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UNWINDING RETROGRESSION: CONFLICTING CONCEPTS AND PATCHY PRACTICE

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Abstract

The doctrine of non-retrogression used by the UN Committee on Economic, Social and Cultural Rights is apt for the current moment of crisis and withdrawal from human rights standards. It addresses instances where the State is responsible for backwards steps in human rights protections. However, it has rarely been used by the Committee as it is paralysed within conceptual confusion and practical ambiguity. This article unravels those difficulties and highlights ways forward. It gives a brief history of non-retrogression, identifies what backwardsness the doctrine seeks to regulate, which actions and inactions of the State it defines as culpable, how the multiple steps of the doctrine are to be proved and where the doctrine fits within the Committee's processes of scrutiny. Overall, it is argued that the significant potential of the doctrine is constrained by its confusions and that urgent reforms are needed to ensure its use and effectiveness.

Can law control reductions in human rights protections? If it could, what sort of reductions should it concern itself with? Do all reductions in social standards amount to violations of human rights law? If not, what kind of reductions are justifiable? One of the primary international human rights treaties provides a prototype of legal doctrine that sets out to address these issues. The doctrine of non-retrogression is central to the successful operation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Yet for all of its innovation and potential, its scope operation remains understudied and uncertain. The doctrine has challenges in its enforcement, its tendency to change, and in confusion surrounding its boundaries.

This article focusses on the challenges and potential of the doctrine of non-retrogression. It addresses the doctrine's focus, its conceptual and terminological ambiguities, and some of the evidential difficulties associated with it. It is argued greater consistency in the construction and use of the doctrine is needed, and that without attention to the operational detail, retrogression – in whatever form – will fail to realise its potential.

Discussion of the doctrine of non-retrogression is urgent. The human rights system has been described as being in a moment of crisis, with States actively withdrawing from institutions[1] and resiling from rights commitments.[2] Further, and despite the centrality of this doctrine on backwards steps to the 2007/8 financial and economic crisis, it was only mentioned nine times in Concluding Observations in the five years following the crisis. This was not due to any lack of relevance, with austerity measures hitting socio-economic rights hard, but rather due to the legal doctrine's own limitations. Foremost amongst these limitations are 1) identifying the object of retrogression, 2) challenges in understanding which actions of States are culpable, 3) the complex stages of proof and evidentiary difficulties, and 4) timings and triggers for the use of the doctrine of non-retrogression. From different perspectives, these limitations show up the conceptual and practical flaws in the current constitution of the doctrine of non-retrogression. The article concludes by suggesting how the doctrine might be rationalised in order to better serve its purpose.

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[1] 'Remarks by President of the Human Rights Council, Vojislav Šuc (Slovenia) on the USA Withdrawal from the Council' (*OHCHR*) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23230&LangID=E> accessed 22 June 2018.

[2] See for a survey of the issues, Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

1. Retrogression: its role and history

The doctrine of non-retrogression found its way into the socio-economic rights cannon in the most inauspicious of manners. An early General Comment of the Committee on Economic, Social and Cultural Rights (CESCR) sought to shed light on a range of concepts and obligations that were contained in the international social rights treaty (the ICESCR). Amongst all of the attention to other well-established legal doctrines, the phrase 'deliberately retrogressive measures' was contained in a single sentence.[3] This phrase has been read for many years now as establishing a doctrine which forbids the erosion of progress made by States (a 'prohibition on backwards steps').[4] However, in that initial General Comment the phrase can be read as little more than a set of stern words to States engaged in anything less than enthusiastic, 'expeditious and effective' progress.[5] Unlike other obligations which the CESCR initiated around that time,[6] retrogression was introduced briefly and with no fanfare.

There followed a period of abeyance between that moment in 1990 and the doctrine's next use in 1999.[7] This was the real embrace of the doctrine of non-retrogression with it appearing in nearly every General Comment after that.[8] This new attention to the doctrine by the CESCR brought with it frequent modifications. There are now nine different versions of the doctrine that have been used in the CESCR's work. Some of these variations are relatively minor, but there are also fundamental conceptual divergences between some of the accounts of the doctrine.

There is a significant degree of ambiguity in the labelling and descriptions of the doctrine of non-retrogression.[9] The first appearance of the concept employed the term 'retrogressive' and in the work of the CESCR this has remained the term used in the vast majority of instances. There have been only infrequent uses of the correlated tense of the term, 'retrogression',[10] but there have been multiple uses of the distinct term 'regressive'.[11] It might be argued that employing a single term for describing the concept would be an advantage in terms of strengthening and clarifying meaning. Indeed, the out-of-place use of the term 'regressive' over the more established 'retrogressive' in the CESCR's Letter to States on the 2007/8 financial and economic crises[12] was highlighted as contributing to uncertainty around the future of the doctrine.[13]

The choice of which term to assemble around, is a relatively simple one. The term 'regressive' has a well-established meaning beyond the ICESCR (especially in relation to tax[14]).[15] The less-developed 'retrogressive' term can therefore be preferred to 'regressive' as it contributes a particularity around

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[3] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) para 9.

[4] For a small selection see; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Croatia* (UN Doc E/1990/5/Add46 2000) para 403; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Jamaica* (UN Doc E/C12/JAM/3-4 2011) para 180; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Kenya* (UN Doc E/C12/KEN/1 2007) para 134.

[5] CESCR, *General Comment 3* (n 3) para 9.

[6] See for example the introduction of the Minimum Core concept consisting of a paragraph of 255 words and 14 lines, compared to retrogression's 47 words and 3 lines. On its *debut*, the Respect, Protect, Fulfil typology received an introduction of 178 words and 15 lines. See, respectively, ibid para 10; CESCR, *General Comment 12: The Right to Adequate Food (Art 11 of the Covenant)* (UN Doc E/C12/1999/5 1999) para 15.

[7] CESCR, *General Comment 13: The Right to Education (Art 13 of the Covenant)* (UN Doc E/C12/1999/10 1999) para 45.

[8] All but CESCR, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights* (UN Doc E/C12/GC/20 2009).

[9] Special mandate holders are especially flexible in their use of the terms, see for an example of a mandate holder seeming to note an absolute prohibition on retrogression; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Mission to the Syrian Arab Republic* (UN Doc A/HRC/17/25/Add3 2011) para 14.

[10] CESCR, *Concluding Observations: Egypt* (UN Doc E/C12/EGY/CO/2-4 2013) paras 6, 18.

[11] CESCR, 'General Comment 21: Right of Everyone to Take Part in Cultural Life' para 65. CESCR, 'Report on the Sixth Session' (1992) UN Doc E/1992/23 para 219 (Concluding Observations on Finland); CESCR, *Concluding Observations: Mali* (UN Doc E/C12/1994/17 1994) para 52; CESCR, *Concluding Observations: United Kingdom* (UN Doc E/C12/GBR/CO/5 2009) para 33; CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions' (2011) UN Doc E/2011/22 para 463 (Decision on cooperation with specialized agencies); CESCR, *Concluding Observations: Spain* (UN Doc E/C12/ESP/CO/5 2012) para 28.

[12] 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.

[13] 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 & the Promotion of Economic and Social Rights* (Hart 2013) 50–1.

[14] This is an especial issue where the CESCR or State would wish to address the quite separate matter of regressive tax or financing regimes; CESCR, *Concluding Observations: Columbia* (UN Doc E/C12/1/Add74 2011) para 14; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Ireland* (UN Doc E/1990/6/Add29 2000) para 231.

