

# Growth versus Austerity: Protecting, Respecting, and Fulfilling International Economic and Social Rights During Economic Crises

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*International economic crises are to countries what reagents are to compounds in chemistry: they provoke changes that reveal the connections between particularities and the general. ... Economic crises shape countries, but crises also express what is happening within those countries. Both crises and countries change over time, so that relationships change as well. And every country faces each crisis differently.*

— Peter Gourevitch<sup>1</sup>

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1. PETER GOUREVITCH, POLITICS IN HARD TIMES: COMPARATIVE RESPONSES TO INTERNATIONAL ECONOMIC CRISES 221 (1986).

## I. INTRODUCTION

Economic crises may have precipitated political regime changes in the 20th Century,<sup>2</sup> but they may also be credited with provoking many normative developments in international law. Much of contemporary international law and cross-border regulatory practices derive from States' historical responses to issues of sovereign debt liability, the attribution of private actors' conduct towards States, multi-State coordination through international financing and banking institutions, diplomatic protection, and the international minimum standard of treatment owed to aliens, among others.<sup>3</sup> The *Oscar Chinn* case,<sup>4</sup> decided by the Permanent Court of International Justice (PCIJ) in 1934, was the first international judgment to recognize that the exogenous injury wrought by an economic crisis (the Great Depression) upon an investor's anticipated profits or returns on investment could, in specific circumstances, fail to give rise to a legally actionable vested right —

The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which is said to have led him to wind up his transport and shipbuilding businesses, is unable to see in his original position — which was characterized by the possession of customers and the possibility of making a profit — anything in the nature of a vested right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it.<sup>5</sup>

The *Oscar Chinn* case showed that injury exogenously caused by economic crises (and not endogenously caused through State actions responding to such crises) to investor returns need not engage a State's international responsibility. This position deviated from the earlier prevailing wisdom that economic crises *sua sponte* could not justify a State's non-

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2. See Mark J. Gasiorowski, *Economic Crisis and Political Regime Change: An Event History Analysis*, 89 AM. POL. SCI. REV. 882 (1995).

3. See generally EMMANUELLE JOUANNET & CHRISTOPHER SUTCLIFFE, *THE LIBERAL-WELFARIST LAW OF NATIONS: A HISTORY OF INTERNATIONAL LAW* 58-83, 152-83, 249-56 (2012); Christian Walters, *Debt Crisis* (Sample article from the online version of the Max Planck Encyclopedia of International Law), available at [http://www.mpepil.com/sample\\_article?id=/epil/entries/law-9780199231690-e1516&recno=1&](http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1516&recno=1&) (last accessed Sep. 6, 2012); Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L. J. 321 (2011); & Lawrence Baxter, *Internationalisation of law — the 'complex' case of bank regulation*, in *THE INTERNATIONALIZATION OF LAW: LEGISLATING, DECISION MAKING, PRACTICE AND EDUCATION* 3-37 (2010).

4. *Oscar Chinn (U.K. v. Belg.)*, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12, 1934).

5. *Id.* ¶ 99.

repayment of its debts. In the 1929 *Brazilian Loans* case<sup>6</sup> and the *Serbian Loans* case,<sup>7</sup> for example, the PCIJ had held that economic dislocations arising from the First World War did not necessarily release States from their obligation to pay sovereign bondholder claims.<sup>8</sup> The Court continued to assume this circumspect stance 10 years later in *The Societe Commerciale de Belgique*,<sup>9</sup> when it declined to rule on Greece's alleged incapacity to pay debts it had acknowledged (and were adjudged in final arbitral awards) due to financial hardship.<sup>10</sup>

Economic crises have strongly influenced the “regulatory turn in international law,”<sup>11</sup> and, as this Article will show, this regulatory turn encompasses developments on the content of modern human rights.<sup>12</sup> Questions of State responsibilities during economic crises were central to the historical dialectic that evolved in the articulation of international economic, social, and cultural rights, specifically contained in the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>13</sup> (and to

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6. This case involved the question of whether the Brazilian Government was obliged to pay French bondholders who had put in capital for the construction of various ports and railways in gold or its equivalent in value and not in French francs. The court ruled that the Great War had not exempted Brazil from its liabilities, and its obligation still stands, seeing as how the war did not make it impossible to obtain gold (or its equivalent) for payment. *Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.)*, 1929 P.C.I.J. (ser. A) No. 21 (July 12).
  7. The stance of the court seemed to soften in the *Serbian Loans* case, when it stated that the effects of war would surely “receive appropriate consideration” in determining actual liability. However, it still held, consistent with the *Brazilian Loans* case that a legal obligation to pay is not necessarily extinguished by war. *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, 1929 P.C.I.J. (ser. A) No. 20 (July 12).
  8. See *Brazilian Loans*, 1929 P.C.I.J. at 120, ¶ 66 & *Serbian Loans*, 1929 P.C.I.J. at 39-40, ¶ 82.
  9. *Societe Commerciale De Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).
  10. See *Societe Commerciale de Belgique*, 1939 P.C.I.J.
  11. By “regulatory turn,” Cogan means the shift of international law’s focus and action from the State and governments to the individual. Cogan, *supra* note 3, at 321.
  12. While Cogan’s article makes a distinction between the regulatory turn and what he terms as the “Human Rights Turn” in international law, this Article discusses how the human rights element is presented through the framework of the regulatory turn, which treats individuals as the main subject of international law. See Cogan, *supra* note 3, at 323-24 & 334-37.
  13. *International Covenant on Economic, Social, and Cultural Rights*, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

some extent, the “third-generation” right to development under the 1986 United Nations Declaration on the Right to Development).<sup>14</sup> The ultimate result of inter-State exchanges on these rights revealed a clear preference for a conceptual minimum (otherwise put, a “social protection floor”)<sup>15</sup> to be observed by States even during economic crises. These rights were designed to progressively accommodate and adjust to deteriorating fiscal capacities of States during economic crises, without sacrificing the essential content of the very same rights imperilled by the threats to a State’s social protection policy-making abilities. As aptly observed by Thomas Hammarberg, the Council of Europe Commissioner of Human Rights, at the height of the global economic crisis of 2008 —

[i]n times of economic crisis it is particularly essential to ensure the protection of social rights. ... Economic and social rights have not been defined in a vacuum; they are based on the experience of past crises and on the knowledge that ignoring social justice comes at an enormous cost. They can also serve as very useful guiding principles for political decision makers at a time when difficult choices have to be made.<sup>16</sup>

This Article draws attention to a neglected aspect of State responses to economic crises within the realm of public international law and international human rights law. While much of the current debates on the spiralling Eurozone debt crisis focus on inter-State proposals such as the fiscal treaty compact, a banking union, or deeper political or federal unions between the Eurozone member States,<sup>17</sup> a counterpart broader dialogue must also be had on the duties of States to protect, respect, and fulfill international economic, social, and cultural rights, particularly during economic crises when States are most likely to initiate various new policy measures. The 2012 ILO/World Bank Joint Synthesis Report entitled *Inventory of Policy Responses to the Financial and Economic Crisis* observes that

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14. Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

15. The term “social protection floor” was developed by the International Labor Organization to describe an approach which encouraged governments to guarantee security and social services to their populations “paying particular attention to vulnerable groups.” International Labor Organization [ILO] & World Health Organization [WHO], Social protection floor for a fair and inclusive globalization (Report of the Social Protection Floor Advisory Group Chaired by Michelle Bachelet), available at <http://www.ilo.org/public/english/protection/secsoc/downloads/bachelet.pdf> (last accessed Sep. 6, 2012).

