Limitations to and Derogations from Economic, Social and Cultural Rights

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Abstract

This article explores the question of limitations to and derogations from economic, social and cultural rights. With regard to limitations, it analyses Article 4 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) (limitations) and its relationship to Article 2(1) of the ICESCR (progressive realisation). It argues that the criteria of Article 4 should be applied as a uniform standard to evaluate all limitations of economic, social and cultural rights, regardless of the reasons for which these limitations are made. This is against the background of the approach of the Committee on Economic, Social and Cultural Rights, which draws a distinction between retrogressive measures states may take when they face resource constraints under Article 2(1) on the one hand; and limitations for other reasons under Article 4 on the other hand. With regard to derogations, the question is discussed whether states are permitted to derogate from the ICESCR despite the fact that the ICESCR does not contain a derogation clause. A tendency can be observed in the states’ and the CESCR’s approach to allow for derogations from the ICESCR’s labour rights, but to exclude derogations from other ESC rights, in particular from minimum core obligations under these rights.

1. Introduction

The UN Committee on Economic, Social and Cultural Rights (CESCR or the Committee) has adopted several General Comments in recent years which

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have contributed to the clarification of states' obligations corresponding to many rights contained in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). However, there has been little direct discussion about legitimate limitations to and derogations from economic, social and cultural (ESC) rights, even though the question about the extent to which states are allowed to limit and possibly derogate from some ESC rights is intrinsically linked to the question of the precise scope of states' obligations under the ICESCR.

Armed conflicts, natural disasters and other emergencies, as well as economic difficulties can influence or undermine a state's ability to maintain an achieved level of implementation of ESC rights under the obligation 'to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant [ICESCR] by all appropriate means...'. In these situations, states need to be given the possibility to limit and possibly derogate from some ESC rights in accordance with clearly established criteria that prevent arbitrariness in these matters.

While there is no derogation Article in the ICESCR, it contains a general limitation clause in Article 4. Yet with regard to limitations the CESCR almost never refers to the requirements set out in Article 4. Instead, it has begun to develop criteria to evaluate 'retrogressive measures' under Article 2(1) that states take when they face severe resource constraints. The CESCR's approach to derogations from ESC rights is unclear.

The adoption of the Optional Protocol to the ICESCR by the UN General Assembly in December 2008 will further increase states' interest in criteria the CESCR might apply to evaluate any limitations (including retrogressive measures) to ESC rights. The Optional Protocol gives the CESCR the power to consider individual complaints of alleged violations of ESC rights and to issue its non-binding views on these communications.

For these and other reasons, it seems to be expedient to have a closer look at states' options for limiting and possibly derogating from the ICESCR. In the first part of this article, the concepts of limitations and derogations and their underlying rationale shall briefly be explained in order to establish the basis for the discussion of them with regard to ESC rights. This includes an attempt to clarify the differences and overlaps between these concepts, since there is a tendency in the states' and the CESCR's approach to confuse them. In the second part, the discussion will move to the question of the extent to which

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1 993 UNTS 3, which entered into force on 3 January 1976.
2 Article 2(1) ICESCR.
4 For instance, greater clarity in the scope of states' obligations under the ICESCR in times of armed conflict would also facilitate the discussion about the relationship of legal obligations under the ICESCR and international humanitarian law.
states are permitted by the ICESCR to limit ESC rights, and to possibly derogate from some of them in situations of emergency. This will include an analysis of Article 4 of the ICESCR, the ICESCR’s general limitations clause, and a discussion of its relationship to Article 2(1) of the ICESCR. Finally, the question shall be examined whether states may derogate from ESC rights in situations of emergency, against the background of the absence of a derogation clause from the ICESCR.

The discussion will primarily draw upon states’ reports to the CESCR, the CESCR’s documents (Concluding Observations, General Comments and other statements), and the travaux préparatoires of the ICESCR, as well as academic literature.

2. Clarifying Terms: Limitations and Derogations

A. Limitations

The rationale for permitting limitations of human rights is twofold: first, limitations highlight that human rights are rarely absolute or unconditional rights, which makes the human rights framework manageable. Most human rights rather reflect a balance between individual and community (state) interests. Referring to the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) formulated this clearly in its Soering v United Kingdom judgment:

[I]nherent in the whole of the Convention [ECHR] is a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights.6

Many civil and political rights, but also some ESC rights, can therefore lawfully be limited for reasons of public order, public health, public morals, national security or public safety,7 which reflect these ‘public interests’.8

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5 213 UNTS 222; 312ETS 5.
6 A 161 (1989); 11 EHR R 439 at para. 89.
7 See Articles 12, 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); and Article 8 ICESCR. Regional treaties may list further grounds for limitations, see, for example, Article 8 ECHR; Article 32(2) of the American Convention on Human Rights 1978, 1144 UNTS 123 (ACHR); and Article 14 of the African Charter on Human and Peoples’ Rights 1986, OAU CAB/LEG/67/3 rev.5; 1520 UNTS 217; 21 ILM 58 (1982) (ACHPR).
Second, limitation clauses mirror the necessity to solve conflicts between rights, for instance between the right to freedom of expression and the rights to respect for privacy or to freedom of religion. One right can be limited to give room so that another right can be exercised; these are limitations for the ‘protection of the rights and freedoms of others’.9 The rights and freedoms of others which may be invoked for limiting a specific right do not have to be recognised in the same instruments.10

In addition to the requirement of imposing limitations only for one of the reasons set out in the relevant human rights treaty, there are further criteria which states have to meet when they wish to lawfully limit human rights. Limitations have to ‘be determined by law’11 and only those limitations are permitted which are ‘necessary’,12 or ‘necessary in a democratic society’.13 The latter requirement includes the principle of proportionality which plays a vital role in assessing the necessity of limitations. It requires that the limitation of rights is proportional in its scope and intensity to the purpose being sought.14

Provided that measures limiting human rights conform to these requirements, they can be in place over a long period of time, and in all types of situations ‘from everyday public order maintenance and policing strategies to national security and large scale military operations’.15 This does not, however, exclude that the scope of limitations changes over time, for example in accordance with societal developments or changes of circumstances which makes them no longer ‘necessary’ or proportionate. Human rights courts and other bodies constantly emphasise that they interpret human rights in accordance with the changing structures, values and priorities of societies. The ECtHR has, for instance, stated that the ECHR is ‘a living instrument which,...

9 Articles 12, 18, 19, 21 and 22 ICCPR; Article 8 ICESCR; Articles 8, 9, 10 and 11 ECHR; Articles 12, 13, 15, 16, 22 and 32(2) ACHR; and Articles 11 and 27(2) ACHPR. Articles 19 ICCPR and Article 13(2)(a) ACHR additionally allow for limitations that aim to protect the ‘reputations of others’.


11 See Articles 12(3), 18(3), 19(3), 21 and 22 ICCPR; Articles 4 and 8 ICESCR; Articles 5(1), 8(2), 9(2), 10(2), and 11(2) ECHR; Articles 12(3), 13(2) and (4), 15, 16(2), 21(2) and 22(3) ACHR; and Articles 11, 12(2) and 14 ACHPR. Some Articles contain a slightly different wording, such as ‘prescribed by law’, ‘in accordance with the law’ and ‘in conformity with the law’.

12 Articles 12(3), 18(3) and 19(3) ICCPR; Articles 12(3) and 13(2) ACHR; and Article 11 ACHPR.

13 Articles 14(1), 21 and 22(2) ICCPR; Article 8 ICESCR; Articles 15, 16(2) and 22(3) ACHR. The ECtHR refers even more frequently to ‘democratic society’, namely in Articles 6(1), 8(2), 9(2), 10(2) and 11(2). Article 31(1) of the European Social Charter 1961, CETS 35; Article G Revised European Social Charter 1996, 529 UNTS 89, CETS 163; and Article 4 ICESCR and Article 29 of the Universal Declaration of Human Rights, 10 December 1948, GA Res. 217 A (III), refer merely to ‘a democratic society’ while omitting the word ‘necessary’.

14 See, for example, Siracusa Principles, supra n. 10 at para. 11; and Nowak, supra n. 8 at 275.

must be interpreted in present day conditions. It shall also be kept in mind that limitations can never be applied in a way so as to suppress or eliminate a right completely.

**B. Derogations**

A derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation in times of emergency which 'threatens the life of the nation'. What follows is a brief summary of the basic principles that states have to abide by when they wish to derogate from civil and political rights in exceptional situations, with a view to discussion of their possible analogous applicability to some ESC rights in other parts of this article. These standards are embodied in Article 4 of the International Covenant on Civil and Political Rights (ICCPR), as well as in regional human rights treaties, and have been refined through interpretation.

The first basic principle is the principle of exceptional threat. It indicates that states can derogate from human rights only in exceptional cases, when

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16 Tyrer v United Kingdom A 26 (1978); 2 EHR 1 at para. 31. See also Harris, O’Boyle and Warbrick, Law of the European Convention on Human Rights, 2nd edn by Harris, O’Boyle, Bates and Buckley (Oxford: Oxford University Press, 2009) at 7–8.


19 Article 4(1) ICCPR.

20 Article 4(1) ICCPR reads: ‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’

21 Article 15 ECHR and Article 27 ACHR. The provisions of the ICCPR, ECHR and ACHR reveal some differences: the basic principles are, however, similar and are emphasised here.

22 See, for example, the more extensive discussions of derogations from civil and political rights in the following principal documents and literature: Human Rights Committee General Comment 29: States of Emergency (art. 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11; 9 IHRR 303 (1999); Tenth annual report and list of states which, since January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr Leandro Despouy, Special Rapporteur appointed pursuant to ECOSOC Res. 1985/37, 23 June 1997, E/CN.4/Sub.2/1997/19 at para. 34, which lists situations which have been recognised as ‘public emergencies threatening the life of the nation’; Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in Henkin (ed.), supra n. 17 at 72–91; Fitzpatrick, Human Rights in Crisis (Philadelphia: University of Pennsylvania Press, 1994); Nowak, supra n. 8 at 83–110; Oraa, Human Rights in States of Emergency in International Law (Oxford: Oxford University Press, 1992); and Svensson-McCarthy, The International Law of Human Rights and the States of Exception (The Hague: Martinus Nijhoff Publishers, 1998).

23 Article 4(1) ICCPR refers to a ‘public emergency which threatens the life of the nation’; Article 15 ECHR refers to ‘war or other public emergency threatening the life of the nation’; and Article 27 ACHR refers to ‘war, public danger, or other emergency that threatens the independence or security of a State Party’.

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the restrictions of rights under the respective limitation clauses are inappropri-
ate as a response to the exceptional threat a society faces, and leave uncertain
the continuation of the organised community life on which a particular state
is founded.\textsuperscript{24} International or non-international armed conflicts, serious envi-
ronmental or natural disasters, or attempts to overthrow the constitutional
order can qualify as such exceptional situations,\textsuperscript{25} and derogations must be
the last resort to respond to them.

The principle of exceptional threat is connected to the aim which all deroga-
tive measures shall have. As pointed out emphatically by the Human Rights
Committee (HRC) with regard to the ICCPR, the ‘restoration of a state of nor-
malcy where full respect for the Covenant can again be secured must be the
predominant objective of a state party derogating from the Covenant’.\textsuperscript{26} This
clearly points to the protective rather than repressive nature of the state of
emergency.\textsuperscript{27} (Democratic) institutions, the existence of which is a vital precon-
dition for all protection of human rights, must be preserved; and there may
be situations in which some rights need to be derogated from in order to guar-
antee the fulfilment of more fundamental rights. For example, in situations
of emergency attributable to an armed conflict or severe natural disaster it
might be necessary to derogate from certain aspects of the right to freedom of
movement in order to ensure the protection of the right to life or to prevent
looting.\textsuperscript{28}

The second common standard for the protection of civil and political rights
in emergencies in the ICCPR, the ECHR and the American Convention on
Human Rights (ACHR) is the principle of non-derogability of certain rights.
While the principle itself is not questioned, there is some uncertainty about
its reach because different multilateral human rights treaties contain a differ-
ent number of non-derogable rights.\textsuperscript{29} This is a consequence of the differing
approaches to non-derogability taken in these treaties: while the ECHR lists
only those rights as non-derogable that are most likely to be violated in emer-
gencies and are of particular importance to protect the dignity of individuals
and to guarantee their survival in situations of emergency, the ACHR adds all

\textsuperscript{24} The ECtHR has defined a ‘public emergency threatening the life of the nation’ as an ‘excep-
tional situation of crisis or emergency which affects the whole population and constitutes a
threat to the organised life of the community of which the state party is composed.’ See
\textit{Lawless v Ireland} (Merits) A 3 (1961); 1 EHRR 15 at para. 28.
\textsuperscript{25} See, for example, Nowak, supra n. 8 at 89–92; and Fitzpatrick, supra n. 22 at 56.
\textsuperscript{26} General Comment 29, supra n. 22 at para. 1.
\textsuperscript{27} Final report of Special Rapporteur Despouy, supra n. 22 at para. 42; and International
\textsuperscript{28} However, while such action by the state may be necessary to prevent private acts in violation
of human rights, in practice, as many accounts of states of emergency show, a large problem
is how to prevent abuse by those acting for the state, particularly in military dictatorships.
\textsuperscript{29} Non-derogable rights under the ICCPR are Articles 6, 7, 8(1) and (2), 11, 15, 16 and 18. In con-
trast, the ECHR contains only four non-derogable rights listed in its Article 15(2), whereas
the ACHR contains the longest list of non-derogable rights (11) in its Article 27(2).
rights the suspension of which cannot conceivably be necessary during emergencies. The ICCPR adopts a middle position. Four rights: the right to life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery and servitude, and the principle of non-retroactivity of penal laws, are non-derogable in all three treaties based on the former reasoning. Minimum guarantees against arbitrary detention and other fundamental aspects of the right to a fair trial are also widely considered as non-derogable, notably because derogations from these guarantees would put at risk the other non-derogable rights.

