

Socio-economic rights during economic crises

Warwick, Ben T. C.

DOI:

[10.1017/S0020589315000494](https://doi.org/10.1017/S0020589315000494)

License:

None: All rights reserved

Document Version

Peer reviewed version

Citation for published version (Harvard):

Warwick, BTC 2016, 'Socio-economic rights during economic crises: A changed approach to non-retrogression', *International & Comparative Law Quarterly*, vol. 65, no. 1, pp. 249-265.
<https://doi.org/10.1017/S0020589315000494>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

Final Version of Record available at: <https://doi.org/10.1017/S0020589315000494>

Checked 2/12/2016

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Socio-economic rights during economic crises: A changed approach to non-retrogression

Ben TC Warwick*

Abstract:

When the UN Committee on Economic, Social and Cultural Rights (CESCR) released a letter in early 2012 addressing the financial and economic crises, it was long overdue. Finally, and around four and a half years after the crises began, the body responsible for monitoring those rights that had been most severely impacted had spoken. But what had been said? This article examines the alterations to the doctrine of non-retrogression that the 2012 Letter instigated. It does so by reference to the 'Business as Usual' and 'accommodation' theories of emergency response. The Letter to States is argued to have taken the Committee away from an approach to non-retrogression that treated times of normality and emergency in a similar way, and towards an approach that allows derogation-style deviations from the Covenant. This, it is argued, could have detrimental effects for the protection of economic and social rights. The difficulties in applying such an approach are considered.

Keywords:

economic and social rights, emergency, economic crisis, retrogression, enforcement, derogation, limitation, *UN Committee on Economic, Social and Cultural Rights*

I. INTRODUCTION

When the UN Committee on Economic, Social and Cultural Rights (CESCR) released a letter in early 2012¹ addressing the financial and economic crises, it was long overdue. Finally, around four and a half years after the crises began, the body responsible for monitoring those rights that had been most severely impacted had spoken. Yet the content of the guidance given – in the form of a letter from the Chairperson² – largely neglected over twenty years' worth of the Committee's own work.³ Instead of reiterating the principles developed over the preceding two decades, this Letter substantially recast the obligations of States in relation to socio-economic rights⁴ and set down altered tests and new rhetoric. All of this occurred at the

* Graduate Teaching Assistant and Doctoral Candidate, Durham Law School, b.t.c.warwick@durham.ac.uk. I am grateful to all of those who have read and commented upon earlier versions of this article. I am particularly indebted to Anashri Pillay, Fiona de Londras, Ruth Houghton, and the two anonymous reviewers at ICLQ for their comments. Aspects of the work have been presented at the Durham ESRAN-UKI workshop, and at the Law and Society Association Annual Meeting, Seattle. Any remaining errors are my own.

¹ Reproduced below at Annex I; Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW.

² Letter to States (n 1, Annex I), 1.

³ For a sample, see; CESCR, *General Comment 3: The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant)* (UN Doc E/1991/23, 1990) para 9; CESCR, *General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (UN Doc E/C12/2002/11, 2002) para 19; CESCR, *General Comment 19: The Right to Social Security (art. 9)* (UN Doc E/C12/GC/19, 2007) para 42. See further; Aoife Nolan, Nicholas J Lusiani and Christian Curtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 132.

⁴ The term 'socio-economic rights' is used here to cover the full range of economic, social and cultural rights as expressed in the International Covenant on Economic, Social and Cultural Rights. The Letter to States applies equally to 'cultural' rights as to 'social' and

very time when it mattered most⁵ - in the context of the worst international economic crisis since the inception of the international human rights framework.

The change in how the International Covenant on Economic, Social, and Cultural Rights (ICESCR)⁶ deals with reductions in socio-economic rights protection marked a conceptual shift. The Letter moved away from the CESCR's traditional position and arguably has more general implications for the ICESCR. The CESCR's earlier approach afforded States an *everyday* flexibility in protecting Covenant rights, but did not permit exceptional powers or the authority to substantially weaken rights protection in times of crisis. This article argues that the Letter to States, by contrast, endorses a new *emergency* regime for the implementation of obligations, amounting to a near-suspension of some key obligations.

Such a change in the CESCR's approach is relevant in, for example, situations of economic, security or public health crisis, or as a result of natural disaster. In such diverse circumstances, States may wish to reduce expenditure on rights, restrict the accessibility of rights, or increase taxation on rights-realising goods. In any of these scenarios where a reduction of socio-economic rights is claimed, the longstanding prohibition on 'backwards steps' allows the CESCR to assess compliance with States' international human rights obligations.

This article begins by detailing the conceptual distinction between the 'Business as Usual' and 'accommodation' approaches to emergency situations. This theoretical background is then applied in the context of socio-economic rights, before proceeding to outline what the pre-2012 approach of the ICESCR was, both generally and in terms of reductions in rights protection. The article then turns to focus on the post-2012 situation, beginning with an assessment of the legal and rhetorical weight of the CESCR's Letter. Following this, there is a specific focus on the new approach taken to backwards steps in rights protection by the 2012 'Letter to States'.⁷ It is concluded that this new approach works to 'accommodate' emergencies. The section closes with a normative assessment of this conceptual shift. It argues that despite the reiteration of some older, general obligations such as the minimum core, the new tests that are set down in the CESCR's Letter are unsuitable. They might pose a broader threat to socio-economic rights protection and there are inadequate safeguards to their operation.

II. 'BUSINESS AS USUAL' VS. 'ACCOMMODATION'

The CESCR's change in approach to reductions in the level of protection given to socio-economic rights can be conceptualised as a shift from a regime that was inflexible in the face of emergencies,⁸ to a more adaptive approach. Traditionally it has been accepted that

'economic' rights. There are a number of terms used in this area of study which are largely interchangeable; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 3–4.

⁵ D Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 International Journal of Constitutional Law 710, 719.

⁶ *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3).

⁷ The Letter has been referred to as an 'Open Letter' and a 'Letter to States' in the literature. The Letter's designation on the UN's webpages has changed from 'Open Letter on Economic, Social and Cultural Rights in the Context of the Economic and Financial Crisis' to 'Letter by the Chairperson of the Committee on austerity measures' (a change highlighted by; Aoife Nolan (in discussion, ESRAN-UKI workshop, Swansea, April 2015)). This change may indicate a desire of the CESCR's to focus the Letter upon 'austerity' rather than 'economic and financial crisis' more broadly. Differing titles available at

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12173&LangID=E>> and

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=68> respectively.