[15] 'Regressive' is defined as '[o]f, relating to, or designating backward movement in space; characterized by such movement; retrograde'; Oxford English Dictionary, *Regressive* (2014).

which an insulated legal meaning can be formed and speaks specifically to the human rights context. Such linguistic particularity is necessary in light of the (ab)use of both 'regressive' and 'retrogressive' in contexts that are not linked to their legal meaning. State reports to the CESCR[16] and the CRC[17] have employed the term in general descriptions as an approximation for 'backwards' or 'undesirable', while one State has employed the mathematical meaning of 'regression' (a statistical technique) in its report[18] and another has discussed 'retrogression' on matters of civil and political rights.[19] There are many times fewer (mis)uses of the 'retrogression' term in State reports to the CESCR.[20] A report of the Open-ended Working Group on an optional protocol to the ICESCR, notes that States couched some of their concerns about harmful amendments in terms of 'retrogression'.[21] As far as these distinctions are concerned, then, to maintain a distinctive and bounded meaning, 'retrogressive' and its companion terms 'retrogression' and 'retrogressively' are clearly preferable.

There is a further terminological concern that remains. Ironically, it relates to an absence of terminology. As has been highlighted by Nolan, the CESCR has failed in high-profile examples to use the word retrogression or even regressive, instead opting to describe the situation in terms of a 'step backwards'.[22] While replacing the term retrogressive with the backwardness concept would be somewhat more accessible, such a change of language would need to be made explicitly. As it is, the CESCR's uses of 'backwards steps' language amounts to a tangential reference to retrogression that, in the context of the country concerned, serves to soften their finding by divorcing it from the hard legal doctrine. New word choices such as this also serve to further the complexity of non-retrogression. Does the doctrine of non-retrogression only relate to backwardness? What is the meaning of a 'step'? Do the same justificatory criteria apply to backwards steps as to fully retrogressive steps (however they may differ)?

Despite its somewhat haphazard history, non-retrogression holds promise. Quite uniquely, it ties States to what they have already achieved and is strongly geared towards stabilisation in a crisis or in everyday policymaking. It could – if fully functional – protect a virtuous cycle of human rights improvement and secure the gains made by human rights campaigners. It could act against moments of backlash against progress. While, none of the versions of non-retrogression promulgated by the CESCR have prevented all reductions to rights enjoyment, they require that backwards steps are justified by the State. These justificatory steps become central and institute a system of barriers to, and scrutiny of, policy measures that harm socio-economic rights enjoyment. This promise, however, is often hamstrung on practical and conceptual fuzziness.

2. Retrogressive Measures; Retrogressive Effects

The closer that the CESCR's doctrine of non-retrogression is examined, the more complex it becomes. We know that in essence, the doctrine aims to address backwardness (and perhaps, also, stagnation). But backwardness in *what*? Focus too closely on backwards effects of a policy measure, and human rights actors must sit back and wait for damage to manifest before they can act. A more pre-emptive

[16] See, for examples, *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Belgium* (UN Doc E/C12/BEL/3 2006) para 124; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Austria* (UN Doc E/1994/104/Add28 2004) para 160; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Columbia* (UN Doc E/C12/4/Add6 2000) paras 60, 316.

[17] See, for examples, *State Party Report under the Convention on the Rights of the Child: Myanmar* (UN Doc CRC/C/8/Add9 1995) para 11; *State Party Report under the Convention on the Rights of the Child: Kenya* (UN Doc CRC/C/KEN/2 2006) para 446; *State Party Report under the Convention on the Rights of the Child: Peru* (UN Doc CRC/C/125/Add6 2005) para 209.

[18] *State Party Report under the Convention on the Rights of the Child: Armenia* (UN Doc CRC/C/93/Add6 2003) para 325.

[19] *State Party Report under the Convention on the Rights of the Child: China (Hong Kong Special Administrative Region)* (UN Doc CRC/C/83/Add9 (Part I) 2004) para 85.

[20] The only notable example being, *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Korea* (UN Doc E/1990/6/Add23 1999) para 65.

[21] Catarina de Albuquerque, *Report of the Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Fifth Session* (UN Doc A/HRC/8/7 2008) paras 161, 243.

[22] Nolan (n 13) 51; citing CESCR, *Concluding Observations: Spain* (n 11).

approach which predicts retrogression on a paper-based analysis can be a blunt tool and push retrogression into highly technical territory.

Nolan, Lusiani and Courtis – building in some respects on Courtis' earlier work[23] – tackle this question by drawing a distinction between 'normative' and 'empirical' retrogression.[24] Normative retrogression 'concerns steps backwards in terms of legal, de jure guarantees',[25] while empirical retrogression 'is concerned with de facto, empirical backsliding in the effective enjoyment of the rights'.[26] For example the simple repeal of a piece of legislation that guaranteed social housing would be easily identifiable as normative retrogression. Empirical retrogression might occur where all of the legislation has remained constant, but the need for social housing has increased so that the existing stock is no longer able to satisfy demand. This is a useful categorisation that takes the analysis of this area further. In particular, Nolan *et al* identify through this model some of the difficulties that are faced by the CESCR in evidencing, showing causation of, and adjudicating on empirical retrogression.[27]

Their division can be extended in order to add another useful distinction; the difference between retrogressive *measures* and retrogressive *effects*. In the case of normative retrogression, the backwardness is assessed in isolation from its actual effects. It is essentially a paper exercise that, at its extreme, could incorporate predictions of the effects that might flow. This allows – as Nolan et al identify – legally trained individuals to assess such retrogression easily.[28] The nature of such assessments as paper-based causes them to also to be abstract or hypothetical. This is beneficial in in a couple of senses. First, it facilitates early assessments of violations of the doctrine of non-retrogression; there is simply no need for negative effects to be occurring when the retrogression can be demonstrated in the law. This paper-based assessment is also an effective way of identifying and recognising the expressive harms of retrogression (a retrogression that is a symbolic reduction but which may not have significant empirical impacts).[29]

How rapidly such assessments could occur would affect where the ex post/ ex ante division is placed, however with normative retrogression it would be possible to make a full and accurate assessment of even a draft law *before any* retrogression (normative or empirical) had been enacted. For example, a pre-legislative scrutiny committee could assess whether normative retrogression would occur. This is useful in guiding State conduct and in preventing (rather than reacting to) ESR violations. Such an *ex ante* approach is highly pertinent to ongoing attempts to better mainstream human right generally, and positive duties in particular, into State decision making.[30]

Of course, while assessing the retrogression of a (normative) measure is straightforward, there are significant difficulties with assessing whether (empirical) effects are retrogressive. Nolan *et al* discuss these in some depth,[31] but in sum the focus of this strand of retrogression on de facto enjoyment of

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[23] Christian Courtis, 'La Prohibicíon De Regresividad En Materia De Derechos Sociales: Apuntes Introductorios' in Christian Courtis (ed), *Ni Un Paso Atrás: La Prohibicíon De Regresividad En Materia De Derechos Sociales* (Editores de Puerto 2006).

[24] Aoife Nolan, Nicholas J Lusiani and Christian Courtis, '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) 123.

[25] Courtis defines this as 'any measure adopted by the state that suppresses, restricts or limits the content of the entitlements already guaranteed by legislation constitutes a *prima facie* violation. It entails a comparison between the previously existing and the newly passed legislation, regulations or practices, in order to assess their retrogressive character'; Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 2(4) Erasmus Law Review 379, 393.

[26] Nolan, Lusiani and Courtis (n 24) 123.

[27] ibid 124, 127.

[28] ibid 127. See also Courtis who notes such work is 'not foreign in a range of areas of law'; Courtis (n 25) 393.

[29] This duality of an expressive harm (perpetrated, but not necessarily felt) is discussed in the non-discrimination literature; Deborah Hellman, *When Is Discrimination Wrong?* (Harvard University Press 2008) 26.