16. Thomas Hammarberg, In times of economic crisis it is particularly essential to ensure the protection of social rights, available at [http://www.coe.int/t/commissioner/Viewpoints/081117\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/081117_en.asp) (last accessed Sep. 6, 2012).

17. See, e.g., Peter Spiegel, EU plan to rewrite Eurozone budgets, available at <http://www.ft.com/intl/cms/s/o/oda7179e-bee4-11e1-bebe-00144feabdco.htm#axzz1z2UUDv6O> (last accessed Sep. 6, 2012).

most governments favor a combination of growth and social protection policies during global financial crises, rather than simply imposing austerity measures —

Social insurance and social assistance programmes are the main instruments to provide income protection to workers in the case of a shock. The most common social insurance programmes include health insurance; old age, disability, and survivorship pensions; and unemployment benefits. The programmes are usually financed, at least in part, through workers contributions and pay-roll taxes. Social assistance programmes, on the other hand, include various forms of targeted or universal cash or in-kind transfers financed out of general revenues.

Confronted with increased needs, 69 countries expanded social insurance and social assistance programmes, while three took only austerity measures. There was also a clear trend towards expanding existing schemes rather than introducing new ones. ... The survey clearly demonstrates regional trends in terms of responses. High-income countries were more likely to amend their unemployment benefit systems. In middle-income countries, most of them lacking established unemployment schemes, the most common form of crisis response was the extension of cash transfers — which can be implemented more quickly than social security schemes and discontinued once the crisis is over — and public work schemes. In low-income countries, food subsidies and, to a lesser extent, public works, were a common option.<sup>18</sup>

In times of economic crises, when State resources are challenged the most, the policy mix is critical to ensure continued ICESCR compliance. The Committee on Economic, Social, and Cultural Rights (Committee) has held the view that, in times of economic crises, while they may push governments to formulate and execute programs which “involve a major element of austerity,”<sup>19</sup> this should not trigger a corresponding decline in social security and welfare for the individual.<sup>20</sup> Rather, it is during these times that both States and international organizations should be more steadfast in implementing full protection for the economic, social, and cultural rights of the person.<sup>21</sup> States should see to it that this protection is

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18. International Labor Organization and World Bank, *Inventory of Policy Responses to the Financial and Economic Crises (Joint Synthesis Report)* 27, available at [http://siteresources.worldbank.org/INTLM/Resources/ILO\\_WB\\_2012.pdf](http://siteresources.worldbank.org/INTLM/Resources/ILO_WB_2012.pdf) (last accessed Sep. 6, 2012).

19. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 2: International Technical Assistance Measures* (arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights), ¶ 9, U.N. Doc. E/1990/23 (Feb. 2, 1990) [hereinafter *General Comment No. 2: International Technical Assistance Measures*].

20. *Id.*

21. *Id.*

incorporated with any measure they take to adjust to economic crises, and the United Nations and other organizations should work to foster international cooperation, in order to effect such incorporation.<sup>22</sup> Policy responses must therefore be continually assessed for their consistency with the ICESCR.

This Article contributes to the debate on ICESCR compliance during economic crises by describing normative, empirical, and policy tools that States can wield to monitor and assess their continued compliance with the ICESCR. Part II (ICESCR During Economic Crises: A Social Protection Floor) discusses the normative contours of the minimum social protection obligations of States in relation to the ICESCR. Part III (ICESCR-Sensitive Policy Responses to Economic Crises: Reflections from the Committee) shows how these rights operate as a fixed constraint upon the policy options of States and why hard and inflexible “austerity” positions by States could prove inconsistent with these commitments under international human rights law. While the Committee put forward a set of guidelines in December 2011 to determine the consistency of State crises responses with the ICESCR, some pragmatic difficulties may nevertheless be anticipated due to the incipient status of quantitative and qualitative empirical monitoring of State performance of the minimum content of ICESCR rights during these crises. The Conclusion suggests a reorientation in the mandate of the Committee and the reporting duties of States contending with economic crises, particularly to ensure close monitoring and dialogue on ICESCR compliance and a State’s policy options during such periods of turbulent deprivations.

## II. ICESCR DURING ECONOMIC CRISES: A SOCIAL PROTECTION FLOOR

### *A. Resource Constraints Do Not Justify ICESCR Non-Compliance*

Article 2 (1) of the ICESCR describes the nature of the general legal obligations undertaken by State Parties to the ICESCR —

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>23</sup>

Resource constraints cannot adequately justify a State’s failure to comply with the minimum core content of ICESCR rights. The Committee

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22. See *General Comment No. 2: International Technical Assistance Measures*, *supra* note 19, ¶ 9.

23. ICESCR, *supra* note 13, art. 2 (1).

explains that the scarcity of resources at hand does not license States to neglect their duties relevant to the protection of rights. Rather, States are still mandated to “ensure the widest possible enjoyment of the relevant rights”<sup>24</sup> given their situations, and to come up with plans of action to be able to reconcile the “resource constraints” with the enjoyment of rights, as well as to be able to monitor the extent of non-enjoyment in their jurisdictions.<sup>25</sup> As such, even in times of severe resource constraints, “whether caused by a process of adjustment, of economic recession, or by other factors[,] the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.”<sup>26</sup>

The minimum essential levels of ICESCR rights should not be seen as arbitrarily predetermined static quantities. These minimum levels are determined mainly by the States themselves in partnership with the Committee and in conjunction with the regular reportage process under the Convention.<sup>27</sup> As such, these levels may require periodic dynamic reassessment. Part IV of the ICESCR places reporting obligations on States, which includes a State’s preliminary assessment of its resource constraints and the factors and difficulties that affect its degree of fulfillment of ICESCR obligations.<sup>28</sup> Within two years of the entry into force of the ICESCR for a particular State Party, that State has to submit a report containing a “comprehensive review ... with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant.”<sup>29</sup> The purpose of this initial report is to make sure States are truly aware of the situation in their territory with reference to persons’ enjoyment or non-enjoyment of each of the rights recognized in the Covenant. The initial report also serves to encourage States to monitor such situation regularly.<sup>30</sup> Subsequent periodic reports by the State Party are meant to assess progress or improvements from the

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24. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The Nature of State Parties’ Obligations* (art. 2 (1) of the *International Covenant on Economic, Social and Cultural Rights*), ¶ 11, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment No. 3: The Nature of State Parties’ Obligations*].