⁸ The terms 'emergency' and 'crisis' are used interchangeably here to reflect their general interchangeability in scholarship and public discourse.

situations of emergency can be addressed either by means of the standard ‘everyday’ system of rules, or by allowing some emergency exceptions to those rules.⁹ These approaches have respectively been termed the ‘Business as Usual’ and ‘accommodation’ models.¹⁰ Such theories, although developed in the context of security emergencies, have also been applied to emergencies of an economic nature.¹¹

The Business as Usual model (alternatively termed the ‘strict enforcement’ model¹²) demands that ‘[o]rdinary legal norms and rules continue to be followed strictly and adhered to with no substantive change or modification’.¹³ This approach is rooted in the contention that ordinary legal rules have sufficient foresight and flexibility to allow an effective emergency response.¹⁴ This model does not envisage measures of derogation, the claiming of special emergency powers, or the suspension of normal legal frameworks.¹⁵ Put differently, this approach holds that the ordinary legal setup is ‘law for all seasons’.¹⁶

A model of ‘accommodation’ stands in contrast to the ‘Business as Usual’ model of emergency response. The accommodation model can broadly be thought of as allowing the relaxation or suspension of legal rules and norms.¹⁷ Such a suspension might allow for measures that had not previously been envisaged,¹⁸ or for the limitation, suspension, or removal of certain rights and guarantees.¹⁹ In practice, suspensions of legal rights might result in detention without trial or the removal of State food aid provision. The justificatory rationales for these measures are said to vary, and the measures may be objectively necessary in some sense, precautionary, or simply aimed at reassuring a public that policy-makers perceive to be panicked.²⁰

Determining whether a Business as Usual or Accommodation approach is ‘best’ has been a matter of extensive debate. No view is expressed here on the validity, applicability or otherwise of the two theories and their variants. Instead the argument maps the transition from one model to another, and seeks to assess the compatibility of the models with the provisions and internal logic of the ICESCR.

Notwithstanding that the argument below rests on the potential compatibility of the ICESCR with one or other of the types of emergency response, the broader contentions about each of the models provide important context. In favour of the accommodation model is the ‘reality of emergency management’.²¹ It seems intuitive that if the situation is severe enough, those holding power will not be restrained by the ‘technicalities’ of a legal document.

⁹ Ni Aoláin and Gross describe this difference as ‘rule and exception’ (Oren Gross and Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 172.); see also Eric A Posner and Adrian Vermeule, ‘Accommodating Emergencies’ [2003] *Stanford Law Review* 605, 606.

¹⁰ Gross and Ni Aoláin (n 7) 88–9.

¹¹ William E Scheuerman, ‘The Economic State of Emergency’ (1999) 21 *Cardozo Law Review* 1869; Michal R Belknap, ‘New Deal and the Emergency Powers Doctrine’ (1983) 62 *Texas Law Review*; Rebecca M Kahan, ‘Constitutional Stretch, Snap-Back, & Sag: Why Blaisdell Was a Harsher Blow to Liberty than Korematsu’ (2004) 99 *Northwestern University Law Review*.

¹² Posner and Vermeule (n 7) 606.

¹³ Gross and Ni Aoláin (n 7) 88.

¹⁴ *ibid* 86–8.

¹⁵ *ibid* 86.

¹⁶ *ibid*. There are, within this Business as Usual approach, varying degrees of stringency. Here the ‘soft’ Business as Usual approach is referred to, which demands consistency of law, but not necessarily of results. *Ibid* 89.

¹⁷ Posner and Vermeule (n 7) 606.

¹⁸ Gross and Ni Aoláin (n 7) 66.

¹⁹ *ibid* 77.

²⁰ *ibid* 80–1, 69.

²¹ Gross and Ni Aoláin (n 7) 95.

Although developed in relation to security emergencies, the accommodation model has been applied to economic emergencies in the literature²² and hallmarks of the model have been seen in practical responses to economic crises.²³ Recently, however, it has been argued that the distinctive features of *economic* emergencies undermine the normative justifications for traditional accommodation responses.²⁴ According to this argument, the design or use of legal frameworks to allow emergency accommodations in response to economic crises is largely unjustified.²⁵

Proponents of the Business as Usual approach, on the other hand, argue that denying emergency accommodations acts as a ‘strategy of resistance’²⁶ which can minimize the frequency and severity of government ‘crisis’ responses.²⁷ The Business as Usual approach has also been described as ‘socially beneficial’ as it demands justifications and explanations by reference to a ‘normal’ standard.²⁸ Such a requirement for justification might translate into the maintenance of a more consistent set of legal principles or rights.

III. PRE-2012 APPROACH

Taken as a whole, the ICESCR has not traditionally supported deviations from Covenant obligations that are rationalised as ‘emergency’ responses²⁹ and it contains no provision allowing for derogations.³⁰ Instead, flexibilities are afforded through article 2(1)³¹ and article 4, and additionally through the use of less prescriptive substantive articles. The most significant of these – article 4 – allows States to enact ‘limitations’ but, crucially, does not frame such measures as ‘emergency’ ones.

The distinction between derogations and limitations is not an exact one, but there are several differences of ‘character and scope’.³² For example, derogation provisions are subject to a threshold condition, meaning there must usually be a ‘time of public emergency’ before the reduction of rights protections can be contemplated.³³ This is not the case with limitations, which can be enacted at any time including in situations of ‘normality’. There are additional differences in the scope of the potential interference(s) with rights. With derogations regimes, the restraining factors on action tend to be the ‘exigencies of the situation’, ‘other obligations under international law’ and the requirement of non-discrimination.³⁴ In the context of limitations, however, requirements of legality, compatibility with the ‘nature’ of the rights

²² Scheuerman (n 9) 1873.

²³ Alan Greene, ‘Questioning Executive Supremacy in an Economic State of Emergency’ [2015] Legal Studies 10–16.

²⁴ *ibid* especially pp 16–26.

²⁵ *ibid* 27.

²⁶ Gross and Ni Aoláin (n 7) 99.

²⁷ *ibid* 99–101.

²⁸ Frederick Schauer, ‘Easy Cases’ (1985) 58 S. Cal. L. Rev. 399, 439; Gross and Ni Aoláin (n 7) 101.