[30] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP Oxford 2008) 169ff.

[31] Nolan, Lusiani and Courtis (n 24) 124–128.

rights makes 'comprehensive'[32] real-world evidence essential. The authors further emphasise the need for a longitudinal assessment:

> [b]uilding this kind of empirical case is much less straightforward, requiring a careful monitoring of the degree of empirical retrogression over time…[33]

Such evidence is expensive to collect and analyse and where States avoid collecting such (embarrassing) data this cost will most likely fall to civil society organisations. Naturally, in the period of time needed for evidence to appear and be collected, human rights violations will be allowed to persist. In the social housing example above, showing empirical retrogression might require evidence of the increased need and evidence of the impact that was having on housing waiting lists, and possibly some form of evidence about whether these individuals had found suitable alternative housing. The culpability of the government would also have to be demonstrated, so adjudicative bodies might delay any finding of retrogression to allow the State to satisfactorily respond. The CESCR has found empirical retrogression in Spain's protection of the right to housing, but a large body of evidence and the complaint author's twelve years of unsuccessful social housing applications made this an easy case.[34] Showing empirical effects on the rights to health or to cultural life might be an even more complex and long-term task.

A number of further points arise when these two strands of retrogression – empirical and normative – are considered together. The very existence of these different types of non-retrogression suggests that there are multiple harms that are captured by the obligation (broadly, normative and empirical). Further, there will be an overlap between the two (a sort-of central area of a Venn diagram), where *both* normative and empirical retrogression are evidenced. A new legislative measure might be retrogressive on paper but not be identified as such because of a lack of interest in the change at the time of its passage. When later retrogressive effects are seen and evidenced, then a claim of both types of retrogression might occur. While not necessarily problematic, such an overlap will have to be consistently and clearly managed to avoid confusion (does such 'double-retrogression' require closer scrutiny or harsher findings, for example?).

Again, considered in combination, it is clear that the significantly less burdensome path to proving normative retrogression creates a practical bias in favour of that strand. It would be advisable for rights-bearers to bring their claim within the scope of normative retrogression if at all possible, and even if they are actually experiencing real-world effects. It is this latter point that is concerning. There is a danger that retrogression becomes predominantly an exercise in legal argumentation, and the experiences of individuals become isolated because the effects upon them have been insufficiently long, severe or widespread to constitute 'proof'. Add to this the possibility that normative retrogression could be found without the law ever having been enforced or without practically impacting anyone, and the gap between the two strands becomes very large.

This large gap between the two was present in the background when the CESCR noted that it was:

> concerned at the regressive measures adopted by [Spain] that increase university tuition fees, thus jeopardizing access to university education for disadvantaged and marginalized individuals and groups.[35]

Using a normative retrogression approach, finding retrogression would be relatively easy and substantially paper-based, involving a comparison of the laws before and after the change and assessing for a reduction in the level of rights protection granted. However, to show empirical retrogression the

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[32] ibid 124.
[33] ibid 128.
[34] *Djazia and Bellili v Spain [2017]* CESCR Communication 5/2015, UN Doc E/C.12/61/D/5/2015 (21 July 2017)
[35] CESCR, *Concluding Observations: Spain* (n 11) para 28. Due to the variations in terminology, it is impossible to know whether the Committee intended to suggest that this 'regressive' measure was also potentially 'retrogressive'.

effects of the new regime would have to be gathered together over a period of time and the link to the change demonstrated.

Practical difficulties in showing empirical retrogression need not be fatal to an assessment of this aspect of the doctrine, however. By moving beyond a requirement that materialised and somewhat substantial harm is evidenced, the Committee can improve the reactivity of the doctrine. More readily accepting forecasts and testimonial evidence of those experiencing the retrogression (whether they are directly affected or indirectly observing a change) would improve the operation of non-retrogression (and many other obligations).[36] This would bring the practical benefits of better understanding the impacts and bringing them to the fore more quickly. It would also be symbolically significant in bringing the voices of individuals to the fore and displacing the dominance of officialdom and metrics.

There is also room for thinking more broadly about the meaning of normative retrogression and space for scepticism about the special place afforded to backwards steps based in *law* (rather than in service delivery, budgetary allocations, or discourse). This is one reason that aligning the strands of retrogression in terms of normative-measures and empirical-effects is analytically valuable. It paves the way for a solution to the dominance of law, by taking a broader approach to 'normative' retrogression that incorporates a focus on all measures taken by the State (legal or otherwise). Other backwards effects (empirical retrogressions) would remain as a residual category able to address the less foreseeable harms to rights. This expanded approach allows Nolan *et al*'s key distinction between paper-based and practice-based assessments to be maintained, while opening up a space for a larger range of paper-based assessments.

This would mean that possible normative retrogression (or, in other terms, a retrogressive *measure*) might be contemplated in respect of any measure that can be properly subjected to a paper-based assessment. This could include 'administrative, budgetary [or] judicial'[37] measures and State 'strategies, policies and programmes'.[38] Expanding the image of normative retrogression to incorporate some of these measures would mean more challenging assessments than might be the case for statutory law, but they would still possible in some instances. Care, for example, is required to avoid over-interpreting budget reductions as necessarily implying retrogression.[39] The context of the measure will be relevant to determining whether normative retrogression has occurred. However, such context is equally important in respect of legal measures. The repeal of a law may appear to be retrogressive until the context of judicial developments, operational effectiveness, and new statutory enactments are considered.

While it may be more challenging to assess for normative retrogression in respect of some non-legal measures, and even allowing for the fact that a conclusion will not be reachable in all cases, such assessments are possible in principle. For example, while all reductions in budgetary allocations will not amount to retrogression, it is plausible to assert that drastic cuts that are not justified by the context can be assessed on paper as constituting normative retrogression. To insist on a delay while the effects of these cuts are seen, evidenced, and dealt with under empirical retrogression would be perverse.

A further budget-related example drawn from O'Connell et al's work, further illustrates the need for a broader interpretation of normative retrogression. They note 'a promise of funding that is

[36] Meghan Campbell and Ben Warwick, 'The Impact of Economic Reform Policies on Women's Human Rights' (2018) <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/03/Campbell-and-Warwick_Women-and-Austerity_IE-Foreign-Debt-28final29-1.pdf> accessed 22 June 2018.

[37] CESCR, *General Comment 18: The Right to Work (Art 6 of the Covenant)* (UN Doc E/C12/GC/18 2005) para 22.

[38] CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 67.

[39] International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (Official Records of the General Assembly, Fifty-sixth Session, Supplement No 10 (A/56/10) 2001) article 4.

subsequently withdrawn before it was actually allocated may constitute a retrogressive measure…'.[40] It is agreed that such a State action could be properly addressed by retrogression, but the only realistic route for enforcement of the doctrine in such a scenario would be through normative retrogression (a paper-based reduction in standards). Attempts to bring such measures under empirical retrogression would be virtually impossible given the challenges of gathering evidence of reduced enjoyment flowing from a cancelled funding promise.

Understanding what it is that the doctrine of non-retrogression seeks to police is central to any sort of effective operation of the obligation. This requires a tandem assessment of the legal position with the realities of policymaking and activism. As has been discussed above, a doctrine that is too narrowly focussed on legal norms will be poor at addressing practical problems of rights violations, and could drive this corner of the human rights project further into the territory of legalism. It is useful to re-band the doctrine to understand its application to measures (i.e. legal, policy or budgetary inputs) and to retrogressive effects (i.e. evidenced, real world outcomes). This allows a greater range of measures to be assessed relatively easily on paper, while maintaining a place in the doctrine's operation for evidence of lived outcomes. This latter category, even with this rethinking of the elements of the doctrine, remains a challenge to operationalise. The current structure of the doctrine suggests a need for longitudinal and high level data to show a retrogressive effect. Such evidentiary challenges could be mitigated by the CESCR admitting a greater range of predictive analyses, and by lending greater weight to the voices and experiences of those affected.