25. See *General Comment No. 3: The Nature of State Parties’ Obligations*, *supra* note 24, ¶ 11.

26. *General Comment No. 3: The Nature of State Parties’ Obligations*, *supra* note 24, ¶ 12.

27. See ICESCR, *supra* note 13, arts. 2 & 16.

28. *Id.* arts. 16-17.

29. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 1: Reporting by State Parties*, ¶ 2, U.N. Doc. E/1989/22 (Feb. 24, 1989) [hereinafter *General Comment No. 1: Reporting by State Parties*].

30. See *General Comment No. 1: Reporting by State Parties*, *supra* note 29, ¶ 3.

assessment first made in the initial report. The reports “provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant.”<sup>31</sup> The dialogic process between the State Party and the Committee also facilitates “public scrutiny of government policies with respect to economic, social[,] and cultural rights,”<sup>32</sup> and encourages cooperation between the State Party and non-governmental groups.

Most importantly, it should be noted that a State Party’s resource constraints and fiscal capabilities are already factored into the State’s initial determination of these minimum essential levels of ICESCR rights as reported to, and periodically evaluated with, the Committee. As the Committee stressed early on in the implementation of the ICESCR, the practice of States confirms that there is a “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights[.]”<sup>33</sup> Such an obligation constitutes the *raison d’être* of the ICESCR. As explained by the High Commissioner on Human Rights in his General Comment —

Article 2 (1) [of the ICESCR] obligates each State party to take the necessary steps ‘to the maximum of its available resources.’ In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources[,] it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>34</sup>

As the next Section will show, the Committee’s work of determining the “minimum core obligations” in partnership with ICESCR State Parties has already evolved towards certain discernible concrete guidelines. These guidelines, taken with the particular initial assessments made by a State Party submitted in its initial report to the Committee, can enable a State Party to identify the minimum “social protection floor” it has committed to continuously observe under the ICESCR.

#### *B. Minimum Core Obligations of the ICESCR: Seven Components of the “Social Protection Floor”*

The Committee has repeatedly considered severe economic contractions or crises in determining State Parties’ duty to comply with minimum core obligations under the ICESCR. Even in circumstances where economic

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31. *General Comment No. 1: Reporting by State Parties*, *supra* note 29, ¶ 6.

32. *Id.* ¶ 5.

33. *General Comment No. 3: The Nature of State Parties’ Obligations*, *supra* note 24, ¶ 10.

34. *Id.*



sanctions are to be lawfully imposed by the United Nations Security Council pursuant to its authority under the United Nations Charter, the Committee observes that the system of economic sanctions imposed by the Security Council still makes room for the availability of and access to basic resources.<sup>35</sup> This is in line with the duty of “the international community itself ... to do everything possible to protect ... the rights of the affected peoples of the State.”<sup>36</sup>

Over the years and in the process of its reportage and coordination with ICESCR State Parties, the Committee has developed guidelines on determining the minimum core content (otherwise known as core obligations) of the right to food,<sup>37</sup> the right to health,<sup>38</sup> the right to social security,<sup>39</sup> and the right to water,<sup>40</sup> among others, in the Committee’s General Comments. While these General Comments are not legally binding

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35. *General Comment No. 3: The Nature of State Parties’ Obligations*, *supra* note 24.

36. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 8: The Relationship Between Economic Sanctions and Respect for Economic, Social, and Cultural Rights*, ¶¶ 4 & 7, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).

37. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (art. 11 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶¶ 8-13 & 17, U.N. Doc. E/C.12/1999/5 (Dec. 5, 1999) [hereinafter *General Comment No. 12: The Right to Adequate Food*]. See also Rolf Künemann, *The Right to Adequate Food: Violations Related to its Minimum Core Content*, in *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 161-83 (Audrey R. Chapman & Sage Russel eds., 2002).

38. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 43, U.N. Doc. E/C.12/2000/4 (Nov. 11, 2000) [hereinafter *General Comment No. 14: The Right to the Highest Attainable Standard of Health*]. See also Audrey R. Chapman, *Core Obligations Related to the Right to Health*, in *CORE OBLIGATIONS*, *supra* note 37, at 185-215.

39. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 19: The Right to Social Security (art. 9 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 59, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) [hereinafter *General Comment No. 19: The Right to Social Security*]. See also Lucie Lamarche, *The Right to Social Security in the International Covenant on Economic, Social, and Cultural Rights*, in *CORE OBLIGATIONS*, *supra* note 37, at 87-114.

40. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 37, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment No. 15: The Right to Water*].

in nature and are often regarded as a form of soft law,<sup>41</sup> they are not to be easily disregarded. The General Comments are significant sources of authoritative interpretation of the ICESCR by the Committee, deriving “from an explicit invitation to do so by the Economic and Social Council.”<sup>42</sup> The following Subsections summarize the minimum core content of ICESCR rights as developed by the Committee.

### 1. On the Right to Adequate Housing

With respect to the right to adequate housing,<sup>43</sup> the Committee recognizes that different State Parties will consider varying factors in determining adequacy, but that there are certain things which must be taken into account regardless of the State’s situation, such as legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.<sup>44</sup> Moreover, in every country, the Committee maintains that certain measures involving facilitation of self-help to vulnerable sectors and the forbearance of government from certain practices should be implemented immediately.<sup>45</sup> If such measures seem beyond the capacity of the State to implement due to limited resources, it is their duty to seek aid from the international community “in accordance with [A]rticles 11 (1), 22[,] and 23 of the Covenant, and that the Committee be informed thereof.”<sup>46</sup> Measures to vindicate the right to adequate housing may reflect a mix of appropriate public and private sector actions so long as “[i]n essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.”<sup>47</sup>

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41. See generally Dinah L. Shelton, *Soft Law* (George Washington University Law School Public Law and Legal Theory Legal Studies Research Paper No. 322) 5, available at <http://ssrn.com/abstract=1003387> (last accessed Sep. 6, 2012).

42. Urfan Khaliq & Robin Churchill, *The protection of economic and social rights: a particular challenge?*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 199–260 & 204–07 (Hellen Keller & Geir Ulfstein eds., 2012).

43. ICESCR, *supra* note 13, art. 11 (1).

44. See U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (art. 11 (1) of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 8, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter *General Comment No. 4: The Right to Adequate Housing*].

45. *General Comment No. 4: The Right to Adequate Housing*, *supra* note 44, ¶ 10.

46. *Id.*

47. *Id.* ¶ 14.

## 2. On the Right to Education

In the context of the right to education,<sup>48</sup> the Committee explains that there exists an obligation to respect which requires States to “avoid measures that hinder or prevent the enjoyment of the right to education.”<sup>49</sup> An additional obligation to protect requires States to ensure that third parties are prevented from doing the same.<sup>50</sup> Finally, the “obligation to fulfill (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education.”<sup>51</sup> The minimum core obligation with respect to the right to education includes obligations —

to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in [A]rticle 13 (1); to provide primary education for all in accordance with [A]rticle 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ ([Article] 13 (3) and (4)).<sup>52</sup>

Finally, the Committee stresses that, with regard to primary education, a State is obligated to offer “compulsory primary education, free of charge.”<sup>53</sup> It cannot avoid this obligation by reason of lack of resources. Should there really be such scarcity, the obligation extends to the “international community” who must help.<sup>54</sup>

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48. ICESCR, *supra* note 13, art. 13 (1).

49. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 13: The Right to Education (art. 13 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 47, U.N. Doc. E/C.12/1999/10 (Aug. 12, 1999) [hereinafter *General Comment No. 13: The Right to Education*].

50. *See General Comment No. 13: The Right to Education, supra* note 49, ¶ 47.

51. *General Comment No. 13: The Right to Education, supra* note 49, ¶ 47. As a general rule, State Parties are obliged to fulfill (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. *Id.*

52. *Id.* ¶ 57.

53. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 11: Plans of Action for Primary Education (art. 13 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 9, U.N. Doc. E/C.12/1999/4 (May 10, 1999) [hereinafter *General Comment No. 11: Plans of Action for Primary Education*].

54. *See General Comment No. 11: Plans of Action for Primary Education, supra* note 53, ¶ 9.

### 3. On the right to Adequate Food

The Committee clarified early on that the right to adequate food<sup>55</sup> is not determined according to a minimum benchmark (calories, nutritional value, etc.), but rather, would have to be “realized progressively.”<sup>56</sup> The obligation to respect this right prohibits States from doing anything to prevent access to adequate food while the obligation to protect this right “requires measures by the State to ensure that [private] enterprises or individuals do not deprive individuals of [the same].”<sup>57</sup> Finally, the obligation to fulfill (facilitate) this right means that “the State must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.”<sup>58</sup> The core content of the right to adequate food has been described as the —

availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture [and] accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>59</sup>

The burden of proof is on any State when it claims that, due to shortage in resources, it cannot meet the minimum essential levels with regard to food. In addition to proving that it has done its best to allocate its resources, it must also prove that it has sought international aid but there was a failure to respond or an inadequacy of such response.<sup>60</sup> Thus, even when a State faces severe resource constraints, “whether caused by a process of economic adjustment, economic recession, climatic conditions[,] or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.”<sup>61</sup>

### 4. On the Right to the Highest Attainable Standard of Health

This right does not merely pertain to a right to health care, but rather, “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health[.]”<sup>62</sup> State Parties set these national benchmarks and health indicators in coordination with the Committee, using work

55. ICESCR, *supra* note 13, art. 11 (1).

56. *General Comment No. 12: The Right to Adequate Food*, *supra* note 37, ¶ 6.

57. *Id.* ¶ 15.

58. *Id.*

59. *Id.* ¶ 8.

60. *See General Comment No. 12: The Right to Adequate Food*, *supra* note 37, ¶ 17.

61. *General Comment No. 12: The Right to Adequate Food*, *supra* note 37, ¶ 28.

62. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, *supra* note 38, ¶ 4.

previously done by the World Health Organization (WHO) or the United Nations Children's Fund (UNICEF) as guides.<sup>63</sup> The obligation to respect this right "requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health[.]"<sup>64</sup> while the obligation to protect this right requires States to prevent third parties from doing the same. The obligation to fulfill this right "requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional[,] and other measures towards the full realization of the right to health."<sup>65</sup> States that introduce retrogressive measures assume the "burden of proving that they have been introduced [only] after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources."<sup>66</sup>

The Committee finds that minimum essential levels of the right to health include States' duties to observe certain core obligations, such as:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing[,] and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods[,] and services; [and]
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population[.]<sup>67</sup>

These core obligations have been described by the Committee as non-derogable, meaning that a "State Party cannot, under any circumstances

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63. See *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, *supra* note 38, ¶¶ 57-58.

64. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, *supra* note 38, ¶ 33.

65. *Id.*

66. *Id.* ¶ 32.

67. *Id.* ¶ 43.

whatsoever, justify its non-compliance with the core obligations” using the defense of insufficient resources.<sup>68</sup>

### 5. On the Right to Water

While this right is not explicitly provided for in the ICESCR, the Committee links this right with the right to an adequate standard of living under Article 11 and the right to the highest attainable standard of health under Article 12.<sup>69</sup> Both freedoms and entitlements constitute the right to water. Freedoms would include rights relevant to access and entitlements are those rights which have to do with the supply and management of water which should provide equal “opportunity for people to enjoy the right to water.”<sup>70</sup> While the Committee notes that this right’s progressive realization is dependent on resource constraints, there are some obligations that are immediately effective for States regardless of such constraints.<sup>71</sup> A State that claims that resource constraints prevent it from fulfilling its obligations has to prove that it has done all it possibly could with the available resources in the attempt to meet the obligations.<sup>72</sup> In order to assist its monitoring process, right to water indicators and benchmarks are developed by the States in coordination with the Committee and other organizations of the United Nations.<sup>73</sup>

The obligation to respect the right to water requires States to “refrain from interfering directly or indirectly in the enjoyment of the right to water,”<sup>74</sup> and especially during “armed conflicts, emergency situations, and natural disasters,”<sup>75</sup> such right obligates States to protect water resources as they are considered “indispensable for the survival of the civilian population.”<sup>76</sup> The obligation to protect the right requires States to “prevent third parties from interfering in any way with the enjoyment of the right to water.”<sup>77</sup> Other obligations include those to facilitate the right, which asks the State to help people better enjoy the right; to promote it, which obligates the State to properly educate its population about use and

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68. *Id.* ¶ 47.

69. *See General Comment No. 15: The Right to Water, supra* note 40, ¶ 3.

70. *General Comment No. 15: The Right to Water, supra* note 40, ¶ 10.

71. *See General Comment No. 15: The Right to Water, supra* note 40, ¶ 17.

72. *General Comment No. 15: The Right to Water, supra* note 40, ¶ 41.

73. *Id.* ¶¶ 53-54.

74. *Id.* ¶ 21.

75. *Id.* ¶ 22.

76. *Id.*

77. *Id.* ¶ 23.

preservation of water; and to provide, which requires States to step in when certain groups are finding it hard to access or enjoy the right to water.<sup>78</sup>

The minimum essential levels of the right to water entail the State's core obligations:

- (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- (c) To ensure physical access to water facilities or services that provide sufficient, safe[,] and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- (d) To ensure personal security is not threatened when having to physically access to water;
- (e) To ensure equitable distribution of all available water facilities and services;
- (f) To adopt and implement a national water strategy and plan of action addressing the whole population;
- (g) To monitor the extent of the realization, or the non-realization, of the right to water;
- (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups; [and]
- (i) To take measures to prevent, treat[,] and control diseases linked to water, in particular ensuring access to adequate sanitation.<sup>79</sup>

These core obligations, in the view of the Committee, are likewise non-derogable, and non-compliance with these core obligations cannot be justified.<sup>80</sup>

## 6. On the Right to Work

The right to work<sup>81</sup> is also subject to the progressive realization of States based on the availability of maximum resources. What is immediately required for States Parties to the ICESCR, regardless of their relative resource constraints, is to ensure that the right to work can be exercised “without discrimination of any kind” and that the State will take steps

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78. See *General Comment No. 15: The Right to Water*, *supra* note 40, ¶ 25.