Theoretically, all civil and political rights which do not fall under the principle of non-derogability in the relevant treaty can be derogated from, provided such measures conform to the other principles set out above and below. In particular the principle of proportionality ensures that derogable rights are not derogated from arbitrarily once the state of emergency is declared.

The principle of non-discrimination is a further basic principle that states must follow when they derogate from civil and political rights. Derogations shall not be discriminatory ‘on the ground of race, colour, sex, language, religion or social origin’.

And lastly, rights may only be derogated from ‘to the extent strictly required by the exigencies of the situation’. This reflects the principle of proportionality, which is of utmost importance in the context of derogations. According to the principle of proportionality, the severity and scope of interference must be proportionate to the emergency situation that threatens the life of the nation, limited to what is actually necessary to cope with that situation. Every single measure taken must bear a reasonable relationship to the threat, i.e. must be linked to the facts of the emergency, and must potentially be effective

30 Fitzpatrick, supra n. 22 at 64.
31 Article 4(2) ICCPR, Article 15(2) ECHR and Article 27(2) ACHR.
32 For example, General Comment 29, supra n. 22 at paras 13–16; Siracusa Principles, supra n. 10 at para. 70; and Recommendation 15 of the International Commission of Jurists, supra n. 27 at 460.
33 Article 4(1) ICCPR and Article 27(1) ACHR explicitly prohibit certain forms of discrimination in emergency measures, whereas the ECHR is silent on the issue. This does not allow for the conclusion that arbitrary discrimination against certain groups is permitted in times of emergency under the ECHR, since it is difficult to argue that it is ‘strictly required by the exigencies of the situation’. For further discussion, see Fitzpatrick, supra n. 22 at 62.
34 Article 4(1) ICCPR; and General Comment 29, supra n. 22 at para. 8. It should be noted that the list of grounds on which discrimination is prohibited under Article 4(1) is more limited than the grounds set out in Article 2(1) ICCPR which adds political or other opinion, national origin, property, birth or other status. The grounds listed in Article 4(1) ICCPR are exhaustive, i.e. certain forms of discrimination are permitted in the context of derogations as long as it is not arbitrary.
35 Article 4(1) ICCPR; and Article 15(1) ECHR. The wording of Article 27(1) ACHR differs slightly as it allows derogations ‘to the extent and for the period of time strictly required by the exigencies of the situation’.
36 See, for example, Siracusa Principles, supra n. 10 at para. 53; and Nowak, supra n. 8 at 97–8.
(suitable) in helping overcome the grave situation.\textsuperscript{37} The principle also refers to the territorial and temporal scope of the measures, and requires their regular review.\textsuperscript{38} As soon as the grave threat has diminished or disappeared, derogations have to be adapted accordingly or lifted altogether. As observed by the HRC with regard to the ICCPR, the principle of proportionality also requires that in practice ‘no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party’\textsuperscript{39}—obligations have to be taken into account whenever the proportionality of a measure is assessed.

Under Article 4(1) ICCPR states are further required to officially proclaim any derogation from the ICCPR. Official proclamation aims to inform people affected by the derogations about the exact material, territorial and temporal scope of application of the emergency measures,\textsuperscript{40} and allows the state’s legislative and judicial bodies to supervise their legality and implementation.\textsuperscript{41} States are also expected to notify other states parties to the ICCPR through the intermediary of the UN Secretary General about the derogations adopted in the course of an emergency.\textsuperscript{42} The ECHR and the ACHR contain similar provisions on notification.\textsuperscript{43}

C. Differences and Similarities Between Limitations and Derogations

From the foregoing it is clear that derogations are legally distinct from limitations in character and scope, as well as with regard to the conditions necessary to justify them. The most obvious difference is that derogations are only permitted in exceptional cases where states face a danger that threatens the life of the nation, while states may limit human rights even in normal times, albeit for a limited and exhaustive number of reasons. Limitations are a necessary and normal element of the human rights treaty system, since without them there would be an unworkable system of absolute rights of each individual. Thus, while resorting to derogations is undesirable and can only be done in exceptional circumstances, reasonable limitations are part of the ‘oil’ of the human rights system allowing states to flexibly regulate various conflicts of interest which occur within (democratic) societies.

States are usually required to exhaust all possibilities under limitation clauses before they can resort to emergency measures. At times, however,

\begin{itemize}
\item \textsuperscript{37} See, for example, Nowak, supra n. 8 at 97–8.
\item \textsuperscript{38} See, for example, ibid. at 98; and Fitzpatrick, supra n. 22 at 60.
\item \textsuperscript{39} General Comment 29, supra n. 22 at para. 4.
\item \textsuperscript{40} See, for example, Nowak, supra n. 8 at 92.
\item \textsuperscript{41} See, for example, Buergenthal, supra n. 22 at 80.
\item \textsuperscript{42} Article 4(3) ICCPR.
\item \textsuperscript{43} Article 15(3) ECHR and Article 27(3) ACHR require notification to the Secretary-Generals of the Council of Europe and the Organisation of American States respectively.
\end{itemize}
limitations and derogations may resemble each other, with clear distinctions being difficult to make. For instance, limitations based on ‘national security’ may be similar to derogations resorted to in a ‘public emergency which threatens the life of the nation’.

Subject to review, limitations can be in place over longer periods of time, whereas derogations are undoubtedly intended to have only a temporary character, strictly as long as the exceptional situation prevails. Nonetheless, this does not imply that states usually derogate from human rights for a short time only. In reality, states have derogated from human rights over long periods of time referring to the perceived or real existence of an emergency which ‘threatens the life of the nation’.

There are other differences with regard to the procedures by which limitations and derogations can be effected. Limitations have to be ‘determined by law’, which is not directly required for temporary derogations. Derogations, on the other hand, have to be officially proclaimed as well as notified to other state parties of relevant treaties. There is also a difference in the number and identity of rights affected by limitations and derogations. As regards the ICCPR, limitation clauses only affect specific rights, whereas the derogation clause theoretically affects all rights that are not non-derogable.

There are also similarities between derogations and limitations: the principle of proportionality requires that every limitation or derogation stands in a reasonable relationship to the aim pursued by a limitation, or to the gravity of the emergency threatening the life of the nation respectively. In this context, it is important to note that the principle of proportionality applicable to limitations and derogations alike ensures that, in practice, neither limitations nor derogations permit states to disregard their human rights obligations altogether.

Another similarity, at least as far as the ECHR is concerned, is the applicability of the margin of appreciation doctrine to limitations as well as to derogations. This doctrine gives states a certain measure of discretion in the implementation of the ECHR including its limitations and derogation clauses, subject to review by the ECtHR. It is based on the assumption that the organs of member states to the ECHR possess a better understanding of all aspects of

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44 This is clear from the discussion on the meaning of ‘national security’ by Lockwood, Finn and Jubinsky, supra n. 8 at 71–2.
45 This is obvious from the list of states that have proclaimed a state of emergency, which is published biennially by the UN Office of the High Commissioner for Human Rights (OHCHR). For the most recent list available, see OHCHR, List of states which have proclaimed or continued a state of emergency, 7 July 2005, E/CN.4/Sub.2/2005/6.
46 General Comment 29, supra n. 22 at para. 4.
47 This similarity between derogations and limitations is pointed out by Steiner, Alston and Goodman, supra n. 15 at 358.
specific situations within their country, and generally make their decisions in good faith in conformity with the ECHR.48

3. Limitations to and Derogations from Economic, Social and Cultural Rights

A. The CESCR's and States' Unclear Approach to Limitations to and Derogations from the ICESCR

Relatively little information is available about states' and the CESCR's interpretation of Article 4 ICESCR, or about their opinion and practice on possible derogations from ESC rights. Among other reasons, this may be due to the fact that until very recently Article 4 was not mentioned in the reporting guidelines of the Committee, which states were asked to follow when they submitted their periodic reports on the implementation of the ICESCR.49 The reporting guidelines did not require states to report on the limitations they had imposed on ESC rights, let alone on derogations they may have adopted and the national or international legal basis for these. This omission has been remedied with the recent adoption of new reporting guidelines, which have, however, not yet been followed by states.50

The CESCR also very rarely requires states to provide this information when they respond to the Committee's Lists of Issues, which identify questions the Committee wishes to discuss with states' representatives during an upcoming session, and which were not clear from the states' reports.51 Nonetheless, some states include information on Article 4 ICESCR in their reports.52 Some of this information is useful and gives an idea about states' approaches to Article 4;53 other information is less insightful, since it lists measures which the respective state can take under its national emergency legislation and

48 For a more extensive analysis including of relevant judgments of the ECtHR, see Harris et al., supra n. 16 at 11–14 and 626.
49 CESCR, Revised general guidelines regarding the form and contents of reports to be submitted by states parties under Articles 16 and 17 of the ICESCR, 17 June 1991, E/C.12/1991/1.
50 The Guidelines on Treaty Specific Documents, 24 March 2009, E/C.12/2008/2 at para. 14 read in conjunction with the Compilation of Guidelines on the Form and Content of Reports, 29 May 2008, HRI/GEN/2/Rev.5 at para. 40(c), now requires states to include information explaining the scope of derogations, restrictions or limitations; the circumstances justifying them; and the timeframe envisaged for their withdrawal in their common core documents to all UN human rights treaty bodies.
52 From the 54 state reports examined by the CESCR between April 2004 and May 2009, 26 directly mentioned Article 4 ICESCR, including the document submitted by the United Nations Interim Administration Mission in Kosovo (UNMIK).
53 See the discussion below on the interpretation of Article 4 ICESCR.
thus refers to derogations only, ignoring limitations. For example, the Tajik
state report lists at length all regulations which govern the state of emergency
in Tajikistan.54

This reveals a confusion of limitations and derogations. In addition, state
reports on Article 4 rarely clearly mention limitations or derogations that are
permitted in respect of ESC rights in national law,55 or what impact deroga-
tions from civil and political rights have on the enjoyment of ESC rights.
Algeria, for instance, reported that ‘the measures taken under the state of
emergency in no way affect the implementation of the ICESCR. Algerian citi-
zens have continued to exercise in full the rights recognised in the Covenant
despite the havoc wrought and the crimes committed by terrorist criminals.’56

All too often, states list possibilities to limit or derogate from civil and political
rights in their reports on Article 4 only,57 or suggest that they are in full com-
pliance with Article 4 without giving any details. The Philippines, for example,
reported that ‘the Philippine Government does not subject the rights provided
under the Covenant to any limitations other than those determined by law. Such
limitations—where they exist—are compatible with the nature of these
rights and are solely for the purpose of promoting the general welfare in a
free society.58 Other states claim not to place any limitations on ESC rights.59

At times, these assertions are questionable.

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54 CESCR, Initial Report, Tajikistan, 31 May 2006, E/C.2/TJK/1, at paras. 124–75. Similarly see, for
example, CESCR, Second Periodic Report, Nepal, 7 August 2006, E/C.12/NPL/2, at paras
110–23; CESCR, Initial Report, Malta, 26 May 2003, E/1990/5/Add.58 at paras 41–5; CESCR,
Initial Report, Kuwait, 20 November 2003, E/1990/5/Add.57 at paras 67–70; CESCR, People’s
Republic of China, reporting on the implementation of the ICESCR in Macao Special
Administrative Region, 4 March 2004, E/1990/5/Add.59 at paras 823–6; and CESCR, Third

55 Two of the rare exceptions are Brazil and Switzerland, at least concerning limitations; CESCR,
Second Periodic Report, Brazil, 28 January 2008, E/C.12/BRA/2 at para. 169; and CESCR,
is also given by CESCR, Third Periodic Report, Chile, 14 July 2003, E/1994/104/Add.26 at
para. 142; CESCR, Initial Report, Latvia, 21 September 2005, E/1990/5/Add.70 at paras
98–101; and the document submitted by UNMIK, 15 January 2008, E/C.12/UNK/1 at paras
114–15.

57 See, for example, Initial Report, Tajikistan, supra n. 54. The fact that the Tajik report to the
HRC contains a similarly long section on the Tajik emergency legislation is revealing in this
respect, see: HRC, Initial Report, Tajikistan, 11 April 2005, CCPB/C/TJK/2004/1 at paras
52–8. See also the other reports at supra n. 54; and CESCR, Initial Report, Peru, 17 June

58 CESCR, Combined Second, Third and Fourth Periodic Reports, Philippines, 7 September 2007,
E/C.12/PHL/4 at para. 76. Similarly, see CESCR, Second Periodic Report, Ecuador, 20
December 2002, E/1990/6/Add.36 at para. 36; CESCR, Initial Report, Egypt, 30 June 1998,
E/1990/5/Add.38 at paras 71–4; and CESCR, Second Periodic Report, Venezuela, 8 January
1999, E/1990/6/Add.19 at para. 26, stating that ‘Venezuela fully recognises and complies with
the provisions of the statement in article 4 of the Covenant.’