3. Diagnosing State Action

Another indicator of the nascence of the doctrine of retrogression can be seen in the difficulties in identifying the wrongdoing contained in a State action or inaction. It is clear from the Committee's work that the doctrine is seeking to address backwards steps (and perhaps stagnation) in rights protections. Further, as seen in the discussion above, these backwards steps can come in the form of measures or effects. However, there is an additional and significant aspect of the doctrine which directs its application. For the doctrine of non-retrogression to apply, a State action has to be 'deliberate' in some sense.

The CESCR is unclear whether the *measure* or the *retrogression* must be deliberate for the doctrine to apply. There are two potential meanings when 'deliberate' is used in connection to 'retrogressive'. Unhelpfully, each of these meanings can be encapsulated in similar wording. These meanings are (in order of ascending State culpability);

1. Deliberate retrogressive measure:	That the measure (which happens to be retrogressive) was deliberate (i.e. that the measure was deliberate, but the retrogressive result was not necessarily)
2. Deliberately retrogressive measure:	That the retrogressive nature of the measure was deliberate (i.e. that the measure was deliberately constructed to be retrogressive)

Far from a minor issue of terminology, the choice between these two meanings is crucial to understanding the scope of the non-retrogression prohibition and to determining the culpability of States. Put simply; does the doctrine of non-retrogression seek to punish all bad State policy or only deliberately bad State policy?

[40] ibid 92.

The terms 'deliberate/ly retrogressive measures' are used interchangeably in the literature.[41] However, leaving aside the exact terms used by authors, there is some agreement that the second meaning above is the correct one (i.e. that the retrogressive nature was deliberate). Sepúlveda implies agreement with the second of these definitions when she refers to a step backward as the result of an 'intentional decision' (i.e. she sees the decision not just to take a step, but to take a step *backwards*, as the result of an intentional or deliberate process).[42] O'Connell et al,[43] Nolan and Dutschke[44] and Nolan et al[45] cite this passage of Sepúlveda's analysis approvingly. Elsewhere, Sepúlveda Carmona mirrors the CESCR's work more explicitly when she emphasises the range of steps to be taken before enacting a retrogressive measure and thus pointing towards the second definition.[46]

There is also a tension here in the CESCR's work. As Nolan notes, 'the Committee has never addressed the difference between retrogressive measures that are deliberate and those that are not'.[47] Far less has the Committee given guidance on what it is that the State must not do deliberately. The most obvious reading of the CESCR's work is the second of the two definitions (that the retrogressive nature must be deliberate). This is the approach of the Limburg Principles (a set of influential principles developed by experts to assist in the interpretation of socio-economic rights).[48] Further, some of the criteria that the CESCR has developed to allow States to justify retrogression in some circumstances, sit uneasily alongside an assessment of whether measures were deliberately taken or not (the first definition). The appraisal of whether a measure was accidental or deliberate entails a logical clash with an assessment of whether the State had carefully considered the measure and had had the impacts independently assessed.[49] The latter criteria would seem to answer the deliberateness question (i.e. if the State had carefully considered the measure, it is clearly deliberate). Yet the two criteria are presented in competition to each other in the doctrine's criteria; deliberateness is seen as bad, while careful consideration is seen as good.

Yet if the more likely second definition (that the backwardsness was deliberate) is used, there is a danger that the State might escape culpability where its deliberation on a measure cannot be shown. The CESCR defines measures broadly to include 'legislation, strategies, policies and programmes',[50] and in this context thinking of examples of non-deliberate measures is difficult. One might suggest that a relatively automated, technical and/or low level measure taken without the knowledge or deliberation of the 'State' might not be deliberate. However, when the breadth of the concept of the State in international law is considered even these low-level measures would be incorporated.[51]

However, the consensus seems to be that retrogression needs that the backwardsness, as well as the measure, is deliberate. This is a much more difficult contention to show. On the one hand, we might take the personification of the State to an extreme and discuss the deliberateness of its actions in much the same way the intention of individuals is discussed in domestic law. At the other end, however, such a treatment ignores the multifaceted nature of States which have at their core multiple policy processes,

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[41] See, for example, Independent Expert on the question of human rights and extreme poverty, *Rights-Based Approach to Recovery* (UN Doc A/HRC/17/34 2011) para 18; Aoife Nolan and Mira Dutschke, 'Article 2 (1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) 3 European Human Rights Law Review 280, 282; Courtis (n 25) 393.

[42] M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 323.

[43] O'Connell and others (n 39) 70.

[44] Nolan and Dutschke (n 41) 282; this relevant passage of Nolan and Dutschke is cited in Nolan (n 13) 46.

[45] Nolan, Lusiani and Courtis (n 24) 133.

[46] Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 26–27.

[47] Nolan (n 13) 47.

[48] 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) UN Doc E/CN.4/1987/17 para 72. As the work of experts in the field these principles are influential but not binding. Sepúlveda's reminder of their age and the array of developments since then is also valuable; Sepúlveda (n 42) 19.

[49] CESCR, *General Comment 19* (n 38) para 42.

[50] ibid 67.

[51] International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (Official Records of the General Assembly, Fifty-sixth Session, Supplement No 10 (A/56/10) 2001) article 4.

many divergent intentions, and which do not behave as individuals do. Even if 'deliberateness' can be conceptually resolved with the nature of States' functioning, there is the more pressing issue about what evidence can be used to show the State's deliberate intention to damage rights. This focus on the intention of the State also sets aside the experience of the individual rights holder, who will experience the reduction in her rights in much the same way regardless of the intention behind the measure.

Finding evidence of such malign intent in a State's functioning would be extremely difficult. While it is relatively easy to demonstrate the deliberateness with which a State enacted a measure (through a governmental statement, for example), it is altogether more difficult to show that the State deliberately harmed the rights of its citizenry. Much more likely, under this meaning of non-retrogression, is that States simply claim that the retrogressive nature of the measure was unintended and thus escape their obligations. Significantly, the burden of proof relating to deliberateness is one of the few criteria that has been left undetermined, and so this extremely difficult task will likely fall to the Committee or claimants to demonstrate.[52] The kinds of evidence that would show the State's 'deliberateness' are also unclear. If an NGO met with a government minister to show how a measure was retrogressive would subsequent State action be considered to be deliberately retrogressive? What if the issue of backwardsness was raised in the legislature when the measure was being debated? Or does showing deliberateness require the exceptional evidence of a minister saying how he wishes to reduce rights by enacting the measure?

An example can show the extreme difficulties in this respect. Fiscal austerity policies in the UK were enacted deliberately through legislation, policy and budgetary measures from 2009 onwards.[53] These policies had a clear range of backwards effects, which stemmed both directly from the closure of State-run services and indirectly from the spill-out effects on the economy and the private sector.[54] While there is no doubt that the policies were enacted deliberately, the doctrine of non-retrogression appears to require that the backwardsness was also deliberate. The State has consistently argued that austerity was justified and has even sought to contest the existence of negative impacts (even in the face of considerable evidence).[55] There has never been publicly available evidence that the intention of the government was to harm the living standards of individuals.

Behind this difficulty in identifying and conceptualising the object of non-retrogression, lie practical difficulties in using the doctrine in the work of the CESCR and in NGO advocacy. It also highlights the need for consistency with variations in language and explanations contributing to uncertainty surrounding the doctrine.

