Global Campus Europe

ADAM MICKIEWICZ UNIVERSITY

European Master's Degree in Human Rights and Democratisation
A.Y. 2018/2019

Austerity at what cost?

A comparative analysis of the protective standards of Economic, Social and Cultural Rights during economic crisis

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Abstract

The economic crisis of 2008 had a severe impact on the economic, social and cultural rights of people, which was aggravated by the responses taken by the affected states, including a variety of austerity measures that focused on public expenditure cuts, tax raises and labor law reforms. Not a long time after the adoption of such measures, the responsible bodies for the protection of human rights were called to decide on cases where those measures were impugned as violating people's rights. This research examines the criteria employed by three bodies, namely the UN Committee on Economic, Social and Cultural Rights, the European Committee of Social Rights and the European Court of Human Rights. First, it analyzes the criteria's theoretical framework and their application by the relevant bodies, identifying the bodies' strengths and weaknesses, the latter mainly relating to the adoption or not of the crisis and emergency narratives. While several similarities are observed in their approach, the research also engages in identifying certain differences in the way they handle crisis-related cases, differences that have impacted the protection of rights. Finally, it concludes with several identified gaps in the protection system that require more attention in order for economic, social and cultural rights to be protected effectively during economic crises.

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Introduction

On 15th September 2008 Lehman Brothers, the well-known US investment bank declared bankruptcy, marking the beginning of the 2008 global financial crisis, which has been described, as quoted by the Independent, as *"the worst financial crisis in global history".*[1] The causes of this crisis are mainly attributed to irresponsible policies related to bank loans which pursued short term –but vast- profits, however ended up in trillions of government dollars spent on banks' bail outs.[2] In fact, it has been argued that *"Banking bailouts have socialized the losses and privatized the profits – with little public dialogue or transparency as to who will bear the costs".*[3] The answer to this question did not take long to become more than evident. What started as a financial crisis soon became an economic one, impacting on the real economies of both developed and developing states owing to the interrelatedness of the economy in today's globalized world. [4] The population of the affected states rapidly started to notice the consequences, bearing the costs for a crisis they were not responsible for.[5]

The economic crisis of 2008 has had a devastating effect on human rights across the world, impacting on the whole spectrum of rights, from economic, social and cultural ones to civil and political, too.[6] However, the severe degradation of rights during the last decade is attributable to not only the economic recession itself, but to governments' responses to the crisis, the majority of which, even though in the first years opted for fiscal stimulus programs, later focused on austerity measures,

[1] Ben Chu, "Financial crisis 2008: How Lehman Brothers helped cause 'the worst financial crisis in history' " (Independent, 12 September 2018), <https://www.independent.co.uk/news/business/analysis-and-features/financial-crisis-2008-why-lehman-brothers-what-happened-10-years-anniversary-a8531581.html>, last accessed 15/07/2019

[2] Center for Economic and Social Rights (CESR), "Human Rights and the Global Economic Crisis Consequences, Causes and Responses" (2009), Human Rights and the Financial Crisis, 1-2

[3] Aldo Caliari, Sally-Anne Way, Natalie Raaber a, Anne Schoenstein, Radhika Balakrishan, Nicholas Lusiani, "Bringing Human Rights to Bear in Times of Crisis: A human rights analysis of government responses to the economic crisis" (2010), Submission to the High-Level Segment of 13th session of the United Nations Human Rights Council on the global economic and financial crises, 13

[4] CESR op.cit (2)

[5] ibid (3)

[6] Ibid (2)

including mainly public expenditure cuts.[7] These measures included among others reforms in labor law, cuts in social benefits, salaries and health care expenditure, taking a severe toll on people's economic and social rights. In Greece for example there has been a widespread cut in mental health care spending, despite the rise of mental health illnesses and the number of suicides during the crisis.[8] In light of these severe challenges to rights protection several of these austerity measures were contested in front of national and international human rights bodies or they were assessed during the relevant monitoring mechanisms responsible for supervising states' compliance with their obligations.

The *purpose* of this research is

-to examine the criteria used by the relevant human rights bodies, aiming at identifying the latter's strengths and weaknesses.

- to highlight good practices followed by certain of the examined bodies that can set an example for the rest as well as certain approaches followed that might have a negative impact on rights' protection and thus might need re-visiting.

-finally it will demonstrate possible gaps in the existing protection system, mainly related to the weaknesses of the protective framework of economic, social and cultural rights and the accountability gaps considering international financial institutions as well as other international organizations.

The main research question is:

1. How different bodies reacted to the economic crisis?

Sub-questions:

1. Has the crisis impacted on the way the relevant bodies responded?
2. Have the monitoring bodies' responses lived up to their protective role?

[7] Aoife Nolan, "Introduction", in A. Nolan (Ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 3

[8] Aoife Nolan, "Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis" (2015), 4 *European Human Rights Law Review*, 358, 362

3. What differences are identified in their reaction and how these differences have impacted on rights' protection?
4. What gaps are there in the human rights protection system during crisis?

Methodology

This research will demonstrate the existing protective standards of economic, social and cultural rights during crisis through an analysis of the work of three monitoring bodies, namely the UN Committee on Economic, Social and Cultural Rights, the European Committee of Social Rights and the European Court of Human Rights. In the beginning, it will analyze the theoretical framework lying behind the relevant bodies' decisions, elaborating on each of the standards used to protect economic, social and cultural rights. This part will focus on the development of the criteria of the UN Committee, due to certain changes identified in relation to the 2008 global financial crisis, followed by a theoretical analysis of the criteria used by the relevant bodies.

Following this, an analysis of the case-law of the examined bodies will take place, aiming at examining the way they apply the criteria analyzed in the previous chapter. It should be taken into consideration that regarding the UN Committee the case law analyzed includes cases referring to previous economic crises, in an attempt to reiterate certain differences identified in its approach, while the case-law of the European Committee and the Strasbourg Court refers to the 2008 global financial crisis. Later on, based on the analysis of the relevant bodies' case-law, certain conclusions are drawn, relating to several differences identified in the application of the criteria and the use of certain concepts that impact on the effectiveness of rights' protection.

Certain observations should be made however, due to the different nature of the protective mechanisms involved in this research. Concerning the UN Committee, the analysis focused mainly on its Concluding Observations on state reports, due to a lack of individual complaints related to the context of the economic crisis. In fact, only one individual complaint makes explicit reference to the crisis and assesses a measure adopted in this context. On the contrary, the European Committee had the opportunity

to assess austerity measures in several cases during its complaints procedure as well as its reporting system. The importance of this observation lies in the different nature of the reporting mechanism compared to the complaints procedure. The latter focuses on a specific case which allows it to be more context-specific and analyze the contested legislation in practice and in more detail.[9] Naturally, the same applies to the European Court of Human Rights, since the examination of each case is based on a judicial interpretation of the impugned laws, analyzing the facts in detail.

The present research was based mostly on academic articles concerning the theoretical framework of the analyzed criteria, the case-law of the relevant bodies as well as the relationship between economic, social and cultural rights and the economic crisis. The analysis undertaken is a legal one, analyzing the use of the examined criteria by the three monitoring bodies. Nonetheless, given the crisis context of this research and the interrelatedness of economic policies with the protection of human rights, certain references to economic terms are made in order to achieve a more integrated approach of the topic.

[9] Robin R. Churchill; Urfan Khaliq, "The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?" (2004), 15 *European Journal of International Law*, 417, 450

Chapter 1: Protective Standards: Theoretical Framework

1.1 Introduction

Not a long time after the beginning of the global financial crisis of 2008, most states hit by recession, in an effort to overcome its effects and avoid defaulting on their obligations decided to adopt austerity measures with the view to decrease government spending and increase public resources. Nevertheless, such measures have taken a toll on the populations' economic, social and cultural rights (ESCRs). As a result, the bodies responsible for rights' protection were confronted with a lot of cases concerning the impact of austerity measures on the realization and protection of rights, by examining either state reports or complaints according to their respective procedures. The criteria they based their decisions on are almost overlapping, although their development presents certain differences worth analyzing.

1.2 The UN Committee on Economic, Social and Cultural Rights: The development of the criteria

Financial and economic crises are not new to this world. On the contrary, before the global financial crises that started in 2008 and affected almost all states, a lot of countries had been through periods of severe economic instability. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) therefore had the opportunity to evaluate states' obligations during economic crises[10], for example during the Argentinean crisis of 1998-2002. According to Warwick, *"…by 2007, the CESCR was a well-established body that had just reached its twentieth anniversary. It was therefore reasonable to expect a robust response from the Committee to state responses to the crisis that impacted heavily on economic and social rights."*[11] However, a slight divergence from its usual approach was observed concerning the handling of the 2008 global financial and economic crisis.

[10] Ben Warwick, "Socio-economic rights during economic crises: a changed approach to non-retrogression" (2016), 65 *International & Comparative Law Quarterly*, 249, 256

[11] Ben T. C. Warwick, "A Hierarchy of Comfort? The CESCR's Approach to the 2008 Economic Crisis", in G. MacNaughton & D. Frey (Eds.), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press 2018), 130, available at SSRN: https://ssrn.com/abstract=3201192, last accessed on 25/06/2019

Before 2012, when examining States' compliance with their obligations during crisis the CESCR relied on the interpretation of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[12] and the obligations dictated there. Article 2 par. 1 of the ICESCR stipulates that

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

1.2.1 Progressive Realization

According to Alston and Quinn, *"The concept of progressive achievement is in many ways the linchpin of the whole Covenant".*[13] Due to their nature as resource-dependent, economic, social and cultural rights (ESCRs) cannot be realized immediately. For example, in order for the right to health to be realized, a State should provide the necessary resources for hospitals, medical personnel and equipment, actions that need time and money to be fulfilled. Furthermore, usually the realization of ESCRs necessitates the availability of a great amount of resources. As Lotilla puts it *"Expressed in terms of state expenditure of resources, one group of rights requires minimal or no expenditures while the other requires a substantial commitment of resources".*[14] For example, the provision of social benefits to low-income households can take up a high amount of the government's budget, such as in Greece where it reaches almost 24% of the GDP. [15] It is therefore evident that the realization of ESCRs varies depending on the level of development of each State and

[12] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)
[13] Philip Alston; Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987), 9 Human Rights Quarterly, 156, 172
[14] Raphael Perpetuo M. Lotilla, "State Implementation of the International Covenant on Economic, Social and Cultural Rights" (1986), 61 Philippine Law Journal 259, 263
[15] OECD Data, Social Spending, available at <https://data.oecd.org/socialexp/social-spending.htm#indicator-chart>, last accessed on 02/06/2019

its available resources,[16] since the requirement to immediately achieve full realization of such rights by all States would disregard the intrinsic differences of their financial situation and the difficulties that developing states are confronted with.

Nonetheless, despite the positive connotation underlying the concept of progressive realization, intended to take into account the resource-dependent nature of such rights as well as financial discrepancies between states, a lot of concerns were expressed during the drafting of the Covenant, relating to its ambiguous meaning and the risk it entailed for the effective protection of ESCRs.[17] It is true that States could take advantage of the ambiguity of this term and prioritize other goals rather than the realization of these rights. This is why the CESCR, intending to highlight the normative content of the obligation to progressively realize ESCRs stated that:

> *Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.*[18]

Were it to be understood as empty words, progressive realization would provide no effective protection to such rights, allowing states to decide for themselves when full realization would take place. As pointed out by Nolan et al., the meaning of progressive achievement is that States have the obligation to expand the enjoyment of such rights over time.[19]

It is worth mentioning that despite the formulation of States' obligations as requiring the progressive achievement of such rights, several of the obligations established in the ICESCR are to be realized immediately. In the words of the CESCR, *"...while the*

[16] Audrey R. Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996), 18(1) Human Rights Quarterly, 23, 31
[17] Alston; Quinn op.cit. (176)
[18] CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, (last accessed 16 June 20190, par. 9
[19] Nolan. A.; Lusiani. N.; Courtis. C., "Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights", in A. Nolan (Ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014). 123

Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect."[20] Several obligations of this kind do not depend on the available resources of each state neither on their level of development.[21] For example, the obligation stipulated in Article 2 par.2 of the ICESCR, namely to guarantee that all rights are exercised with no discrimination of any kind, is immediately applicable, as also emphasized by the CESCR[22]. The principle of non-discrimination is one of the pillars of Human Rights Law, since it reflects the idea that human rights are inherent to all human beings, irrespective of their race, colour, age, sex etc[23] so it comes as natural that the CESCR emphasized its immediate applicability, intending to strengthen the protection of ESCRs of all people.