79. *Id.* ¶ 37.

80. *Id.* ¶ 40.

81. ICESCR, *supra* note 13, art. 6 (1).

towards the full realization of this right.<sup>82</sup> States must move as “expeditiously and effectively as possible towards full realization,”<sup>83</sup> and should not introduce retrogressive measures. If such retrogressive measures are imposed, the State assumes the burden of proving that they were introduced only “after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided in the Covenant and in the context of the full use of the State Parties’ maximum available resources.”<sup>84</sup> The State can develop indicators to monitor and evaluate compliance with the right to work in conjunction with the Committee and the International Labour Organization (ILO).<sup>85</sup>

The obligation to respect the right to work asks States not to interfere with an individual’s enjoyment of such right, while the obligation to protect requires the State to make sure third parties are precluded from interfering as well.<sup>86</sup> Finally, the obligation to fulfill the right to work “includes the obligations to provide, facilitate[,] and promote that right. It implies that State Parties should adopt appropriate legislative, administrative, budgetary, judicial[,] and other measures to ensure its full realization.”<sup>87</sup> Resource constraints may explain the difficulties of a State in fully guaranteeing the right to work,<sup>88</sup> but they cannot justify violations of the principle of non-discrimination in Article 2 (2) of the ICESCR which is “directly applicable to all aspects of the right to work.”<sup>89</sup>

The minimum core obligations of the right to work include the following:

- (a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups; [and]

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82. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 18: The Right to Work (art. 13 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 19, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) [hereinafter *General Comment No. 18: The Right to Work*].

83. *See General Comment No. 18: The Right to Work*, *supra* note 82, ¶ 20.

84. *General Comment No. 18: The Right to Work*, *supra* note 82, ¶ 21.

85. *See General Comment No. 18: The Right to Work*, *supra* note 82, ¶¶ 46-47.

86. *General Comment No. 18: The Right to Work*, *supra* note 82, ¶ 22.

87. *Id.*

88. *Id.* ¶ 32.

89. *Id.* ¶ 33.



- (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations[.]<sup>90</sup>

## 7. On the Right to Social Security

The right to social security<sup>91</sup> is most needed, and certainly most challenged, during economic crises.<sup>92</sup> The right covers the security of individuals gained from having access to resources, financial or otherwise, when they are unemployed for whatever reason, when the price of services such as health care is too high, or when the people they are dependent on, such as parents or guardians, cannot sustain them.<sup>93</sup> Variances may occur in the realization of this right considering the financial aspect of its implementation, but the Committee still maintains that the “fundamental importance of social security for human dignity and the legal recognition of this right by State Parties mean that the right should be given appropriate priority in law and policy.”<sup>94</sup>

The obligation to respect this right requires that “State Parties ... [refrain] from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security [or] arbitrarily or unreasonably interferes with ... traditional arrangements for social security ... [or] with institutions that have been established ... to provide social security.”<sup>95</sup> The obligation to protect the right to social security “requires that State Parties prevent third parties [including individuals, corporations, and other private actors that may administer social security schemes], from interfering in any way with the enjoyment of the right to social security.”<sup>96</sup> The obligations to facilitate, promote, and provide the right to social security are likewise present.<sup>97</sup>

Finally, the right to social security has several core obligations that should be observed notwithstanding resource constraints. These include the obligations of the State:

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90. *Id.* ¶ 31.

91. ICESCR, *supra* note 13, art. 9.

92. See Ellen Ehmke & Mara Skaletz, *Strengthening social security in economic crises: The need for a social protection floor* (Dialogue on Globalization Briefing Paper by Friedrich Ebert Stiftung), available at <http://library.fes.de/pdffiles/iez/global/06739.pdf> (last accessed Sep. 6, 2012).

93. See *General Comment No. 19: The Right to Social Security*, *supra* note 39, ¶ 2.

94. *General Comment No. 19: The Right to Social Security*, *supra* note 39, ¶ 41.

95. *Id.* ¶ 43 (1).

96. *Id.* ¶ 43 (2).

97. See *General Comment No. 19: The Right to Social Security*, *supra* note 39, ¶¶ 47–50.

- (a) To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic form of education;
- (b) To ensure the right of access to social security systems or schemes on a non-discriminatory basis especially for disadvantaged and marginalized individuals and groups;
- (c) To respect existing social security schemes and protect them from unreasonable interference;
- (d) To adopt and implement a national social security strategy and plan of action;
- (e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups; [and]
- (f) To monitor the extent of the realization of the right to social security.<sup>98</sup>

None of these core obligations directly obligate the State to provide social security. Rather, focus is on preserving access to the right, implementation of pre-existing social security schemes, and monitoring compliance with this right. Monitoring should be undertaken with reference to benchmark indicators on the elements of the right to social security (adequacy, coverage of social risks and contingencies, affordability and accessibility) between national institutions of the State party to the ICESCR, the Committee, and other international organizations such as the ILO, the WHO, and the International Social Security Association.<sup>99</sup>

The foregoing seven rights arguably comprise the social protection floor of minimum core obligations under the ICESCR that remain operative during economic crises. With these core obligations in mind, the Committee in practice expects that a State Party does not simply have the power to intervene but has the duty to do so when more conventional approaches of crisis management which are not centered on rights protection leave some groups vulnerable.<sup>100</sup> The Committee specified these minimum obligations drawing from its extensive involvement in the State reportage process under the ICESCR, the analysis of many State reports over the years, as well as the

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98. *General Comment No. 19: The Right to Social Security*, *supra* note 39, ¶ 59. See also *General Comment No. 19: The Right to Social Security*, *supra* note 39, ¶¶ 29-31, 44-46, 68-70, 31-39, 74 & *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, *supra* note 38, ¶¶ 43-44.

99. See *General Comment No. 19: The Right to Social Security*, *supra* note 39, ¶¶ 74-76.

100. See Giorgio Baruchello and Rachel Lorna Johnstone, *Rights and Value: Construing the International Covenant on Economic, Social and Cultural Rights as Civil Commons*, 5 *STUD. IN SOC. JUST.* 91, 99 (2011).

institutional experience of monitoring ICESCR compliance even in periods of economic adjustment, recession, or crisis. The Committee's discussion of ICESCR minimum core obligations has been referenced in the United Nations' own definition of the concept of a social protection floor —

The term 'social floor' or 'social protection floor' has been used to mean a set of basic social rights, services[,] and facilities that the global citizen should enjoy. The term 'social floor' can correspond to the existing notion of 'core obligations,' to ensure the realization of, at the very least, minimum essential levels of rights embodied in human rights treaties.<sup>101</sup>

Part III will show how the concept of the social protection floor through the ICESCR minimum core obligations operates as a built-in constraint to policy-making during economic crises.