4. Proving Retrogression

The process of demonstrating retrogression depends greatly on the version of the doctrine that is followed. It has been argued in that the detail of the doctrines' application is inconsistent and unclear. The CESCR has done little to discourage such conflicts between the versions of its doctrines either implicitly through its restatements of the terms of retrogression, or explicitly through an explanatory note. The Concluding Observations of the Committee are similarly unhelpful in understanding the dynamics of the doctrine's application, with the CESCR failing to ever rigorously apply the doctrine to country situations. This inconsistency is one part of the difficulty in concretely proving retrogression. The other significant element is the lack of clarity surrounding the burdens of proof that are required by the doctrine. The CESCR variously notes that the 'burden of proving' retrogression is upon states, that

[52] See below at section 4.

[53] See generally, Craig Berry, *Austerity Politics and UK Economic Policy* (Palgrave Macmillan UK 2016).

[54] See in relation to health, David Stuckler and others, 'Austerity and Health: The Impact in the UK and Europe' (2017) 27 European Journal of Public Health 18.

[55] Patrick Butler, 'Government Dismisses Study Linking Use of Food Banks to Benefit Cuts' *The Guardian* (19 November 2014) <http://www.theguardian.com/society/2014/nov/19/cuts-benefit-changes-driving-up-use-food-banks-study> accessed 22 June 2018.

there is a 'strong presumption' against retrogression, that retrogression is 'prohibited', that 'retrogressive measures should in principle not be taken', but also that they can be 'inevitable'.[56] ~~Besides this array of standards, is the requirement of article 8(4) of the Optional Protocol which obliges the CESCR to consider the reasonableness of the State's actions when considering complaints. The balancing of these standards is to take place while 'bearing in mind' that States are entitled to pursue the ICESCR rights in a range of ways (thereby giving a sort of margin of appreciation to the State[57]).~~

A good pair of examples representing the two poles of the level and variance of complexity in the process of showing the existence of an impermissible retrogressive measure, are General Comment 3 and General Comment 19. General Comment 3, can be disaggregated into five aspects that must be shown in order to successful show impermissible retrogression:

1) Is the measure a backwards (or stagnant) one?
2) If so, are the maximum of available resources being used?
3) If so, can it be shown that the measure was taken deliberately?
4) If so, can it be shown that the measure was taken after careful consideration? (if not measure is retrogressive)
5) If so, can the measure be justified by reference to the totality of ICESCR rights? (if not measure is retrogressive)

This is an intricate approach to international human rights doctrine, with no other general obligations entailing this degree of complexity. Further, this break down of the elements shows the close relationship that retrogression has with other obligations and international human rights principles. A measure that failed the test at stage 2 could amount to a violation of the separate obligation to use the maximum available resources. And a measure not taken 'deliberately' under stage 3 test would fall within the 'real world' flexibility afforded to States and would not be retrogressive.[58]

The responsibility for showing all of these aspects is an open question as the CESCR does not specify who must prove each step. It might be surmised that, in practice, under General Comment 3 this responsibility will fall to the 'claimant' (whether an individual or NGO) that is invested in showing the breach. In some instances, such demonstrations will be relatively straightforward where, for example, deliberateness can be shown through government statements and/or legislation. Yet other parts of showing retrogression, requiring proof that there was no 'careful consideration' by the State, will be substantially more difficult. By the time the CESCR had developed General Comment 19 (some eighteen years later) this balance has been significantly redressed, with the CESCR explicitly putting more of a burden upon the State to prove the existence of some mitigating factors. In this version of the doctrine, the only aspects of proof not specifically assigned to the State are the deliberateness of the measure, and – understandably – the demonstration that a retrogressive measure has been enacted.

Yet, this later version of retrogression is also made even more complex. General Comment 19 leaves the structure of General Comment 3 in place, but adds a further step:

6) Does the CESCR find (despite a strong presumption against permissibility) and considering the following factors, that retrogression was impermissible?
   a. there was reasonable justification for the action;
   b. alternatives were comprehensively examined;

[56] CESCR, *General Comment 18* (n 37) para 21; CESCR, *General Comment 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)* (UN Doc E/C12/GC/22 2016) para 38.

[57] ~~CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 paras 11, 12; Chairperson of the CESCR (n 12); Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39; on how 'reasonableness' and the margin might interact see, Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) The International Journal of Children's Rights 248, 277.~~

[58] CESCR, *General Comment 3* (n 3) para 9.

c. there was genuine participation of affected groups in examining the proposed measures and alternatives;
d. the measures were directly or indirectly discriminatory;
e. the measures will have a sustained impact on the realization of the right […], an unreasonable impact on acquired […] rights or whether an individual or group is deprived of access to the minimum essential level of [the right];
f. whether there was an independent review of the measures at the national level.

In addition to the five criteria of General Comment 3, the newer approach adds a melee of six suggested factors that the CESCR are able to consider in order to make a finding of retrogression. On paper, this is an addition to the previous steps, and therefore should act in favour of those claiming retrogression has taken place (retrogression can now be found at stages 4, 5, or 6). Put differently, even those measures that are carefully considered measures and justified by reference to other ICESCR rights can now be found to be retrogressive according to General Comment 19. However, in reality a rigorous step-by-step approach to retrogression is rarely followed with the result that the previously discussed criteria (and the entire retrogression content of General Comment 3) are positioned as mere prerequisites to empower the CESCR to undertake a more substantive assessment based on a weighing of factors in the sixth step. This additional complexity, and the increased range of factors that are to be considered, is liable to make it even more difficult to show that retrogression has taken place.

Beyond these general difficulties with the process of proving retrogression, there are some specific problems with the various burdens of proof attached to the doctrine. The Committee often notes that there is a 'strong presumption of impermissibility' of retrogression and that the 'State party has the burden of proving' that its measure is a permissible and justified one. [59] It has occasionally varied its language to say that retrogressive measures 'should in principle not be taken'[60] and that the State party 'has to demonstrate'[61] the permissibility of the measure. Despite the Committee's repetition of these key phrases, there is little expansion in general or through specific examples on the meaning of a 'strong presumption of impermissibility' for the State's burden of proof. The 'strong presumption' against retrogression could, for instance, indicate that the standard or strength of the burden of proof that rests upon States is a difficult one to overcome, or that there is very little deference to the State's justification. Courtis, for example, argues that retrogression is subject to 'heightened scrutiny'.[62] Such a standard is easily justified when informational asymmetry of States and the often large teams of analysts available to them is considered. The burden upon States in disproving retrogression might be summarised in the following terms; 'there is a rebuttable but strong presumption that retrogressive measures are impermissible. It is for the State to rebut that presumption and thereby to prove their permissibility'.

In respect of Optional Protocol complaints by individuals petitioning the CESCR for a case-specific remedy, there are several ~~add an~~ additional layers of complexity. In the Optional Protocol treaty, as a key reassurance to States,[63] ~~the~~ issues under consideration are to be seen through a reasonableness lens and States are afforded an additional discretion in choosing which policy approach to pursue.[64] Article 8(4) of the Optional Protocol obliges the CESCR to 'consider the reasonableness of the steps taken by the State Party'. In addition, the Committee is required to assess the actions of the State while

[59] CESCR, *General Comment 13* (n 7) para 45.
CESCR, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (UN Doc E/C12/2002/11 2002) para 9. CESCR, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15(1)(c) of the Covenant)* (UN Doc E/C12/GC/17 2006) para 27.
[60] CESCR, *General Comment 18* (n 37) para 21.
[61] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 paras 9, 10. ~~CESCR, '"Maximum of Available Resources" Under an Optional Protocol' (n 57) paras 9, 10.~~
[62] Courtis (n 25) 393.
[63] Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39, 45.
[64] '[T]he Committee shall bear in mind that the State Party may adopt a range of possible policy measures'; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013, UN Res A/RES/63/117) art 8(4).