1.2.2 Maximum Available Resources

Another important element characterizing the formulation of states' obligations towards ESCRs is the stipulation that the realization of these rights will take place progressively, *to the maximum of its available resources.*[24]As underlined by Alston and Quinn *"the meaning of the phrase 'progressive achievement,' (...) is in practice inextricably linked to the phrases (...) 'the maximum of its available resources.'"*[25] The allocation of state resources constitutes one of the most problematic issues concerning the protection of ESCRs. According to Robertson, *"'Maximum' stands for idealism; 'available' stands for reality. 'Maximum' is the sword of human rights rhetoric; 'available' is the wiggle room for the state".*[26] It goes without saying that a state's expenditure includes more responsibilities than realizing human rights and it should be its decision how to allocate the available resources, a decision that cannot

[20] CESCR, General Comment 3, op.cit. (par.1)
[21] Perpetuo M. Lotilla op.cit. (265)
[22] CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20
[23] UN Human Rights Office of the High Commissioner, "What are Human Rights", available at https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx, last accessed on 10/07/2019
[24] Art. 2 par. 1 ICESCR
[25] Alston; Quinn op.cit., (173)
[26] Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the Maximum Available Resoures to Realizing Economic, Social, and Cultural Rights" (1994), 16 Human Rights Quarterly. 693, 694

be substituted by an international body.[27] Nevertheless, such discretion is not limitless since it would otherwise *"nullify"* the obligations established under the Covenant.[28]

The UN CESCR has not developed the concept of maximum available resources extensively so far. It has only stated that it *"refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance",*[29] meaning that State-parties that do not have the necessary resources to fulfill their obligations should ask technical assistance from more developed states.[30] In a statement regarding the evaluation of this obligation, the CESCR emphasized its respect to the margin of appreciation of each State regarding the allocation of their resources.[31] Nonetheless, as Balakrishnan et al. stress

> *The concept of maximum available resources requires further development in order to challenge the unequal distribution of material resources, and re-imagine the role of the state not only as an efficient administrator of existing resources, but as an institution that mobilizes resources to meet core human rights obligations.*[32]

Regarding the content of this obligation, Robertson underlines that States, when allocating their resources, should prioritize the promotion and realization of human rights.[33] For example, States should prioritize the provision of adequate healthcare rather than allocating their resources on other fields such as defense and military equipment. What is more, resources should be used effectively while at the same time

[27] Ibid (702)
[28] Alston; Quinn op.cit., (177)
[29] UN CESCR Statement - An Evaluation Of The Obligation To Take Steps To The "Maximum Of Available Resources" Under An Optional Protocol To The Covenant, E/C.12/2007/1, 21 September 2007, par. 5
[30] Eide Riedel; Gilles Giacca; Christophe Golay, "The Development of Economic, Social and Cultural Rights in International Law", in Riedel, Giacca and Golay (ed.) *Economic, Social And Cultural Rights in International Law, Contemportary issues and Challenges* (Oxford University Press, 2014), 15
[31] CESCR Statement (2007) op.cit. par. 12
[32] Radhika Balakrishnan; Diane Elson; James Heintz; Nicholas Lusiani, "Maximum Available Resources & Human Rights: Analytical Report" (2011), Center for Women's Global Leadership, 4
[33] Robertson, op.cit. (695)

States, especially during resource constrains, should consider making use of other type of resources and not only financial ones.[34]

1.2.3 Non-retrogression

Another obligation of utmost importance, especially in the context of crisis is the obligation of non-retrogression. As Warwick puts it, *"The obligation of nonretrogression requires that states maintain progress on the rights and neither reduce or stagnate on their rights protections".*[35] It is therefore evident that non-retrogression comes as a natural consequence of the duty to progressively realize ESCRs.[36] An example of retrogressive measures would be cuts in pensions or other social security benefits, something that has happened extensively in a number of countries during the crisis. Non-retrogression practically allows states to reduce any afforded level of enjoyment of ICESCR rights only under very strict conditions.[37] It seems as deliberately retrogressive measures are considered a prima facie violation of the ICESCR and the burden falls onto the States to justify them,[38] however the Committee has not explained the difference between deliberately and non-deliberately retrogressive measures, even though it refers to such concepts in a variety of cases.[39] It should be noted though that, due to the nature of ESCRs as intrinsically linked to the economic conditions of each state, the establishment of very strict criteria on retrogressive measures could have an opposite result and actually impede their protection, since sometimes adjustments are necessary in the light of special economic circumstances.[40]

The principle of non-retrogression has been derived from the ICESCR by the Committee based on the obligation established in the Covenant for the progressive

[34] Sigrun Skogly, "The Requirement of Using the Maximum of Available Resources for Human Rights Realisation: A Question of Quality as Well as Quantity" (2012), 12 Human Rights Law Review, 393, 404
[35] Warwick (2018) op.cit.(135)
[36] Nolan; Lusiani; Courtis op.cit., (123)
[37] Mary Dowell-Jones, "The Sovereign Bond Markets and Socio-Economic Rights", in Riedel, Giacca and Golay (ed.) *Economic, Social And Cultural Rights in International Law, Contemportary issues and Challenges* (Oxford University Press, 2014), 63
[38] Nolan; Lusiani; Courtis op.cit. (125)
[39] ibid (133)
[40] Ibid (131)

realization of ESCRs.[41] The criteria concerning deliberately retrogressive measures have been subject to changes by the CESCR throughout its work[42]. In its General Comment 3, the Committee stressed that

> *...deliberately retrogressive measures (...) would require the most careful consideration and would need to be fully justified by reference to the totality of the rights (...) and in the context of the full use of the maximum available resources.*[43]

Nolan et.al argue that this would require States to show the concerned measures would positively affect the rights of some by having –quoting the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights- *'the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups'*[44], while Gomez emphasizes the need that such measures are preceded by a study of their impact.[45] The CESCR stresses that deliberately retrogressive measures should be considered *"in the context of the full use of the maximum resources"*[46], thus allowing such measures only when resources are scarce to no fault of the State and when the latter can show that the measures are necessary for the protection of the totality of the rights.[47]

In a following Statement of 2007, the CESCR laid down more specific criteria for deliberately retrogressive measures, noting that it will deal with such cases on a *"country-by-country basis".*[48] Among those, some concern the existence of factors impacting on the available resources, such as the state's level of development (a), the country's economic state and in particular if it is going through a period of economic instability (c) and finally, whether there are other factors resulting in resource

[41] Warwick (2018) op.cit., (136)
[42] Joe Wills, Ben TC Warwick, "Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse" (2016), 23 (2) *Indiana Journal of Global Legal Studies*, 629, 654
[43] CESCR, General Comment 3, op.cit . (par.9)
[44] Nolan; Lusiani; Courtis op.cit., (134); International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, Guideline 14 (d)
[45]Felipe Gómez Isa, "The Reversibility of Economic Social and Cultural Rights in Crisis Contexts" (2013), Global Education Magazine, available at < http://www.globaleducationmagazine.com/reversibility-economic-social-cultural-rights-crisis-contexts/>, last accessed on 05/06/2019
[46] CESCR, General Comment 3, op.cit. (par. 9)
[47] Nolan; Lusiani; Courtis op.cit. (134)
[48] CESCR Statement (2007) op.cit. (par. 10)

constraints, such as natural disasters or armed conflicts (d).[49] Taking into consideration the resource-dependent nature of ESCRs, it comes as natural that those factors will be taken under consideration by the CESCR. In addition, the Committee will examine whether the State sought international cooperation or assistance or rejected similar offers (f) and whether it made an effort to identify low-cost options (e)[50], showing that it will accept such measures only after every other effort has been made. Finally the last criterion refers to whether the measures violated the minimum core content of the ICESCR[51], proving the importance the CESCR affords to this concept which will be analyzed below. Indeed, the Committee has introduced an absolute prohibition of retrogression when it impacts on the minimum essential levels of the rights.[52]

The Committee has mentioned the obligation of non-retrogression in several of its General Comments regarding specific rights established in the ICESCR.[53] Nevertheless, only in General Comment 18 regarding the Right to Work has the Committee provided specific examples of retrogressive measures and only in General Comment 19 has it developed more specific criteria based on which it would examine compliance of retrogressive measures with States' obligations.[54] More specifically, in General Comment 18 the CESCR stresses that examples of retrogressive measures would be

> *denial of access to employment to particular individuals or groups, whether such discrimination is based on legislation or practice, abrogation or suspension of the legislation necessary for the exercise of the right to work or the adoption of laws or policies that are manifestly incompatible with international legal obligations relating to the right to work. An example would*

[49] Ibid [criteria (a), (c) and (d), par. 10]
[50] Ibid [criteria (e) and (f), par. 10]
[51] Ibid [criterion (b), par. 10]
[52] Gomez op.cit.
[53] Eg CESCR. *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, General *Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11
[54] Nolan; Lusiani; Courtis op.cit. (135)

> *be the institution of forced labour or the abrogation of legislation protecting the employee against unlawful dismissal.*[55]

While in General Comment 19 it lays down specific criteria regarding the right to social security, underlining that it will examine whether:

> *(a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.*[56]

These two General Comments demonstrate that the CESCR is capable of elaborating in more detail on the concept of non-retrogression regarding each specific right, so States would have clearer guidelines as to what constitutes a non-permissible retrogressive measure.

The turning point regarding the approach of the Committee towards deliberately retrogressive measures was a Letter by the Chairperson of the CESCR addressed to the State parties to the ICESCR, dated 16 May 2012.[57] In this Letter, the Committee establishes new criteria concerning the principle of non-retrogression, by referring to austerity policies. The new criteria include temporariness, necessity and proportionality, non-discrimination and protection of the minimum core content of rights or the social protection floor.[58] In addition, with a Statement published in 2016 concerning the economic crisis and austerity measures, the Committee proceeded in

[55] CESCR, *General Comment No. 18: The Right to Work (Art. 6 of the Covenant),* 6 February 2006, E/C.12/GC/18, par. 34
[56] CESCR, *General Comment No. 19: The right to social security (Art. 9 of the Covenant),* 4 February 2008, E/C.12/GC/19, par. 42
[57] Letter addressed by the Chairperson of the CESCR to States parties to the International Covenant on Economic, Social and Cultural Rights, 16 May 2012
[58] ibid

strengthening the criteria by adding new ones such as the obligation for an impact assessment of the proposed measures, the participation of affected groups in the process and an independent review at national level[59]. Both these documents and the contained criteria will be analyzed thoroughly below. This constant change in the criteria however, combined with the *"resulting lack of clarity"* have limited the potential of this obligation to render austerity measures impermissible.[60]

Last but not least, in light of the current responses to the global financial crisis, characterized by a prioritization of economic and financial interests, the Statement of the CESCR on Globalization reflects its approach towards the pursuit of economic goals as opposed to the protection of ESCRs. While the Committee reiterated that certain aspects of Globalization relating to the free market and its priority over the State are not against the principles of the ICESCR or States' obligations, it stressed that:

> *Taken together, however, and if not complemented by appropriate additional policies, globalization risks downgrading the central place accorded to human rights (…) This is especially the case in relation to economic, social and cultural rights.*[61] (…) *"Competitiveness, efficiency and economic rationalism must not be permitted to become the primary or exclusive criteria against which governmental and inter-governmental policies are evaluated*".[62]

This demonstrates the firm stance of the CESCR as a guarantor of ESCRs, not allowing the prioritization of other goals that would risk their violations. The importance of this Statement is better understood compared against the changed approach of the Committee after 2012, seeing austerity policies as unavoidable and an inevitable response to the crisis.

[59] CESCR, Statement on Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2016/1, (22 July 2016)
[60] Wills; Warwick op.cit. (654)
[61] CESCR, Statement on Globalization and Economic, Social and Cultural Rights, 18th session, May 1998, par. 2
[62] Ibid (par. 4)

1.2.4 Emergency doctrine

This changed approach of the Committee reflects an elaboration of its "emergency doctrine", in light of the lack of a derogation clause in the ICESCR[63], a lack that, however, raises questions regarding the justification of this emergency approach. According to Muler, the approach of some International Human Right Institutions shows that the lack of a derogation clause means the absolute prohibition of derogations from the rights protected.[64] It is true that, especially in types of emergencies other than economic ones, such as armed conflicts, derogation from ESCR (and most of all subsistence rights, like the right to food and shelter) is difficult to be deemed as necessary.[65] In fact, even during economic constraints the CESCR itself has reiterated that *"…endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent"*.[66] This is why the new approach of the CESCR has been criticized, with academics supporting that the aforementioned Letter by the Chairperson of the Committee can *"shift the interpretation of the doctrine of non-retrogression (…) by moving towards a model of emergency 'accomodation' "*[67] while Alkiviadou stresses that with this Letter, *"the Committee endorses the crisis narrative of necessity in the restriction of social and economic rights and inflates 'the importance of neo-liberal market based ideals'",*[68] quoting Warwick.

One one hand, the elaboration of the emergency doctrine by the Committee and the stipulation of new criteria in both the aforementioned Letter and Statement regarding austerity measures could be seen as a means to protect, rather than limit the enjoyment of ESCRs. Reacting to the global financial crisis by drawing State Parties' attention to the criteria that should be met when responding to the crisis could be

[63] Zdzislaw (Dzidek) Kedzia, "Reinforcement of Economic, Social and Cultural Rights" (2014), 14 *European Yearbook on Human Rights* 23, 32
[64] Amrei Muler, "Limitations to and Derogations from Economic, Social and Cultural Rights" (2009), 9 *Human Rights Law Review* 557, 596
[65] Ibid (593)
[66] CESCR, General comment No. 2: International technical assistance measures (art. 22 of the Covenant), Fourth session (1990), par. 9
[67] Warwick (2016) op.cit. (255)
[68] Natalie Alkiviadou, "Sustainable Enjoyment of Economic and Social Rights in Times of Crisis: Obstacles to Overcome and Bridges to Cross" (2018), 20 (4) *European Journal of Law Reform*, 3, 10; Warwick (2016) op.cit. (255)

interpreted as an acceptance of the Committee of the realities of this world and as an effort to strengthen the protection of the concerned rights. As Green puts it when talking about national emergencies and governments' responses, *"such action, despite its unpalatable or even illegal nature, must nevertheless be taken in order to alleviate a greater harm that would occur were the status quo maintained".*[69] On the other hand, adopting an emergency approach runs the risk of weakening human rights protection standards and allowing for a suspension of rights and guarantees established in the legal system.[70]

1.3 The Council of Europe

1.3.1 The European Committee of Social Rights

Turning now to the European human rights protection system, the most relative bodies responsible for monitoring States' compliance with human rights norms are the European Committee of Social Rights (ECSR) and the European Court of Human Rights (ECtHR). The ECSR is responsible for monitoring compliance with the European Social Charter (ESC)[71] and the Revised ESC (RESC)[72] and its role has been catalytic in adjudicating cases regarding violations of social rights during the economic crisis. This can be attributed to its interpretative methods, highlighting the values enshrined in the ESC, namely dignity, autonomy, equality and solidarity,[73] and, according to O'Cinneide, including an effective and dynamic interpretation of the Charter *"recognizing that changing social and economic conditions, along with changing expectations and shifts in moral understanding, may require adjustments in its case-law".*[74] Contrary to the CESCR, the ECSR did not follow a general approach towards States' obligations but laid down specific obligations relating to each

[69] Alan Greene, "Questioning Executive Supremacy in an Economic State of Emergency" (2015), 35 Legal Studies. 594, 599
[70] Warwick (2016) op.cit (251)
[71] Council of Europe, European Social Charter, 18 October 1961, ETS 35, available at: https://www.refworld.org/docid/3ae6b3784.html (last accessed 27 June 2019)
[72] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, available at: https://www.refworld.org/docid/3ae6b3678.html (last accessed 27 June 2019)
[73] Holly Cullen, "The Collective Complaints System of the European Social Charter: Interpretive Methods of the European Committee of Social Rights" (2009), 9 Human Rights Law Review, 61, 76
[74] Colm O'Cinneide, "Bringing Socio-Economic Rights back to the mainstream of Human Rights: the case-law of the European Committee of Social Rights as an example of rigorous and effective rights adjudication", *Revista Europea de Derechos Fundamentales*, Núm. 13/1er Semestre 2009. 259, 290

protected right.[75] As O'Cinneide stresses, this approach helped the ECSR *"...avoid some of the conceptual problems that the CESCR has faced..."*.[76]