205, holding that there was ‘nothing to report’ under Article 4.
With regard to derogations from ESC rights, many states seem to assume the derogability of the right to strike or other rights related to labour issues set out in Articles 6, 7 and 8 ICESCR.60 The state report from Slovenia, for example, explains a procedure under Slovene law by which workers may be required to perform compulsory labour during emergencies when this is necessary to deal with the consequences of a severe natural or other disaster, or to guarantee the effective defence of the country when it faces a direct military threat.61

Occasionally, the Committee’s position on limitations of ESC rights can be inferred from its statements;62 by contrast, its position on possible derogations from some ESC rights and the legal basis for this remains rather unclear.63 Moreover, the CESCR never points out to states when they fail to make a clear distinction between limitations and derogations in their reports. It also does not ask states to justify obvious limitations in accordance with the criteria of Article 4 ICESCR in its ‘constructive dialogue’ with states parties.64 For example, in 2006 in its Concluding Observations on the Uzbek state report the CESCR merely voiced its concern about the decline in the annual per capita spending on public health in Uzbekistan despite a rise in GDP.65 It did not require Uzbekistan to justify its policies in relation to each of the elements of Article 4 ICESCR. More blatant examples concern the Committee’s Concluding Observations on Sudan and the Democratic People’s Republic of Korea.66


62 CESCR General Comment 13: Right to education (art. 13), 8 December 1999, E/C.12/1999/10; 7 IHRR 303 (2000) at para. 42; and CESCR General Comment 14: Right to the highest attainable standards of health (art. 12), 11 August 2000, E/C.12/2000/4; 8 IHRR 1 (2001) at para. 28, are the only General Comments that directly mention Article 4 ICESCR.

63 The CESCR sometimes refers to the non-derogability of minimum core obligations corresponding to each ESC right, for example, CESCR, Poverty and the ICESCR: Statement by the Committee to the Third United Nations Conference on Least Developed Countries, 10 May 2001, E/C.12/2001/10 at para. 18.

64 One of the very rare direct references to Article 4 ICESCR can be found in CESCR, Concluding Observations, China (Hong Kong Special Administrative Region (HKSAR)), 21 May 2001, E/C.12/1/Add.58 at para. 40: ‘When formulating and implementing its policies on permanent residence and split families, HKSAR is urged to give the most careful attention to all the human rights dimension of the issue, including Articles 2(2), 3 and 10 of the Covenant. The Committee reminds HKSAR that any limitations in connection with Article 10 must be justified in relation to each element set out in Article 4.’


66 CESCR, Concluding Observations regarding Sudan, 1 September 2000, E/C.12/1/Add.48 at para. 25, where the Committee expressed ‘concern’ about the ‘bombardment of villages and camps of the civilian population, in the war zones in southern Sudan, including the bombing
The CESCR has started to develop criteria in accordance with which it evaluates ‘retrogressive measures’ states may take or are forced to take when they face sudden resource constraints.\textsuperscript{67} Usually, it makes such an evaluation with reference to Article 2(1) ICESCR, which requires states to progressively realise ESC rights in accordance with the resources available to them. It seems that the CESCR does not consider these ‘retrogressive measures’ to be ‘limitations’ within the meaning of Article 4 ICESCR. The reasonableness of making a distinction between ‘retrogressive measures’ for reasons of resource constraints on the one hand and ‘limitations’ of ESC rights for other reasons on the other hand can be questioned; the relationship between Articles 4 and 2(1) ICESCR is examined further below.

\textbf{B. Article 4 ICESCR: An Analysis of the ICESCR’s General Limitation Clause}

Article 4 ICESCR reads as follows:

\begin{quote}
The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.
\end{quote}

Article 4 ICESCR thus allows states to limit the rights set forth in part III of the ICESCR.\textsuperscript{68} It restricts both the reasons for which ESC rights can be limited, and the way in which such limits can be effected. From the \textit{travaux préparatoires} it is clear that Article 4 was not meant to apply to restrictions a state may impose for reasons of lack of resources (retrogressive measures), since

\textsuperscript{67} In particular in General Comment 14, supra n. 62 at paras 32 and 48; General Comment 13, supra n. 62 at para. 45; General Comment 15: Right to water (arts 11 and 12), 20 January 2003, E/C.12/2002/11; 10 IHRR 303 (2003) at paras 19 and 42; General Comment 19: Right to social security, 4 February 2008, E/C.12/GC/19 at paras 42 and 64; and General Comment 18: Right to work (art. 6), 6 February 2006, E/C.12/GC/18; 13 IHRR 625 (2006) at paras 21 and 34.

\textsuperscript{68} This excludes the right to self-determination in Article 1, the non-discrimination provisions in Article 2(2) and Article 3 ICESCR from the limitation clause.
this issue was thought to fall under Article 2(1) ICESCR.\textsuperscript{69} Nonetheless, the debates in the UN Commission on Human Rights in 1951 and 1952 when substantive parts of the ICESCR were drafted indicate that the approach taken in Article 4 is inherently linked to the notion of progressive realisation embodied in Article 2(1) of the Covenant and with this to the nature of ESC rights.\textsuperscript{70}

(i) The sole purpose of limitations to ESC rights: the promotion of general welfare

Like limitation clauses in other human rights treaties, Article 4 ICESCR reflects the desire to give states flexibility in the necessary balancing of individual rights with public interests. A significant difference to limitation Articles of other human rights treaties is, however, that there is ‘solely’ one legitimate reason for which ESC rights can be limited: ‘for the purpose of promoting general welfare.’ This makes limitations under Article 4 ICESCR narrower than those of other human rights treaties, including those of the European Social Charter.\textsuperscript{71}

An examination of the drafting history of Article 4 ICESCR reveals the reasons why no other purposes were incorporated. While there was a narrow majority for including a general limitation clause into the draft Covenant in the UN Commission on Human Rights,\textsuperscript{72} several state representatives

\textsuperscript{69} This is clear from the debates during the 234th–236th and 306th–308th meetings of the UN Commission on Human Rights in 1951 and 1952, which focused on the question of how ESC rights could be limited by legitimate interests of the community. See, for example, the explicit statement made by the UK representative, Mr Hoare, that Article 32 [now Article 4] solved the problem of limitation which was not solved by Article 1 [now Article 2]: see Summary Record of the 308th meeting of the UN Commission on Human Rights, 6 June 1952, E/CN.4/SR.308 at 5. Other representatives made similar statements, for example, Mr Whitlam (Australia), ibid. at 5; Mr Santa Cruz (Chile), ibid. at 6; Mr Morozov (USSR), Summary Records of the 306th meeting of the UN Commission on Human Rights, 6 June 1952, E/CN.4/SR.306 at 11; Mr Juvigny (France), Summary Record of the 307th meeting of the UN Commission on Human Rights, 6 June 1952, E/CN.4/SR.307 at 5; and Mr Waheed (Pakistan), ibid. at 13. See also Alston and Quinn’s analysis of the travaux préparatoires of Article 4 in Alston and Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, (1987) 9 \textit{Human Rights Quarterly} 156 at 194.

\textsuperscript{70} This is obvious from the debate in the Commission that led to the inclusion of only one reason for which limitations of ESC rights are permitted: see Part B(i) below.

\textsuperscript{71} Article 31(1) of the European Social Charter 1961 (ESC); and Article G of the Revised European Social Charter 1996 (Revised ESC) permit limitations that ‘are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.’ It should be noted, however, that the ESC, unlike the ICESCR, does not provide for ‘progressive realisation’ in accordance with available resources of the rights set out in the ESC. This gives states less flexibility when implementing the ESC, and may therefore partly explain the inclusion of the broader limitation clause.

\textsuperscript{72} During the 308th meeting a vote taken on the question whether the Commission wished to include a general limitation clause into the ICESCR was decided favourably by only nine votes to eight, with one abstention: see Summary Record of the 308th meeting of the UN Commission on Human Rights, supra n. 69 at 8.
successfully argued that no limitations to ESC rights for reasons of public order, public morals or the respect for rights and freedoms of others should be permitted. It was argued that these reasons seemed not to be relevant to the same extent as they were with regard to civil and political rights. The Indian representative, for instance, noted that she was not quite sure whether there was any need for a limitation Article of the kind submitted by the United States [proposing *inter alia* limitations for reasons of public order and public morals] covering economic, social and cultural rights, as there was in the case of civil rights. She asked how the enjoyment of the right such as the rights to health, education and adequate working conditions could be limited.73

To illustrate this point, it can be recalled that limitations for reasons of public order often affect for example the right to freedom of movement. When a society faces natural disasters, threats of terrorist attacks or non-international armed conflicts which affect public order, movement can be restricted in order to guarantee people's safety; and in severe cases the imposition of curfews can be justified.74 In these cases, it seems not to be justifiable to directly limit people's right to food and health in the same way, even though the restriction of freedom of movement will undoubtedly have some effect on people's ability to enjoy their right to food and health. Arguably, this will have to be taken into account when the proportionality of the restrictions on the right to freedom of movement is evaluated. Even more obvious seem the reasons for the exclusion of morality or public morals as a ground for permitting limitations of ESC rights. At the time the ICCPR and the ECHR were drafted, the typical situation for invoking this provision was the need to control prostitution: the restriction of openly practiced prostitution in certain districts was seen as a legitimate limitation of the right to freedom of movement for the purpose of protecting public morals.75 It would not be conceivable to restrict the right to food, health, housing, etc. of any individual for such reason of public morals.76

73 Summary Record of the 234th meeting of the UN Commission on Human Rights, 2 July 1951, E/CN.4/SR.234 at 23. Similar statements were made by Mr Malik (Lebanon), ibid. at 20; Mr Jevremovic (Yugoslavia), Summary Record of the 235th meeting of the UN Commission on Human Rights, 2 July 1951, E/CN.4/SR.235 at 5; Mr Morosov (USSR), ibid. at 7; Mr Wabed (Pakistan), ibid. at 17; Mr Santa Cruz (Chile), Summary Record of the 307th meeting of the UN Commission on Human Rights, supra n. 69 at 6; Mr Boratynski (Poland), ibid. at 8; and Mr Ghorbal (Egypt), ibid. at 12. See also the discussion by Alston and Quinn, supra n. 69 at 202.

74 Nowak, supra n. 8 at 278. See also Siracusa Principles, supra n. 10 at paras 22–4 on public order (*ordre public*); and Lockwood, Finn and Jubinsky, supra n. 8 at 56–63.

75 Nowak, supra n. 8 at 280. Similarly see Lockwood, Finn and Jubinsky, supra n. 8 at 66–70.

76 However, the Indian reservation to Article 4 ICESCR, the only reservation which was entered to this Article, suggests that under Indian law ESC rights can be limited for, among others, reasons of public order, decency and morality: see http://www2.ohchr.org/english/bodies/
These considerations resulted in a rejection of identical wording to Article 29(2) of the Universal Declaration of Human Rights 1948 (UDHR) as a limitation clause for the ICESCR, which would have allowed limitations ‘for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality [and] public order’ in addition to the purpose of promoting general welfare. The validity of this decision seems to be affirmed by the practical experiences of the European Committee of Social Rights supervising the implementation of the European Social Charter. The European Social Charter contains a broad limitation clause, permitting restrictions for the ‘protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals’. The vast majority of cases in which these provisions have been invoked are cases relating to the limitation of Articles 5 and 6 of the European Social Charter, which respectively set out the rights to organise and to collective bargaining. It is noteworthy that the ICESCR includes a specific clause for the limitation of Article 8 ICESCR, containing the right to strike and the rights to form and join trade unions. Article 8(1)(a) and (c) ICESCR explicitly allow for limitations ‘in the interests of national security or public order or for the protection of the rights and freedoms of others’. This is understandable from the character of the rights of Article 8, which resemble civil and political rights more than any of the other rights in the ICESCR. This suggests that, in practice, it may not be necessary to permit limitations of other ESC rights for these far-reaching reasons beyond the promotion of general welfare, especially not for subsistence rights, such as the rights to food, health, housing or clothing. A closer look shall now be taken at the notion of ‘general welfare’ in the context of the ICESCR.

ratification/3.htm#reservations [last accessed 10 September 2009]. When the ICESCR was drafted, the French and US representatives also argued that it might be necessary to limit the right to education in accordance with the just requirements of morality: see Summary Record of the 306th meeting of the UN Commission on Human Rights, supra n. 69 at 10 (Mr Juvigny, France) and Summary Record of the 307th meeting of the UN Commission on Human Rights, supra n. 69 at 8 (Mrs Roosevelt, USA). The argument was rejected by the majority of delegations.

77 The proposal by the US in this respect (E/CN.4/610/Add.2), based on Article 29 UDHR, was amended accordingly during the 234th-236th meetings of the UN Commission on Human Rights in 1951. See Summary Record of the 236th meeting of the UN Commission on Human Rights, 2 July 1951, E/CN.4/SR.236 at 14. France tried to reintroduce ‘respect for the rights and freedoms of others’ and ‘legitimate requirements of morality and public order’ as reasons for which ESC rights could be limited during the 306th–308th meetings of the UN Commission on Human Rights in 1952. But it withdrew its proposal as it turned out that there was no broad support for this: see Summary Records of the 308th meeting of the UN Commission on Human Rights, supra n. 69 at 7.

78 Article 31(1) ESC; and Article G(1) Revised ESC, supra n. 71.

As noted by Alston and Quinn, ‘general welfare’ is to be interpreted restrictively in the context of Article 4 ICESCR. While the meaning of ‘general welfare’ is not elaborated on in the travaux préparatoires, the fact that permitting limitations for reasons of maintaining public order, public morality and the respect for rights and freedoms of others was explicitly rejected during the drafting process, makes clear that the term ‘general welfare’ does not implicitly include these terms. The same is true for the notion of ‘national security’ which was never suggested as a reason for which ESC rights could be limited during the drafting process.