'bearing in mind' that States are entitled to pursue the ICESCR rights in a range of ways (thereby giving a sort-of margin of appreciation to the State[65]). Further, the focus of the Optional Protocol on specific cases gives rise to questions of how individual cases are to be reconciled with the broader claims of society. For example, the Committee will have to grapple situations where there has been manifest retrogression of an individual's rights, but where this has not occurred in the context of general societal retrogression. The Inter-American Court of Human Rights concluded that it was possible to find an individual violation of socio-economic rights, while rejecting the claim that there was a general violation of those rights.[66] However, it remains to be seen whether the CESCR could sustain such a position alongside the general examinations of States that it undertakes.

Therefore, ~~Thus~~ in the Optional Protocol context, the CESCR will be required to filter its analysis through multiple and often unclear burdens of proof and standards of adjudication. It is currently difficult to know how the Committee will undertake such a task. The difficulty of the multiple aspects of the doctrine could result in avoidance techniques or muddled reviews, or conversely could lead to a constructive rationalisation of the many and overlapping criteria. At present, only five substantive views have been issued under the Optional Protocol process (with the others being rejected at the admissibility stage).[67] Of these, only one mentions retrogression. The Committee's handling of retrogression in that case was robust and more rigorous than any previous application of the doctrine. Further, and demonstrating a potential route through the complex burdens of proof, the Committee was able to fill the large gaps in the Spanish State's defence of its own position. This early sign from the Optional Protocol is promising and shows how a degree of simplification can make the doctrine more useable, but the complexity of non-retrogression might yet come to overwhelm attempts to invoke it in individual complaints.

~~Besides this array of standards, is the requirement of article 8(4) of the Optional Protocol which obliges the CESCR to consider the reasonableness of the State's actions when considering complaints. The balancing of these standards is to take place while 'bearing in mind' that States are entitled to pursue the ICESCR rights in a range of ways (thereby giving a sort-of margin of appreciation to the State[68]).~~

This discussion of non-retrogression ~~is~~ touches on complex questions of evidence and proof that are generally under-explored in relation to the treaty bodies, and which go beyond the scope of this article.[69] However, a few key points on these burdens are necessary. Firstly, while it might look attractive to divide the proof of the facts from legal evaluation (and the so-called burden of persuasion), this approach is challenging in the arena of human rights law.[70] Adjudication of human rights questions tends to lead to overlapping considerations of the social situation, the law and even normative questions. In a range of judicial settings courts have been vague about whether burdens of proof are to be applied to law, facts, or both.[71] The same is true of the CESCR which gives no guidance on whether the burden upon States is a burden that requires the production of evidence, a burden of persuasion, or

[65] CESCR, '"Maximum of Available Resources" Under an Optional Protocol' (n 61) paras 11, 12; Chairperson of the CESCR (n 12); Porter (n 63); on how 'reasonableness' and the margin might interact see, Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) The International Journal of Children's Rights 248, 277.

[66] *Case of the "Five Pensioners" v Peru* [2003] IACtHR Series C No.98.

[67] *López Rodríguez v Spain* [2016] CESCR Communication 1/2013, UN Doc E/C.12/57/D/1/2013; *IDG v Spain* [2015] CESCR Communication 2/2014, UN Doc E/C.12/55/D/2/2014; *Djazia and Bellili v Spain* [2017] CESCR Communication No 5/2015, UN Doc. E/C.12/61/D/5/2015; *Ana Esther Alarcón Flores et al v Ecuador* [2017] CESCR Communication No 14/2016, UN Doc. E/C.12/62/D/14/2016; *Marcia Cecilia Trujillo Calero v Ecuador* [2018] CESCR Communication No 10/2015, UN Doc. E/C.12/63/D/10/2015.

[68] ~~CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 paras 11, 12; Chairperson of the CESCR (n 12); Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39; on how 'reasonableness' and the margin might interact see, Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) The International Journal of Children's Rights 248, 277.~~

[69] For a classic and comprehensive look at such questions in the English common law, see HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, OUP 1985).

[70] Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches With Special Reference to the American and German Legal Systems* (Martinus Nijhoff Publishers 1998) 4.

[71] ibid 40.

a hybrid burden that requires a combination of the two. Yet the determination of these questions is vitally important in determining the 'risk of non-persuasion'[72] (i.e. who risks losing the dispute if the case is not proved). This should lie with the State according to the CESCR's guidance, but in practice the risk has been left squarely with civil society and individuals. Were the Optional Protocol's inquiry procedure to be used in relation to potential retrogression, the picture would become even more complex and could conceivably draw the CESCR itself into the exercise of proof/ disproof.[73]

There are, further, a number of areas where non-retrogression steps into the territory of other obligations and encounters different burdens of proof. For example, the CESCR has been clear that where the retrogression leads to an infringement of the core content of the ICESCR rights, then there is a straightforward relationship.[74] It notes straightforwardly that, '[t]he adoption of any retrogressive measures incompatible with the core obligations … constitutes a violation'.[75] This amounts to a 'strict liability' approach in the sense that there are none of the flexibilities that exist in relation to retrogression. A similar approach is taken to equality between women and men according to the CESCR's work on that specific topic (although this approach is more easily grounded in article 3 of the Covenant).[76]

~~Optional Protocol complaints add an additional layer of complexity. In the Optional Protocol treaty, as a key reassurance to States,[77] the issues are seen through a reasonableness lens and States are afforded an additional discretion in choosing which policy approach to pursue.[78] Thus in the Optional Protocol context, the CESCR will be required to filter its analysis through multiple and often unclear burdens of proof and standards of adjudication. This is likely to cloud reasoning and leave the process and proof elements unclear.~~

As a whole, these multiple layers and aspects of proof leave enforcement on a vague footing. Close attention shows how they cause a complex process that is likely to be well beyond the capacity of the international human rights system to interrogate (especially in light of its severe workload issues). The breakdown also demonstrates the large number of aspects that can fall to individual claimants and civil society to evidence.

5. Examinations: Timing and Triggers

The CESCR has a mere six hours with which to examine and question States on – at least – five years' worth of human rights issues.[79] Even when a State faces its six-hour examination, the irregularity of that examination may allow the State to avoid effective scrutiny. While States are notionally subject to a review every five years, there was in fact a 9.7 year gap between the most recent and penultimate examinations of OECD countries (the smallest gap was 5.5 years).[80] This becomes all the more obvious in moments of crisis where retrogression is more likely. In the 2007/8 financial and economic crisis most

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[72] ibid 2.

[73] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (n 64) art 11.~~*Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013, UN Res A/RES/63/117) art 11.~~

[74] Of course, identifying the content of the minimum core remains a significant challenge in many cases.

[75] CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 48; See also, CESCR, *General Comment 15* (n 59) para 42; CESCR, *General Comment 17* (n 59) para 42; CESCR, *General Comment 19* (n 38) para 64; CESCR, *General Comment 23: The Right to Just and Favourable Conditions of Work (Art 7 of the Covenant)* (UN Doc E/C12/GC/23 2016) para 52.

[76] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3 1966) art 3; CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)* (UN Doc E/C12/2005/4 2005) para 42.

~~[77] Porter (n 57) 45.~~

~~[78] '[T]he Committee shall bear in mind that the State Party may adopt a range of possible policy measures'; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (n 67) art 8(4).~~

[79] Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System' (United Nations Human Rights Office of the High Commissioner 2012) 31.