The ECSR's approach when monitoring compliance with States' obligations during the application of austerity measures has been based on the restriction clause found in the Charter, article 31 of the ESC and article G of the RESC. This indicates a very different approach than the one followed by the CESCR, which did not use the restriction clause of the ICESCR, stipulated in article 4. On the contrary, as analyzed above, it dealt with austerity measures and the issue of resource constraints by referring to the obligations stipulated in article 2 ICESCR, the principle of non-retrogression and the criteria elaborated in the Letter of May 2012. As Muler emphasizes, the CESCR *"...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".*[77] The Charter's restriction clause however does not follow the same formulation as the one provided in the ICESCR. It follows the example of the restrictions established in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[78] "borrowing" the criteria of legality and necessity in a democratic society.[79]

More specifically, article 31 of the ESC and Article G of the RESC establish that the restrictions imposed on the realization of ESCRs should be *"prescribed by law and (...) 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".* The principle of legality is central in both the ESC and the ECHR and has been interpreted as a requirement for such laws to be *"sufficiently clear".*[80] For the restrictions to be justified they have to serve one of the legitimate aims stipulated in the article, namely public interest, national security, public health or morals, a list

[75] ibid (292)
[76] ibid
[77] Muler, op.cit. (558)
[78] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html, last accessed 10 July 2019
[79] Tadeusz Jasudowicz, "Limits of Enjoyment of Human Rights in the System of the European Social Charter" (2017), 6 *Polish Review of International and European Law*, 49, 55
[80] Cullen op.cit. (86)

which has been interpreted as being exhaustive,[81] meaning that States cannot impose restrictions for other reasons rather than those strictly mentioned in the restriction clause. It is evident that the legitimate aims included in this provision of the ESC are very different than the one established by article 4 of the ICESCR. The latter allows interferences only to the extent that they serve the purpose of general welfare, which narrows its scope and prohibits restrictions to ESCRs serving any other aim.[82] Nevertheless, it can be argued that restricting ESCRs, and especially subsistence rights, for reasons like public morals is difficult to be supported.[83] Last but not least, restrictions should be "necessary in a democratic society", a requirement that has been interpreted into a principle of proportionality, a concept which is very common when examining restrictions to rights at both national and international levels.[84]

1.3.2 The European Court of Human Rights

This analysis would be incomplete if there was no mention to the ECtHR, the most relevant body responsible for the protection of human rights in the European system. The ECtHR decides on violations of the ECHR, an instrument including mostly civil and political rights with the exception of the right to property and the right to education, established in articles 1 and 2 of the First Addition Protocol to the Convention[85] respectively. Despite the nature of the ECHR as a civil and political rights instrument, it *"establishes an essential and principled frame of reference for the observance of social rights"*[86] and therefore *"Increasingly, a core of social rights thus seems to be protected in the Court's interpretation of the European Convention".*[87] This should come as no surprise taking into account the indivisibility

[81] Ibid (85)
[82] Muler op.cit. (570)
[83] Ibid (571)
[84] Cullen op.cit. (87)
[85] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* 20 March 1952, ETS 9, available at: https://www.refworld.org/docid/3ae6b38317.html, last accessed 10 July 2019
[86] Matti Mikkola, "Social Rights as Human Rights in Europe" (2000), 2 *European Journal of Social Security*, 259, 259
[87] Christina Binder; Thomas Schobesberger, "The European Court of Human Rights and Social Rights – Emerging Trends in Jurisprudence" [2015] *Hungarian Yearbook of International Law and European Law*, 51, 51

of Human Rights, recognized in the Vienna Declaration and Programme of Action.[88] Regarding austerity measures, most of the complaints filed with the ECtHR regard the right to property, which according to the Court's expansive jurisprudence includes claims to social security provisions and salaries provided by the State.[89]

The ECtHR does not follow the example of the ESC with a general restrictions clause, but includes conditions for interference in each right that deems to be subjected to restrictions. Therefore, the criteria used by the ECtHR when adjudicating cases relating to austerity measures come from these specific conditions set out in the concerned provisions, while in certain cases where the applicants have made a complaint regarding the discriminatory nature of the contested measures, the Court has made use of Article 14 of the ECHR, which introduces a prohibition of discrimination. Almost all restrictions' criteria in the ECHR are formulated in a similar way, requiring them to be provided by law, be necessary in a democratic society and to serve a legitimate aim. The legality requirement has been interpreted by the Court as demanding the law to be accessible and precise, preventing its arbitrariness and enabling right-holders to be aware of its meaning.[90] The phrase "necessary in a democratic society", as already analyzed above, introduces the principle of proportionality in the reasoning of the Court, according to its jurisprudence.[91] At the same time, the restrictive laws should serve one of the legitimate aims stipulated in the concerned provision. It is interesting that regarding the right to property, interferences are permitted only for the sake of public interest, a concept that has been the reason for the rejection of several applications by the Court, in combination with the notion of the margin of appreciation.[92]

[88] UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23
[89] Mantzoufas Panagiotis, *Οικονομική Κρίση και Σύνταγμα (Economic Crisis and Constitution)*, (Sakkoulas Publications, 2014), 112 (translated by author)
[90] D. J. Harris; M. O'Boyle; E.P. Bates; C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2nd ed., 2009), 345
[91] Ibid (349)
[92] See Ioanna Pervou, "Human Rights in Times of Crisis: The Greek Cases before the ECtHR, or the Polarisation of a Democratic Society" (2016), 5(1) *Cambridge Journal of International and Comparative Law*, 113

The ECtHR recognizes the exceptional circumstances of the economic crisis[93], thus justifying several of the contested measures. This approach demonstrates that the Court has also adopted an economic emergency doctrine[94], having as a consequence that *"The current economic crisis has been compared to the previous security one and the argument of the "fiscal interest" of the State has become almost analogous to that of 'a threat to national security' in the last decade"*[95]. The admittance of the exceptional circumstances led the Court to allow a wide margin of appreciation to Member States, due to the social and political connotation of the contested measures, in combination with recognizing as a legitimate aim the greater public interest of States. [96] Nonetheless, Intzipeoglou notes that the ECtHR approach to the current economic crisis resembles to a great extent how the Court dealt with cases concerning the War on Terror, running the risk of normalizing economic emergency situations.[97] As Dimopoulos puts it *"There is a danger that the measures enacted to deal with the emergency may become permanent, eroding rights won over long social struggles".*[98]

1.4 Substantive criteria

1.4.1 Legality

The requirement of legality concerns only the Council of Europe's bodies not the CESCR. This criterion is included in the limitation clause of the ICESCR which, as discussed above, has not been used by the CESCR to examine austerity measures. It constitutes a test of the rule of law[99], since it requires that all restrictions to rights are established by law to avoid arbitrariness and it has mostly be developed in the international context in the jurisprudence of the ECtHR. The concept of law is interpreted quite extensively by the ECtHR and it can include not only national

[93] Eg *Da Conceição Mateus and Santos Januário v. Portugal*, App Nos 62235/12 and 57725/12 (ECtHR 8 October 2013)
[94] Kyriaki Pavlidou, "Social Rights in the Greek Austerity Crisis: Reframing Constitutional Pluralism" (2018), 10 *Italian Journal of Public Law*, 287, 302
[95] Ifigeneia Intzipeoglou, "The European Court of Human Rights and austerity measures in the Eurozone: an ally against human rights violations or merely a bystander?" (2019), *LSE Law Review* Winter Issue, 21
[96] Pervou op.cit. (119)
[97] Intzipeoglou op.cit (21)
[98] Andreas Dimopoulos, PIGS and Pearls: State of Economic Emergency, Right to Resistance and Constitutional Review in the Context of the Eurozone Crisis (2013), 7 *Vienna Journal on International Constitutional Law*, 501, 505
[99] Jasudowicz op.cit. (55)

regulations but also case-law as well as laws generated by the European Union and international bodies, as long as they satisfy the ECHR's understanding of law.[100] Additionally, the laws have to be accessible and precise, to ensure the effective protection of the limited rights.[101] Taking into account that the ECSR usually refers to the jurisprudence of the ECtHR[102] it comes as natural that it has interpreted the criterion of legality in a similar way, by including in the concept of law not only legislation but also case law and by requiring them to be precise and foreseeable.[103]

1.4.2 Necessity

The notion of necessity can be interpreted as having a dual meaning. Firstly, necessity is usually referred to as being part of the proportionality test, an interpretation which will be analyzed below. However, necessity can also be interpreted as an autonomous concept and more specifically, as part of the *"emergency paradigm"*[104]. It practically means admitting the existence of exceptional or endangering circumstances that dictate the need to adopt measures aiming at confronting the situation that has arisen. As Greene notes *"...the sacrifice of constitutionalist principles such as human rights (...) are represented as being unpalatable but unavoidable decisions that need to be taken in order to respond to a threat at hand".*[105] For example, the closing of schools during an armed conflict, even though violating the right to education, might be deemed necessary to safeguard the rights to life of the students and staff. Of course Greene here is referring to national security emergencies but in light of the responses of governments to the global financial crisis of 2008, it is obvious that this statement also applies to economic emergencies as well. Greene himself later emphasizes that "*…the state of emergency became the predominant response mechanism for (...) economic emergency",*[106] proving that the emergency paradigm and specifically the invocation of the necessity principle constitutes the most frequent way to confront an economic crisis.

[100] Harris; O'Boyle; Bates; Buckley op.cit. (345)
[101] Ibid
[102] O'Cinneide (2009) op.cit. (291)
[103] Conclusions 2014 - Spain - Article 6-3, 05/12/2014 (XX-3/def/ESP/6/3/EN)
[104] Greene op.cit. (595)
[105] ibid (597)
[106] Ibid (603)

Intrinsically linked to the notion of necessity is the concept of public interest. As analyzed above, measures affecting the enjoyment of ESCRs are permissible only to the extent that they are serving a legitimate aim. In the context of the economic crisis, this legitimate aim is the satisfaction of the public interest, which is defined as *"any consideration justifying a limitation of a constitutional right and which is not included within the category of the protection of the rights of others".*[107] The concept of public interest is derived from the values underpinning a democratic society and the constitution of the State and can be interpreted as including various specific goals, such as national security and public order.[108] For this purpose to be considered legitimate a high degree of urgency and social significance are required, justifying that the limitation of human rights is serving the greater good of the society.[109]

Nevertheless, the use of public interest as a justification for limiting human rights and especially ESCRs, should be done with caution, since it can be used by the authorities to cover arbitrary limitations of rights. It is true that the content of public interest is determined in the framework of specific decisions of the State and is always intrinsically linked to the given circumstances at the time, [110] which is why it is always present during the drafting of social policies[111], especially during crisis. However, it should be born in mind that not every public interest can justify limitations to rights, especially in a society committed to their protection.[112] This is particularly important in the context of the current economic crisis, where not only governments but also human rights' monitoring bodies stressed the urgency and the significance of the public interest that austerity measures serve, allowing for a severe degradation of ESCRs around the world. The use of public interest by the relevant bodies will be examined later in the analysis.

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[107] Barak Aharon, *Proportionality: Constitutional Rights and their Limitations* (Cambridge Studies in Constitutional Law), (Cambridge University Press 2012), 265
[108] Ibid (251,254)
[109] Ibid (266)
[110] Stavroula N. Ktistaki, "Η Επίδραση της Οικονομικής Κρίσης στα Κοινωνικά Δικαιώματα" (The impact of the Economic Crisis on Social Rights) (2012), 4/635 *Επιθεώρησις Δικαίου Κοινωνικής Ασφάλισης (Social Security Law Review),* 481, 500 (translated by author)
[111] Xenophon Contiades and and Alkmene Fotiadou, "Social rights in the age of proportionality: Global economic crisis and constitutional litigation" (2012), 10 (3) *International Journal of Constitutional Law*, 660, 685
[112] Aharon op.cit. (265)

1.4.3 Proportionality

The proportionality test is one of the most known devices that monitoring bodies employ in order to adjudicate on whether there has been an impermissible limitation of a right. It could be described as a *"limitation of the limitation"*[113], since it poses certain limits to the decision-makers by laying down certain criteria restrictions to human rights should meet. The proportionality test comprises 3 sub-tests, namely the suitability, the necessity and the stricto-sensu proportionality requirements.[114]

Starting with the suitability test, it dictates that the measures applied are appropriate for realizing the purpose that they serve or in other words that they can *"rationally lead to the realization"*[115] of this purpose. In this sense, it constitutes a "threshold test" and not a balancing one, since it only allows for limiting laws that have the potential to achieve the desired goal.[116] In the case of austerity measures limiting ESCRs it should be proved that those measures could lead to the realization of the public interest they are supposed to achieve, namely the decrease of public debt, economic stability and improvement of the State's economic situation. Of course one can never be entirely sure of the probability of the measures to achieve the purpose, since this is based on assumptions based on the current situation in a country.[117] This is all the more relevant when it comes to the social and economic policies of a government and whether they can contribute to the improving of the economy, since the latter also depends on external factors, a result of the interdependence of today's economies. The conclusion as to whether the means are suitable will eventually be based on a factual test, taking into consideration relative facts and data[118] that will demonstrate whether the proposed measures are appropriate or not.

[113]Kostas Chrysogonos, Ατομικά και Κοινωνικά Δικαιώματα (*Civil and Social Rights),* (3rd ed., Nomiki Vivliothiki, 2006), 90
[114] David Bilchitz, "Socio-economic rights, economic crisis, and legal doctrine" (2014a), 12 (3) *International Journal of Constitutional Law*, 710, 735
[115] Aharon op.cit. (303)
[116] Ibid (315)
[117] Ibid (308)
[118] Ibid (307)

The second test of proportionality, namely the necessity requirement, means that the measures chosen have to be the *"least restrictive of human rights".*[119] Usually not only one measure is suitable to achieve the desired goal. On the contrary, governments can decide among several measures that might be deemed appropriate for this purpose.[120] This also applies in the case of economic crisis, where austerity policies constitute only one side of the coin. The identified alternatives when compared with the contested measure have to be equally sufficient to realize the purpose, although this criterion should not be interpreted too strictly, since it would then render the necessity test useless, by making it practically impossible to identify any alternatives at all.[121] Especially regarding austerity measures, it is worth mentioning that even though alternatives should be feasible, taking into account the current economic situation of the State, the competent bodies examining the proportionality of the measure should not interpret the concept of feasibility too strictly or defer to the legislature, since this would be endangering the effective protection of rights.[122] For example, if the government suggests that the alternative measures could not be adopted due to resource unavailability, Courts should *"engage in substantive and normative reasoning relating to the alternatives that are under consideration"*[123], to guarantee the effective protection of rights.