²⁹ Diane A Desierto, ‘ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises’ (2012) 44 George Washington International Law Review 473, 493.

³⁰ M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 281 (fn 132), 293. Indeed there was no specific discussion of such a provision during the drafting process; Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 156, 217.

³¹ Scott Leckie, ‘Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20 Human Rights Quarterly 81, 94.

³² Amrei Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9 Human Rights Law Review 557, 654.

³³ See, for example, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) article 4.

³⁴ *ibid* article 4.

and the promotion of the ‘general welfare of society’ restrain the potential rights-interfering actions.³⁵

In essence, the purpose of article 4 ICESCR is to accommodate balances between (or the ‘harmonisation’ of³⁶) various rights, and between rights and ‘the legitimate interests of the community’,³⁷ and thus to pragmatically resolve tensions within the Covenant itself.³⁸ In taking such an approach, the ICESCR accommodates situations in which different rights come into conflict with each other or cannot be fully realised in tandem. The Covenant scheme, does not however, allow for a departure from those rights for reasons that are not ‘compatible with the nature of [the] rights’.³⁹

The use of limitations, rather than derogations, is indicative of the ICESCR’s overall approach to emergency management. Through prohibiting derogations, the ICESCR denies the need for exceptional responses to emergency situations. This approach places emergency responses within the ‘ordinary’ scope of application of the ICESCR and does not allow for exceptional emergency responses to situations that threaten security or order.⁴⁰ As such, it has been argued that ‘the Covenant fully applies in emergency situations’.⁴¹ This approach is often justified by highlighting that the nature of socio-economic rights (requiring access to food, healthcare, work etc.) makes them more, and not less, important in times of emergency.⁴²

The pattern of allowing everyday flexibility but barring exceptional or emergency responses is reflected in the doctrine of non-retrogression. Since 1991 there has been a doctrine attached to the ICESCR for the purpose of regulating reductions in socio-economic rights protection. The fullest statement of the doctrine is in the General Comment on the right to social security.⁴³ There, the CESCR required States that wished to reduce rights protection (to take a retrogressive step) to prove that the measures are duly ‘justified by reference to the totality of the [ICESCR] rights’, and that the maximum available resources are being used.⁴⁴ In addition the CESCR noted that it:

‘will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups ... (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an

³⁵ ICESCR (n 4) article 4.

³⁶ Alston and Quinn (n 28) 194.

³⁷ *ibid.*

³⁸ CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (UN Doc E/C12/2000/4) para 28. See also; Sepúlveda (n 28) 278.

³⁹ ICESCR (n 4) article 4. Sepúlveda suggests the synonym ‘essence’ here to imply that measures should not be contrary to the ‘essence’ of the Covenant rights; Sepúlveda (n 28) 281.

⁴⁰ Alston and Quinn (n 28) 202. Except, as Sepúlveda notes, ‘where such a situation is “genuinely synonymous” with general welfare of society’; Sepúlveda (n 28) 282.

⁴¹ Sepúlveda (n 28) 296. See also; Statement of the CESCR on ‘The World Summit For Social Development And The International Covenant On Economic, Social And Cultural Rights’; CESCR, *General Comment 3* (n 2) 11–12.

⁴² CESCR, ‘Report on the Forty-Fourth and Forty-Fifth Sessions’ (2011) UN Doc E/2011/22 para 150. See further; Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013) 139.

⁴³ CESCR, *General Comment 19* (n 3) 42.

⁴⁴ *ibid.*

individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures ...⁴⁵

As such, the principle of non-retrogression in its pre-2012 form combined with the individual rights, article 4, and article 2(1), to provide significant flexibilities to States. Where States parties found themselves unable to progressively realise the rights, it was open to them to prove the need to take ‘backwards steps’.⁴⁶ This doctrine regulating retrogressive measures was also subject to a consistent set of standards – if not consistent interpretation. Although certain limits could not be contravened (for example, States could not justify discrimination or the infringement of the minimum core⁴⁷), this procedure granted significant *everyday* discretion and flexibility to States. These everyday flexibilities denied the need for derogations, special powers or the suspension of legal frameworks.

Crucially, the Business as Usual model emphasised consistency of outcome. By refusing to subject socio-economic rights protection to the fluctuations of crisis situations, the importance of those rights is arguably underscored. Further, beyond simply emphasising the importance of the protection of the rights (a claim liable to being ‘trumped’ by something *even more* important, such as a crisis), the Business as Usual approach highlights the value of *consistent* protection. A final, more pragmatic, benefit of the Business as Usual approach is the maintenance of spaces for advocacy, since if the obligations remain intact there remain avenues for contesting the State’s approach.

IV. POST-2012 APPROACH

This general picture of how the ICESCR previously dealt with emergencies underlines the significance of the (legal and/or rhetorical) move that the CESCR has made with respect to the non-retrogression doctrine. The Open Letter has the potential to substantially shift the interpretation of the doctrine of non-retrogression – and perhaps consequently of the Covenant – by moving towards a model of emergency ‘accommodation’. The permanence and significance of the approach adopted by the CESCR in its Letter hinges on the status and influence of a Letter addressed ‘on behalf of’ the Committee.⁴⁸

The CESCR has only ever produced two such open letters,⁴⁹ although the use of statements is significantly more widespread.⁵⁰ No other treaty monitoring committee has a practice of producing open letters such as these and it has been suggested that that the Letter may not even have the status of soft law.⁵¹ Yet the Letter may still have, or acquire, some

⁴⁵ *ibid.*

⁴⁶ The term ‘backwards step’ is used synonymously with ‘retrogressive measure’ in for example; Special Rapporteur on extreme poverty and human rights, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, Magdalena Sepúlveda Carmona (*Fiscal Policy and Human Rights*) (UN Doc A/HRC/26/28 2014) para 28; Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, *Common Violations of the Human Rights to Water and Sanitation* (UN Doc A/HRC/27/55 2014) para 46. The term ‘backsliding’ is also used; Center for Economic and Social Rights (CESR), ‘Mauled by the Celtic Tiger: Human Rights in Ireland’s Economic Meltdown’ (2012) 6 <<http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf>> accessed 3 September 2014; Nolan, Lusiani and Courtis (n2) 125.

⁴⁷ CESCR, *General Comment 19* (n 3) 42.