Consequently, in the context of the ICESCR, ‘general welfare’ should be understood as referring primarily to the economic and social well-being of the people and the community. From this finding, it is clear that open-ended concepts like ‘national security’ or ‘economic development’ are not sufficient to justify limitations, unless the state can prove that in a specific situation these concepts are clearly identical with ‘the general welfare’. The burden of proving such a state of affairs would rest with the state, and the CESCR would clearly have the mandate to review the state’s reasoning. For example, in a situation of internal or international armed conflict a state might be able to justify non-discriminatory rationing of food if there was a general scarcity by arguing that this was necessary for maintaining ‘general welfare’, even if this would at the same time be a measure to maintain ‘public order’ through ensuring equitable distribution.

Even though the CESCR has never commented directly on its understanding of ‘general welfare’, this finding seems to be supported by its General Comment on the right to health. With regard to national security or public order as possible grounds for limitations of the right to health, the Comment indicates that a state party which, for instance,

restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a government, or fails to provide immunization against the community’s major infectious diseases, on grounds such as

80 Alston and Quinn, supra n. 69 at 201–2.
81 Daes, The Individual’s Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/432/Rev.2 (1983) at 123–4. See also ibid. at 55, where the Special Rapporteur comments that ‘its [general welfare’s] purpose is to promote man’s dignity and well-being . . . the general welfare is something quite different from “reason of State”.’ Similarly, see Alston and Quinn, supra n. 69 at 202.
82 Alston and Quinn, ibid. In this context, see also the statement of the Chilean representative (Mr Santa Cruz) when Article 4 was drafted, holding that the limitation clause should not allow states to delay the ‘implementation of such rights as those to education, health and social security in order to concentrate all its resources on economic development, thus sacrificing the interests of the present generation to those of the next.’ Summary Record of the 235th meeting of the UN Commission on Human Rights, supra n. 73 at 13.
national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in Article 4.83

This would include an obligation to show that in the situation in which these limitations are imposed for reasons of ‘national security’ or ‘public order’, this is practically the same as imposing them for reasons of ‘promoting general welfare’ in the understanding set out above.

The Committee also seems to share the view that references to broad concepts like ‘economic development’ cannot easily justify limitations of ESC rights, since policies adopted towards this end often limit ESC rights of certain individuals or groups without ‘promoting general welfare’. This is clear from the CESCR’s statements on national and international developmental policies (e.g. poverty reduction strategies or structural adjustment programmes) which are often implemented in the name of economic development. For instance, in its Concluding Observations concerning Egypt it was found that ‘some aspects of structural adjustment programmes and economic liberalisation policies introduced by the Government of Egypt, in concert with international financial institutions, have impeded the implementation of the Covenant’s provisions, particularly with regard to the most vulnerable groups’.84 With this the Committee seems to suggest that the limitations of ESC rights of vulnerable groups as a consequence of the implementation of economic policies are not justified. One reason would presumably be that the limitations of ESC rights which disproportionately affect particular vulnerable groups can never be seen as ‘promoting general welfare’.85

Another interesting question in this context would be whether states could argue that in times of armed conflict ‘general welfare’ is more effectively promoted by spending on defence including on anti-insurgency operations, rather than on food, health-care, housing or social security programmes. In line with the above, the fact that ‘national security’ and ‘public order’ are excluded from the purposes for which states are permitted to limit ESC rights seems to suggest that this is difficult to justify if the state cannot show that upholding ‘national security’ and ‘public order’ is clearly tantamount to upholding

83 General Comment 14, supra n. 62 at para. 28. Similarly General Comment 13, supra n. 62 at para. 42.
85 See also the Limburg Principles on the Implementation of the ICESCR, June 1986, at para. 52, available at: www.unimaas.nl/bestand.asp?id=2453 [last accessed 10 September 2009], holding that ‘promoting general welfare’ is to be understood as ‘furthering the well-being of the people as a whole’ (emphasis added). The Limburg Principles were adopted by a group of distinguished experts in international law.
'general welfare'. This may be possible to show in particular where a state faces an attack by a foreign aggressor. But limitations affecting the minimum core of each of the rights would not be permitted, since they would go against 'the nature of these (ESC) rights'.

The CESCR has indirectly touched upon aspects of this question under Article 2(1) of the ICESCR when discussing the justification of retrogressive measures occurring due to lack of resources, which it has not considered a limitation falling under Article 4 of the ICESCR. Thus, ultimately this question is one related to finding a reasonable interplay in the application of Articles 4 and 2(1) of the ICESCR, which shall be discussed below (Section C).

(ii) ‘In a democratic society’

The qualification that limitations must be acceptable ‘in a democratic society’ further restricts the scope of limitations permitted under Article 4 ICESCR. It adds an additional, independent standard of legitimacy that limitations must meet. At the same time, the text links the requirement ‘in a democratic society’ inherently to the understanding of ‘general welfare’. As noted by the Greek representative during the drafting process of the ICESCR, the reference to a ‘democratic society’ in the general limitation clause was of ‘vital importance... since in its absence... [the limitation clause] might very well serve the ends of dictatorship’. That is, a decision on what constitutes ‘general welfare’ has to be taken in the context of conditions prevailing in a democratic society.

With regard to the ECHR, the phrase ‘in a democratic society’ has been described as ‘heavy with uncertainty’, which seems to be of even greater significance for the international context of the ICCPR and the ICESCR since there is ‘no single model of a democratic society’. For a long time, the discussion about democracy and about what constitutes a ‘democratic society’ was seized by ideological differences between Communist and Western states during the Cold War. The different understandings of democracy also made it difficult to transfer principles the ECtHR had begun to develop with regard

86 The meaning of this phrase is discussed in Part B (iv) infra.
88 Summary Record of the 235th meeting of the UN Commission on Human Rights, supra n. 73 at 20.
89 Harris et al., supra n. 16 at 349.
90 Siracusa Principles, supra n. 10 at para. 21; and Limburg Principles, supra n. 85 at para. 81. See also Garibaldi’s remark that ‘democracy has meant and means many different things to many different people’; Garibaldi, supra n. 87 at 42. See further Kiss, supra n. 17 at 307.
91 Garibaldi, supra n. 87 at 53–66. This is also clear from Daes’ analysis: Daes, supra n. 81 at 127–8.
to the clause ‘in a democratic society’ in its jurisprudence on the ECHR to the international level, i.e. to the context of the ICCPR and ICESCR. This was particularly so because membership in the Council of Europe is conditioned upon the existence of a particular type of democratic society within a state.\textsuperscript{92} However, since the end of the Cold War these ideological confrontations have lost their relevance, which is supported by the fact that the meaning of ‘democratic society’ in the UDHR, the ICCPR and ICESCR was always understood to rather refer to ‘some system of political principles that is associated with Western thought and traditions’,\textsuperscript{93} i.e. a representative system, and not to a form of ‘peoples’ or socialist democracy as had been proposed by the Soviet Union.

The HRC and the CESCR in their General Comments, Concluding Observations and other documents hardly ever interpret the clause ‘in a democratic society’. When referring to the phrase ‘necessary in a democratic society’ the HRC usually confines itself to discuss the principle of proportionality under the term ‘necessary’\textsuperscript{94} without commenting on the requirements of a ‘democratic society’. This is partly explicable by the fact that the HRC has not yet adopted General Comments on Articles 21 and 22 of the ICCPR, the only provisions of the ICCPR which contain the condition that limitations have to be ‘necessary in a democratic society’.

The ECtHR by contrast has succeeded in bringing some clarity to this phrase by identifying certain characteristics of a ‘democratic society’ in its jurisprudence. All limitation clauses of the ECHR include the phrase ‘necessary in a democratic society’. These characteristics can be used by analogy for the interpretation of the same phrase in Article 4 ICESCR, in particular against the background of the de-ideologisation of the term ‘democracy’.\textsuperscript{95} It should

\textsuperscript{92} This is obvious from the preamble of the Statute of the Council of Europe, in which the contracting states reaffirm ‘their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.’ See http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm [last accessed 10 September 2009].

\textsuperscript{93} Garibaldi, supra n. 87 at 68. Referring to the \textit{travaux préparatoires} of the UDHR, the ICCPR and the ICESCR, Garibaldi finds that the majority of the delegations involved in the drafting process rejected the view that the then communist systems might qualify as a ‘democratic society’. All attempts by the Soviet Union to replace ‘democratic society’ with the ‘the requirements of a democratic state’ or ‘in the interests of democracy’ failed (at 53–63).


\textsuperscript{95} This is supported by Daes’ analysis of the meaning of the term ‘democratic society’ in the UDHR, the ICCPR and the ICESCR, which highlights similar elements as the ECtHR in its jurisprudence. She holds that ‘regardless of how democracies may call themselves—direct, representative, Western, liberal, socialist, organic, bourgeois or popular—they are only real and pure democracies when they guarantee and respect human rights and fundamental freedoms, including in particular the right of everyone to participate in political life at the local and the national level by means of free elections, enabling each people to choose freely and periodically its own government, and recognising the activities of pluralist political institutions.’ See Daes, supra n. 81 at 127–8.
nonetheless be noted that despite the end of the ideological confrontations of the Cold War, the phrase ‘in a democratic society’ does not require a state to be a ‘democratic society’ in order to become or remain a party to a universal human rights treaty containing this phrase.96 The persistence of different forms of democracy and other systems of government in countries around the world would make this an unreasonable requirement.

The ECtHR has identified ‘pluralism, tolerance and broad-mindedness’ as ‘hallmarks’ of a democratic society.97 It has also pointed to the importance of political expression as well as the protection of ‘plural centres of power and influence’ through upholding freedom of association and expression as vital elements of a ‘democratic society’.98 This includes respect for the opinions of minorities.99 Transferring this to the context of Article 4 ICESCR would imply that decisions to limit ESC rights should be based on some consultation process (as inclusive as possible), should not be ordered unilaterally and should be subject to popular control.100 Even if not directly referring to Article 4, the CESCR has noted that it would, when assessing whether a state party has ‘taken reasonable steps to the maximum of its available resources to achieve progressively the realisation of the provisions’ of the ICESCR, place ‘great importance on transparent and participative decision-making processes at the national level’.101 Arguably, a ‘transparent and participative decision-making process’ is exactly one requirement that should be met under the provision ‘in a democratic society’, with regard to decisions on limiting ESC rights in order to promote general welfare. This finding is also supported by Craven’s remark that democratic principles find explicit recognition in other Articles of the ICESCR.102

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96 Garibaldi, supra n. 87 at 27; and Alston and Quinn, supra n. 69 at 204.
97 For example, Young, James and Webster v United Kingdom A 44 (1981); 4 EHR 38 at para. 63. See also Harris et al., supra n. 16 at 352, discussing other relevant judgments of the ECtHR.
98 Harris et al., ibid.
99 See, for example, Chassagnou v France 1999-III; 29 EHRR 615 (GC) at para. 112; and Jayawickrama, supra n. 8 at 188, citing cases from different countries, for example, the Indian Supreme Court’s finding that a democratic society is one in which ‘it is not necessary that everyone should sing the same song’; see Rangarajan v Jagjivan Ram [1990] LRC (Const) 412.
100 See Garibaldi, supra n. 87 at 204; and Daes, supra n. 81 at 128.
101 CESCR, Statement: An Evaluation of the Obligations to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant, 21 September 2007, E/C.12/2007/1 at para. 11. This is confirmed in several General Comments of the Committee, for example, General Comment 14, supra n. 62 at paras 11, 17 and 54; General Comment 15, supra n. 67 at para. 48; and General Comment 19, supra n. 67 at paras 26, 42(c), 46 and 69. It is also in line with Toebes’ observation regarding the right to health, that the Committee has generally disapproved of any coercive policies relating to the health of populations: see Toebes, The Right to Health as a Human Right in International Law (Antwerpen: Intersentia, 1999) at 143.
102 Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (Oxford: Clarendon Press, 1995) at 120, referring to Articles 1(1) and 13(1) ICESCR.
(iii) ‘Determined by law’

Article 4 of the ICESCR further requires that limitations on ESC rights are ‘determined by law’. Since again there is little indication of the CESCR’s interpretation of the phrase ‘determined by law’, parallels can be drawn with the understanding of ‘law’ under other human rights treaties, especially the ICCPR and the ECHR, which also require that limitations are ‘determined by law’, ‘prescribed by law’ or imposed ‘in accordance with the law’. The HRC and the ECtHR have interpreted these phrases in similar ways, and there is no reason why there should be a different interpretation for the ICESCR. The CESCR seems to share this view, since in its General Comment on the right to adequate housing it referred extensively to the HRC’s understanding of ‘law’. The condition ‘determined by law’ obliges states to provide for any limitation of human rights in national law. National laws must be consistent with relevant human rights treaties, and must be in force at the time when the limitation is imposed. In its General Comment 15 the CESCR established, for example, that ‘any action that interferes with an individual’s right to water ... [must be] performed in a manner warranted by law, compatible with the Covenant.’ The ‘law’ does not need to be statute law, it can also be judge-made law, or it can be made by an international organisation. Mere administrative provisions are however, insufficient. The ECtHR further clarified the qualities a national rule must reach in order to be considered as ‘law’: it must be publicly available (‘adequately accessible’), and must be ‘formulated with sufficient precision to enable the citizen to regulate his conduct’ (sufficiently precise). Public availability implies that laws are available