After identifying the existence of several alternatives that can realize the purpose *"quantitatively, qualitatively, and probability-wise – equally"*[124] the next element to be examined in the necessity test is whether the alternatives are less restrictive, by comparing the impact that each alternative has on the concerned rights. [125] It is true that some measures can heavily impact on a certain right by affecting its core, while others restrict it to a far lesser extent.[126] The necessity test guarantees that governments choose the latter ones. Bilchitz argues that there can be a balancing

[119]Juan Cianciardo, "The Principle of Proportionality: the Challenge of Human Rights" (2010), 3 *Journal of Civil Law Studies*, 177, 179
[120] Aharon op.cit. (305)
[121] David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach?, in L Lazarus,C, McCrudden and N Bowles(eds.) *Reasoning Rights* (2014b) (Hart Publishing, 2014), 18, available at SSRN: https://ssrn.com/abstract=2320437, last accessed on 25/06/2019
[122] Ibid (24)
[123] Ibid (25)
[124] Aharon op.cit (324)
[125] ibid
[126] Bilchitz (2014b) op.cit. (29)

component in the necessity test itself, albeit a limited one, when there is an alternative that indeed impacts the right to a lesser extent but it might realize the purpose in a slightly less effective way.[127] Then, the balancing would be between the gain for human rights against the loss for the desired purpose.[128]

The third component of the principle of proportionality is a balancing test between the benefit gained for the public interest against the harm done to the limited right, known as stricto sensu proportionality.[129] This way even if the measure is considered suitable and necessary, it is ensured that it is not limiting the right to an unacceptable extent. For example, shooting an escaping prisoner could not be deemed a proportional measure, since the right to life is far more valuable than the interest of the State to keep them incarcerated.[130] This example reflects the rule underpinning the stricto sensu proportionality test, namely that the elements weighed here are the social importance attributed to the benefit acquired by the measure against the social importance of avoiding harming the relevant right.[131] As demonstrated in the example above, even when a measure is considered suitable and necessary, sometimes it restricts the right to such an extent that compared with the intended purpose, it cannot be forgiven. As Barak summarizes it *"The higher the social importance of preventing the marginal harm (...) then the marginal benefits created by the limiting law (...) should be of a higher social importance and more urgent..."*[132]

1.4.4 Equality and non-discrimination

The principle of equality and non-discrimination is the central pillar upon which Human Rights Law is construed, since the latter is *"predicated on the fundamental principle of the inherent dignity and equal worth of every human being".*[133] In other words, equality dictates that all human beings are equal, entitled to the same rights and prohibiting their unequal treatment based on criteria such as their sex, nationality,

[127] ibid (33)
[128] ibid
[129] Aharon op.cit. (340)
[130] Chrysogonos (2006) op.cit, (94)
[131] Aharon op.cit. (349)
[132] Ibid (363)
[133] Audrey R. Chapman; Benjamin Carbonetti, "Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights" (2011), 33 Human Rights Quarterly, 682, 683

color etc. Non-discrimination is the negative expression of the principle of equality and it has been defined by the CESCR in its General Comment 20 as:

> *any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.6 Discrimination also includes incitement to discriminate and harassment.*[134]

According to this principle, similar cases should be dealt in the same way while differential treatment is needed in substantially distinct situations[135]. This is known as substantive equality as opposed to the formal one, which can result in unfair treatment when two different cases are treated the same way. In addition, States should take the appropriate measures not only to revoke laws that introduce direct discrimination but also act to correct cases of indirect discrimination,[136] that results from the negative effects that seemingly non-discriminatory laws have on specific people.[137]

The principle of non-discrimination plays a significant role in the area of economic, social and cultural rights. As Harris et al. stress *"a great deal of discrimination law is concerned with the enjoyment of economic and social rights, such as rights to employment or pay and working conditions or to housing".*[138] This becomes all the more relevant during the global financial crisis, where the adopted austerity measures had a disproportionate effect on a specific group of people. For example, as Chrysogonos stresses, in Greece austerity policies affected mostly people working in the public sector and pensioners, since they focused on cuts on salaries and pensions, while free-lancing businesses were benefited by the failure of the State to combat tax

[134] CESCR, *General Comment No. 20 – Non discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/GC/20 (2 July 2009), par. 7
[135] Chrysogonos (2006) op.cit (120)
[136] CESCR, General Comment 20 op.cit. (par. 8, 9, 10)
[137] Ben Saul; David Kinley; Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights –Commentary, Cases and Materials* (Oxford University Press. 2014), 181
[138] Harris, D.J., O'Boyle; M. Bates; E.P.; Buckley, C.M., *Law of the European Convention on Human Rights* (Oxford University Press, 3rd ed. 2014), Chapter 18, pp. 783-822, 786

avoidance and collect the relevant taxes.[139]Especially during an austerity era, this principle becomes catalytic in protecting the rights of the most vulnerable and marginalized, who are the ones who have suffered the disproportionate cost of the crisis.[140] Governments should take steps to ensure that the crisis will have no disproportionate effects on marginalized and vulnerable groups and make sure that there are no obstacles preventing these groups from accessing basic goods and services.[141] Finally, they should ensure the adoption of measures benefiting those groups that are most in need.[142]

1.4.5 Minimum core content

The minimum core content of rights is a criterion intended to strengthen their protection and render it more effective by introducing an inviolable limit that no restriction can cross or in other words *"…a threshold below which individuals should not be allowed to fall without a very strong justification".*[143]As a concept it was firstly articulated internationally by the CESCR[144] and since then it has been used by other international bodies responsible for the protection of human rights. It is defined as *"…the nature or essence of a right, that is, the essential element or elements without which it loses its substantive significance as a human right…"*[145] and especially regarding ESCRs, it intends to *"establish a minimum legal content".*[146]

Despite its potential to safeguard rights against complete deprivation, it is one of the most complex concepts in the field of ESCRs, since there has been no determination as to what it entails but most importantly, in the light of the financial discrepancies between states, it has not been clarified whether is constitutes an absolute or relative term, depending on whether the discussion is about a developed or developing

[139] Kostas Chrysogonos, *Η Καταστρατηγηση του Συνταγματος στην εποχη Των Μνημονιων* (The circumvation of the Constitution in the era of Memorandums), (Livanis, 2013), 133 (translated by author)
[140] Wills; Warwick op.cit. (645)
[141] Ignacio Saiz, "Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis" (2009), 1 (2) *Journal of Human Rights Practice*, 277, 283
[142] ibid
[143] Bilchitz (2014a) op.cit. (730)
[144] Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008), 33 *Yale International Law Journal*, 113, 115
[145] Audrey Chapman; Sage Russell, "Introduction" in Audrey Chapman, Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights"*, (Intersentia, 2002), 9
[146] Young op.cit. (113)

state.[147] A very helpful interpretation of the concept is provided by Prof. Kedzia, member of the CESCR, who argues that the minimum core content is a *"methodological contruction"* and it can only be defined in a specific context, rather than *in abstracto,* meaning that it can take into account the special circumstances of each state.[148] It is also worth mentioning that identifying the minimum core content of rights is only the first step[149] and States should continue with the progressive realization to comply with their obligations towards ESCRs.

The concept of the minimum core content of ESCRs entails an obligation of States to provide the minimum essential elements of each right.[150] As stressed by the CESCR in its General Comment 3, a lack of such an obligation would mean that the Covenant *"would be largely deprived of its raison d'etre".*[151] In a crisis context this obligation entails ensuring that certain resources will be allocated in a way to ensure that essential goods and services are provided to all and adopting measures to lift obstacles preventing vulnerable groups from enjoying minimum essential levels of rights[152]. In addition, this inviolable core is particularly important as a safeguard against austerity measures which cannot lead to the violation of the minimum core of the rights.[153] This prohibition comes as natural since depriving people entirely of their social, economic and cultural rights would deprive the latter of their normative and protective function. Even the CESCR itself has emphasized that States adopting austerity measures should first identify the minimum core content of the Covenant rights or a social protection floor and guarantee their protection.[154]

[147] Karin Lehmann, "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core" (2006), 22 (1) *American University International Law Review*, 163, 183
[148] Manuscript Zdzislaw (Dzidek) Kedzia, in: Binder/Piovesan/Ùbeda de Torres/Hofbauer ed., "Social Rights Protection in the ICESCR and its Optional Protocol", "Research Handbook on International Law and Social Rights", to be published by Edward Elgar Publishing in 2020 (Contribution made available to me by the author)
[149] Scott Leckie, "Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998), 20 *Human Rights Quarterly*, 81, 102
[150] CESCR, General Comment 3 op.cit. (par. 10)
[151] ibid
[152] Saiz op.cit. (282)
[153] Markus Krajewski, "Human rights and austerity programmes" In L. Satragno (Author) & T. Cottier, R. Lastra, & C. Tietje (Eds.), *The Rule of Law in Monetary Affairs: World Trade Forum*, (Cambridge University Press 2014), 503
[154] CESCR, Letter of May 2012, op.cit

1.4.6 Temporariness

The criterion of temporariness regarding the nature of austerity measures has been developed by the relevant bodies as a consequence of the adoption of the emergency doctrine. The CESCR stated in its Letter to the State parties that austerity measures should be temporary and cover only the period of the crisis, [155] while the ECtHR has also made references to the temporariness –or not- of the measures. The only body not making any reference to this criterion is the ECSR, proving once again that it adopted a different approach, dealing with the contested measures by using the regular criteria of the ESC's limitation clause, without resorting to an emergency doctrine. Temporariness forms part of the emergency paradigm, together with necessity and expedience.[156] For example, in case of an armed conflict, exceptional measures will be taken to safeguard national security and once the state is no longer under threat, the measures will cease to exist. Temporary measures constitute an exception to the rule of normality and in principle should not have any permanent effects.[157] As noted by Gross they *"are designed to respond to a particular emergency and then be removed as soon as, or shortly after, that emergency has been met successfully".*[158]

The principle of temporariness of emergency measures raises two issues: first, the risk of the normalization of the emergency, resulting in those measures becoming permanent[159] and secondly, especially in the case of an economic crisis, the disregard that at times, the contested measures should be considered correctional rather than temporary. On one hand, recent history has demonstrated that in a lot of cases governments have normalized situations of emergency, maintaining exceptional measures that were supposed to be temporary.[160] As Greene stresses *"The idea that we are, instead, living in a permanent state of emergency, where exceptional powers*

[155] ibid
[156] Greene op.cit. (595)
[157] Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy" (2000), 21 *Cardozo Law Review,* 1825, 1834
[158] Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional" (2003), 112 *Yale Law Journal* 1011, 1036
[159] Bernadette Meyler, "Economic Emergency and the Rule of Law" (2007), 56 *DePaul Law Review* 539, 564
[160] See for example "Turkey: Normalizing the State of Emergency", (*Human Rights Watch*, 20 July 2018) available at https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency, last accessed on 16/06/2019

are no longer temporary, has arguably become the dominant paradigm".[161] On the other hand, it is also supported that certain measures were not meant to be temporary, but were adopted in order to correct mistakes of the past that led to the economic meltdown.[162] Phenomena such as the *"sharp slowdown in economic growth, the maturation of governmental commitments"*[163], as well as the ageing of the population in combination with the need to ensure the sustainability of the welfare state[164] demonstrate that in fact, certain economic adjustments were needed.

1.5 Procedural Criteria

1.5.1 Participation

The principles of participation, transparency and accountability constitute foundational values of democratic societies and they give substance to the meaning of the word democracy: the inclusion of people in the exercise of power. They are required by the human rights framework as procedural guarantees of State policies.[165] The CoE Commissioner for human rights has stressed that *"The right to public participation (...) goes beyond mere electoral rights to include duties to actively involve those affected by social and economic policy in meaningful channels of participation"*.[166] The UN independent expert on Poverty in her report on extreme poverty and human rights also stresses the importance of the participation of the poor in the policy-making, since decision-makers not only lack knowledge and experience on the issues faced by the former, but also might not take their interests' seriously.[167] The same applies in cases where economic policies are negotiated and especially

[161] Alan Greene, op.cit. (597)
[162] Ibid (606)
[163] Paul Pierson, "Coping with Permanent Austerity Welfare State Restructuring in Affluent Democracies", in Paul Pierson (ed.) *The New Politics of the Welfare State,* (Oxford University Press; 1st edition, 2001), 411
[164] See Mary Dowell-Jones, "The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments" (2015), 15 Human Rights Law Review, 193
[165] Magdalena Sepulveda Carmona, "Alternatives to austerity: a human rights framework for economic recovery", in A. Nolan (Ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 29
[166] CoE Commissioner for Human Rights, "Safeguarding human rights in times of economic crisis", Issue Paper (2013), 33
[167] UN Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, 11 March 2013, A/HRC/23/36, available at: https://www.refworld.org/docid/51b996e04.html [accessed 16 June 2019], par. 12

when those policies are going to impact heavily on the population, ensuring that decision makers will consult the people affected on the causes of their vulnerable state, thus rendering the policies more effective. [168]

1.5.2 Transparency

Transparency is intrinsically linked to the right to information[169] which plays a catalytic role when it comes to public life, since it guarantees the democratic character of the state by allowing people to have access to decisions that determine the future of their country and –by extension- their own. Especially when it comes to economic decisions of the State, these must be transparent so that people are aware of the process followed and the reasons lying behind the chosen policies, while at the same time transparency enhances states' legitimacy in the eyes of the population.[170] The same applies to budget decision-making so people access relevant information that will have a decisive impact on their living.[171] Especially when it comes to decisions regarding austerity policies that have imposed severe cuts on peoples' income and thus have impacted gravely on their living, people have the right to know what led to the implementation of such decisions as well as the way they were adopted. As stressed by Roberts *"Advocates of FOI reply that it is precisely at moments like these, when governments are making difficult choices about where spending should be cut, that FOI is most important".*[172]

1.5.3 Accountability

Transparency is closely linked to accountability, since the public has access to potentially wrongful actions by the State that can later bring to justice. Especially in an economic crisis, taking into account the severe impact that austerity measures had

[168] Sepulveda Carmona, op.cit. (51)
[169] Alasdair Roberts, "Transparency in Troubled Times" 2012, *Legal Studies Research Paper Series*, 12-35 Research Paper, 1, available at SSRN: https://ssrn.com/abstract=2153986 or http://dx.doi.org/10.2139/ssrn.2153986 , last accessed on 25/06/2019
[170] Ibid (8)
[171] Aoife Nolan, Mira Dutschke "Article 2(1) ICESCR and states parties' obligations: whither the budget?" (2010), (3) *European Human Rights Law Review*, 280, 287, Available at SSRN: https://ssrn.com/abstract=1663230, last accessed on 25/06/2019
[172] Roberts op.cit. (6)

on the population and most of all, on vulnerable and marginalized groups, ensuring the accountability of the relevant actors and the redress of human rights violations is of paramount importance. States should not prevent people from accessing judicial mechanisms and at the same time should take steps to guarantee access to justice to vulnerable and marginalized groups.[173] In the current context of the crisis, it is important to remember that "*In no case should a State be forced to prioritise accountability to international financial institutions over that to its own people".*[174] The concept of accountability is particularly relevant in the crisis of 2008 since austerity measures in the majority of cases were dictated by International Financial Institutions (IFIs) or other International Organizations such as the EU as loaning conditions, and as reiterated by Salomon when talking about the case of Greece *"the way in which the crises have been governed has exposed a series of black holes when it comes to accountability for the violation of human rights"*.[175] This however will be analyzed further below.