⁴⁸ Letter to States (n 1, Annex I), 1.

⁴⁹ The other letter being: Chairperson of the CESCR, ‘Letter Dated 30th November 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (2012) UN Doc CESCR/49th/AP//MAB.

⁵⁰ Statements are formatted differently, and generally come from the CESCR as a whole, having been ‘adopted’ in one of the CESCR’s sessions, rather than from the Chairperson ‘on behalf of’ the Committee.

⁵¹ Aoife Nolan, ‘Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds.) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013), 50.

form of soft law status as a result of Committee's use of its tests in subsequent documents.⁵² Alternatively, it might be argued that while the Letter and indeed General Comments are not authoritative as a result of their *form*, the particular *institutional position* of the CESCR may lend legal weight to the statements. While in general international law is highly State-centric,⁵³ since leaving the interpretation of human rights treaties solely in the hands of States would likely result in overly restrictive interpretations⁵⁴ it is possible to recognise treaty bodies as acting 'in lieu' of States in certain respects.⁵⁵ This would validate the CESCR's primary responsibility for the interpretation of the Covenant and might allow such interpretative practice to count as 'subsequent practice' under the VCLT rules on treaty interpretation, thus giving the statements of the Committee some legal significance.⁵⁶ In any case, even if the Letter lacks soft law status, adjudicative bodies would likely take it seriously as an interpretation of the ICESCR obligations.⁵⁷

In practice, however, the Letter has significance beyond its legal influence. By providing (at the very least) a point of reference or a form of words that can be reproduced in the CESCR's Concluding Observations on State reports, the Letter has a degree of rhetorical power. Of the 54 States that have been examined since the release of the Letter, ten have been reminded of it or have had its wording reproduced in their Concluding Observations.⁵⁸ In the international sphere of governance such use of rhetoric has been effectively employed for the purposes of compulsion⁵⁹ and such potential influence – whether legal or rhetorical – means the content of the CESCR's Letter should be taken seriously and subjected to critical attention.

There are two primary indicators of the new 'accommodation' direction; firstly, the fact that any change in approach at all took place in the context of the financial and economic crises and secondly, the substance and character of the changes.

It is common for crisis situations and the rhetoric surrounding them to be used to ground claims for greater deference to those exercising power.⁶⁰ Implicitly, this is what has occurred in the CESCR's Letter to States. The letter formed the Committee's primary response to the financial and economic, and the CESCR used it to make substantial alterations to the doctrine of non-retrogression. In addition, the CESCR relies on rhetorical devices to show deference to States and to inflate the importance of (neo-liberal) market-based idea(l)s. For example, there is a flat acceptance that 'a lack of growth, impede[s] the progressive realisation of economic, social and cultural rights', and a reminder that States should 'avoid at all times' denials of socio-economic rights.⁶¹ This is weak phrasing that might be indicative of a cautious approach by the CESCR. If there was anything in the uncertainty of a crisis that the CESCR could state with confidence it was that States 'should not' violate socio-economic rights.

⁵² Ibid, 51.

⁵³ Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (4th ed, OUP Oxford 2014) 294-5.

⁵⁴ Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' 42 *Vanderbilt Journal of Transnational Law* 905, 919.

⁵⁵ Ibid. A function also with some grounding in the ICESCR itself; *ICESCR* (n 4) article 21.

⁵⁶ International Law Association, 'International Human Rights and Practice: Final Report on the Impact of the Findings of the United Nations Human Rights Treaty Bodies' (2004) para 22; *Vienna Convention on the Law of Treaties* (1969), article 31(3)b.

⁵⁷ Crystallization into customary international law is also possible. See generally; Malcolm Shaw, *International Law* (Cambridge University Press 2014) 201.

⁵⁸ In the CESCR's Concluding Observations on Ireland (E/C.12/IRL/CO/3, para 11), Slovenia (E/C.12/SVN/CO/2, para 8), Romania (E/C.12/ROU/CO/3-5, para 15), Czech Republic (E/C.12/CZE/CO/2, para 14), Ukraine (E/C.12/UKR/CO/6, para 5), Japan (E/C.12/JPN/CO/3, para 9), New Zealand (E/C.12/NZL/CO/3, para 17), Iceland (E/C.12/ISL/CO/4, para 6), Bulgaria (E/C.12/BGR/CO/4-5, para 11), and Spain (E/C.12/ESP/CO/5, para 8). See further; Nolan (n 48), 51-52.

⁵⁹ Michael Barnett and Raymond Duvall, *Power in Global Governance* (Cambridge University Press 2004) 15.

⁶⁰ Scheuerman (n 9) 1871.

⁶¹ Letter to States (n 1, Annex I), 5, 3 (emphasis added).

Furthermore, this stands in stark contrast to the CESCR's previous practice of reminding States that socio-economic rights are more, and not less, important in times of national emergency.⁶² At the same time, the CESCR's use of the term 'crisis' in the context of retrogression indicates, at the very least, a passive ingestion of that characterisation of the situation. Previously, the doctrine had generally appeared linked to 'everyday' situations of resource constraints and only less often in emergency contexts. The CESCR had encountered economic crises before, and had not demonstrated so much flexibility to national governments.⁶³ Such a rupture in the Committee's approach might plausibly be attributed to the (perceived) nature of the financial and economic crises as international, rapid, structural, and severe.

The nature of the changes is also relevant; the substantive adjustments to non-retrogression display a clear emergency character. Prior to the 2012 Letter, States that wished to enact backwards steps were required to undertake multiple and relatively onerous measures. For example, in the context of social security, the Committee noted that before it might declare a retrogressive step 'permissible', it would examine some eight factors that required wide-ranging and independent review of the proposed measure. As noted above, this test included a requirement for participation, justifications, considerable review of the proposed measures and other precautions from the State.⁶⁴

However, after 2012 a shift is discernible and there are now only four criteria that States must fulfil before taking a backwards step: this being grounded in emergency 'accommodation'. Thus the Committee says that in order to be acceptable;

'first, the policy is a temporary measure covering only the period of the crisis; second, the policy is necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights; third, the policy is not discriminatory...; fourth, the policy identifies the minimum core content of rights...and ensures protection of this...'.⁶⁵

Yet two of these four criteria cannot even properly be described as conditions specific to the taking of retrogressive measures. While the inclusion of these conditions – that measures cannot be discriminatory, nor can they infringe the minimum core – is interesting in its own right, especially given the Letter's reference to social protection floors and the role of the International Labour Organisation,⁶⁶ these are general, longstanding and immediate⁶⁷ obligations that exist beyond the circumstances of retrogression.⁶⁸

⁶² CESCR, *General Comment 2: International Technical Assistance Measures* (UN Doc E/1990/23 1990).

