysis examines the resources allocated for the achievement of the human rights to water and sanitation during a specific budget period compared to the allocations made to other areas of expenditure.

Carrying out a dynamic analysis, which involves comparing the evolution of the realization of human rights over time, would be more suitable. The data set of two or more points in time can be checked against indicators and benchmarks identifying whether States are making adequate progress towards achieving the human rights to water and sanitation.

EXAMPLE: FOLLOW-UP TO COUNTRY VISITS

During a total of 9 official country visits, the Special Rapporteur assessed the human rights situation of the country at the time of the visit. On the other hand, through the follow-up analysis project, the Special Rapporteur dynamically assessed the human rights situation comparing the situation at the time of the visit to the time when the follow-up analysis was carried out. For the follow-up assessments, the interpretation of the progressive realization was introduced in five categories: good progress, progress ongoing, limited progress, progress not started and retrogression.

The category "limited progress" describes situations in which actions have been taken that

- are not targeted towards the realization of the human rights to water and sanitation
- are not deliberate or concrete.
- are progressing slowly
- address the short term and do not tackle structural and systemic issues.

The category "progress ongoing" describes situations where action has been taken but

- implementation remains partial
- the outcome of the action is unclear.

Finally, the category "good progress" refers to situations in which implementation has been successful or is imminent.

RECOMMENDATIONS FOR MONITORING

In monitoring the progressive realization of the human rights to water and sanitation it is necessary to adopt an integrated, comprehensive approach that includes several dimensions:

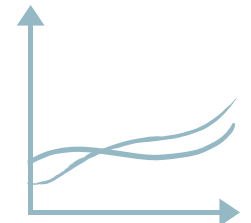
- 1** The normative content should be assessed separately, to allow for an in-depth assessment that takes into account qualitative dimensions;
- 2** Separate assessment should be complemented by an integrated assessment that cuts across the entire normative content and also the human rights principles;
- 3** The normative content needs to be assessed against the usage of the maximum available resources.

MONITORING MECHANISMS



When the Committee on Economic, Social and Cultural Rights reviews States parties' compliance with Covenant obligations, the monitoring of the human rights to water and sanitation is often subsumed under the dimension of the rights to an adequate standard of living and health.

Bodies such as the WHO-UNICEF Joint Monitoring Programme for Water Supply, Sanitation and Hygiene and other statistical bodies also play a monitoring role – not necessarily linked to the human rights framework – based on the data provided by national statistical offices.



The UN-Water Global Analysis and Assessment of Sanitation and Drinking Water initiative examines whether there is an enabling environment for the provision of water supply, sanitation and hygiene services, including through national policies and plans.

At the national level, national human rights institutions and ombudspersons are oversight mechanisms that protect and promote human rights. In many States, however, their mandates do not cover monitoring State compliance with the human rights to water and sanitation, a task most often left to regulatory bodies, which often fail to take a human rights-based approach as a whole to regulation. At times, civil society organizations and communities also play monitoring roles at the national level.



FINAL REMARKS

As the Special Rapporteur finishes his six-year term, he wishes to address a frequent comment expressed by many practitioners: that human rights are not clear and that they simply represent pie-in-the-sky ideals that are pleasant to contemplate but unrealistic and impractical.

As illustrated in the present report, human rights are contextual and do not provide the clear-cut solutions that many are searching for; nonetheless, they do provide a framework for compliance with their standards. What is correct for one country may not be the best solution for another and, therefore, the role of a United Nations human rights expert is not to prescribe a standard solution but, rather, to provide guidelines for States, practitioners and civil society to implement the progressive realization of human rights to water and sanitation taking into account the specific national and local contexts.

A decade has passed since water and sanitation have been explicitly recognized as human rights, yet the specifics of how to implement the obligation to progressively realize those rights still require further clarification and understanding. Through this report, and by addressing the broad scope of the obligation of progressive realization, the Special Rapporteur provides several guidelines and principles that States should consider when implementing the obligation to progressively realize the human rights to water and sanitation.



**HUMAN RIGHTS TO
WATER AND SANITATION**

The full realization of the human rights to water and sanitation cannot be left to States alone. The larger human rights ecosystem is composed of other actors, particularly those that monitor State compliance, which ranges from treaty to statistical bodies, from national to international bodies and from governmental to non-governmental bodies. Private actors working in the water and sanitation sector must understand that they too are bound by human rights obligations, particularly when they provide services by delegation from States and when national legislation reflects a State's international human rights obligations. The Special Rapporteur recommends that monitoring bodies introduce and utilize the guiding questions contained in the present report in identifying and assessing the progressive realization of the human rights to water and sanitation.