1.5.4 Human Rights Impact Assessment

One of the criteria used by international bodies when examining austerity measures, is whether the relevant actors conducted a human rights impact assessment (HRIA), prior to the adoption of the measures. The UN Special Rapporteur on Health, as quoted by Macnaughton, defined HRIA as *"the process of predicting the potential consequences of a proposed policy, programme or project on the enjoyment of human rights."*[176] The obligation to conduct a HRIA becomes even more relevant in the field of economic and social policy, bearing in mind the impact that these policies have on the public's living conditions. A State willing to commit to its obligations towards ESCRs can only do so, if prior to any decision regarding these fields realizes a serious study of the possible impacts that the proposed measures can have on the economic,

[173] Sepulveda Carmona op.cit. (29)
[174] Ibid (30)
[175] Margot E. Salomon, "Of Austerity, Human Rights and International Institutions" (March 25, 2015) LSE Legal Studies Working Paper No. 2/2015, 2, available at SSRN: https://ssrn.com/abstract=2551428 or http://dx.doi.org/10.2139/ssrn.2551428, last accessed on 29/06/2019
[176] Gillian Macnaughton, "Human Rights Impact Assessment: A Method for Healthy Policymaking" (2015), 17 (1) *Health and Human Rights Journal*, 63, 65; Paul Hunt, UN Special Rapporteur on the right to the enjoyment of the highest attainable standard of health, Interim Report to the General Assembly, UN Doc. No. A/62/214 (2007), para. 37.

social and cultural rights of its people. Such assessments intend to limit potential negative effects and support positive ones, thus ensuring compliance of States with their international obligations. [177]

[177] Macnaughton op.cit. (65)

Chapter 2: The application of the criteria

2.1 The UN CESCR

2.1.1 Before 2008

The global financial crisis in 2007-2008 was not the first one that the CESCR was confronted with. The UN Committee had the opportunity to monitor States' obligations towards ESCRs and establish standards of protection in the context of economic constrains during several crises that states went through in the 1990s, such as the ones in Asia[178] or Argentina. The CESCR recognized the difficulties that an economic crisis entailed for the realization of ESCRs but emphasized the need to protect such rights especially during economic instabilities. In its Concluding Observations adopted at the time the CESCR included a paragraph entitled *"Factors and difficulties impeding the implementation of the Covenant"*[179], where it acknowledged the impact of the crisis on the compliance with the obligations under the Covenant. This demonstrates the realistic approach adopted by the CESCR and the admission that, due to the nature of ESCRs and their interdependence with economic realities of States, economic crises will inevitably take their toll on the realization of ESCRs.

Nevertheless, despite this realistic admission, during the crises of the 1990s the CESCR adopted a very active role towards the protection of rights. In its Concluding Observations on Argentina in 1999, the CESCR, while acknowledging the economic challenges faced by the State, stressed that the amount of the minimum pension *"should not be unilaterally reduced or deferred,* ***especially in times of economic constraints".***[180] It is therefore evident how the CESCR perceives social rights –and the right to social security in this case- to require even stronger protection during economic crises, due to the risks posed to the enjoyment of such rights as a result of their interdependence with the economic situation of the State. The CESCR also noted in several Concluding Observations the negative impact that structural adjustment

[178] Warwick (2018) op.cit. (130)
[179] Eg CESCR, *Concluding observations on Argentina*, 8 December 1999, E/C.12/1/Add.38
[180] Ibid (par. 33) (emphasis added)

programmes had on ESCRs,[181] as well as the need for States to take into account their obligations under the Covenant when negotiating with International Financial Institutions (IFI).[182]

The most indicative case however of the CESCR's tenacious stance in the protection of ESCRs is the Concluding Observations concerning the Republic of Korea in 2001. In the context of the Asian economic crisis which also impacted the economic situation in the Republic of Korea[183], the CESCR noted that the prioritization of economic goals and *"overreliance on macroeconomic policies"* have had a negative impact on ESCRs resulting in *"some rights or the rights of some groups (...) being sacrificed for the sake of economic recovery and market competitiveness".*[184] This demonstrated the firm belief of the CESCR that economic goals and technocratic visions cannot and should not take priority over the realization of ESCRs, especially in a time where the latter are mostly at risk. This approach of the CESCR is particularly relevant in relation to the 2008 global financial crisis, where most governments and International Organisations such as the EU, have focused on economic stabilization and recovery as well as improvement of States' competitiveness in the market, disregarding their obligations towards the realization of ESCRs. However, as will be demonstrated below, the CESCR seemed to adopt a more lenient approach in the 2008 global financial crisis.

2.1.2 Period 2008-2012

Since the beginning of the crisis in 2008 and until the issue of the Letter in 2012 the CESCR did not address the issue of the crisis in its Concluding Observations or General Comments, except in two cases, namely the Concluding Observation on the

[181] CESCR, *Concluding observations on Argentina*, op.cit., par.10, *Concluding observations on Venezuela*, 21 May 2001, E/C.12/1/Add.56, par. 8, *Concluding observations on Ecuador*, 7 June 2004, E/C.12/1/Add.100, par. 9, *Concluding observations on Brazil*, 26 June 2003, E/C.12/1/Add.87, par. 16

[182] CESCR, *Concluding observations on Argentina* op.cit., par. 28, *Concluding observations on Ecuador*, op.cit., par. 56, *Concluding observations on Brazil*, op.cit., par. 43, *Concluding observations on Mexico*, 8 December 1999, E/C.12/1/Add.41, par. 34

[183] Will Kenton, "Asian Financial Crisis" (Investopedia, updated Mar 26, 2019), available at <https://www.investopedia.com/terms/a/asian-financial-crisis.asp>, last accessed on 20/06/2019

[184] CESCR, *Concluding observations on the Republic of Korea*, 21 May 2001, E/C.12/1/Add.59, par. 11-13

State of Cameroon[185] and the List of Issues addressed to the Netherlands,[186] where it addressed the right to work and most specifically the impacts of the crisis on unemployment. One possible explanation of this lack of reference to the crisis could be the nature of the reporting mechanism, according to which States should submit their reports to the CESCR every five years.[187] The long period between each reporting session could mean that during the period 2008-2012 the CESCR examined reports referring to the pre-crisis period or by countries not heavily affected by the crisis. For example, in the case of Cyprus, one of the EU countries severely hit by the economic recession, the Concluding Observations of the CESCR in June 2009 did not mention the crisis and neither did its List of Issues in January 2009. This however could be explained by the submission of the State report in 2007 –before the outbreak of the crisis- and by the fact that Cyprus was mostly affected after 2010.[188]

2.1.3 2012 and after

Maximum available resources

After the publication of the Letter in May 2012, the CESCR started using the criteria elaborated there while also it kept referring to the obligation of states concerning the maximum use of their available resources. In certain cases the CESCR "reminded" States their obligation to use the maximum of their available resources for the realization of ESCRs,[189] while in cases where resources devoted to ESCRs were inadequate it was more decisive and expressed its concern while also recommending their increase.[190] The CESCR has expressed its concern over the focus of austerity

[185] CESCR, *Concluding observations on Cameroon*, 23 January 2012, E/C.12/CMR/CO/2-3, par. 14
[186] CESCR, *List of issues to be taken up in connection with the consideration of the combined fourth and fifth periodic report of the Netherlands /E/C.12/NLD/4-5) and the fourth periodic report of the Netherlands Antilles (E/C.12/NLD/4/Add.1)*, 22 December 2009, E/C.12/NLD/Q/4-5, par. 10
[187] CESCR, *Selected resolutions and decisions of the Economic and Social Council relating to the implementation of the international Covenant on Economic, Social and Cultural Rights*, 27 October 1988, E/C.12/1989/4, 31
[188] Grigoris Ioannou, Giorgos Charalambou, "Ο κοινωνικός και πολιτικός αντίκτυπος της κυπριακής οικονομικής κρίσης (2010-2017)" [The social and political impact of the Cypriot economic crisis (2010-2017)] (2017), 3, available at <https://www.fescyprus.org/fileadmin/user_upload/documents/CyprusEconomicCrisis_gr_v02_DIGITAL.pdf > , last accessed on 21/06/2019 (translated by author)
[189] Eg CESCR, *Concluding observations on Iceland*, 11 December 2012, E/C.12/ISL/CO/4, *Concluding observations on Greece*, 27 October 2015, E/C.12/GRC/CO/2
[190] Eg CESCR, *Concluding observations on Romania*, 9 December 2014, E/C.12/ROU/CO/3-5, *Concluding observations on Canada*, 23 March 2016, E/C.12/CAN/CO/6

measures on public cuts[191] and it has criticized the prioritization of military goals instead of ESCRs.[192] It can be deduced that the CESCR, in certain cases, actually makes determinations on whether such allocation complies with states' obligations, without completely deferring to state-parties, thus rendering the protection of rights more effective. Nevertheless, nowhere does the CESCR make more specific determinations as to what constitutes a sufficient amount of resources that would comply with the Covenant standards. On the contrary *"Little progress has been made in creating a set of workable standards which are detailed, systematic, and authoritative".*[193] Despite the discrepancies between States, certain standards could be developed and they would prove very helpful to States when deciding on the allocation of their resources.

Non-retrogression

Regarding the principle of non-retrogression, it has already been mentioned that the CESCR elaborated new criteria in its Letter of 2012 which will be analyzed right below. The CESCR makes explicit reference to this obligation in several of its Concluding Observations either by just mentioning the concept or by stressing the new criteria as well. In certain cases it expresses its concern over the retrogressive nature of certain measures adopted by States,[194] while in other cases it adopts a stricter approach, recommending States to avoid the adoption of retrogressive measures,[195] without repeating the new criteria. One recent exception is the Concluding Observations on Bulgaria, where the CESCR stressed that if retrogressive measures are unavoidable, they should comply with the criteria elaborated in the Letter, namely necessity, proportionality, non-discrimination, protection of the minimum core content and temporariness.[196] It is thus evident how the CESCR now uses these new criteria to examine the permissibility of retrogressive measures in the age of austerity policies and consecutive budget cuts.

[191] CESCR, *Concluding observations on Ireland*, 8 July 2015, E/C.12/IRL/CO/3
[192] CESCR, *Concluding observations on Sudan*, 27 October 2015, E/C.12/SDN/CO/2
[193] Robertson op.cit (703)
[194] Eg CESCR, *Concluding observations on Spain*, 6 June 2012, E/C.12/ESP/CO/5, par. 28, *Concluding observations on New Zealand*, 31 May 2012, E/C.12/NZL/CO/3, par. 17
[195] CESCR, *Concluding observations on Bulgaria*, 11 December 2012, E/C.12/BGR/CO/4-5, par. 11
[196] CESCR, *Concluding observations on Bulgaria*, 29 March 2019, E/C.12/BGR/CO/6, par. 9

An interesting approach of the CESCR regarding its stance towards retrogressive measures during crisis is found in the examination of the French report in 2016. The CESCR did make use of its earlier standards, by requiring such measures to be *"…unavoidable and fully justified in relation to the totality of the rights…"*and *"…in the light of the State party's obligation to pursue the full realization of those rights to the maximum of its available resources;",* while also repeating the new standards of necessity, proportionality and non-discrimination.[197] It is the only case during crisis where the CESCR repeats its earlier criteria on non-retrogression together with some of the new ones elaborated in the Letter of 2012. While its eagerness to effectively protect ESCRs in the light of the economic crisis is evident, using the previous criteria together with the new ones can have as a consequence that states do not have a clear framework regarding the criteria for non-retrogression and therefore can weaken the protection of the relevant rights.

Legality and Temporariness

What strikes as interesting in the case-law of the CESCR regarding austerity measures is that is does not establish the requirement of legality. As Warwick stresses, *"…the Letter to States sets 'law' and 'legality' aside in a manner entirely consistent with an emergency 'accommodation' approach".*[198] This could be considered consistent with the adoption of the "emergency doctrine" by the CESCR, as explained above. However, it is more likely that the CESCR did not wish to engage in the issue of legality within the universal context in which it functions, because of the many different legal systems existing worldwide, which would make the interpretation of the legality criterion very difficult and complicated. Nevertheless, it is true that requiring austerity measures to be lawful affords a more effective protection to rights against arbitrary actions of the government, especially in the current context where most States prioritized economic growth and competitiveness against the realization and protection of ESCRs. Despite the lack of the legality criterion, the CESCR tried to intensify the protection of ESCRs when introducing the requirement of temporariness

[197] CESCR, *Concluding observations on France,* 13 July 2016, E/C.12/FRA/CO/4, par.25
[198] Warwick (2016), op.cit (259)

of austerity measures, covering only the period of the crisis.[199] In certain cases it recommended States to gradually phase out such measures[200] while elsewhere it adopted a more rigid approach, by determining the percentage of growth that would entail the revocation of those measures.[201] The emphasis of the CESCR on the revocation of austerity measures as soon as the crisis is over and the restoration of the previous situation demonstrates its realistic approach towards economic hardships, which however does not remove its protective role.