⁶³ The Committee merely; 'takes into account' (Solomon Islands, E/C.12/1/Add.33, para 9) and 'acknowledges' (Mongolia, E/C.12/1/Add.47, para 9) the effects of the Asian financial crisis; 'recognises' Togo's economic crisis (Togo, E/C.12/1/Add.61, para 7); 'notes' the economic difficulties in Mexico (Mexico, E/C.12/1/Add.41, para 12), Algeria (Algeria, E/C.12/1995/17, para 12) and Suriname (Suriname, E/C.12/1995/6, para 7). It additionally highlights the economic difficulties in Belarus and Cameroon, but appears to offer no flexibility to those States (Belarus, E/C.12/1/Add.7/Rev.1, para 10; Cameroon, E/C.12/CMR/CO/2-3, para 14).

⁶⁴ CESCR, *General Comment 19* (n 2) 42.

⁶⁵ Letter to States (n 1, Annex I), 6

⁶⁶ Developed in; CESCR, 'Social protection floors: an essential element of the right to social security and of the sustainable development goals' (UN Doc. E/C.12/2015/1, 2015).

⁶⁷ Bridgit Toebes, 'The Right to Health' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, M Nijhoff Publishers 2001) 176.

⁶⁸ Although non-discrimination and non-derogable standards are also hallmarks of emergency derogation clauses. Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press 1994) 61–2, 63–6.

Thus, the specific non-retrogression test is reduced to two criteria; that policies are temporary and that they are necessary and proportionate. The Letter to States notes that the first condition on ‘any proposed policy change’ is that the policy should be temporary. This is similar to the approach under the ICCPR,⁶⁹ the European Convention on Human Rights (ECHR),⁷⁰ and the American Convention on Human Rights (ACHR).⁷¹ Apart from having proved problematic to enforce and define,⁷² a condition of ‘temporariness’ denotes a period of exception to, or an aberration from, the more ‘permanent’ state of normality. Such a separation of exception (or emergency) from normality, has been characterised as a ‘fundamental aspect’ of an ‘emergency paradigm’.⁷³ This approach departs from the ICESCR’s previous ‘Business as Usual’ approach to the non-retrogression doctrine by indicating that there is to be an exception to its ‘usual’ applicability. The requirement that policy changes that will affect ICESCR rights be ‘necessary and proportionate’ is also borrowed from the ICCPR, ECHR and ACHR emergency derogations regimes.⁷⁴

The Letter’s revised test for non-retrogression can be mapped onto the structure of the derogations clauses. Such provisions generally involve a dual-limbed test for determining the legality of a measure.⁷⁵ The first limb is a threshold test, asking if the requisite circumstances are present for derogation.⁷⁶ The second limb focuses on the substance of the measure introduced pursuant to the derogation. The contents of the letter take a similar approach. The first requirement is that there is a temporary economic and/or financial crisis, with elements of ‘a lack of growth’ and ‘inevitable’ adjustments to rights.⁷⁷ The second limb of the test then uses the ‘necessary and proportionate’ test to assess the substance of the measure.⁷⁸ Of course, while there are parallels between the Letter’s derogation-style terminology and structure, and other international and regional human rights frameworks, there is nothing which binds the CESCR to previously established meanings of those terms.

There is also a distinctive ‘emergency’ character to the changes. The use of ‘negative lists of exception’ is a familiar feature of emergency governance.⁷⁹ By listing those elements of the ICESCR which should not be affected by the crisis (i.e. international cooperation, the protection of the core content of the rights, and non-discrimination), the Committee takes an approach to crisis regulation which is similar to that seen in some national constitutions⁸⁰ and

⁶⁹ ICCPR (n 31) article 4.

⁷⁰ *European Convention on Human Rights* (1950) article 15(1). Cf the ECtHR case of *A v United Kingdom*; Fiona de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (Cambridge University Press 2011) 200–202.

⁷¹ *American Convention on Human Rights* (1969) article 27. Notwithstanding the similarities between the ACHR and ICCPR, many of the constitutions of South American countries set out separate regimes for a diverse range of emergencies, including economic emergencies; Gross and Ní Aoláin (n 7) 42; Brian Loveman, *The Constitution of Tyranny: Regimes of Exception in Spanish America* (University of Pittsburgh Press 1993) 25. See further; Exception and Emergency Powers, Gabriel L Negretto and Jose Antonio Aguilar Rivera, ‘Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship’ (1999) 21 *Cardozo Law Review* 1797.

⁷² Alan Greene, ‘Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights’ (2011) 12 *German LJ* 1764, 1782; Gross and Ní Aoláin (n 7) 171.

⁷³ Greene, ‘Separating Normalcy from Emergency’ (n 71) 1765; Gross and Ní Aoláin (n 9) 174–5. Although these authors do not explicitly endorse this view.

⁷⁴ Human Rights Committee, *General Comment 29: States Of Emergency (Article 4)* (CCPR/C/21/Rev1/Add11 2001); ECHR (n 66) article 15(1); ACHR (n 67) article 27. All of these regimes require proportionality by reference to the ‘exigencies of the situation’.

⁷⁵ Greene, ‘Separating Normalcy from Emergency’ (n 68) 1766.

⁷⁶ *Ibid.*

⁷⁷ Letter to States (n 1, Annex I), 5..

⁷⁸ Letter to States (n 1, Annex I), 6. The two other conditions listed in paragraph 6 – the requirement of non discrimination and respect for the minimum core of the rights – might be thought of as ‘absolute’ or non-derogable provisions.

⁷⁹ Gross and Ní Aoláin (n 7) 58.

⁸⁰ *ibid* eg Nicaragua, Portugal, South Africa, Peru.

in the non-derogable provisions of the ICCPR.⁸¹ This legal method identifies ‘key’ values, either in the sense that they are ‘fundamental’ or that there is no clear reason for their infringement during a crisis.