103 On the meaning of the slight differences in these wordings in the context of the ICCPR, see Nowak, supra n. 8 at 272. 
105 See, for example, HRC General Comment 19: Protection of the family, 27 July 1990, A/45/ 40(Vol.I)(Supp); 1-2 IHRR 24 (1994) at para. 4; General Comment 16, supra n. 104 at para. 4; and Siracusa Principles, supra n. 10 at para. 15. With regard to the ECtHR, see Harris et al., supra n. 16 at 334.
106 General Comment 15, supra n. 67 at para. 56.
107 Harris et al., supra n. 16 at 344–5, analysing relevant jurisprudence of the ECtHR in that regard. See also Nowak, supra n. 8 at 272–3. This understanding of ‘law’ also coincides with the understanding of the drafters of the ICESCR. For example, during the 236th meeting of the UN Commission on Human Rights in 1951 the French representative (Mr Cassin) noted that ‘the law’ was not restricted to statute law. By ‘the law’ was meant the whole body of legal precedent and practice ...’: Summary Record of the 236th meeting of the UN Commission on Human Rights, supra n. 77 at 9.
108 Nowak, supra n. 8 at 272–3. See also Silver v United Kingdom A 61 (1983); 5 EHR 347 at para. 86.
109 Saturday Times v United Kingdom A 30 (1979); 2 EHR 245 at para. 49, analysed (among other cases) by Harris et al., supra n. 16 at 134 and 345. See also Siracusa Principles, supra n. 10 at para. 17, referring to the ICCPR: ‘legal rules limiting the exercise of human rights shall be clear and accessible for everyone’; and Limburg Principles, supra n. 85 at paras 48, 50 and 51.
to everyone. However, as established in the ECtHR’s jurisprudence it is accepted that the understanding of certain laws is only possible with advice.110 Sufficient precision refers to the quality of the law: while it is clear that laws may not be formulated with absolute precision, the discretion that may be given to national authorities by a law must be indicated with sufficient clarity, including the limits of such discretion.111 This has also been reiterated by the HRC which found with regard to limitations of freedom of movement that ‘laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.’112

To sum up, the requirement of ‘determined by law’ is fulfilled when the limitation is defined in any form of national law (usually enacted by an elected parliament) which conforms with international human rights standards and is generally accessible, foreseeable and sufficiently clear.

(iv) ‘Compatible with the nature of these rights’

Another important boundary set by Article 4 ICESCR with regard to states’ possibilities to limit ESC rights and which is unique among the limitation clauses of human rights treaties, is the requirement that any limitation must be ‘compatible with the nature of these [ESC] rights.’ This raises the question how the ‘nature of these rights’ can be determined, and whether there are certain rights which, by their very nature, cannot be subjected to limitations. The travaux préparatoires only indicate that the Chilean representative who proposed the inclusion of this phrase wished to make sure that the impact of any restrictions of the ICESCR was studied with regard to each right proclaimed in the Covenant individually to prevent their nullification.113 Even though the CESCR has never directly referred to this phrase in its General Comments and Concluding Observations on state reports, once more several of its statements give insight into its likely interpretation of this phrase. A number of state reports on Article 4 to the CESCR are also revealing.

In general, the approach of the CESCR points toward ‘minimum essential levels’ and corresponding minimum core obligations under each ESC right as representing the ‘nature of these rights’.114 Minimum core obligations reflect

110 See Harris et al., supra n. 16 at 134 and 245, analysing the ECtHR’s relevant cases.
111 Ibid. at 346–8.
112 General Comment 27, supra n. 94 at para. 13.
113 Summary Record of the 235th meeting of the UN Commission on Human Rights, supra n. 73 at 13. The Chilean proposal was adopted by the Commission without any further discussion: see Summary Record of the 236th meeting of the UN Commission on Human Rights, supra n. 77 at 11.
114 CESCR, General Comment 3: The nature of states parties’ obligations (art. 2, para. 1), 14 December 1990. E/1991/23(Supp); 1-1 IHRR 91 (1994) at para. 10, sets out the basic lines of its minimum core approach. It found that ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon
a universal absolute bottom-line of obligations under each of the rights of the ICESCR, which has to be respected, protected and fulfilled by all state parties to the ICESCR, regardless of their level of economic development. 115 With regard to different situations in which ESC rights have de facto been limited and the policies adopted in these contexts, such as economic difficulties, prevailing severe poverty, armed conflict and natural disasters, the CESCR has called on states to guarantee the enjoyment of ‘basic economic, social and cultural rights, as part of minimum standards of human rights’;116 the provision of ‘basic services, including the health and education infrastructure’;117 and respect for minimum core obligations in the context of developmental policies.118

More broadly, in its recent General Comment on the right to water the CESCR found that an individual shall ‘under no circumstances’ be deprived of ‘the minimum essential level of water’.119 ‘Under no circumstances’ includes

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115 This is clear, for example, from and General Comment 14, supra n. 62 at paras 47–8; General Comment 15, supra n. 67 at paras 40, 42 and 44(c); and General Comment 19, supra n. 67 at para. 65. The reading of minimum core obligations as an absolute universal bottom-line is also predominant among experts discussing minimum core obligations, even though this discussion has not yet come to an end. See, for example, Limburg Principles, supra n. 85 at para. 85 at para. 25 (‘States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’); Örıcü, ‘The Core of Rights and Freedoms: The Limits of Limits’, in Campbell, Goldberg, McLean and Mullen (eds), Human Rights: From Rhetoric to Reality (Oxford: Blackwell, 1986) at 37; Arambulo, Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects (Antwerp: Intersentia, 1999) at 130–5; Toebes, supra n. 101 at 224; Scott and Axton, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise’ (2001) 16 South African Journal on Human Rights 206 at 250; Chapman and Russell (eds), Core Obligations: Building a Framework for Economic, Social and Cultural Rights (Antwerp: Intersentia, 2002) at 14; and White, ‘The Applicability of Economic, Social and Cultural Rights to the UN Security Council’, in Baderin and McCorquodale (eds), Economic, Social and Cultural Rights in Action (Oxford: Oxford University Press, 2007) at 89. For a recent differentiated analysis of minimum core obligations, see Bilchitz, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights (Oxford: Oxford University Press, 2007) in particular chapter 6.


117 CESCR, Concluding Observations regarding the Russian Federation, 12 December 2003, E/C.12/1/Add.94 at para. 38.

118 Poverty and the ICESCR, supra n. 63 at para. 17, stating: ‘When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect.’

119 General Comment 15, supra n. 67 at para. 56. Similarly, see General Comment 14, supra n. 62 at para. 47.
situations in which states may be permitted to impose limitations for the ‘promotion of general welfare’. Statements of the Committee in General Comments show that it regards non-fulfilment of minimum core obligations as a violation of corresponding core rights.120 This supports the idea that limitations of minimum core obligations are not permitted, supposedly because this goes against the ‘nature of these rights’. Moreover, any other understanding of the phrase ‘compatible with the nature of these rights’ would contradict the rationale which underlay the adoption of the minimum core obligations approach by the CESCR, that is to counter the tendency that states use the notion of progressive realisation of ESC rights in accordance with available resources to escape any meaningful obligation under the ICESCR.121

On other occasions, the CESCR has even observed that minimum core rights/obligations are ‘non-derogable’.122 Possibilities to derogate from ESC rights will be discussed in more detail below. Here this statement can be seen as a reaffirmation that the CESCR considers minimum core obligations as describing the ‘nature’ of ESC rights. To reiterate, derogations usually constitute a greater interference with human rights than ‘softer’ limitations.

The HRC has made similar statements with regard to limitations of civil and political rights. In its General Comment 27, for instance, it found that states which impose restrictions to freedom of movement under Article 12(3) ICCPR shall ‘always be guided by the principle that the restrictions must not impair the essence of the right’.123 Referring to the ICESCR, the Limburg Principles comment on Article 4 ICESCR that the requirement of compatibility ‘with the nature of the right’ prohibits limitations that ‘jeopardise the essence of these rights’,124 that essence being reflected in minimum core obligations.

Several states also seem to follow the interpretation that minimum core obligations and corresponding rights should not be limited under Article 4 of the ICESCR. Even if they do not explicitly state that they regard minimum core obligations to represent the ‘nature of these rights’, the fact that they report on these issues under Article 4 allows such a conclusion. For example, Switzerland in its initial report to the CESCR noted that any restriction of

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120 General Comment 19, supra n. 67 at para. 65. See also, for example, General Comment 15, supra n. 67 at para. 40; and General Comment 14, supra n. 62 at para. 47.
121 General Comment 3, supra n. 114 at para. 10; and Chapman and Russell, supra n. 115 at 5.
122 General Comment 14, supra n. 62 at para. 47; General Comment 15, supra n. 67 at para. 40; and Poverty and the ICESCR, supra n. 63 at paras 16 and 18.
123 General Comment 27, supra n. 94 at para. 13. See also HRC General Comment 31: Nature of the general legal obligation imposed on States Parties to the Covenant. 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004) at para. 6, stating: ‘in no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.’ See also HRC General Comment 22: Freedom of thought, conscience and religion. 30 July 1993, CCPR/C/21/Rev.1/Add.4; 1-2 IHRR 30 (1994) at para. 8.
124 Limburg Principles, supra n. 85 at para. 56. See also, General Comment 14, supra n. 62 at para. 28.
fundamental rights guaranteed in the Swiss constitution must ‘respect the essence (the “hard core”) of the fundamental right and not void the letter of its substance’.\textsuperscript{125} It further elaborates that the legislature can enact rules limiting fundamental rights, but that ‘its competence is restricted by the intangible core of those rights, and if it were to take measures voiding a right of its substance it would be violating the guarantee of that right’.\textsuperscript{126} The Brazilian state report displays a similar reasoning in its paragraphs on the implementation of Article 4 in Brazil. Discussing several judgements of the Brazilian Constitutional Court, the report finds that when unjustifiable state inertia or abusive governmental behaviour ‘affect the irreducible set of minimum conditions necessary to a life with dignity and essential to an individual’s very survival, it is possible for the Judiciary to intervene so as to ensure the enjoyment of economic, social and cultural rights’.\textsuperscript{127}

The understanding that any limitation of ESC rights must be compatible with the ‘nature of these rights’, excluding limitations of minimum core obligations and corresponding rights is also reflected in relevant academic literature. For example, Rosas and Sandvik-Nylund argue that Article 4 of the ICESCR would preclude a ‘departure from a minimum standard of livelihood and health’.\textsuperscript{128} With regard to the right to food, Alston found in 1984 that ‘any proposed limitations on the right to food which could result in death by starvation are clearly unacceptable’.\textsuperscript{129} Indeed, it would be very difficult to imagine limitations to the minimum core of the right to health and food (i.e. access to basic (emergency) health care and to an amount of food to be free from hunger),\textsuperscript{130} which would be consistent with the very nature of these rights. Especially with regard to subsistence rights, the minimum core obligations corresponding to these rights match vital interests of individuals that are

\begin{itemize}
  \item \textsuperscript{125} CESCR, Initial Report regarding Switzerland, 18 September 1996, E/1990/5/Add.33 at para. 66(d).
  \item \textsuperscript{126} Ibid. at para. 71. See also the Swiss Federal Court’s judgment in V. v Einwohnergemeinde X. und Regierungsrat des Kantons Bern, 27 October 1995, BGE/ATF 121 I 367, in particular Erwägung 2, at para. b. An English translation of the case is available at: http://www.escr-net.org/case law/caselaw.show.htm?doc id=401055 &country=13639 [last accessed 10 September 2009].
  \item \textsuperscript{130} The discussion about the possible scope of minimum core obligations under the right to health and food is ongoing. With regard to the right to health see, for example, General Comment 14, supra n. 62 at paras 43–5; Toebes, supra n. 101 at 284–8; and Chapman, ‘Core Obligations Related to the Right to Health’, in Chapman and Russell, supra n. 115 at 185–214. On the right to food, see CESCR General Comment 12: Right to adequate food (art. 11), 12 May 1999, E/C.12/1999/5: 6 IHRR 902 (1999) at paras 6, 8 and 33; and Künemann, ‘The Right to Adequate Food: Violations Related to its Minimum Core’, in Chapman and Russell, supra n. 115 at 161–83.
\end{itemize}
important for their survival. Thus, particularly concerning these rights, it seems to be hardly ever possible to limit the minimum core without touching upon the very nature of the rights in question. This is also in line with the general understanding that the ‘power to impose restrictions on fundamental rights is essentially a power to “regulate” the exercise of these rights, not to extinguish them.\footnote{Jayawickrama, supra n. 8 at 187, including related footnotes referring to case law from different countries.}

Beyond the question of whether the phrase ‘the nature of these rights’ can be understood as excluding limitations that touch upon the minimum core obligations under ESC rights, Alston and Quinn point out that the phrase clearly precludes limitations which sweepingly cover all or many ESC rights. This is so unless a state can show that these measures are in conformity with the nature of all rights of the ICESCR, which is rather unlikely. It also suggests that the burden of proof to demonstrate that limitations do not interfere with the very nature of ESC rights lies with the state.\footnote{Alston and Quinn, supra n. 69 at 201. Regarding the burden of proof, see also General Comment 14, supra n. 62 at para. 28.}