Necessity and Proportionality

One of the most important and controversial criteria laid out by the CESCR is the one of necessity, as part of the "emergency paradigm" and therefore indicative of the adoption of the "emergency doctrine" by the CESCR. In several cases the CESCR has stressed that *"certain adjustments are at times inevitable"*[202], which even though demonstrates a realistic approach to the crisis, raises questions regarding the admission of the CESCR that austerity was necessary. Recent research suggesting the existence of alternatives to austerity less harming on ESCRs,[203] such as counter cyclical policies like economic stimuli focusing on an increase on public spending, [204] in combination with evidence from previous economic crises about the failure of austerity policies,[205] creates doubts about why the CESCR did not adopt a firmer stance against austerity policies, by emphasizing alternatives and expressing concerns over the failure of austerity in the past. Indeed it has been argued that *"The lack of counter-cyclical policies in times of crisis often risks jeopardizing hard-fought gains in housing, education, health, water and employment".*[206] As underscored by Greene, the concept of necessity includes a subjective estimation of the circumstances by the

[199] CESCR, Letter op.cit.
[200] CESCR, *Concluding observations on Cyprus* op.cit., par. 12
[201] CESCR, *Concluding observations on Slovenia,* 15 December 2014, E/C.12/SVN/CO/2, par. 8
[202] CESCR, *Concluding observations on Greece* op.cit. (par. 8)
[203] Sepulveda Carmona, op.cit. (40)
[204] Center for Economic and Social Rights (CESR), Fiscal Fallacies: "8 Myths about the 'Age of Austerity' and Human Rights Responses" (July 2012), Rights in Crisis Series Briefing Paper, 4
[205] Ha-Joon Chang, "Austerity has never worked" (The Guardian, 4 June 2012), <https://www.theguardian.com/commentisfree/2012/jun/04/austerity-policy-eurozone-crisis>, accessed on 22/06/2019
[206] Caliari et al. op.cit (5)

authorities, which is the reason that a *"more critical scrutiny"* of their decisions is needed.[207]

Nevertheless, it should be noted that the CESCR did highlight in a variety of cases the importance of effective tax collection as a means to increase state resources,[208] showing its willingness to focus on supplementary solutions to budget cuts, in an effort to avoid extensive cuts in social spending. Moreover, in its decision on an individual complaint the CESCR found that the responding Government had not established sufficiently why the relevant measure was necessary, especially considering the on-going economic crisis, thus concluding that there was a violation of the ICESCR provision.[209] It can be deduced that due to the nature of the individual complaints procedure as more context specific, the CESCR is more willing to declare certain measures adopted during crisis as incompatible with states' obligations. Right after the necessity criterion the CESCR stressed that these measures should be proportionate, without however further elaborating on this criterion in its Concluding Observations, other than drawing States attention on the disproportionate effect of measures on disadvantaged and marginalized groups,[210] which will be addressed below.

Non-discrimination

The CESCR has been more unyielding in its approach when applying the criterion of non-discrimination, focusing mostly on the less fortunate which are usually the ones most severely hit by both the crisis and the imposed measures. More specifically and in light of the severe impact of the crisis on the more vulnerable sections of the population, the CESCR has emphasized extensively the need to protect disadvantaged and marginalized groups from the adverse and disproportionate effect of austerity

[207] Greene op.cit. (600)
[208] CESCR, *Concluding observations on United Kingdom of Great Britain and Northern Ireland,* 14 July 2016, E/C.12/GBR/CO/6, par. 17
[209] CESCR, *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015*, 21 July 2017 (E/C.12/61/D/5/2015)
[210] CESCR, *Concluding observations on United Kingdom of Great Britain and Northern Ireland* op.cit. (par. 18)

measures,[211] thus making sure that everyone is protected even against indirect discrimination, which is usually less obvious. More specifically, it has emphasized that "*even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes*",[212] expressing its determination to protect those that are most at risk.

In certain cases it has specified which disadvantaged groups have been disproportionally affected by austerity, such as *"poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies, migrants and asylum seekers",*[213] while elsewhere it has focused on measures necessary to mitigate inequalities through social transfers.[214] While its stance demonstrates a strong willingness to safeguard the rights of the ones in need, the CESCRs does not provide criteria about which groups fall into the category of disadvantaged or marginalized, neither does it give a definition of these concepts. [215] This has been criticized as rendering its approach somewhat vague and open-ended.[216] Developing such criteria would provide States with explicit guidelines as to which groups need extra attention but they might also exclude certain groups that even though are in need of special attention could not meet those criteria. By leaving this notion open-ended the CESCR is willing to accept the vulnerability of a group on a case-by-case basis and according to the relevant circumstances.

Minimum Core Content

One of the most important criteria laid down by the CESCR is the requirement that the minimum core content of the Covenant rights is always protected. The CESCR stresses this obligation in almost all its Concluding Observations on states affected by the crisis, stating that austerity measures should respect the core content of each

[211] CESCR, *Concluding observations on United Kingdom of Great Britain and Northern Ireland* op.cit. (par. 18)
[212] CESCR Statement (2007) op.cit. (par. 4)
[213] CESCR, *Concluding observations on Spain (2012)*, op.cit. (par. 8)
[214] CESCR, *Concluding observations on Iceland* op.cit. (par. 6)
[215] Chapman; Carbonetti op.cit. (723)
[216] ibid

right.[217] This obligation is particularly relevant during the crisis, characterized by a tendency to cut back on social spending affecting the ESCRs of people, since it establishes a threshold under which no person can fall.[218] Moreover it leads states into prioritizing those individuals and groups who are most at risk of falling under this threshold, thus taking the appropriate steps to ensure their access to basic elements of the Covenant rights.[219] The eagerness of the CESCR to protect the essence of the ICESCR is more than evident, since allowing states to violate the minimum core content of rights would mean that the Covenant has lost its protective and normative content.

It should however be noted that the CESCR has remained quite vague in determining the protected threshold qualitatively.[220] Admittedly, in its Concluding Observations during crisis the CESCR does not make any specification as to what a minimum core content entails. This creates issues when the discrepancies between developed and developing countries are taking into account. While the minimum core content could prove life-saving in developing countries, it can be argued that it is of limited value in developed states where the majority of people live well beyond this threshold and who, even though not falling under the minimum threshold, they still suffered severe economic losses during the crisis that heavily impacted on their living.[221] It could however follow Kedzia's interpretation mentioned in the previous chapter and use this concept as a methodological tool, defining it on a case-by-case basis. [222] This is not to say however that the CESCR should give up on this criterion. On the contrary, the minimum core is one of the most important safeguards against complete deprivation of rights, thus protecting the normative content of the ICESCR and ensuring ESCRs for the most disadvantaged.

[217] CESCR, *Concluding observations on United Kingdom of Great Britain and Northern Ireland* op.cit. (par. 18)
[218] David Bilchitz (2014a) op.cit. (730)
[219] ibid
[220] ibid
[221] Ibid (732)
[222] Kedzia (2020) op.cit. (unpublished contribution)

Procedural criteria: Transparency, Participation, Accountability and HRIA

The CESCR was very active in stressing the importance of procedural criteria too, such as the requirements for the participation of affected groups in the decision-making process, mentioned in its Statement in 2016[223] and even though referring to social security only, its jurisprudence indicates that it applies on all rights of the ICESCR. The CESCR tends to use this criterion together with the ones of transparency and accountability, thus laying down a comprehensive framework ensuring that decision making is legitimate and not arbitrary. In certain cases the CESCR has stressed the need to increase transparency and participation in the decision making regarding resource allocation[224], while elsewhere it has emphasized the need for transparency and accountability during loan negotiations,[225] an obligation of particular importance especially in the current crisis, with the loans granted to a number of States with the view to overcome their economic hardships.

Additionally, in several cases the CESCR links the obligation of States to enhance public participation with their duty to conduct a HRIA of the proposed measures. In its Concluding Observations on the UK for example, it suggested that the State evaluates the impact of its fiscal policy on human rights with the participation of the public.[226] The CESCR therefore adopts a very active stance in safeguarding the procedural elements concerning the adoption of adjustment programmes and does not seem to justify their circumvention despite its emergency approach. This is particularly important if we take into consideration examples of adjudicating bodies that did condone the lack of a HRIA, justifying it by the economic emergency the state found itself in. This is the case of the Greek Council of State which stated that in case of urgent measures adopted to overcome an imminent danger (in the relevant case the danger of default), the obligation of HRIA can be circumvented.[227]

[223] CESCR Statement (2016) op.cit (par. 4)
[224] CESCR, *Concluding observations on Romania* op.cit. (par. 7)
[225] CESCR, *Concluding observations on Lebanon*, 24 October 2016, E/C.12/LBN/CO/2
[226] CESCR, *Concluding observations on United Kingdom of Great Britain and Northern Ireland* op.cit. (par. 17)
[227] Greek Council of State (Grand Chamber), Decision 2287/2015, 10 June 2015 (translated by author)

Findings of violations

Moreover, certain general observations should be mentioned, which in the context of the crisis and taking into account the CESCR's role as the principal guarantor of ESCRs, raise some questions. First of all, the international context in which the CESCR is working[228] as well as the nature of the reporting system, intending to be a constructive dialogue with States in a cooperative environment, so as to engage them in a fruitful discussion and not alienate them,[229] at times lead the CESCR in using flexible language in its Concluding Observation. It demonstrates a reluctance to declare States' violations,[230] including during crisis and usually suffices in "reminding" States of their obligations [231] and expressing concern over the toll that austerity is taking on ESCRs.[232] This however is understandable in the UN context and does not mean that it has any practical impact on the effectiveness of its protective role. It is also worth mentioning that, while the CESCR has been characterized as "too cautious" when using strong language, however there have been certain cases where such violations were declared,[233] such as the case of Bulgaria where the CESCR found that rising unemployment in the context of the economic crisis rendered the State in violation of its obligations under the Covenant.[234]

Political neutrality of the CESCR

Finally, taking into consideration the interrelatedness of human rights and politics, certain comments regarding the CESCR's stance on this issue during crisis could explain its general approach towards austerity. In its General Comment 3 the CESCR stresses that

> *…in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a*

[228] Warwick (2018) op.cit. (129)
[229] Leckie op.cit (122)
[230] Leckie op.cit. (108)
[231] Wills; Warwick op.cit (655)
[232] See CESCR *Concluding observations on Greece* op.cit.
[233] Leckie op.cit. (97)
[234] CESCR *Concluding observations on Bulgaria (2012)* op.cit. (par. 11)

> *mixed, centrally planned, or laissez-faire economy, or upon any other particular approach.*[235]

This statement makes sense in the international context in which the CESCR is operating, since State Parties have adopted a variety of political and economic systems characterized by fundamental differences. Nonetheless, it has been argued that austerity is *"the product of a particular political-economic order",*[236]reflecting the principles of neoliberalism, namely free markets and minimal state intervention, which result in social spending cuts, since the State is considered "economically inefficient".[237] One one hand, the CESCR's political neutrality is justified due to its willingness to engage all States and extend its protection to all of them. Nevertheless, as Warwick argues *"failing to take a stance in relation to a dominant political trend can be to politically acquiesce to that trend".*[238] Whether the CESCR actually adopts a political trend is doubtable. However, in light of the blatant violations of ESCRs taking place due to austerity policies, in combination with the existence of alternative solutions as analyzed above, the CESCR could have been more rigid in declaring several austerity policies in contradiction with the obligations under the Covenant.

2.2 The European Committee of Social Rights

The ECSR is the principal body responsible for monitoring the realization of ESCRs in Europe, on the basis of the ESC. Its role in the realization of economic and social rights has been catalytic in the context of the crisis and since the very beginning its position in favor of the protection of rights was very clear, when stating that *"the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most".*[239] Several collective complaints were filed against Greece's austerity policies and the ECSR deemed a lot

[235] CESCR, General Comment 3 op.cit. (par. 8)
[236] Wills; Warwick op.cit (663)
[237] Paul O'Connell, "Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity" (August 23, 2011), in Nolan, O'Connell & Harvey (eds) *Human Rights and Public Finance*, (Hart Publishing, 2012) available at SSRN: https://ssrn.com/abstract=1915221, last accessed on 23/06/2019
[238] Wills; Warwick op.cit (662)
[239] ECSR, General Introduction to the Conclusions XIX-2 (2009)

of the impugned measures to be in violation of the Charter, while austerity measures were also assessed during the reporting procedure.

One of the most important cases was the Decision on Complaint No. 111/2014, where the ECSR *"adopted a dynamic and analytical interpretation of the Charter"*[240], and stressed that *"ensuring the effective enjoyment of equal, inalienable and universal human rights cannot be subordinated to changes in the political, economic or fiscal environment".*[241] The ECSR does not accept that the protection of human rights is dependent on the current economic conditions and, while acknowledging the severity of the crisis,[242] prioritizes their enjoyment over the realization of economic goals. As previously discussed, the ECSR uses the criteria of legality, necessity and proportionality when assessing austerity measures as well as the procedural ones of participation, transparency, accountability and the obligation of HRIA. Last but not least, it makes determinations on the resources devoted to the realization of economic and social rights.

2.2.1 Resources

The ECSR's contribution to the crisis jurisprudence is evident in its determinations regarding the resources allocated by States in the realization of ESCRs, without however overstepping states' deference in this field.[243] For example, in its Conclusions during the reporting procedure, the ECSR has mentioned the state's total spending on labor policies[244] or on social protection,[245] by referring to it as a percentage of the country's GDP. What is interesting is that it makes comparisons between the state's percentage and the EU's average as a means to measure their compliance, a way that has been suggested by Robertson as a means to measure compliance of states with their obligation to provide their maximum available

[240] Nikolaos A. Papadopoulos, "Austerity Measures in Greece and Social Rights Protection under the European Social Charter: Comment on GSEE v. Greece case, Complaint No. 111/2014, European Committee of Social Rights, 5 July 2017" (2019), 10 (1) *European Labour Law Journal,* 85, 85
[241] Complaint No. 111/2014, Decision on the merits of 23 March 2017, par. 88
[242] ibid (par. 247)
[243] Cullen, op.cit. (91)
[244] Conclusions 2012 - Italy - Article 1-1, 07/12/2012 (2012/def/ITA/1/1/EN)
[245] Conclusions 2013 - Portugal - Article 30, 06/12/2013 (2013/def/PRT/30/EN)

resources.[246] For example, in the case of Bulgaria it stresses that *"according to Eurostat, public expenditure on active labour market policies in Bulgaria amounted to 0.26% of GDP in 2009, which again was a low figure among EU-27 countries".*[247] It is evident that the ECSR has been very decisive when examining the allocation of resources and is not hesitant to state when such allocation is not enough.

2.2.2 Legality

As stressed in the previous chapter, the ECSR did not resort to an emergency doctrine to examine the permissibility of austerity measures. This is very clear in a case concerning Greece where it stated that

> *…Greece, as it had not availed itself of the right of derogation, was fully bound by its obligations under the 1961 Charter, and the Committee is therefore not called to rule on derogations permitted under certain conditions in time of war or public emergency.*[248]

Instead, the ECSR made use of the restriction clause of the ESC, which has been interpreted as being taken into account when assessing the merits of a complaint,[249] while stressing that such restrictions should be interpreted narrowly.[250] Regarding the first criterion of legality, the ECSR stresses that the relevant measure should have a *"clear basis in law"*[251] , namely that they have been *"agreed upon by the democratic legislature".*[252] Also, following the interpretation of the ECtHR, the ECSR has stated that *"prescribed by law means by statutory law or any other text or case-law provided that the text is sufficiently clear i.e. that satisfy the requirements of precision and foreseeability…".*[253] The European Committee has referred to the rule of law test in certain collective complains decisions during crisis, where it has found that the

[246] Robertson, op.cit (711)
[247] Conclusions 2012 - Bulgaria - Article 1-1, 07/12/2012, 2012/def/BGR/1/1/EN
[248] Complaint No. 111/2014 Decision on the merits op.cit. (par. 79)
[249] Ibid (par. 78)
[250] Ibid (par. 83)
[251] Ibid
[252] Ibid
[253] Conclusions 2014 - Spain - Article 6-3, 05/12/2014 (XX-3/def/ESP/6/3/EN)

contested measures are lawful, being based on legislative acts.[254] The ECSR has not elaborated extensively on this criterion as a reason to deem austerity measures impermissible under the ESC restriction clause, despite incidents where states, using economic emergency as a pretext, circumvented certain procedures. In Greece for example *"emergency legislative procedures became the norm"* marginalizing the parliament,[255] thus raising questions regarding the legality of those measures. This issue will be analyzed further below.