Finally, the Letter to States sets ‘law’ and ‘legality’ aside in a manner entirely consistent with an emergency ‘accommodation’ approach. Thus the Letter argues that States should not deny or infringe rights, as ‘[a]part from being contrary to their obligations under the Covenant’⁸² other negative effects such as political instability might arise. To a lesser degree the CESCR repeats this diversion from legality when it notes that the Covenant provides mere ‘guideposts’,⁸³ and notes that adjustments to socio-economic rights are ‘at times inevitable’.⁸⁴ The CESCR’s willingness to use legal obligations as a secondary value places States’ obligations in a position subordinate to the ‘necessities of the situation’⁸⁵; accommodating ‘necessary’ emergency responses is the new guiding value.

In sum, the substance and character of these alterations to the doctrine indicates a shift towards an emergency accommodation paradigm. This shift from Business as Usual to accommodation was not subtle and contained some paradigmatic examples of emergency-type responses. These changes are significant and have operational consequences which are explored below.

V. IMPLICATIONS OF AN ‘EMERGENCY’ SHIFT

The previous sections have outlined how the CESCR’s approach to retrogression and ‘emergency’ has been conceptually modified. This section will assess some of the dangers of these changes. This is important because emergency regimes have historically been the setting for some of the most extensive and grave departures from human rights.⁸⁶ In the context of the Letter, the major (but not the only) threats can be categorised in terms of ‘incommensurate balancing’, threats to the foundational principles of socio-economic rights, and the inadequacy of safeguards.

A. An appropriate test?

The construction of the new test of non-retrogression has the potential to raise a number of issues for socio-economic rights. The second condition set down by the Letter requires States to assess whether their proposed policies are:

‘necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights’.⁸⁷

As there are two possible interpretations of this text, it is difficult to know with certainty how the Committee will give effect to it.

⁸¹ ICCPR (n 31) article 4(2).

⁸² Letter to States (n 1, Annex I), 3 (emphasis added).

⁸³ *ibid* 4.

⁸⁴ *ibid* 6.

⁸⁵ Gross and Ní Aoláin (n 7) 173.

⁸⁶ Joan F Hartman, ‘Working Paper for the Committee of Experts on the Article 4 Derogation Provision’ (1985) 7 Human Rights Quarterly 89, 91.

⁸⁷ Letter to States (n 1, Annex I), 6..

The test, read strictly, has two incongruent parts. On the face of it, the Letter requires that measures enacted be both necessary and proportionate. Yet, the Letter goes on to define this ‘necessary and proportionate’ test as requiring that the policy that is best for (least ‘detrimental’ to) the protection of socio-economic rights be selected. These two strands of the test sit uncomfortably together, and the ‘necessary and proportionate’ test effectively becomes subsumed. Indeed, on this reading, the test is not readily recognisable as a condition of necessity and proportionality. Rather, it requires States to choose the measure least detrimental to the rights. As such, a measure proposed by a State would, according to this reading, be tested against whether the alternative is more detrimental for socio-economic rights – not according to whether it is necessary and proportionate.

Another (and more plausible) reading of the CESCR’s test is possible, however. In this reading, the ‘necessary and proportionate’ test outlined in the Letter can be seen as intended to ensure that a proposed policy is necessary and proportionate *in the context of the financial and economic crises*. The Letter’s clause ‘in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights’, might then be read as meaning ‘having due regard for economic, social and cultural rights’. Such a reading is justifiable given the CESCR’s own usages,⁸⁸ the incongruence of the test when read strictly, and the context in which the Letter was written.⁸⁹

Thus the test might, in practice, be said to read: ‘measures should be necessary and proportionate in the context of the crisis, and having due regard for economic, social and cultural rights’. This interpretation seems closer to what the CESCR was trying to achieve. Elsewhere in the Letter the Committee is preoccupied with balancing socio-economic rights with the economic situation of the day.⁹⁰ Contextually, it is clear that the concern was not with States that were choosing between two rights-friendly policies (as is suggested by a strict reading), but with States that were enacting measures to deal with the financial and economic crises that were unnecessarily and disproportionately damaging socio-economic rights.

Yet, if the latter interpretation was the CESCR’s intention, then it raises serious questions about how such a proportionality analysis might be carried out. It would entail balancing rights against neoliberal economic ‘imperatives’. Before even reaching such a point of balancing, the CESCR would have to concede that rights are commensurate with a specific kind of economic benefit.⁹¹ To be clear, this is an entirely different contention to the widely accepted view that the realisation of socio-economic rights depends deeply on resource allocation.⁹² Such balancing would instead concede that economic ‘necessities’ can ‘buy-out’ rights protections.⁹³ This is particularly problematic given the lack of regard had for socio-

⁸⁸ The CESCR has abbreviated the full version of the Letter’s test to simply require the measure to be ‘necessary and proportionate’; CESCR, *Concluding Observations: Iceland* (UN Doc E/C12/ISL/CO/4, 2012) para 6.

⁸⁹ An interpretation justified under; *Vienna Convention on the Law of Treaties* (n 52), article 32.

⁹⁰ For example, the acceptance that ‘a lack of growth, impede[s] the progressive realization of economic, social and cultural rights’; Letter to States (n 1, Annex I), 5..

⁹¹ Cass R Sunstein, ‘Irreversibility’ (Social Science Research Network 2008) SSRN Scholarly Paper ID 1260323 4 <<http://papers.ssrn.com/abstract=1260323>> accessed 30 September 2014.

⁹² See eg. Manuel Couret Branco, *Economics Versus Human Rights* (Routledge 2009) 8.

⁹³ Rejecting balances between socio-economic rights and neoliberal economic imperatives does not necessarily preclude the balancing of those rights against other referents, including (sustainable) economic referents of a different kind. This will especially be the case where the referent can be shown to genuinely represent ‘the legitimate interests of the community’ and can thus be accommodated under article 4 ICESCR; Alston and Quinn (n 28) 194.

economic rights by neo-liberal ‘necessities’.⁹⁴ Moving towards such a position risks representing the rights themselves as market imperatives.⁹⁵

If commensurability were to be conceded, the task of proportionality analysis would only become more difficult. It would be immensely difficult to accurately identify and measure in terms of economic statistics the ‘benefit’ of an isolated policy that reduced rights protection. Even if this were possible, appraising this would be an unenviable task. In reality, without such figures (whether as a result of the State being either unable or unwilling to provide them) the CESCR would be left having to rely on a heavily subjective and rhetorical assessment of the benefit of reducing rights protection. Given the prevalence of highly subjective rhetoric in this arena, including the neo-liberal rallying call ‘There Is No Alternative’, reliance on a necessity test seems to do little to examine the relative importance of decision-making factors.