(v) Proportionality

The discussion on the prohibition of limitations which conflict with the very nature of each of the ESC rights already points to the question of the proportionality of limitations. As with limitations imposed on civil and political rights under the ICCPR and the ECHR, limitations under Article 4 of the ICESCR should be proportionate. Looking at the jurisprudence of the HRC and the ECtHR to clarify the understanding of the principle of proportionality in the context of limitations, it is obvious that ‘the interference must correspond to a pressing social need and, in particular, that it is [must be] proportionate to the legitimate aim pursued’.\footnote{Olsson v Sweden (No.1) A 130 (1988); 11 EHRR 259 at para. 67; and Chassagnou v France, supra n. 99 at para. 113. See also the analysis by Harris et al., supra n. 16 at 10–11 and 349; General Comment 22, supra n. 123 at para. 8; General Comment 31, supra n. 123 at para. 6; and Nowak, supra n. 8 at 275.}

The ECtHR has further found with regard to the principle of proportionality that the more important the protected right is, the more will states be required to demonstrate that there exists a pressing social need for an interference.\footnote{See, for example, the ECtHR’s finding in Dudgeon v United Kingdom A 45 (1981); 4 EHRR 149 at para. 52, where the interference was with ‘a most intimate aspect of private life’ requiring that ‘there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes [of Article 8(2) ECHR]. Dudgeon v United Kingdom is discussed, among other cases, in Harris et al., supra n. 16 at 351–2.}

As established above, the only legitimate aim in the context of the ICESCR is the ‘promotion of general welfare’. From the other end, the greater the pressing social need, reflecting one of the legitimate interests (for the ICESCR the promotion of general welfare) for
which rights can be limited, the easier it might be for states to justify interfer-
ences.135 In the context of ESC rights this might hint at a difference that can
be made between subsistence rights, the upholding of which is necessary for
the very survival of people (for example, the right to basic food, a basic level of
health care, clothing and basic shelter) which can be considered ‘more impor-
tant’ than other ESC rights which are not as vital for the immediate survival
of people, such as the rights related to trade unions (Article 8 ICESCR), or the
right to take part in cultural life (Article 15 ICESCR). Generally, in line with
the findings above on the ‘nature of ESC rights’, a limitation conflicting with
minimum core obligations/rights cannot be regarded as proportionate, even if
it claims to be imposed for the purpose of promoting general welfare, since
arguably there will never be a proportionate relationship between the severe
restriction of the rights of individuals and the goal sought.

Further requirements of the principle of proportionality are, first, appropri-
ateness of the means, i.e. the condition that any limitation of an individual
right must be appropriate to achieve the suggested aim (the promotion of
general welfare in the ICESCR context);136 and, second, the requirement to
apply the most lenient means to achieve the protection of a legitimate public
interest by limiting a particular right.137 The latter criterion has also been
established by the CESCR in its General Comment on the right to health, obser-
vying that ‘limitations must be proportional, i.e. the least restrictive alternative
must be adopted where several types of limitations are available.’138 In the
same context the Committee observed that limitations should be ‘of limited
duration and subject to review’.139

C. Understanding Article 4 in the Context of the ICESCR as a Whole:
the Relationship between Article 4 and Article 2(1) ICESCR

As mentioned, from the travaux préparatoires it is clear that Article 4 was not
meant to apply to retrogressive measures a state may take or is forced to take
because of resource constraints in its progressive implementation of ESC
rights. This was not considered to be a ‘limitation’ in the sense discussed

135 On the jurisprudence of the ECtHR in this respect, see Harris et al., supra n. 16 at 354–7.
136 General Comment 27, supra n. 94 at para. 14; Nowak, supra n. 8 at 275; and for the ECtHR’s
approach, see, for example, Kokkinakis v Greece A 260-A (1993); 17 EHRR 397 at para. 49,
discussed in Harris et al., supra n. 16 at 359.
137 General Comment 27, supra n. 94 at para. 14; and Nowak, supra n. 8 at 275. For the ECtHR’s
analogous findings, see Harris et al., supra n. 16 at 359, analysing Campbell v United
Kingdom A 233 (1992); 15 EHRR 137 at para. 48; and Marckx v Belgium A 31 (1979); 2 EHRR
330 at para. 40.
138 General Comment 14, supra n. 62 at para. 29.
139 Ibid. Another reference to the principle of proportionality can be found in the CESCR’s
General Comment 7, supra n. 104 at para. 15.
so far, but as a matter to be dealt with under Article 2(1) of the ICESCR.140 It appears that the CESCR follows this reading, since when discussing states’ obligation to progressively realise ESC rights under Article 2(1), it has started to develop criteria to evaluate retrogressive measures taken due to resource scarcities;141 it has never explicitly referred to Article 4 of the ICESCR in this context.

In the following it will be argued that it is unreasonable to make a distinction between, on the one hand, retrogressive measures in the progressive realisation of ESC rights because of resource constraints evaluated with reference to Article 2(1) ICESCR; and, on the other hand, limitations of ESC rights for other reasons, evaluating them against the criteria of Article 4. Indeed, it is often impossible to draw this distinction in practice. It will be argued that a unified standard should be applied for evaluating all limitations, including retrogressive measures—namely the criteria just set out as required under Article 4. A brief comparison between the criteria of Article 4 and the criteria developed by the CESCR to evaluate retrogressive measures will show that this is not unrealistic, since the requirements under both schemes are not far from one another. This will also establish a sensible contextual relationship between Articles 2(1) and 4.

Before this is done it shall be noted that in all its recent General Comments and statements the CESCR has emphasised that there is a strong presumption of impermissibility of retrogressive measures taken in relation to the rights in the ICESCR.142 If retrogressive measures are unavoidable, the state has the burden of proving that they have been introduced only after the criteria discussed below have been met. This enables the Committee to distinguish between the inability and the unwillingness of states to avoid retrogressive measures, a distinction that has been identified as essential by the Committee plenty of times.143

(i) Reasons for limitations and retrogressive measures

Under Article 4 the only reason for limiting ESC rights is the ‘promotion of general welfare’ which, as argued above, usually excludes limitations for reasons of ‘national security’, ‘public order’ and ‘public morals’. The General Comments already mentioned, and a recent statement of the CESCR made during the drafting of an Optional Protocol to the ICESCR on individual communications to the Committee, reveal that retrogressive measures under

140 See the quotes above from the travaux préparatoires, supra n. 69.
141 See the CESCR’s General Comments, supra n. 65; and Statement on an Optional Protocol to the ICESCR, supra n. 101 at para. 10.
142 General Comment 13, supra n. 62 at para. 45; General Comment 14, supra n 62 at para. 32; General Comment 15, supra n. 67 at para. 19; and General Comment 19, supra n. 67 at para. 42.
143 See, for example, General Comment 12, supra n. 130 at para. 17; General Comment 14, supra n. 62 at para. 47; and General Comment 15, supra n. 67 at para. 41.
Article 2(1) can be justified by resource constraints. However, the reasons for which these resource constraints occur seem to be relevant for the justification of retrogressive measures. In the statement of the Committee on the drafting of an Optional Protocol it indicated that it would evaluate states parties’ claims justifying retrogressive measures with resource constraints on a country-by-country basis in the light of objective criteria such as:

(i) The country’s level of development;
(ii) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
(iii) The country’s current economic situation, in particular whether the country was undergoing a period of economic recession;
(iv) The existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict;
(v) Whether the State party had sought to identify low-cost options; and
(vi) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.

Thus, the Committee seems ready to accept economic recessions, armed conflicts, natural disasters and the general level of development of states as factors which influence the availability of resources and which can be related to retrogressive measures. For instance, it seems to flow from point (iv) that the CESCIR is ready to recognise that states facing armed conflicts can justify retrogressive measures resulting from the diversion of resources from the implementation of ESC rights to the fighting of an international or internal armed conflict. This approach is also obvious from several Concluding Observations on state parties’ reports, in which the Committee recognised the additional difficulties states facing armed conflicts had in implementing ESC rights, and took these difficulties into account when formulating its recommendations.

The same is true for states facing natural disasters or economic recession.

144 See sources cited in supra n. 141.
However, it is not clear whether the Committee would accept justifications for retrogressive measures solely based on the existence of an armed conflict and the connected necessity to divert resources towards war efforts. The relatively long list of other criteria above makes this rather unlikely. Allowing states to justify retrogressive measures by solely pointing to the existence of an armed conflict might also ignore the fact that states frequently bear some responsibility for the outbreak of internal and international armed conflict. It is not uncommon that armed conflicts are a consequence of insufficient or discriminatory implementation of ESC rights as well as civil and political rights. The CESCR has also criticised states for significantly increasing their military expenditure while at the same time decreasing their spending on health and education, which is in line with the Committee’s strong emphasis on the general presumption that retrogressive measures are prohibited.

Thus, this short discussion on reasons for limitations under Article 4 and reasons for resource constraints which may result in retrogressive measures can be concluded with the observation that in the CESCR’s current approach states enjoy a wider discretion when they invoke resource constraints under Article 2(1). For instance, as mentioned, while limitations of ESC rights in times of war may not be justified under Article 4 if a state cannot show that they clearly ‘promote general welfare’ in the particular circumstances, under Article 2(1) states are given an opportunity to invoke resource constraints resulting from the war effort to justify retrogressive measures without fulfilling this requirement. It is, however, unlikely that the CESCR accepts the existence of an armed conflict alone as a legitimate reason for retrogressive measures.

Against this background, it seems reasonable to the present author to require—if a state faces severe resource constraints for whatever reason, and retrogressive measures are truly unavoidable—that states follow the concept of ‘general welfare’ of Article 4 ICESCR. This concept can guide states on where retrogressive measures should be taken so that ‘general welfare’ suffers as little as possible in the prevailing circumstances. This is how one can understand the CESCR’s statement that retrogressive measures must be ‘duly justified by reference to the totality of the rights provided for in the Covenant’, as well as their introduction only after the ‘most careful consideration of all alternatives’, including seeking to identify ‘low-cost options’ and mobilisation of international assistance. All these conditions aim at ensuring as little damage

149 See, for example, General Comment 15, supra n. 67 at para. 19; General Comment 13, supra n. 62 at para. 45; General Comment 14, supra n. 62 at para. 32; and General Comment 19, supra n. 67 at para. 42. See also the Report of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, Building Resilience: A Human Rights Framework for World Food and Nutrition Security, 8 September 2008, A/HRC/9/23, at Annex II, para. 5.
to ‘general welfare’ as possible. Thus, while there is an inherent contradiction in stating that retrogressive measures prompted by scarce resources are only justified when they ‘promote general welfare’, it can be expected that the notion of ‘general welfare’ is still to be taken into account. It seems appropriate to require states to organise retrogressive measures in such a way that they promote general welfare, or limit its erosion, as effectively as possible.

(ii) Respect for minimum core obligations

It has been shown above that under Article 4 ICESCR limitations of minimum core obligations cannot be justified, provided we follow the understanding that minimum core obligations describe ‘the nature of these (ESC) rights’. From the Committee’s statements it is not entirely clear whether it accepts that even very severe resource constraints leading to retrogressive measures can justify the non-implementation of minimum core obligations under Article 2(1) ICESCR.

On the one hand, the Committee seems not to exclude completely that in exceptional circumstances states may be unable to fulfil even their minimum core obligations because of lack of resources. On the other hand, the CESCR has held in several General Comments that retrogressive measures incompatible with minimum core obligations constitute a violation of the respective rights. For example, in its General Comment 14 on the right to health it found that ‘[t]he adoption of any retrogressive measures incompatible with the core obligations under the right to health [...] constitutes a violation of the right to health.’ This shows that the Committee will not accept severe retrogressive measures that infringe the minimum core rights/obligations under the ICESCR. This would also correspond well to the understanding that the implementation of minimum core obligation/rights is per se affordable through being a fundamental function of a state, and that

150 General Comment 3, supra n. 114 at para. 10, states: ‘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.’

151 General Comment 14, supra n. 62 at para. 48. Similar paragraphs can be found in General Comment 15, supra n. 67 at para. 42; General Comment 19, supra n. 67 at para. 64; and General Comment 17: 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)), 12 January 2006, E/C.12/GC/17; 13 IHRR 613 (2006) at para. 42.

152 This flows from the Committee’s findings in its General Comments that the failure to meet minimum core obligations amounts to a violation of the respective ESC rights: see General Comments cited in supra n. 120.

153 Chapman and Russell, supra n. 115 at 11–12. See also the judgment of the Indian Supreme Court in Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another (1996) AIR SC 2426 at para. 16, reflecting the opinion that what is constitutionally necessary (in this particular case the provision of emergency health services to the Indian population) has to be done, regardless of scarce resources. Similarly the Swiss Federal Court in V. v Einwohnergemeinde X. und Regierungsrat des Kantons Bern, supra n. 126, Erwägung 2 at...
they establish an absolute bottom-line requirement, which no state should fall short of, and which should never be ignored.154

The majority of the CESCR's statements point to a prohibition of such retrogressive measures based on Article 2(1), an interpretation that is supported here. Thus, to return to the comparison between criteria for the justification of retrogressive measures and limitations under Article 4, both exclude measures which conflict with minimum core obligations.

(iii) In a democratic society/in accordance with the law

Limitations under Article 4 must in addition be acceptable ‘in a democratic society’ and implemented ‘in accordance with the law’. With regard to retrogressive measures adopted because of resource constraints under Article 2(1), the Committee noted that it will evaluate them in light of the efforts a state has made to remedy the situation, i.e. whether the state has carefully considered all alternatives, for example by making a serious attempt to identify low-cost options and to seek assistance from the international community. In its General Comment 19 on the right to social security, the Committee emphasised that it will look at whether decisions on retrogressive measures have been taken with ‘genuine participation of affected groups’ and whether ‘there was an independent review of the measures at the national level’.155 These criteria resemble the criteria describing the requirement under Article 4 that limitations have to be acceptable ‘in a democratic society’.