2.2.3 Temporariness

Continuing with the next criterion of temporariness, the ECSR has not established it as one of the requirements for austerity measures to be deemed permissible. It is not included in the restriction clause of the ESC nor has it been referred to during the examination of the collective complaints or reporting procedure as one of the criteria it examines. In certain cases the ECSR has mentioned the temporary nature of such measures without however making any further comment on this issue.[256] This is indicative of the ECSR's approach to the crisis, characterized by the non-adoption of an emergency doctrine. This assumption is further supported by the fact that only in the derogation clause of the ESC, is there an indirect mention to the criterion of temporariness, where it is stipulated that states should inform the Secretary General when the measures *"have ceased to operate"*[257].

Thus, the ECSR uses the same criteria to examine the permissibility of austerity measures as the ones when examining states' compliance with their obligations during periods of normalcy. The ECSR recognizes the risks posed to ESCRs by economic crises and takes a very active stance towards their protection, by not allowing economic goals or other interests become the priority over these rights. For example, in a case concerning cuts to social benefits, while recognizing that *"contracting parties may consider that the consolidation of public finances, in order to avoid*

[254] Complaint No. 111/2014, Decision on the merits op.cit. (par. 84)
[255] Anna Tsiftsoglou, "Greece after the Memoranda: A Constitutional Retrospective" (January 2019), GreeSE Paper No. 132, *Hellenic Observatory Papers on Greece and Southeast Europe, Research at LSE,* (4-5)
[256] Conclusions 2012 - Portugal - Article 1-1, 07/12/2012 (2012/def/PRT/1/1/EN)
[257] Article 30 ESC and Article F RESC

mounting deficits and debt interest constitutes a means of safeguarding the social security system"[258] it does not lower its threshold of protection by embracing the crisis narrative, as will be demonstrated by the analysis below.

2.2.4 Proportionality

The criterion of necessity, stipulated in the restriction clause of the ESC (art. 31), which states that restrictions should be *"necessary in a democratic society",* has been interpreted by the ECSR as introducing the proportionality test in its examination.[259] The nature of the collective complaints procedure as context-specific and quasi-judicial has allowed it to develop the proportionality test in further detail than in the reporting system. In certain conclusions on state reports it has stressed the need for measures to be proportional, stating that there has to be *"a reasonable relationship of proportionality between the restriction on the right and the legitimate aim(s) pursued"*[260], while in the collective complaint procedure it has noted that proportionality requires measures to be "*appropriate for reaching the goal pursued, they may not go beyond what is necessary to reach such goal, they may only be applied for the purpose for which they were intended, and they must maintain a level of protection which is adequate"*.[261]

The ECSR has undertaken a thorough examination of the proportionality principle, by elaborating on each component of the proportionality test. Starting with the first requirement of necessity, in a case concerning Greece, the ECSR found a violation of the Charter due to the lack of a real examination of alternative, less restrictive measures, contesting the necessity of the impugned laws, which dictates the adoption of the least harmful measure.[262] This conclusion is of particular importance during crisis since it shows the willingness of the ECSR to challenge states' decisions and stress the need to examine alternatives that would be less harmful to rights. In another example concerning Cyprus, the ECSR while examining the state's report concluded that the imposed cuts to benefits were necessary as a result of different factors such as

[258] Complaint No. 76/2012, Decision on the merits of 7 December 2012, par. 71
[259] Conclusions XX-3 - Spain - Article 6-3, 05/12/2014 (XX-3/def/ESP/6/3/EN)
[260] Conclusions XX-3 (2014) – Spain op.cit.
[261] Complaint No. 111/2014, Decision on the merits op.cit.(par. 87)
[262] Ibid (par. 90)

the crisis and the ageing of the population while also requesting further information on the impact of such cuts on the most disadvantaged part of the population. [263] The ECSR is ready to accept that certain adjustments need to be made in the light of new external factors, such as the demographic issue of the ageing of the population, but does not seem willing to fall back on its protective role.

Moreover, regarding the examination of suitability of the measures, in a decision concerning reforms in labor law the ECSR has stressed the failure of the contested legislation to achieve the intended goal of economic recovery, doubting this way their suitability, based on statistical data presented by the Government[264]. This is especially important in the context of the 2008 crisis, where despite evidence demonstrating the failure of austerity measures in achieving the intended goals of economic growth and their severe impact on the human rights of the population, most governments still followed austerity policies instead of considering alternatives that not only would they have a less harming effect on rights, but would have been more effective in economic terms too. Last but not least, the ECSR makes determinations when assessing the proportionality stricto sensu of the impugned measures, such as in a case concerning a ban on collective bargaining, where it stated that the measures were excessive *"in that the categories of persons included in the notion of "undertaking" were overinclusive"*.[265] It is evident that the ECSR proceeds in a very detailed examination of the proportionality criterion, affording effective protection to ESC rights.

2.2.5 Public Interest

Included in the proportionality test is the examination of the legitimate aim the relevant measures are pursuing. According to Cullen, "…*the ECSR tends to be relatively deferential to state arguments in relation to the question of whether a limitation serves a legitimate aim",*[266] which is evident in a number of its documents, where it has found that the contested measures do in fact serve the public interest, either as the consolidation of public finances[267] or as the remaining of low-age

[263] Conclusions 2013 – Cyprus - Article 12-3, 06/12/2013 (2013/def/CYP/12/3/EN)
[264] Complaint No. 111/2014, Decision on the merits op.cit. (par. 92)
[265] Complaint No.123/2016, Decision on the merits of 12 September 2018, par. 98
[266] Cullen op.cit. (85)
[267] Conclusions XX-2 - Iceland - Article 12-3, 06/12/2013 (XX-2/def/ISL/12/3/EN)

workers in the work-force.[268] In one of its Decisions the ECSR made some very significant comments, noting that governments do not enjoy complete freedom in their decision making, but are bound by International Human Rights Law even when defining the public interest.[269] It also stressed that a state's public interest cannot be defined by external institutions.[270] These statements are of catalytic importance especially in the context of the Eurozone crisis, where the public interest has been re-defined as including the interest of the EU and the stability of the eurozone,[271] prioritizing these goals over human rights. Nevertheless, it should be mentioned that, despite those statements, the ECSR did find that the impugned measures pursued a legitimate aim but considered them disproportional[272], confirming Cullen's position mentioned above.

2.2.6 Non-discrimination

The ECSR has also provided significant jurisprudence regarding the principle of non-discrimination during crisis. It has interpreted article E of the RESC as prohibiting both direct and indirect discrimination, hence promoting substantive equality of people.[273] It has found austerity measures to be discriminatory in both its mechanisms, with a very important case in the context of crisis being the Decision on the Complaint 66/2011 against Greece. The ECSR stated that the different treatment to young workers relating to their minimum wage, while serving a legitimate aim, is disproportional and thus, discriminatory, due to the extent of the reduction and the fact that it was applied to all workers under 25.[274] Nonetheless, its most significant contribution has been the protection of vulnerable groups, which were the ones most severely hit by the crisis. The ECSR has identified which groups need protection the most during resource constraints, while also stressing that these groups should be *"eligible for social welfare services"*[275], intended to mitigate the adverse effects of the crisis on them. It has engaged itself in requiring further information from states

[268] Complaint No. 76/2012, Decision on the merits op.cit. (par. 77)
[269] Complaint No. 111/2014, Decision on the merits op.cit. (par. 84)
[270] Ibid (par. 87)
[271] Mantzoufas op.cit. (122)
[272] Complaint No. 111/2014 , Decision on the merits op.cit. (par. 91)
[273] Cullen, op.cit. (78)
[274] Complaint 66/2011, Decision on the merits of 23 May 2012, par. 135
[275] ECSR, Activity Report 2009 (25 June 2010), 8

when there seems to be a disproportionate effect on a specific group, such as for example in its Conclusions on Italy, where it requested information on the situation of persons with disabilities, which were seemed to be negatively affected by the crisis and the measures undertaken to alleviate such effects.[276] It is evident that the ECSR recognizes the increased risks faced by the most disadvantaged groups and emphasizes the need for measures targeted at their protection.

2.2.7 Transparency, accountability, participation

The ECSR has also been very assertive when assessing the procedural criteria of states' decision-making. In the context of the CoE, the criteria of transparency, accountability and participation as well as HRIA have been stressed as a necessary requirement also by the CoE Commissioner for Human Rights[277], a statement that is included in the ECSR's Decision on a case concerning Greece.[278] The ECSR has stressed in various occasions the need for consultation with the relevant stakeholders before the adoption of measures that are likely to affect them. In certain cases it has even found a violation of the ESC when such requirement was not met, as for example in its conclusions on the report of Spain, where it did not accept the State's argument that the urgency of the situation justified the lack of consultation.[279] It is again proven that the ECSR is not willing to accept derogation from established standards of protection because of the severe economic situation that states were confronted with. In fact, in certain collective complaints filed against Greece, the ECSR found a violation of the ESC on the grounds that no *"…genuine consultation has been carried out with those most affected…"*[280] and because the government did not discuss *"the available studies with the organizations concerned*".[281] The Committee is not willing to recede from its protective role and justify derogations from human right rules on the account of an economic emergency.

[276] Conclusions 2012 - Italy - Article 15-2, 07/12/2012 (2012/def/ITA/15/2/EN)
[277] CoE Commissioner for Human Rights op.cit. (33-34)
[278] Complaint 111/2014, Decision on the merits op.cit. (par. 64)
[279] Conclusions XX-3 - Spain - Article 6-2, 05/12/2014 (XX-3/def/ESP/6/2/EN)
[280] Complaint 111/2014, Decision on the merits op.cit. (par. 90)
[281] Complaint No. 76/2012 ,Decision on the merits op.cit. (par. 74)

2.2.8 Human Rights Impact Assessment

Last but not least, the ECSR has been quite decisive when examining states' compliance with their obligation to conduct a HRIA before the adoption of any austerity measure, in order to ensure the effective protection of rights. The Committee again demonstrates a very rigid stance and does not avail itself from its protective role, but on the contrary has found several violations of this obligation. One of the most significant decisions indicative of the ECSR's approach is the Decision adopted on the Collective Complaint 76/2012, where, *"while taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions"*, it did not justify the lack of research and analysis of the effects of the impugned measures.[282] Again, the Committee takes a realistic approach, by admitting the economic difficulties and the challenges posed to states without however deeming those circumstances as so urgent in order to justify the circumvention of procedural guarantees. The Committee also deemed certain measures as disproportional because of the lack of such an assessment, noting that this lack proves there was no real examination of alternative measures[283], linking the two criteria of proportionality and HRIA and establishing a strong protective framework for economic and social rights.

2.3 The European Court of Human Rights

Since the beginning of the crisis several complaints were filed to the ECtHR against austerity measures, alleging mostly a violation of the right to property, established in Art. 1 of the 1st Additional Protocol to the ECHR. It has demonstrated a noticeable self-restraint when dealing with such cases and has acted with caution in its adjudications concerning austerity policies[284]. It should be noted that, even though the ECtHR is responsible for monitoring the compliance with the ECHR, an instrument including almost exclusively civil and political rights, the Court has interpreted certain rights as including also a social dimension, for example by stating that social

[282] ibid (par. 79)
[283] Complaint 111/2014, Decision on the merits op.cit. (par. 90)
[284] Dalila Ghailani "Violations of fundamental rights: collateral damage of the Eurozone crisis?" in Vanhercke, B., Natali, D. and Bouget, D. (Eds) *Social Policy in the European Union: State of Play 2016* [Brussels, European Trade Union Institute (ETUI) and OSE, 2017], 176

security contributions are included in the scope of protection of the right to property.[285] When, however, dealing with economic and social claims it adopts a more limited approach than the one towards civil and political ones, which is attributed to the larger margin of appreciation that states enjoy in this field and the implication of resources.[286] Taking into consideration that the Strasbourg Court's mandate concerns mainly the protection of civil and political rights, while ESCRs are only indirectly protected, thanks to an expansive interpretation of the ECHR by the Court in combination with the established indivisibility[287] of all human rights, the present analysis will focus on the most relevant criteria used by the Court when adjudicating on the permissibility of austerity measures, namely temporariness, proportionality and the public interest.

2.3.1 Temporariness

One of the criteria used by the ECtHR to justify austerity measures was their temporary nature, embracing the narrative of the Governments and allowing for restrictions on rights. In several cases it adjudicated in favor of the proportionality of austerity policies, based on their temporary and limited nature in combination with the public interest they were serving.[288] This is indicative of the adoption of the economic emergency narrative by the Strasbourg Court, accepting the arguments presented by states that those measures were only temporary with the view to overcome their financial hardships. As Pavlidou argues, the Court *"...revealed in this way an informalised emergency practice at a supranational level".*[289] Again, a Human Rights Body chooses to justify severe restrictions on rights because of their application only for a short period of time, disregarding the impacts those measures had on a large amount of the population, despite their limited duration. As Solomon stresses, an emergency situation *"offers no justification for disregarding basic right (...); to the contrary, emergency situations should summon human rights vigilance".* [290] But, as

[285] Matti Mikkola, "Social Rights as Human Rights in Europe" (2000), 2 Eur. J. Soc. Sec., 259, 261
[286] Bianca Selejan-Gutan, "Social and Economic Rights in the Context of the Economic Crisis" (2013), 4 *Romanian Journal of Comparative Law*, 139, 144
[287] Vienna Declaration and Programme of Action op.cit.
[288] *Da Silva Carvalho Rico v. Portugal,* App. No. 13341/14 (ECtHR, 1 September 2015), par. 46
[289] Pavlidou op.cit. (302)
[290] Salomon (2015) op.cit. (29)

the ECtHR's crisis jurisprudence showcases, human rights were trumped by other goals and interests.