The other stage of the CESCR’s test for permissible crisis measures requires that measures enacted by States are temporary. The problem of becoming ‘stuck’ in a temporary state of emergency has been well critiqued by others and those problems apply here also.⁹⁶ In addition, the fact that a violation was temporary is not, in a meaningful sense, sufficient to justify the action and such an approach would move towards a human rights’ ‘law of averages’.

B. General threats to socio-economic rights

If the new approach of the 2012 Letter is employed by the CESCR when assessing States’ compliance with their obligations, there may be a number effects on socio-economic rights generally. The introduction of a *pseudo* derogation test in the ICESCR context is a new development that has the potential to blur the doctrinal distinctions between the ICESCR and its counterpart the ICCPR. The individual ICESCR rights are already qualified in a manner that ICCPR rights are not (i.e. through the mechanism of progressive realisation). Notwithstanding the many commonalities between the two sets of rights, the incorporation of a liberal derogations regime into the already relatively flexible ICESCR would result in two sets of flexibilities; both progressive realisation and derogation.

As well as blurring the doctrinal distinctions between the Covenants, the Letter threatens to further entrench tired stereotypes about the supposed differences in the ‘nature’ of the rights. The CESCR developing a focus on economic emergencies while the Human Rights Committee primarily focuses on non-economic emergencies is problematic.⁹⁷ It reinforces the traditional message that only socio-economic rights have economic consequences (and thus that economic emergencies are only relevant to those rights). By contrast the ‘security’ dimension of socio-economic rights is neglected in this binary divide, leaving the regime unable to deal with the issues of security and instability that can cause and result from

⁹⁴ Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights’ (2007) 7 Human Rights Law Review 483, 484.

⁹⁵ Joe J Wills, ‘The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony’ (2014) 27 Leiden Journal of International Law 11, 28.

⁹⁶ Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 The Yale Law Journal 1011, 1073 et seq; Greene, ‘Separating Normalcy from Emergency’ (n 68) 1765. The spectre of ‘permanent austerity’ might also be an example of this.

⁹⁷ The Human Rights Committee notes the examples of ‘a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident’; Human Rights Committee, *General Comment 29: States Of Emergency (Article 4)* (n 70), para 5.

violations of these rights.⁹⁸ This polarisation leaves the CESCR's newly 'reformed' emergency regime arguably less able to deal with cross-cutting emergencies than before.

This change of approach towards retrogressive measures also has potential to damage the key progressive realisation obligation of the ICESCR. This obligation has been thought of as a ratchet, requiring that socio-economic rights standards are raised ever higher, with slips in those standards (retrogression) only permissible in limited circumstances and to a limited extent. In this sense, the protection of ICESCR rights in doctrine and in practice has relied heavily upon the 'precommitment' of States.⁹⁹ Yet under the new regime, with fewer and weaker conditions imposed on potential backwards steps, the capacity of non-retrogression to prevent change has been substantially reduced. Progressions in rights standards may no longer be so difficult to reverse and hard fought improvements may be less enduring.

C. Inadequate safeguards

If the regime of emergency retrogression is to be retained by the CESCR, significant safeguards should be built in to it. For example, at the moment, the procedural requirements for declaring, the boundaries of, and the process for ending a period of emergency under the ICESCR are manifestly unclear.

The question of what constitutes an emergency, and who is to declare it, is not addressed by the CESCR.¹⁰⁰ This is a clearly crucial gateway that States wishing to take advantage of increased emergency accommodation must pass through. The CESCR in its Letter seems to highlight the important features of the 2007/8 emergency as being the existence of 'economic and financial crises, and a lack of growth'.¹⁰¹ This does not amount to generalizable advice as to what constitutes an emergency. If the 2012 version of the non-retrogression doctrine is retained, the CESCR should perhaps follow the Human Rights Committee in issuing a full General Comment on the issue,¹⁰² be more rigorous in defining an 'emergency', and offer clear guidance on whether emergencies are to be declared by States or the CESCR in future.

Similarly, the CESCR's brief Letter offers no guidance on when and how emergency situations are concluded. Is a further letter to be expected from the CESCR on the conclusion of the financial and economic crises, for example? How is the existence of the crisis itself, to be separated from the effects of the crisis, and which should determine the conclusion of the situation? Answers to these questions are crucial if the increased crisis flexibilities are to be themselves to be sufficiently circumscribed.

Nor does the new regime outlined by the CESCR provide guidance on the *ex post facto* review of the measures taken during the crisis. If the Letter and its emergency accommodation model of retrogression is to be retained, greater provision should be made in

⁹⁸ This stereotyping is at odds with the UN's various food security and human security initiatives; 'UN Trust Fund for Human Security' <<http://unocha.org/humansecurity/>> accessed 30 September 2014; 'Global Food Security' <<http://www.un-foodsecurity.org>> accessed 30 September 2014.

⁹⁹ This strategy partly mitigates the impact of 'fear' upon the decision-maker; Posner and Vermeule (n 7) 639–40.

¹⁰⁰ Prior to 2012, the CESCR seems only to have expressly characterised three situations as 'emergencies' in relation to water, housing and malnutrition in prisons, but had offered no guidance on the factors that constituted the situations as such; See the Concluding Observations on Yemen (E/C.12/1/Add.92, para 19), Canada (E/C.12/1/Add.31, para 46; E/C.12/MDG/CO/2, para 62), Madagascar (E/C.12/MDG/CO/2, para 28).

¹⁰¹ Letter to States (n.1, Annex I), 5..

¹⁰² Human Rights Committee, *General Comment 5: Derogation of Rights (Article 4)* (HRI/GEN/1/Rev9 (Vol I) 1981); Human Rights Committee, *General Comment 29: States Of Emergency (Article 4)* (n 70).

the State Reporting Guidelines for detailing those emergency situations which have been declared and the measures taken as a result of them.¹⁰³ Given the difficulties with necessity and proportionality analyses and the vagaries of the ‘temporary’ provision, *ex post* review of ‘emergency’ measures should particularly address the minimum core and non-discrimination requirements.