### III. ICESCR-SENSITIVE POLICY RESPONSES TO ECONOMIC CRISES: REFLECTIONS FROM THE COMMITTEE

At the height of the 2008 global financial crisis that began in the United States property and securities markets, United Nations High Commissioner for Human Rights Navanethem Pillay addressed the Human Rights Council and reminded all States of their continuing obligations to observe human rights most especially in times of economic hardship. Commissioner Pillay declared that —

'[w]hile it is imperative to respond to the current crises with a thorough review of the functioning of the international financial and monetary mechanisms, a human rights approach will contribute to making solutions more durable in the medium and long-run. ... [It] helps to identify the specific needs and entitlements of vulnerable groups and individuals ... [who] stand at the frontlines of hardship and are most likely to lose their jobs and access to social safety nets and services.'<sup>102</sup>

With the protraction of the global financial crisis due to the Eurozone debt crisis, the European Union (EU) Agency for Fundamental Rights observed in 2010 that "EU Member States have made efforts to maintain the level of social protection at pre-existing levels prior to the crisis. However, some of the measures taken have [had] an adverse impact on the level of

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101. Social Protection Advisory Group & the United Nations System Chief Executives Board for Coordination [UNCEB], *Global Financial and Economic Crisis: Initiative VI. (A Paper by Various International Agencies on Joint Crisis Initiatives)* 45-46, available at <http://www.ilo.org/public/english/protection/spfag/download/background/spficonceptnote.pdf> (last accessed Sep. 6, 2012).

102. Office of the High Commissioner for Human Rights, *A human rights response to the global economic crisis*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/humanrightsresponsetothecrisis.aspx> (last accessed Sep. 6, 2012).

social protection[.]”<sup>103</sup> such that EU Member States should “provide clearer and more transparent explanations as to whether or not an ‘adequate’ or ‘satisfactory’ level of social protection can be provided during the economic crisis, with supporting evidence, thereby building up consensus for difficult, but necessary, measures and ensuring social cohesion.”<sup>104</sup> The Eurozone debt crisis furnishes a distinct example of the need for continuous reassessment of the consistency between crisis policies and the social protection floor required by the ICESCR minimum core obligations. EU Member States continue to debate the appropriate mix of austerity measures versus growth measures and increased social security benefits for afflicted Eurozone States.<sup>105</sup>

The following Sections will examine important elements in the reassessment of policy consistency with the ICESCR minimum core obligations. As will be seen below, while there is no dearth of normative guidelines for States to test their policies for ICESCR compliance, the empirical tools for monitoring ICESCR compliance and areas for improvement remain rudimentary at best. Much of the difficulty of ascertaining ICESCR minimum core obligations rests with the issue of particularity — it is the State Party itself, in consultation with the Committee, which identifies how the ICESCR minimum core obligations are to be implemented and evaluated in its jurisdiction. Ultimately, it is the marked gap between standard setting and institutional compliance monitoring and coordination that makes achievement of ICESCR compliance difficult during economic crises.

*A. The Committee’s 2012 Proposal: Testing Crisis Policy Responses for ICESCR Consistency*

In May 2012, Committee Chairperson Ariranga G. Pillay wrote all the ICESCR State Parties on behalf of the Committee, urging certain measures

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103. European Union Agency for Fundamental Rights, Protecting fundamental rights during the economic crisis (A Working Paper by the European Union Agency for Fundamental Rights) 48, available at [http://fra.europa.eu/fraWebsite/attachments/FRA-Working-paper-FR-during-crisisDec10\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-Working-paper-FR-during-crisisDec10_EN.pdf) (last accessed Sep. 6, 2012).

104. *Id.*

105. See, e.g., Gavin Hewitt, *Growth versus austerity*, BBC NEWS, May 10, 2012, available at <http://www.brookings.edu/research/opinions/2012/06/14-austere-growth-dervis> (last accessed Sep. 6, 2012) & Richard McGregor & Kiran Stacey, *G8 splits over stimulus versus austerity*, FT, May 19, 2012, available at <http://www.ft.com/intl/cms/s/0/c6bf0b72-arb8-11e1-a22e-00144feabdco.html#axzz22zismN9w> (last accessed Sep. 6, 2012).

in relation to the protection of ICESCR rights in the context of the economic and financial crisis.<sup>106</sup> The letter states, in part —

The Committee has observed over recent years the pressure on many State Parties to embark on austerity programmes, sometimes severe, in the face of rising public deficit and poor economic growth.

...

However, I wish to underline that under the Covenant[,] all State Parties should avoid at all times taking decisions which might lead to the denial or infringement of economic, social[,] and cultural rights. Apart from being contrary to their obligations under the Covenant, the denial or infringement of economic, social[,] and cultural rights by State 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.<sup>107</sup>

This reminder was not particularly unusual for the Committee, as it mirrored the fundamental premises laid down in General Comment 3.<sup>108</sup> What was particularly significant in the Committee's direct communication to ICESCR State Parties however, was the test it laid down for the consistency of crisis policy or adjustment measures with the ICESCR —

Economic and financial crises, and a lack of growth, impede the progressive realization of economic, social[,] and cultural rights and can lead to retrogression in the enjoyment of those rights. The Committee realizes that some adjustments in the implementation of some of these Covenant rights are at times inevitable. State Parties, however, should not act in breach of their obligations under the Covenant.

In such cases, the Committee emphasizes that *any proposed policy change or adjustment has to meet the following requirements*: first, the policy is a *temporary measure* covering only the period of 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* and comprises 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

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106. Ariranga G. Pillay, Letter to All States Parties to the International Covenant on Economic, Social, and Cultural Rights (Letter by the Chairperson of the Committee on Economic, Social, and Cultural Rights dated May 16, 2012) available at <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf> (last accessed Sep. 6, 2012).

107. *Id.*

108. See General Comment No. 3: *The Nature of State Parties' Obligations*, *supra* note 24.

the disadvantaged and marginalized individuals and groups are not disproportionately affected; [and] fourth, the *policy identifies the minimum core content of rights*, or a social protection floor, as developed by the [ILO], and ensures the protection of this core content at all times.<sup>109</sup>

The four required elements, briefly put, refer to: 1) the temporal duration of the measure (temporary according to the period of the crisis); 2) its necessity and proportionality in relation to the achievement of ICESCR protection; 3) the non-discriminatory implementation of the policy; and 4) the policy's compliance with the ICESCR minimum core obligations.<sup>110</sup> It is clear from this communication that the Committee would foreseeably include this assessment of crisis policy responses in its periodic review and reportage process under Part IV of the ICESCR. The May 2012 Letter of Chairperson Pillay significantly shows a first attempt by the Committee to specifically lay down requirements for State Parties' crisis policy measures to comply with the ICESCR. These specific requirements give further emphasis to the ICESCR minimum core obligations, which are designed to affirm that the State has the duty —

to intrude without limit into both private and state resources previously used for other purposes, in order to ensure that its population receives 'core' entitlements. In other words, there is an assumption, though a rebuttable one in the eyes of the Committee, that every state possesses sufficient resources for subsistence purposes if they define resources broadly enough and are sufficiently aggressive in resource acquisition.<sup>111</sup>

The Committee's renewed emphasis on the importance of maintaining compliance with the ICESCR minimum core obligations brings to mind long-standing admonitions by the United Nations Commission on Human Rights for States "[to] consider identifying specific national benchmarks designed to give effect to the minimum core obligation to ensure the satisfaction of minimum essential levels of each of the [ICESCR] rights."<sup>112</sup> It was also quite timely for the Committee to issue these requirements, since there have been more developments in quantitative methods and qualitative measurement approaches that determine the actual minimum core obligation of ICESCR rights applicable to a State, giving due regard for that State's unique resource constraints, governmental capabilities, and population

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109. Pillay, *supra* note 106 (emphasis supplied).