Even though the Committee has never argued that retrogressive measures taken because of resource constraints have to be ‘determined by law’, it would arguably not put an overly heavy burden on states to require that these measures are indeed ‘determined by law’ before they are implemented.

Thus, with regard to the acceptability of limitations ‘in a democratic society’ under Article 4 and the CESCR's current approach to evaluate retrogressive measures due to resource constraints under Article 2(1), there is no difference between the two. Concerning the requirement ‘determined by law’ it has usually only been applied to limitations under Article 4; however, it seems reasonable to expect that retrogressive measures adopted by states also follow the principle of legality. This would arguably have a positive effect since it would reduce the arbitrariness of retrogressive measures when they can only be implemented after a representative legislative body (or

para. b: ‘It is both a precept of humanity and a duty inherent in the purpose of the modern State to protect persons on its territory, where necessary, from physically perishing.’ (emphasis added, translation from German)

154 See supra n. 115. It should be noted, however, that the discussion about the exact content of minimum core obligations has not yet come to an end.

155 General Comment 19, supra n. 67 at para. 42(c) and (f),
other representative authority to which rule-making is delegated) has evaluated them.156

(iv) Proportionality

There are many indications that retrogressive measures—like limitations under Article 4 ICESCR—are justified only if they are proportionate. As already noted, there is the requirement that retrogressive measures only be introduced after the most careful consideration of all alternatives; and the ‘measures must be fully justified by reference to the totality of the rights provided for in the Covenant’.157 It would require states to show that measures taken because a state faces severe resource constraints are as lenient as possible, and that the overall enjoyment of ESC rights is not unduly diminished.

(v) Conclusion from the comparison

From this brief comparison the following conclusion can be drawn. The differences between the conditions that have to be met to justify retrogressive measures under Article 2(1) in the CESCR’s current approach and limitations under Article 4 are minimal, and it would seem reasonable to merge the criteria and to use a unified standard to evaluate limitations of ESC rights, be it for reasons of resource scarcity or any other reason. Otherwise it is not difficult for states to evade their obligations under Article 4, since it seems nearly always possible to relate limitations to resource scarcity and the notion of progressive realisation of Article 2(1). As Alston and Quinn noted, that would allow states to justify limitations on a de facto basis under Article 2(1) rather than on a de jure basis under Article 4.158 In practice, it may also be very difficult to draw a strict line between retrogressive measures that were taken because of resource constraints and limitations that are not related to scarce resources. Take the example of rationing food in times of armed conflict: it can be conceived as a retrogressive measure which is due to the diversion of resources towards the fighting of a war; it can, however, also be seen as a measure to promote general welfare in the particular situation of armed conflict, by ensuring fair distribution of limited food available. Thus, while the CESCR

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156 See Alston and Quinn, supra n. 69 at 206. That the Committee would also welcome this in particular is clear from its General Comment 19, supra n. 67 at para. 42(f), holding that retrogressive measures have to undergo an independent review at national level before they can be implemented.

157 For example, General Comment 13, supra n. 62 at para. 45; General Comment 14, supra n. 62 at para. 32; General Comment 15, supra n. 67 at para. 19; and General Comment 19, supra n. 67 at para. 42.

158 Alston and Quinn, supra n. 69 at 205.
has developed criteria that states have to meet if they wish to justify retrogressive measures, it could rely on Article 4 in this context to a greater extent.

It has been shown that there are almost no contradictions between the requirements of Article 4 and the CESCR’s criteria to evaluate retrogressive measures based on Article 2(1). While there is an obvious difficulty in expecting that retrogressive measures are only permitted when they promote general welfare, it is fully justified to require that the standard of ‘general welfare’ guides states in the implementation of unavoidable retrogressive measures. With regard to all other criteria—i.e. the condition to respect, protect and fulfil minimum core obligations/rights at all times; the requirements ‘in a democratic society’ and ‘determined by law’; and the principle of proportionality—there are no contradictions, and expecting states to follow these criteria when they wish to justify limitations and retrogressive measures will arguably not pose an excessively onerous burden on them.

Such an understanding would go against the travaux préparatoires, which did not intend to apply Article 4 to retrogressive measures states may take for reasons of severe resource constraints; and against the current approach of the CESCR which almost never applies or refers to Article 4 ICESCR. However, as Alston and Quinn pointed out convincingly, from the travaux préparatoires it is equally clear that one of the aims of the drafters of the ICESCR was to ensure that ‘states would not be free to limit the rights arbitrarily in any manner they might choose.’ This would be achieved by merging the criteria developed by the CESCR to evaluate retrogressive measures under Article 2(1) ICESCR with the criteria of Article 4 ICESCR. This solution is therefore ‘appealing on policy grounds.’ It would also establish a sensible and practical contextual relationship between Article 4 and Article 2(1) ICESCR.

D. Derogations from the ICESCR

As mentioned, the ICESCR does not include a derogation article comparable to Article 4 ICCPR. The travaux préparatoires do not contain a discussion on the question of the general appropriateness of derogations from ESC rights, nor on the reasons why no such clause was included.

159 Ibid. at 206. To name but one example in this regard, see the statement of the French representative (Mr Juvigny), Summary Record of the 306th meeting of the UN Commission on Human Rights, supra n. 69 at 9, holding that ‘...limits must be set for each right in the interest of the exercise of this right but the powers of States in that respect must be strictly defined.’

160 Alston and Quinn, supra n. 69 at 206.

161 However, the fact that a substantial minority of delegations opposed the inclusion of even a general limitation clause based on their opinion that limitations of ESC rights were inherently unnecessary (see supra n. 72), allows for the assumption that many delegations regarded permitting derogations as all the more unnecessary, and therefore did not see a need for such a discussion.
In the following, the question will be discussed briefly whether states are or should be permitted to derogate from ESC rights nevertheless. This question is examined by looking at the purpose of allowing derogations from human rights treaties and by reviewing, as far as possible, the approach of states, the CESCR and other international bodies towards this question, as well as of academics.

(i) The purpose of permitting states to derogate from human rights treaties

Reference to the purpose of giving states the possibility to derogate from human rights treaties in states of emergency is used to argue both for and against permitting derogations from the ICESCR and other human rights treaties that do not contain a derogation clause. To recall, the purpose of derogations is the protection of a (democratic) public order (community, state and its institutions) in situations of exceptional threat, and/or the restoration of this order. The existence of this particular public order is an essential precondition for the protection of human rights in the first place, and for its protection or restoration certain human rights can be suspended. This may also be necessary for protecting other human rights which are, in a situation of exceptional threat, of greater importance for the protection of human dignity than others.

Arguments for permitting derogations from the ICESCR and other human rights treaties that do not contain derogation clauses highlight that this purpose could, for example, justify derogations from the right to work and rights related to trade unions;162 or from children’s rights to education by closing schools for a limited period of time in order to protect their right to life and health in the aftermath of a severe natural disaster. The right to education would be derogated from in order to protect the ‘more essential’ right to life. The inherently protective function of derogations is emphasised in such argumentation, and the strict application of the principle of proportionality to every derogative measure should theoretically prevent the abuse of states of emergency. Human rights standards cannot always be the same in times of emergency as in normal times, because this may entail a risk for the nation to fall into chaos, undermining the object and purpose of any human rights treaty.163

More generally, responses to severe natural disasters or other crises will always affect the resources available for social spending, a fact which has to be taken into account in any discussion about derogations from ESC rights.

162 See the discussion in Section 3D(ii) infra.
163 Naming the very object and purpose of international human rights treaties as a reason why derogations should be permitted from human rights treaties which do not contain a derogation clause is particularly prominent in the Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, 17–19 May 1995, in Premont, Stenresen, and Oseredczuk (eds), Non-derogable Rights and States of Emergency (Brussels: Association for International Consultants on Human Rights (CID), 1996) at 39 (paras 28–9).
It seems too ambitious to expect that every aspect of all ESC rights can be implemented during states of emergency, and it is thus more realistic to require states to comply with the derogation principles set out in Section 2B of this article than to let them derogate from ESC rights without putting any restrictions upon their freedom to do so. This argument assumes that states will resort to derogations de facto in any case.

Arguments against permitting states to derogate from the ICESCR point to the fact that it seems to be inherently far less justified or necessary to suspend ESC rights in times of emergency, given the purpose of derogations. Especially with regard to subsistence rights, it is hard to imagine a situation in which it is necessary to deny people their rights to food, health care or basic shelter in order to maintain or restore the public order indispensable for the protection of human rights. Nor is it easily imaginable that derogations from rights to basic health care and basic food can ever be regarded as proportionate, however strong the threat to the nation is. The reason why Article 15 ECHR only contains four non-derogable rights can be recalled in this context as well: these rights were declared non-derogable because they are most vital for the protection of human dignity and most likely at risk of being violated during abusive emergencies. Many other rights were not included because it was thought that it will not reasonably be necessary to derogate from them in any emergency, and not because the drafters wished to give states a right to derogate from all rights ad libitum that are not explicitly non-derogable. The same is true for many ESC rights.

This argument seems to be supported by the experience of the European Committee of Social Rights: to date it has never received a report from a state party to the European Social Charter in which Article 30, the Charter's derogation clause, was invoked. States have apparently not found it necessary to derogate from the rights of the European Social Charter, even those states which have at times derogated from the ECHR, like the United Kingdom, and

164 This seems to underlie the finding of Alston and Quinn that ‘where a situation appears to be sufficiently grave as to warrant derogations the absence of a specific derogation clause from the Covenant [ICESCR] should not be interpreted as foreclosing such possibility: . . . where derogation is undertaken a state party should be required to satisfy the criteria applicable under the Covenant on Civil and Political Rights.’ See Alston and Quinn, supra n. 69 at 219.

165 This remark is made by several authors: Alston and Quinn, supra n. 69 at 217; Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, supra n. 163 at 36 (para. 20); and Mottershaw, ‘Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law’, (2008) 12 International Journal of Human Rights 449 at 451.

166 Fitzpatrick, supra n. 22 at 64.

167 Article 30(1) ESC and the equivalent Article F(1) of the Revised ESC read: ‘In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’

168 Harris and Darcy, supra n. 79 at 377.
other states parties which have faced situations which would arguably amount to an emergency threatening the life of the nation, such as Turkey and Cyprus.169

Another related argument against permitting derogations from the ICESCR is based on the fact that—together with the general nature of the states’ obligation to progressively realise ESC rights—the general limitation clause of the ICESCR (Article 4) enables states to respond flexibly to an emergency situation, including to situations of armed conflict,170 a fact which was confirmed in the discussion above. In contrast to the ICCPR which does not contain a general limitation clause, the inclusion of an additional derogation clause in the ICESCR seemed unnecessary when it was drafted.171 Broad limitation clauses have been given as a reason for the absence of derogation clauses from the African Charter on Human and Peoples’ Rights (ACHPR) as well.172

(ii) States’ and international bodies’ approach to derogations from human rights treaties that do not contain a derogation provision

The approaches of states, the CESCR and other international bodies as to whether derogations from the ICESCR and other human rights treaties without a derogation clause are permitted, and the possible legal basis for this, are inconclusive.

A main argument for the permission of derogations is borrowed from the general international law of treaties. It can be traced in decisions of the International Labour Organisation (ILO),173 as well as in academic literature.174 The fundamental rule of the law of treaties pacta sunt servanda may, at first sight, suggest that no derogations should be allowed from human rights treaties which do not explicitly include possibilities for derogations. However, the law of treaties and customary international law provide for exceptions from the rule pacta sunt servanda. These exceptions can be found in Articles 54–64

169 Concerning Turkey the European Committee of Social Rights found, however, that certain provisions of the Turkish emergency legislation were not in conformity with the general limitation clause (Article 31) of the ESC. See, for example, European Committee of Social Rights, Conclusion XVII-1 (Turkey) 2004 at 7, paras 3–4. Another Member State of the Council of Europe which has been involved in armed conflicts, the Russian Federation, only ratified the Revised ESC in 2009.


171 Alston and Quinn, supra n. 69 at 217.

172 Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, supra n. 163 at 36 (para. 21).

173 See the ILO Commission’s decisions on Greece and Poland, infra n. 179.

174 See, in particular, the Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, supra n. 163 at 36–9, which brings forward much of the following reasoning. See also Oraa, supra n. 22 at Part II (chapters 8–10); Rosas and Sandvik-Nylund, supra n. 128 at 414; and Alston and Quinn, supra n. 69 at 218 not excluding such possibility.
of the Vienna Convention on the Law of Treaties 1969 (VCLT)\textsuperscript{175} which list several reasons for the termination and suspension of the operation of international treaties; and in the International Law Commission's (ILC) Draft Articles on State Responsibility which, in Chapter V (Articles 20–27), specify circumstances which preclude the wrongfulness of state conduct which would otherwise not conform to states' international obligations.\textsuperscript{176} The doctrines of necessity and force majeure are most relevant for this context.\textsuperscript{177}

Subject to certain modifications, these doctrines have been recognised as a legal basis for derogations from human rights and other treaties which aim at the protection of individuals, most prominently by the ILO. For example, in 1984 the ILO Commission of Inquiry, established to examine the observance of ILO’s Freedom of Association Conventions\textsuperscript{178} in Poland, acknowledged that in principle Poland could derogate from these conventions, even though they do not contain a derogation clause. Referring to the doctrine of force majeure and adapting it to the context of ILO Conventions, it however required Poland to show that the measures it had taken and that were otherwise incompatible with the ILO Conventions in question, had been justified by ‘circumstances of extreme gravity’ and had been ‘limited in scope and in duration to what is strictly necessary given the exigencies of the situation’.\textsuperscript{179} The common principles of the treaty provisions on derogations as summarised in part 2B of this article seem to have served the ILO as a basis for describing the ‘special version’ of the public international law doctrine of force majeure applied to human rights treaties/ILO Conventions.\textsuperscript{180} In effect, this resulted in the ILO requiring states to follow the same treaty law principles that are valid for derogation

\textsuperscript{175} 1155 U NTS 331.
\textsuperscript{178} More precisely, ILO Freedom of Association and Right to Organise Convention 1948 (No. 87); and ILO Right to Organise and Collective Bargaining Convention 1949 (No. 98).
\textsuperscript{180} As noted in the Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, supra n. 163 at 38 (para. 28); and by
from the ICCPR, the ECHR and the ACHR when they wish to derogate from ILO Conventions that do not contain a derogation clause.