VI. CONCLUSIONS

The CESCR’s Letter to States was a brief, but highly significant intervention. It can be given various characterisations, as soft law, rhetorically weighty, or as no more than a note to fill the vacuum of comment on the crises by the Committee. It has been suggested here that the extent of the Letter’s influence is of deep importance due to its substantive content. The Letter introduces a number of significant changes to the operation and conceptual framework of the ICESCR. These changes take the doctrine of retrogression in a new, and somewhat counterproductive, direction and if they remain in place a number of significant flaws need to be addressed.

While there are significant ongoing debates concerning emergency theories, it was the Business as Usual approach that was built into the ICESCR. This has now been set aside in favour of a framework of accommodations. There now seems to be significant latitude given to States by the CESCR in times of economic crisis, and the level of States’ obligations during such crises appears to have been reduced. The similarity of those minimal tests to the derogations clauses found in other treaties is concerning. It moves the ICESCR towards incorporating the same flexible approaches which are found in the ICCPR, while neglecting to acknowledge the significant degree of flexibility which is already to be found in the ICESCR.

The tests employed by the CESCR in its Letter to determine whether crisis policies are permissible are also a cause of concern. It seems that the Committee aims to test whether a policy was necessary and proportionate in the light of the crises. This raises broader questions about how to examine the incommensurate values of rights and economics, and introduces a worrying prospect of rights protections being ‘bought-out’. The requirement that violative measures only be ‘temporary’ also remains problematic, as there is no discussion of the implications of a ‘temporary’ violation provided by the CESCR.

A number of general issues also arise from the changes. The newly acquired ability of States to largely suspend their obligations under the Covenant does not sit easily alongside a regime of progressive realisation that already provides significant flexibility to States Parties. There is an additional concern that orientating the ICESCR towards economic emergencies, while the ICCPR focuses primarily on security emergencies could re-entrench stereotypes about the two ‘sets’ of rights.

A final concern was the weakness of the existing system for safeguarding rights against abuses during times of emergency. Despite affording States significant additional flexibility, the Committee has not given greater attention to monitoring their actions. Thus there is little clarity about how States can take advantage of this additional leeway in times of crisis, whether there are procedural hurdles that are to be fulfilled, or how the emergency situation

¹⁰³ CESCR, ‘Guidelines On Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights’ (2009) UN Doc E/C.12/2008/2.

comes to an end. There is similarly no provision, beyond the standard system of State reporting, for the recording, examining, and scrutinizing the emergency measures taken.

The brevity and informal format of the CESCR's Letter should not mask the serious and problematic alterations that it contains. While, in the abstract, a 'conceptual shift' may not appear to threaten the advancement of socio-economic rights, the general applicability of, and substantial freedom afforded by, the changes should raise concerns. If derogation-style changes to the ICESCR's regime of non-retrogression are to be made, close attention should be paid to the consequent substantive and procedural changes they bring to the ICESCR more generally. Without such scrutiny the doctrine of non-retrogression risks aiding States during economic crises, while doing little to protect individuals' socio-economic rights.

Annex I: Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights¹⁰⁴

Reference: CESCR/48th/SP /MAB/SW

16 May 2012

Excellencies,

[1] I write to you, on behalf of the Committee on Economic, Social and Cultural Rights (the Committee), as representatives of States parties to the International Covenant on Economic, Social and Cultural Rights (the Covenant) and in relation to the protection of the Covenant rights in the context of the economic and financial crisis.

[2] The Committee has observed over recent years the pressure on many States parties to embark on austerity programmes, sometimes severe, in the face of rising public deficits and poor economic growth. Decisions to adopt austerity measures are always difficult and complex, and the Committee is acutely aware that this may lead many States to take decisions with painful effects, especially when these austerity measures are taken in a recession.

[3] However, I wish to underline that under the Covenant all States parties should avoid at all times taking decisions which might lead to the denial or infringement of economic, social and cultural rights. Besides being contrary to their obligations under the Covenant, the denial or infringement of economic, social and cultural rights by States parties to the Covenant can lead to social insecurity and political instability and have significant negative impacts, in particular, on disadvantaged and marginalized individuals and groups, such as the poor, women, children, persons with disabilities, older persons, people with HIV/AIDS, indigenous peoples, ethnic minorities, migrants and refugees. In view of the indivisibility, interdependence and interrelatedness of human rights, other human rights also are threatened in this process.

[4] States parties have, of course, a margin of appreciation within which to set national economic, social and cultural policies that respect, protect and fulfil the Covenant. In this context, I wish to highlight that the Covenant also provides important guideposts which can help States parties to adopt appropriate policies that deal with the economic downturn while respecting economic, social and cultural rights. At the heart of the Covenant is the obligation on States parties to respect, protect and fulfil economic, social and cultural rights progressively, using their maximum available resources. This requires States to adopt and implement laws and policies that aim to achieve incremental improvements in universal access to basic goods and services such as health care, education, housing, social security and cultural life.

[5] Economic and financial crises and a lack of growth impede the progressive realization of economic, social and cultural rights and can lead to regression in the enjoyment of those rights. The Committee realizes that some adjustments in the implementation of some

¹⁰⁴ UN Doc HRC/NONE/2012/76 (paragraph numbers added in square brackets).

Covenant rights are at times inevitable. States parties, however, should not act in breach of their obligations under the Covenant.

[6] In such cases, the Committee emphasizes that any proposed policy change or adjustment has to meet the following requirements: first, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times.

[7] Finally, may I highlight that international cooperation is a fundamental obligation for the progressive universal realization of economic, social and cultural rights. In this regard, the Committee has on many occasions underlined the requirement that States parties to the Covenant should respect their obligations in relation to economic, social and cultural rights when making decisions, including on official development assistance, in international financial institutions, such as the World Bank, the International Monetary Fund, regional financial institutions and regional integration organizations. I therefore wish to express the Committee's hope that your Government will be guided by its obligations under the Covenant when developing and adopting international and regional programmes to promote economic and social development and to overcome the economic and financial crisis.

[8] I take this opportunity to wish you every success in your endeavours and to reiterate the assurances of my highest consideration.

(Signed) Ariranga G. Pillay
Chairperson
Committee on Economic, Social and Cultural Rights