[80] Data on file with author.

an average of five years passed between OECD States entering recession[81] and their Concluding Observations being released, with much longer in some cases.[82] This length of time allows States to advance substantially new policy directions and violate the ICESCR rights without ongoing review. Of course, when the State examination does occur, the CESCR is able to look back to retrogression previously committed, but where the context has changed or the policy has already been reversed this type of review will be largely redundant. At its core, such significant delays hinder the richness of the 'constructive dialogue' that can be had between the Committee and the State.[83]

The CESCR's planned five-yearly schedule of State examinations has proved so illusory that since 2013 the CommitteeESCR now counts the five-year period between examinations as beginning at the date of the last State dialogue with the CESCR, rather than the previously completely static five-year programme of deadlines.[84] This essentially resets the delay on the examination of States at each examination. At any one time the number of State reports submitted and requiring examination is relatively stable at around 45 reports.[85] The Committee has expressed its concern in strong terms that backlogs and resource constraints, 'no longer permit it to fully discharge its responsibilities under the [ICESCR] … in an efficient, effective and timely manner'.[86]

These pressures mean that even during 'normal' times there is a significant length of time between examinations, however, in the context of a crisis such as the most recent one there are additional issues that particularly inhibit the use of retrogression. While the primary purpose of the State Examination process is the discussion of policy rather than specific individual cases, the CESCR's efforts in changing State policy will have an indirect effect in changing individual or group circumstances. Therefore delays in the State examination process will have a knock-onis has an impact upon rights-holders seeking to vindicate their immediately realisable rights under the Covenant. In particular, it poses an obvious difficulty for any attempts to examine potential retrogression contemporaneously to its occurrence. Efforts to undertake *ex ante* assessments are similarly stymied. In the case of immediate obligations and, particularly in the context of this discussion, in the case of non-retrogression the periodic approach to examinations leaves a significant enforcement lag.

The reason for this lag is straightforward. With an immediate obligation, at the moment that a violation has occurred it will be relatively obvious. Take the example of the right to education. It contains an immediate obligation upon the State to ensure non-discrimination in respect of education.[87] If the State enacts a discriminatory policy, then it would be in breach of its immediate obligation, and the discriminatory policy could be identified as a breach of the obligation with relative ease. While it may be more complicated in certain instances (for example, where a claim of indirect discrimination requires evidence of the differential impact), there is no doctrinal reason for a delay in finding a breach of the State's obligations. However, there may be some years between the enactment of a policy (and the consequent violation), and the examination of the State. A delay between the violation of an obligation and a State examination means a gap between violation and enforcement that has obvious implications for the rights-holder and the effectiveness of the ICESCR system. Non-retrogression suffers from exactly this problem.

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[81] Recessions are defined by a majority of economists as two consecutive quarters of negative growth (i.e. two, 3-month periods where a country's GDP was reduced on average); Roger A Arnold, *Economics* (Cengage Learning 2008) 151.

[82] An average of five years and one month between the beginning of recession for OECD States and the release of Concluding Observations by the CESCR. This figure excludes Luxembourg (which has yet to report). Data on file with Author.

[83] Beata Faracik, 'Constructive Dialogue as a Cornerstone of the Human Rights Treaty Bodies Supervision' (2006) 38 Bracton Law Journal 39.

[84] This change in approach, although entirely pragmatic, also has the effect of allowing States to benefit from their own delays in cooperation. CESCR, 'Report on the Forty-Eighth and Forty-Ninth Sessions' UN Doc E/2013/22 para 46.

[85] CESCR, 'Report on the Fiftieth and Fifty-First Session' UN Doc E/2014/22 para 5 (Draft decision recommended for adoption by the Economic and Social Council).

[86] ibid paras 5, 6.

[87] CESCR, *General Comment 11: Plans of Action for Primary Education (Art 14 of the Covenant)* (UN Doc E/C12/1999/4 1999) para 10.

As an example, of how these various delays in the Committee examining a State can play out, consider the lag between the beginning of potentially retrogressive austerity measures in Ireland in 2008 (potentially constituting an immediate violation of the Covenant) and the State examination in 2015.[88] Here there was a delay of seven years before the State was examined and the potency of the constructive dialogue was significantly harmed.[89] However, besides the effectiveness of the State Examination process being damaged, there are also effects for human rights impacts. The Committee recommended that Ireland phase out austerity measures[90] and that it revoke those measure that disproportionately affect disadvantaged children.[91] These are findings that are useful to individuals and organisations making their cases in a domestic setting, but these recommendations were not made until individuals had endured a long period of having their rights violated.

The Optional Protocol provides a partial remedy to this problem, allowing further triggers for the consideration of violations of the ICESCR in between periodic State examinations. However, the low ratification level (so far) and the slow pace at which complaints have been dealt with,[92] means that the Protocol is far from perfect as a remedy to this particular problem.[93]

At the same time, potential doctrinal changes to retrogression contained in the Letter to States threaten to exacerbate the issue. [94] By requiring retrogressive measures to be 'temporary' in its Letter to States during the crisis, the CESCR inadvertently intensified the difficulty with infrequent periodic examinations. A detailed examination of retrogressive measures that have ended prior to the State examination would be somewhat redundant, and ended measures are likely to be classed by the CESCR as 'temporary' ones. Yet, such retrogressive policies may be far from temporary if they have existed for the ten years that can sometimes exist between State examinations.

However, even if such difficulties were to be addressed through an increased frequency of State examinations or additional triggers for the consideration of potential violations, there are remaining issues of process. As the discussion in the previous section illustrates, the identification of retrogression can require at least five consequential stages of proof. Assume first, that the CESCR is satisfied that prima facie retrogression is proved by the State report or by NGO shadow reports. The Committee would then need to request that the State prove a) the measure was taken in the context of the use of the maximum of available resources, b) after careful consideration, and c) is justified by reference to the totality of rights. It could do this through the List of Issues sent prior to the State examination and could follow up in the oral examination.[95] Yet even if all of these are sufficiently proved by the State, the Committee would then have to go on to consider deliberateness and subsequently assess factors in favour of permissibility. It is clear that this process requires persistence and an investment of limited time from the Committee, and a State that is (extremely) forthcoming in proving the validity of its

[88] CESCR, *Concluding Observations: Ireland* (UN Doc E/C12/IRL/CO/3 2015).

[89] Three governments covered this period of time and the leading party in government had changed by the time the review had taken place.

[90] CESCR, *Concluding Observations: Ireland* (n 88) para 11(b).

[91] ibid para 31(c).

[92] The five~~three~~ substantive views adopted so far having taken an average of just over~~a~~ two years from the author's submission. Inadmissibility decisions have been much quicker, taking an average of five months. Office of the High Commissioner for Human Rights, 'Table Of Pending Cases Before The Committee On Economic, Social And Cultural Rights, Considered Under The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights' (2015) <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx> accessed 22 June 2018; 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed 22 June 2018.

[93] See further discussion above at pages 11-12. ~~Office of the High Commissioner for Human Rights, 'Table Of Pending Cases Before The Committee On Economic, Social And Cultural Rights, Considered Under The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights' (2015) <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx> accessed 22 June 2018; 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed 22 June 2018.~~

[94] Ben TC Warwick, 'Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65(1) International and Comparative Law Quarterly 249.

[95] Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?* (Intersentia 2004) 131, 133.

actions. In reality, it is unlikely that there are enough opportunities for the sort of back-and-forth dialogue that is needed to establish all of the dimensions of proof.