110. *See* Pillay, *supra* note 106.

111. Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights*, 16 HUM. RTS. Q. 693, 702 (1994).

112. C.H.R. Res. 1993/14, ¶ 7, U.N. ESCOR, 49th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1993/122, at 87 (Feb. 26, 1993).

needs.<sup>113</sup> Nevertheless, it remains to be seen how the Committee will employ this new ICESCR consistency test in its next session for periodic review.

*B. Empirical Assessment of the ICESCR Minimum Core Obligations: An Incipient Work in Progress*

The Committee's resolve in monitoring State Parties' compliance with the ICESCR minimum core obligations during global economic crises will likely be tested by the lack of consensus to date on the empirical assessment of ICESCR minimum core obligations applicable to any country.<sup>114</sup> In the past, the Committee has acknowledged a wide margin of discretion for State Parties to ascertain their respective resource constraints and thereafter, identify the minimum essential levels of ICESCR rights applicable in their jurisdiction at all times, with or without the presence of economic crises.<sup>115</sup> The May 2012 Letter of the Committee, however, required State Parties to show that crisis policies remain consistent with the ICESCR minimum core obligations.<sup>116</sup> This requirement presupposes that the standards created under

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113. See George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 LOY. U. CHI. INT'L REV. 127 (2011); Sital Kalantry et al., *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR* (Cornell Law Faculty Working Papers) 26-50, available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1065&context=clsops\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1065&context=clsops_papers) (last accessed Sep. 6, 2012); Edward Anderson, *Using quantitative methods to monitor government obligations in terms of the rights to health and education* (Paper submitted to the Center for Economic and Social Rights), available at <http://www.cesr.org/downloads/Quantitative%20Methods%20of%20Measuring%20ESCR.pdf> (last accessed Sep. 6, 2012); Eitan Felner, *A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability* (Article from the SUR International Journal on Human Rights), available at [http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo\\_felner.htm](http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo_felner.htm) (last accessed Sep. 6, 2012); & Radhika Balakrishnan & Diane Elson, *Auditing Economic Policy in the Light of Obligations on Economic and Social Rights*, 5 ESSEX HUM. RTS. REV. 29 (2008).

114. See Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social, and Cultural Rights*, 20 HUM. RTS. Q. 81 (1998) & Bruce Porter, *The Reasonableness of Article 8(4) — Adjudicating Claims from the Margins*, 27 NORDIC J. HUM. RTS. 43 (2009).

115. See U.N. High Commissioner for Refugees, *Reception Standards for Asylum Seekers in the European Union* (A Paper by the UNHCR) 4, available at <http://www.unhcr.org/refworld/pdfid/3ae6b344.pdf> (last accessed Sep. 6, 2012) (citing *General Comment No. 3: The Nature of State Parties' Obligations*, *supra* note 24).

116. Pillay, *supra* note 106.

these obligations are not necessarily just particular to a State Party, but must be assessed in conjunction with the Committee and other relevant practices of similarly situated States.

While it is laudable that the United Nations recently admitted the importance of data collection and empirical analysis of human rights compliance,<sup>117</sup> the methodology for determining States' compliance with the ICESCR is nascent at best. The July 2011 Report of the United Nations High Commissioner for Human Rights on the use of indicators in realizing economic, social, and cultural rights endorses the development of human rights indicators, which refer to "specific information on the state of an object, event, activity[,], or an outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights."<sup>118</sup> Indicators could be quantitative or qualitative, while benchmarks constitute "predetermined values for given indicators and are based on normative or empirical evidence."<sup>119</sup> The Report proposes the combined use of various types of indicators: structural, process, and outcome indicators to capture all dimensions of ICESCR implementation — linking "States' commitment to and acceptance of obligations under international human rights standards (structural indicators); efforts undertaken to meet those obligations through implementation of policy measures and programmes (process indicators); and the results ... as regards the concerned populations' enjoyment of human rights (outcome indicators)."<sup>120</sup> After identifying this basket of indicators, the Report suggests that such indicators be disaggregated "to capture existing or potential

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117. Office of the High Commissioner for Human Rights, Using numbers to achieve human rights goals, *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/WorldStatisticsDay.aspx> (last accessed Sep. 6, 2012).

118. United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights*, ¶ 2, Economic and Social Council, U.N. Doc. E/2011/90 (April 26, 2011) [hereinafter *Report of the United Nations High Commissioner for Human Rights*]. See also Office of the United Nations High Commissioner for Human Rights, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, Twentieth meeting of chairpersons of the human rights treaty bodies, U.N. Doc. HRI/MC/2008/3 (June 6, 2008) [hereinafter *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*] & United Nations Secretariat, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, Eighteenth meeting of chairpersons of the human rights treaty bodies, U.N. Doc. HRI/MC/2006/7 (May 11, 2006) [hereinafter *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*].

119. *Report of the United Nations High Commissioner for Human Rights*, *supra* note 118, ¶ 4.

120. *Id.* ¶ 12.



patterns of discrimination in the enjoyment of rights concerned”<sup>121</sup> and also “to strike a balance between contextually specific indicators and universally relevant indicators.”<sup>122</sup> Data would be obtained from government and non-governmental sources, observing legal and ethical safeguards in the gathering, processing, and dissemination of data, and based on “objective, reliable[,] and independent data-generating mechanisms.”<sup>123</sup> Failure to meet an indicator does not necessarily mean that there has been non-compliance with the ICESCR. While indicators may give one a partial look into the situation of a State, further investigation has to be made before one can come at the above-mentioned conclusion of non-compliance.<sup>124</sup> Indicators, however, find their greatest value in being able to “(a) substantiate normative analysis in human rights assessments; (b) set clearer steps for implementing public policies and programmes; (c) set objective criteria for monitoring progress made towards full realization of rights; and (d) support claims of duty-bearers, such as governmental authorities, in courts and other redress mechanisms.”<sup>125</sup>

It should be noted that using statistical data, as proposed in the use of indicators to determine ICESCR compliance, is not at all new in the reportage process already involving State Parties and the Committee. Reports are expected to “provide relevant statistical data ... [to] allow comparison over time and should indicate data sources. States should endeavor to analyze this information insofar as it is relevant to the implementation of treaty obligations.”<sup>126</sup> The United Nations also specifies indicators which States may use in making their reportage assessments of compliance with human rights treaties.<sup>127</sup>

The framework employed by the United Nations to elaborate and further utilize the indicators identified in conjunction with State Parties has been described as flowing from a —

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121. *Id.* ¶ 13.