Some states seem to share the view that the labour rights of the ICESCR are derogable, as they outline possibilities to derogate from Articles 6, 7 and 8 ICESCR in their reports to the CESCR.¹⁸¹ These reports do not, however, specify whether these states consider the same principles that are implicit in the derogation clauses of the ICCPR, the ECHR and the ACHR applicable to derogations from the ICESCR.

The approach of other states, the CESCR and the African Commission on Human and Peoples’ Rights seems to rather suggest that derogations from the ICESCR or the ACHPR are not permitted. In the absence of a derogation clause from the ACHPR, the African Commission has explicitly held that no derogations are allowed from the ACHPR at any time.¹⁸² The notorious risk of abuse of derogation provisions may resonate in this finding. While the CESCR’s approach is not completely clear,¹⁸³ it has at least once found that the minimum core obligation under every ESC right is per se non-derogable,¹⁸⁴ which suggests that it regards the flexibilities of the ICESCR’s general limitation clause as sufficient for states to respond to extraordinary situations.

As mentioned, only very few state reports to the CESCR directly detail derogation procedures from ESC rights; and if they do so, these procedures seem to be limited to derogations from Articles 6, 7 and 8 ICESCR. From reports

¹⁸¹ See the states reports cited in supra n. 60 and n. 61.
¹⁸³ In some General Comments the CESCR held that minimum core obligations relating to the respective rights are non-derogable. For example, in General Comment 14, supra n. 62 at para. 47 and General Comment 15, supra n. 67 at para. 14. In others it remains silent about this question. For example, General Comments 17, 18 and 19, supra n. 67.
¹⁸⁴ In its statement on poverty and the ICESCR, supra n. 63 at para. 18, it held that ‘core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster.’
that are silent on the issue it can be inferred that the respective states may not outline a derogation procedure for ESC rights because they regard such derogations as unnecessary. This is supported by the fact that other states which have derogated from civil and political rights have argued explicitly that these derogations do not extend to ESC rights, and even do not affect the enjoyment of ESC rights.185

(iii) Conclusion on derogations from the ICESCR

From this brief review it is clear that references to the underlying purpose of permitting derogations from civil and political rights in the ICCPR, the ECHR and the ACHR have been used to argue both for and against allowing derogations from human rights treaties that do not contain a derogation clause, including the ICESCR. States and international bodies supervising the implementation of human rights treaties without derogation clauses seem not to have developed uniform approaches towards this question.

It is, however, possible to observe a certain tendency in the brief discussion above: with regard to derogations from the ICESCR, it seems that a distinction is made in the approaches to labour rights on the one hand, and to all other rights on the other hand.

The review of states’ reports to the CESCR and the approach taken in the jurisprudence of the ILO Commissions of Inquiry to derogations from the ILO’s Freedom of Association Conventions suggest that derogations from the right to strike, the right to form and join trade unions and the right to work are quite common during states of emergency. The rights set out in Article 8 ICESCR are also the only rights of the ICESCR listed among the rights most frequently derogated from in times of emergency.186 Furthermore, an older Study by the International Commission of Jurists which reviewed emergency regimes in 15 countries in 1983 observed that ‘restrictions on trade union rights are among the most common attributes of states of exception even when such strikes are not among the stated causes of the emergency’.187 Of all the rights in the ICESCR, the rights of Article 8 most strongly resemble civil and political rights. As proposed in the ILO decisions, it seems reasonable to require states that wish to derogate from the ICESCR’s labour rights in exceptional situations threatening the life of the nation to do this in accordance with the common principles of Article 4 ICCPR, Article 15 ECHR and Article 27 ACHR as summarised in Section 2B of this article.188

186 Final report of Special Rapporteur Despouy, supra n. 22 at para. 158, listing rights that are most frequently derogated from in situations of emergency.
187 International Commission of Jurists, supra n. 27 at 418.
188 This is in line with the findings and recommendations in academic literature that consider the possibility to allow for derogations from labour rights or other ESC rights.
At the same time, the arguments above seem to suggest that all other rights of the ICESCR that are not labour rights are more often regarded as non-derogable, in particular their minimum core content. There is no doubt that it is unrealistic to expect states to implement all aspects of every ESC right in times of crisis to the same extent as in normal times. However, the flexibilities offered under Article 4 ICESCR, the notion of progressive realisation of ESC rights, together with the fact that the suspension of most ESC rights can hardly ever be necessary for the protection or restoration of (democratic) public order, suggest that states will be able to respond to situations of emergency effectively without derogating from ESC rights. Even in situations where states have lost control over parts of their territory, be it to a foreign invader or a strong rebel group, this would not seem unrealistic: under their minimum core obligations they would be required to do their best to implement ESC rights nevertheless and to make every effort to remedy the situation. This would include the request for humanitarian assistance from the international community, as well as the organisation and facilitation of its swift delivery in a non-discriminatory fashion. This seems to be accepted by states and the CESCR: for example, the CESCR commended the efforts of the government of Cyprus to provide services, such as electricity supply and payment of pension benefits, to the population living in the part of the island that it does not control. Similarly, with regard to the implementation of the ECHR, the ECtHR has found that states that have (partly) lost control over their territories still have obligations towards the people living in these territories, albeit these obligations may be more limited or are shared with obligations of other parties to the ECHR who have de facto control over the respective territory.

In the few pieces of academic work that deal with this question, there seems to be a particular agreement and emphasis on the non-derogability of

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See, for example, Alston and Quinn, supra n. 69 at 219, who find that the criteria of Article 4 ICCPR shall be applied to the ICESCR in case a state wishes to derogate from the ICESCR; Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, supra n. 163 at 36–9; and Fitzpatrick, supra n. 20 at 229, who recommends that ‘bodies set up to implement human rights treaties that do not contain an explicit derogation clause should nevertheless be guided in their work by fundamental principles of proportionality and necessity.’

189 CESCR, Concluding Observations regarding Cyprus, 4 December 1998, E/C.12/1/Add.28 at para. 4; and with regard to humanitarian assistance in rebel held territory, see, for example, CESCR, Concluding Observations regarding Sri Lanka, 16 June 1998, E/C.12/1/Add.24 at paras 2 and 22.

190 For example, in Ilașcău and Others v Moldova and Russia 2004–VII; 40 EHRR 1030 (GC) at para. 331, the ECtHR found with regard to Transdnistria, which is under the de facto control of Russia, that Moldova still had a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that are in its power to take, and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.’ Russia was held accountable for violations of ECHR rights primarily, since it controlled the respective region (at para. 394).
minimum core obligations corresponding to basic subsistence rights, such as the right to be free from hunger, basic health care, clothing and basic shelter. They are inherently linked to the non-derogable right to life, since without their protection people's survival cannot be guaranteed. For example, Rosas and Sandvik-Nylund argue that 'survival rights, based on a combination of the right to life contained in the ICCPR, and the right to food and health contained in the ICESCR shall clearly be regarded as non-derogable under the ICCPR and ICESCR.'\(^{191}\) In addition, on many occasions when the CESCR stated that it regards minimum core obligations/rights as non-derogable, it did so in the context of basic subsistence rights, for example with regard to the minimum core obligations under the right to health\(^{192}\) and the right to water.\(^{193}\)

In the end, it has to be noted that it is necessary to obtain further information about states' approaches towards the question of derogations from the ICESCR to draw more founded conclusions. The systematic application of the new reporting guidelines of the CESCR may be a first step into this direction: it may invite states to regularly report on their practice and *opinio iuris* about derogations from the ICESCR and to distinguish them from limitations of ESC rights. It may encourage the CESCR to ask states routinely to elaborate on this question in their reports and in their discussions with the Committee members. Exploring the impact of derogations from civil and political rights on the implementation of ESC rights appears to be equally important in this context, since, as mentioned, the overall tendency in state practice seems to suggest the non-derogability of minimum core ESC rights other than labour rights. Nonetheless, states of emergency have an indirect impact on peoples' ability to enjoy their ESC rights, even on their minimum core—an issue to which not much attention has been paid either.

\(^{191}\) Rosas and Sandvik-Nylund, supra n. 128 at 414. Alston and Quinn, supra n. 69 at 217 (regarding derogations) and at 196–7 (regarding limitations), make a similar remark indicating the difficulty of imagining a situation in which states would be able to justify derogations and limitations of basic subsistence rights. The close proximity of the non-derogable right to life to basic subsistence rights of the ICESCR is also pointed out by the HRC in its General Comment 6: Right to life, 30 April 1982: 1-2 IHRR 4 (1994) at para. 5; and made explicit in Article 6 of Convention on the Rights of the Child 1989, A/RES/44/25 Annex, which links children's right to life with their right to survival that clearly includes an obligation to ensure the availability of basic health care and adequate nutrition for children at all times: see Committee on the Rights of the Child, General Comment 7: Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1; 13 IHRR 309 (2006) at para. 10.

\(^{192}\) General Comment 14, supra n. 62 para. 47.

\(^{193}\) General Comment 15, supra n. 67 at para. 40. To compare, it has not made such an explicit statement in its most recent General Comments on 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 (General Comment 17, supra n. 151); the right to work (General Comment 18, supra n. 67); and the right to social security (General Comment 19, supra n. 67).
4. Concluding Remarks

This article has explored the extent to which states should be permitted to limit or derogate from the ICESCR. It has been noted that little attention has been paid to these questions, and the difference between limitations and derogations has frequently been ignored in the context of ESC rights. It was pointed out that the main difference between limitations and derogations is that states are permitted to limit human rights at all times, albeit for an exhaustive number of reasons, whereas derogations are allowed only in exceptional circumstances which threaten the life of the nation.

With regard to permissible limitations the following findings were made. It was suggested that the distinction the CESCR makes in its evaluations of retrogressive measures that states take due to resource constraints (under Article 2(1)) and of other limitations of ESC rights (under Article 4) should be abandoned. Instead, the criteria set out in Article 4 should be applied in the evaluation of all types of limitations of ESC rights, regardless of their causes. It was shown that this is not unrealistic, since the criteria the CESCR has developed to evaluate retrogressive measures are only slightly different from the conditions of Article 4. It would also prevent states from imposing arbitrary limitations, and establish a sensible contextual relationship between Articles 2(1) and 4 of the ICESCR.

Thus, if states wish to limit ESC rights under Article 4 they have to show that limitations are necessary for the ‘purpose of promoting general welfare’, or are at least implemented in a way that ‘general welfare’ is preserved to the greatest extent possible. General welfare primarily refers to the economic and social well-being of individuals and the community, and excludes notions of ‘public morals’ and ‘public order’. In addition, states must ensure that limitations are determined by national law that conforms to all their international human rights obligations and is sufficiently clear and publicly accessible. The requirement that limitations must be acceptable in a democratic society calls upon states to legitimise any limitation of ESC rights through a participatory and transparent decision making process. Limitations should not infringe upon the nature of any of the ESC rights, which is interpreted to mean excluding limitations which conflict with minimum core obligations/rights. This is consistent with the reading that minimum core obligations are per se affordable and universal. And lastly, limitations have to respect the principle of proportionality, which requires states to show that the scope and severity of a limitation is proportionate to the aim such measures seek to pursue (i.e. the promotion of general welfare). Generally, Article 4 allows states to respond flexibly to situations of tension within a (democratic) society, including to situations of emergencies, without forcing them to breach their obligations under the ICESCR.
With regard to derogations from the ICESCR, it was only possible to observe certain tendencies in the approach of states, the CESCR and other international bodies towards this question. Despite the absence of a derogation clause, there seems to be some agreement on the derogability of the right to strike, rights related to trade unions and the right to work in exceptional situations which threaten the life of the nation. States derogating from these rights should be required to satisfy the criteria applicable under the ICCPR, and to resort to derogations only after they have exhausted the ICESCR’s limitation clause. On the other hand, the flexibilities of Article 4 of the ICESCR, the notion of progressive realisation of ESC rights and the fact that it seems inherently unnecessary to derogate from ESC rights to protect or restore (democratic) public order, suggest that all other ESC rights should be considered as non-derogable, notably their minimum core. In particular the non-derogability of minimum core obligations corresponding to subsistence rights is emphasised time and again in the practice of the CESCR: the rights to be free from hunger, to basic health care, clothing and shelter are of utmost importance for the protection of human dignity and the survival of human beings in emergency situations—a fact also highlighted by the inter-relatedness of these rights with the non-derogable right to life.