In practice, the CESCR does not request States to provide any information on retrogression in their original State reports.[96] Further it has only explicitly used the List of Issues to ask States for (greater) information on potentially retrogressive measures in three of the 207 available Lists (1.5%). The most remarkable of these is where the Committee asks Spain in the first line 'to what extent the austerity measures taken by [it] in the context of the economic and financial crisis have taken into account the requirements specified in the letter [to States on the crisis]'.[97] In the other two cases the information that was requested would be far from sufficient to allow the Committee to properly assess for retrogression.[98] There was nothing explicit included to remind the State of its burden of proof in relation to retrogression. Very similar phrasing was used by the Committee in both instances. The fuller of the two asked the State to:

> [p]lease provide a general assessment of the impact of the recent economic and financial crisis on the enjoyment of economic, social and cultural rights, *including a summary assessment of possible retrogressive policies and measures, as well as the principles on which such policies and measures were based, including the application of the relevant criteria* identified in the letter of the Chair of the Committee on Economic, Social and Cultural Rights addressed to State parties on 16 May 2012.[99]

It is clear that the Committee will continue to struggle to apply the full complexity of the doctrine of non-retrogression without adequate information, and without using all possible avenues to seek such information. Indeed, even in the two instances highlighted above where the CESCR requested that States addressed retrogression, no such elaboration was forthcoming in the States' replies to the List of Issues.[100] The replies were instead used as a forum for a general discussion of the countries' situations with no direct linkage to retrogression or its language

~~-~~The CESCR has also adopted a procedure whereby it can follow-up on the progress a State has made on a recommendation made prior to the date of the next full examination.[101] This will be an important enforcement mechanism, but remains reliant on the formation of clear recommendations at the stage that the Concluding Observations are issued. For example, if a clear finding of retrogression is made in the Concluding Observation then a year or two later the CESCR could ask the State to account for the remedial action it has taken. If there is no, or only a vague, recommendation on retrogression is made then there is little prospect of any successful use of the follow-up procedure.

Without more robust monitoring mechanisms at the international level to allow more regular and more rigorous review of States' potentially retrogressive measures, the doctrine of non-retrogression will remain ineffective. It is clear that the Committee does not have adequate time to properly examine States, nor is able to do so with sufficient regularity. Whatever form the obligations take, and however strong and clear they are, they will require time to apply.

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[96] 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.

[97] CESCR, *List of Issues Prior to Submission: Spain* (UN Doc E/C12/ESP/QPR/6 2016) para 1.

[98] CESCR, *List of Issues: Greece* (UN Doc E/C12/GRC/Q/2 2015); CESCR, *List of Issues: Portugal* (UN Doc E/C12/PRT/Q/4 2013).

[99] CESCR, *List of Issues: Portugal* (n 98) para 3 (emphasis added); similar wording in CESCR, *List of Issues: Greece* (n 98) para 2.~~CESCR, *List of Issues: Portugal* (n 88) para 3 (emphasis added); similar wording in CESCR, *List of Issues: Greece* (n 88) para 2.~~

[100] CESCR, *Reply to the List of Issues: Greece* (UN Doc E/C12/GRC/Q/2/Add1 2015) paras 2-12; CESCR, *Reply to the List of Issues: Portugal* (UN Doc E/C12/PRT/Q/4/Add1 2014) paras 13-31.

[101] CESCR, 'Report on the Twentieth and Twenty-First Sessions' UN Doc E/2000/22 para 38; recently revisited at CESCR, *CESCR Note on the Procedure for Follow-up to Concluding Observations* (adopted at its 61st Session 2017).

6. Conclusions

The CESCR (and all of the UN treaty bodies) face colossal operational challenges and must apply a framework of obligations that is, in many respects, still under development. Yet, in the current era of crisis and draw-back from rights, it is essential that there is a renewed focus on the tools available. Non-retrogression is an essential and chronically under-used tool in scrutinising backwards steps and in preventing them. The main challenges that are currently tempering the potential of the doctrine of non-retrogression have been addressed in this article.

First, there exists a fuzziness in what sort of backwardsness the doctrine seeks to address. The work of the Committee and the majority of the scholarship leaves ambiguity as to whether it is a backwards effect that is being addressed (i.e. something visible 'on the ground'), or whether a government's (in)actions that are self-evidently worsening rights are also covered. Taking the work of Nolan, Lusiani and Courtis as a foundation, two forms of the doctrine were discussed – normative and empirical retrogression. This section discussed the potential of the former category to be more expansive and include non-legal measures, and the challenges inherent showing empirical retrogression.

Having addressed what sort of backwardsness the doctrine is concerned with, the following section turned to the question of which backwards State actions or inactions were culpable according to the doctrine. This particular lack of clarity results from a linguistic confusion between the phrases used by the Committee and in the literature; 'deliberate retrogressive measures' and 'deliberately retrogressive measures'. As was seen, however, the confusion goes well beyond semantics and determines the scope of the obligation and significant parts of its operation.

The difficulties in proving retrogression were also discussed, with the large number of elements to the doctrine unpacked. For each of these, the question of who bears the responsibility for showing the element has been satisfied was examined and the practical consequences considered. Finally, the article turned to the most operational of its concerns to address how an assessment of retrogression fits within the processes and capacities of the CESCR. An appraisal of the latest examinations of OECD States showed that there had been an average of 9.7 years between the last two occasions when they faced the CESCR. This leads to significant implications for the monitoring of the doctrine of non-retrogression.

~~Together this analysis of the doctrine of non-retrogression indicates a doctrine that is, in the abstract, ideal for many of the challenges faced by human rights and by the CESCR. However, in many practical senses, there is an urgent need for adjustment, clarification and reform. Without addressing these conflicting concepts and patchy practices, the doctrine will remain stubbornly under-used and ineffective.~~In improving its use of the doctrine, the Committee should carefully balance three priorities; 1) rationalisation, 2) clarity, 3) practicability. It is clear from the discussion above that the doctrine of non-retrogression has grown in an organic and sometimes haphazard manner. This has caused overlapping and conflicting criteria to be attached to it in an ever-more expansive manner. The Committee should undertake an exercise of rationalising the doctrine, with the aim of definitively stating its key components.

Connected to this first priority is the second; the need for clarity. Subtle ambiguities in language can drastically change the meaning and scope of application of the doctrine of non-retrogression. One example discussed above was the difference between a deliberately retrogressive measure and a deliberate retrogressive measure. The Committee, in committing to a rationalised version of the doctrine, and more generally in its work in General Comments, Concluding Observations and Optional Protocol views must be precise about its meaning. One route to ensuring such clarity would be providing a broader range of examples, so that the scope and manner of the doctrine's application can be seen in

context. The Optional Protocol is a powerful tool in this respect, but the need for clear and illuminating examples also extends to Concluding Observations and General Comments.

The final priority that the CESCR must balance in its future work on the doctrine of non-retrogression is the practicability of the elements of the doctrine. As was discussed above, some elements of the present doctrine are too intricate or multi-layered to realistically be used within the time and resources available to the Committee. The Committee should be careful to avoid creating evidence burdens which cannot feasibly be overcome, or incorporating so many steps to an examination of non-retrogression that they exceed the steps actually available in the process of a State Examination.

Balancing these priorities – rationalisation, clarity, practicability – will pose a significant challenge, especially where they tend to conflict with one another. However, if the potential of the doctrine of non-retrogression is to be realised, then serious reforms are needed. If such radical reform is to take place then it is essential that these reforms carefully balance these priorities in order to improve rather than further complicate the doctrine.

~~Together this~~The analysis of the doctrine of non-retrogression in this article has indicated~~s~~ a doctrine that is, in the abstract, ideal for many of the challenges faced by human rights and by the CESCR. However, in many practical senses, there is an urgent need for adjustment, clarification and reform. Without addressing these conflicting concepts and patchy practices, the doctrine will remain stubbornly under-used and ineffective.