122. *Id.* ¶ 14.

123. *Id.* ¶¶ 15-17.

124. *Id.* ¶ 19.

125. *Report of the United Nations High Commissioner for Human Rights*, *supra* note 118, ¶ 22.

126. Inter-Committee Technical Working Group, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specified documents*, ¶ 26, Fifth Inter-Committee Meeting of the human rights treaty bodies, U.N. Doc. HRI/MC/2006/3 (May 10, 2006).

127. *Id.* ¶¶ 32-39. Such indicators include demographic, social, economic, and cultural indicators, indicators related to the political system, and indicators on crime and justice administration. *Id.*

common approach to identify indicators ... thereby strengthening the notion of the indivisibility and interdependence of human rights. [Also, it] translates the narrative on the normative content of human rights ... into a few characteristic attributes and a configuration of structural, process[,] and outcome indicators [which] bring to the fore an assessment of steps taken by the State party in addressing its obligations — from commitment to international human rights standards (structural indicators) to efforts being undertaken by the primary duty-bearer, the State, to meet the obligations that flow from the standards (process indicators) and on to the results of those efforts from the perspective of rights-holders (outcome indicators).<sup>128</sup>

The framework also departs from excessively particularistic assessments of ICESCR compliance by State Parties by discussing indicators within a certain relevant State context. This consequently leads to “allow[ing] a balance between the use of a core set of human rights indicators that may be universally relevant and at the same time retain[ing] the flexibility of a more detailed and focused assessment on certain attributes of the relevant human rights[.]”<sup>129</sup>

Even with this progression, the use of empirical tools to determine a State’s compliance with the ICESCR minimum core obligations still appears mired in the early stages of developing a workable framework. Within the context of the reportage process of State Parties to the Committee during the regular periodic review mechanism, it is an open question if the Committee’s standard-setting will only outpace pragmatic assessment methodologies.

#### IV. CONCLUSION

The “growth versus austerity” debate amplifies the need to translate the ICESCR into a regular auditing feature of crisis policy assessment. As this Article has shown, the Committee’s practice has yielded various normative standards for ascertaining ICESCR minimum core obligations and for determining the veracity of a State Party’s defense of temporary non-compliance due to resource constraints. The Committee has extended its analysis specifically in its May 2012 Letter on compliance with the ICESCR during economic crises, prescribing a specific test to determine the consistency of a crisis policy response with the ICESCR.

While these normative developments reflect a welcome consensus on the obligatory (and not just aspirational) nature of the ICESCR, advocates of protecting, respecting, and fulfilling the ICESCR during economic crises must also be conscious of pragmatic considerations. In the first instance, the paradigm espoused under the ICESCR is a joint monitoring process

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<sup>128</sup>. *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, *supra* note 118, ¶ 42.

<sup>129</sup>. *Id.* ¶ 23.

between the Committee and the State Parties — the ICESCR did not capulize an adjudication system enabling binding determinations of breaches of ICESCR rights. International remedies for ICESCR violations thus usually do not operate on a paradigm of justiciability or individual complaints. It was not until December 2008 that the landmark individual complaints procedure for the Committee on Economic, Social, and Cultural Rights was initiated through the Optional Protocol to the ICESCR.<sup>130</sup> The Optional Protocol to the ICESCR will enter into force after three more State ratifications or accessions; as to date only seven State Parties (Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Spain) have completed ratification and/or accession procedures out of the 39 signatory States.<sup>131</sup> The Optional Protocol to the ICESCR empowers the Committee to request urgent interim measures from a State Party “as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.”<sup>132</sup> After examination of the individual communication, the Committee transmits its views to the State Party concerned for its consideration and action.<sup>133</sup> The Optional Protocol confers authority to the Committee to conduct confidential inquiries on alleged grave or systematic violations by a State Party of Covenant rights and thereafter, transmitting findings and recommendations to the State Party concerned.<sup>134</sup> The Optional Protocol also enables an inter-State communications procedure, which leads to the issuance of a Committee report on the disputed matter.<sup>135</sup> In a system that remains primarily dependent on the dialogic consultation process between the Committee and the State Parties, the Committee’s May 2012 prescription of its four-element test to determine the consistency of a State’s crisis policy response with the ICESCR minimum core obligations is fairly extraordinary. The actual implementation of this four-element test using empirical tools may yet require time, data gathering coordination, and a more systematic auditing procedure that enables all State Parties — regardless of their resource constraints — to adequately and transparently prepare the empirical data necessary for the test. Certainly, one can expect that States hard-pressed

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130. Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 63/117, arts. 1-2, U.N. Doc. A/RES/63/117 (Mar. 5, 2009) [hereinafter *Optional Protocol*].

131. See United Nations, Status: Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en) (last accessed Sep. 6, 2012).

132. *Optional Protocol*, *supra* note 130, art. 5.

133. See *Optional Protocol*, *supra* note 130, arts. 7-8.

134. *Id.* art. 11.

135. *Id.* art. 10.

during dire economic crises will not necessarily devote dwindling fiscal resources to a self-reflective audit of their police power measures.

Finally, it should also be noted that the Committee's reference to standards of temporality, necessity, proportionality, and compliance with the ICESCR minimum core obligations (as the threshold elements for proving a crisis policy's consistency with the ICESCR) themselves suggest further areas for substantial research within the broader project of achieving full respect, protection, and fulfillment of the ICESCR even during economic crises. Economic crises are hardly uniform, and their duration has not always been discretely perceived.<sup>136</sup> The appropriate duration of a crisis policy is thus also a separate subject for analysis. More importantly, determining the necessity and proportionality of crisis policy measures, apart from verifying their consistency with the ICESCR minimum core obligations, would implicate further interesting analytical questions on the potential usages of "necessity" doctrine and "proportionality" reasoning in issues of ICESCR compliance.<sup>137</sup> Testing the ICESCR's durability within the "growth versus austerity" policy debate has barely begun.

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136. See CARMEN M. REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 3-14 (2009).

An inflation crisis is set at a threshold of 20% per annum. A currency crash is defined as an annual depreciation in excess of 15%. Currency debasements are of two types, the first being a reduction in the metallic content of coins in circulation of five percent or more, and the second being a currency reform whereby a new currency replaces a much-depreciated earlier currency in circulation. A banking crisis is marked by two types of events: (1) bank runs that lead to the closure, merging, or takeover by the public sector of one or more financial institutions, and (2) if there are no runs, the closure, merging, takeover, or large-scale government assistance of an important financial institution (or group of institutions) that marks the start of a string of similar outcomes for other financial institutions. External debt crises are those that involve outright default on a government's external debt obligations — that is, a default on a payment to creditors of a loan issued under another country's jurisdiction.

REINHART & ROGOFF, *supra* note 136, at 3-14.

137. See DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION (2012) & AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 202-10 & 422-34 (2012).