2.3.2 Proportionality

The use of proportionality is central in the jurisprudence of the ECtHR when assessing the permissibility of restrictions on human rights. This principle has been *"enhanced and elaborated"* by the Strasbourg Court which has stressed that all CoE member states should respect and apply it in their national framework.[291] According to the Court, the proportionality test requires a fair balance to be struck between the general interest and the individual's fundamental rights.[292] In the context of the economic crisis, the ECtHR found most of the cases filed against austerity measures to be inadmissible as "manifestly ill-founded"[293] or not violating rights protected by the ECHR.[294] While examining their proportionality, the Court focused mainly on whether the reductions imposed by the impugned measures were *"reasonable"*[295] or *"excessive".*[296] The reasonableness of the reductions was supported by the argument that the measures did not introduce a total loss of the social entitlements, thus finding the impugned measures to be proportional,[297] something consistent with the Court's interpretation that Art. 1 of the 1st Additional Protocol does not guarantee a right to a pension of a particular amount.[298]

It is also worth mentioning that the Court, while assessing the proportionality of the relevant measures, introduced into the proportionality test the element of the exceptional financial conditions, using it as a reason to justify the impugned measures. In several cases the Court noted that austerity measures were justified by the severe economic situation that a lot of European States found themselves in,[299]

[291] Contiades; Fotiadou op.cit. (666)
[292] As pointed out by Barak Aharon op.cit. (344), when citing the ECtHR, *Sporrong and Lönnroth v. Sweden*, App. No. 7151/75 (23 September 1982), par. 69.
[293] Eg *Koufaki and ADEDY v. Greece,* App. Nos. 57665/12 and 57657/12 (ECtHR 7 May 2013), par. 49
[294] Eg *Valkov and Others v. Bulgaria*, App Nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, (ECtHR 25 October2011), par. 111, 118
[295] ibid (par. 97)
[296] Ibid (par. 91)
[297] Ibid (par. 97)
[298] *Koufaki and ADEDY v. Greece* op.cit. (par. 33)
[299] ibid (par.46)

which served as an excuse to cut back on the protection of rights. For example, in cases Da Conceição Mateus and Santos Januário v. Portugal the Court stated that *"In the light of the exceptional economic and financial crisis (...)the applicants did not bear a disproportionate and excessive burden".*[300] This is indicative of the ECtHR's adoption of an emergency doctrine, deeming such measures as necessary in the context of the economic emergency that States are confronted with. Instead of stressing the need for rights to be safeguarded against the adverse impact of the crisis and austerity measures, it follows the emergency narratives of the States weakening the protection afforded to rights.

2.3.3 Public interest

One of the most important criteria used by the ECtHR when finding austerity measures permissible under the ECHR was the public interest of the state. In several of its judgments it stressed that the impugned measures were justified because they were serving the public interest, accepting the arguments of states. This is especially clear in Koufaki-ADEDY v. Greece, where the Court stressed *"In assessing the public interest of the measures in question, the Court attaches particular weight to the report accompanying Law no. 3833/2010 and to the reasoning of judgment no. 668/2012 of the Supreme Administrative Court"*[301], following its usual jurisprudence, namely considering states to be better placed to define what their public interest is, especially when it comes to socio-economic policies.[302] In the context of the current financial crisis however, accepting the governments' narrative on public interest becomes highly problematic. As Karavokyris underscores when talking about Greece, there has been a transformation of the notion of public interest, which has ended up in including an *"updated form of the state's fiscal interest"*.[303]

More specifically, as evidenced by the arguments of most austerity-driven countries, the legitimate aims that austerity measures intend to serve include the fiscal stability

[300] *Da Conceição Mateus and Santos Januário v. Portugal* op. cit. (par. 29)
[301] *Koufaki and ADEDY v. Greece* op.cit. (36)
[302] Eg *Da Silva Carvalho Rico v. Portugal* op.cit. (37)
[303] George Karavokyris, *Σύνταγμα και Κρίση (The Constitution and Crisis)*, (Kritiki, 2014), 96 (translated by author)

of the state and the reduction of state debt and public deficit[304] through cuts on social spending. These policies however have had a dramatic impact on the living of people as collateral damage[305] while trying to achieve a "public interest" defined only in economic and fiscal terms, relating to the state's economic performance. Admittedly, economic prosperity is essential for the realization of ESCRs, because of their resource-dependant nature, and thus an economically unstable state will be unable to comply with its obligations. Nevertheless, taking into consideration the existence of alternative solutions, such as economic stimuli programmes as explained above, which would be less harming on ESCRs but would have entailed an increase on the states' spending, it is quite evident that the goals pursued by austerity policies focused almost exclusively on fiscal interests, rather than the general interest of the population. By agreeing with states' arguments, the ECtHR accepts a very wide definition of the public interest, especially taking into consideration that the fiscal interest has a *"purely monetary value"* and that the public sector does not necessarily *"represent the interests of the nation as a whole".*[306] This comes in contrast with a previous decision where the Court argued that *"…the mere fiscal interest of a public legal entity cannot be assimilated to the public or general interest and cannot justify the violation of the right to property…"*[307], therefore raising questions on why the Court receded from its protective role and accepted the states' definition of public interest.

One last comment regarding the ECtHR approach to the notion of public interest concerns the inclusion of EU fiscal goals in its definition. In particular, in Koufaki-ADEDY v. Greece, the Court repeats the Greek Council of State's reasoning stating that the aims served by the measures *"…were in the general interest and also coincided with those of the euro area Member States, in view of the requirement under European Union legislation to ensure budgetary discipline and preserve the stability of the euro area".*[308] Following the Greek Council of State's argument, the

[304] ibid
[305] Ghailani op.cit. (157)
[306] Pervou op.cit. (124)
[307] As referenced by Karavokyris op.cit. (91) ; *Meidanis v. Greece*, App. No. 33977/06 (ECtHR, 22 May 2008), par. 31 (translated by author)
[308] *Koufaki and ADEDY v. Greece* op.cit. (38)

ECtHR introduces the stability of the Eurozone as one of the legitimate aims that the contested measures pursue, putting flesh to the words of Mario Draghi, as quoted by Alkiviadou, that *"we will do anything it takes to preserve the Euro".*[309] This redefinition of the public interest as including not only the interest of the state but also the stability of the Eurozone[310] and especially the embracing of such transformation by the responsible bodies for the protection of human rights (both the ECtHR and the Greek Council of State) raises serious concerns regarding their protective role and their willingness to challenge state policies that constitute severe infringements of human rights.

[309] Alkiviadou op.cit. (8) ; Jamie Dunkley, "Debt crisis: Mario Draghi pledges to do 'whatever it takes' to save euro" (The Telegraph, 26 July 2012) available at: <https://www.telegraph.co.uk/finance/financialcrisis/9428894/Debt-crisis-Mario-Draghi-pledges-to-do-whatever-it-takes-to-save-euro.html> [last accessed 30 June 2019]
[310] Mantzoufas op.cit. (122)

Chapter 3: Identifying strengths and weaknesses

This following chapter will focus on comparisons between the practice of the three bodies analyzed above, identifying differences in the application of the criteria used to examine austerity measures. As demonstrated in the previous chapters, the majority of the criteria employed to assess such measures overlap, since they have been used by adjudicating bodies for years when assessing the permissibility of restrictions to human rights. Therefore, the identified differences mostly concern the application of these criteria by the relevant bodies while others regard their general approach, which however becomes particularly important in the light of the economic crisis of 2008, which requires rigid and well-established bodies, capable to guarantee the effective protection of human rights. Following this, there will be an analysis of certain concepts used by those bodies, concepts that either promoted the effective protection of rights, or on the contrary, allowed the supervisory bodies to take a step back and adopt a lenient stance towards states.

3.1 Same criteria–different application

3.1.1 Maximum Available Resources

One of the differences identified between the UN CESCR and the ECSR relates to their approach towards the question of resources that states should allocate for the realization of ESCRs. It should be noted that the obligation of states to devote their maximum available resources is stipulated only in the ICESCR while the ECSR first mentioned it, as stressed by Cullen, in its Decision on the Complaint 13/2002 where it noted that *"...a State Party must take measures that allows it to achieve the objectives of the Charter (...) to an extent consistent with the maximum use of available resources"*.[311] Nonetheless, the ECSR has been more precise when assessing states' allocation of resources, not only by mentioning the exact percentage of states' GDP allocated to economic and social rights, but also by measuring it against the EU's average, assessing this way their adequacy compared to EU standards.[312] It should be

[311] Cullen op.cit. (91) ; ECSR, Complaint 13/2002, Decision on the merits of 4 November 2003, par. 53

[312] Eg Conclusions XX-1 - Latvia - Article 1-1, 07/12/2012, XX-1/def/LVA/1/1/EN

noted however that even within the EU there can be wide differences between state economies, with certain member states having much stronger economies than others. As a result, comparing all EU member states against the same indicator can result in unfair conclusions for weaker economies that cannot live up to such high standards.

On the contrary, while the CESCR has expressed its concern over the inadequacy of resources,[313] it has not made any determinations on what an adequate amount entails or on criteria that could serve as guideposts for states. A possible explanation for this could be the global context that the CESCR is working in, as opposed to the European one within which the ECSR is operating, resulting in, as O'Cinneide notes, the latter's jurisprudence being more context-specific and *"tailored specifically for the European context".*[314] It should be noted however that the ECSR, when assessing resources of states that are not members of the EU, although it does stress the inadequacy of the resources, it compares state expenditure against international standards, without further elaboration. For example in the case of Russia, it stressed that *"public expenditure on active labour market policies amounted to 0.02% of GDP in 2010, which is by international comparison very low"*[315] while in the case of Montenegro it reiterated that public expenditure was low compared to *"other States Parties".*[316] Contrary to its Conclusions on EU member states, in this case the ECSR does not provide any guideposts as to what an international standard of adequate resources is, thus limiting the effect of its finding. It is therefore evident that in the international context, it is more difficult to assess this obligation taking into account the different economies of states. Nonetheless, more rigid criteria on what constitutes "available resources" in the international context can help set international standards, making the finding of violations easier and providing guidance for states during socio-economic decision-making.

[313] CESCR, *Concluding observations on Romania* op.cit. (par. 7)
[314] Colm O' Cinneide, "Austerity and the Faded Dream of a 'Social Europe'", in A. Nolan (Ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 196
[315] Conclusions 2012 - Russian Federation - Article 1-1, 07/12/12, 2012/def/RUS/1/1/EN
[316] Conclusions 2012 - Montenegro - Article 1-1, 07/12/2012, 2012/def/MNE/1/1/EN

3.1.2 Emergency narrative: Legality, Necessity, Temporariness

One of the most significant differences identified among the relevant bodies in their approach towards the economic crisis and the adoption of austerity measures is the choice of the CESCR and the ECtHR to adopt an emergency doctrine, which has already been analyzed above. This approach however by definition led to a different application of the concerned criteria, compared to the ECSR, but discrepancies between the CESCR and the ECtHR were also present.

Legality

The concept of legality is central in the jurisprudence of both the ECtHR and the ECSR and as analyzed above it has been interpreted in a very similar way. The CESCR on the other hand, did not introduce the criterion of legality in its assessment of austerity measures. As already mentioned, legality is stipulated in the ICESCR restriction clause, but the CESCR did not examine such measures on this basis, so there was no mention to this criterion during the economic crisis. On the contrary, both the CoE bodies have mentioned it in the examination of cases concerning austerity measures, where they found that the impugned measures were lawful. One possible explanation for the non-inclusion of the legality criterion in the CESCR's test could be, as highlighted in the previous chapter, that due to the adoption of the emergency doctrine, the CESCR lowered its threshold of protection by admitting the urgency of the situation[317]. Its overall approach however does not seem to justify the above statement, since it has demonstrated certain willingness to safeguard ESCRs during the crisis. Probably the CESCR did not want to engage itself in such a complex notion, given the international context and the different legal systems established throughout the state parties to the Covenant.

The ECtHR on the other hand, even though it is embracing the crisis narrative and the emergency approach, does refer to the criterion of legality, by stating that the impugned measures were in fact provided for by law, in certain cases supporting this judgment by referring to decisions of the state's Constitutional Court, which also

[317] Warwick (2016), op.cit (259)

deemed the contested measure as constitutional.[318] In a crisis-related case it stressed that *"the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness"*.[319] The same approach is followed by the ECSR which also deemed several austerity measures to be lawful. On one hand, the examination of the criterion of legality is highly welcomed since it prevents arbitrary restrictions of rights by the Government. However, the way that the relevant bodies applied this criterion, especially taking into account the general context under which such measures were adopted, raises several questions.

Most specifically, taking Greece as an example, austerity measures were mostly adopted according to the emergency procedure, lacking almost entirely a parliamentary debate.[320] For instance, concerning the first package of austerity measures, the urgency of the situation did not allow for an adequate parliamentary discussion, since the government alleged that it was urgent to vote the concerned law before the 19th May 2010, a date when a 10€ billion bond loan would mature.[321] As stressed by Marketou, *"The members of parliament had less than three days to read the statute and its annexes, and only one day to discuss it in parliament. Even members of the government later admitted that they had not had time to read the MoU".*[322] Under these circumstances, the admittance that the Greek impugned measures were in fact lawful can be problematic. It is worth mentioning that their unlawfulness was also raised by the European Trade Union Confederation intervening in Complaint 111/2014.[323] However, it should be noted that in the case of the ECSR the contested measures were found to be violating the ESC as non-proportional.[324]

[318] *Da Silva Carvalho Rico v. Portugal* op.cit. (35-36)
[319] N.K.M. v. Hungary, App. No. 66529/11 (ECtHR 14 May 2013), par. 47
[320] Pervou op.cit. (116)
[321] Afroditi Ioanna Marketou, "Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function When It Is Dying" (2015), 4 *Cambridge Journal of International & Comparative Law*, 289, 293
[322] Marketou op.cit. (293)
[323] Complaint 111/2014, Decision on the merits op.cit. (par. 38)
[324] Ibid (par. 91)

Necessity

The criterion of necessity is used by all bodies examined in this analysis, albeit in a quite distinctive way, resulting in different conclusions. To begin with, the CESCR has referred several times to the necessity of adjustment programmes[325] and has stressed that at times such measures might me inevitable.[326] It is clear that the CESCR chooses to address austerity as a "necessary evil" and then lays down the criteria on which austerity measures are going to be assessed, not contesting austerity as a policy choice. Of course, one could say that this is because of the scale of the current crisis which has been described as *"international, rapid, structural, and severe"*.[327] Admittedly, the adoption of the emergency doctrine by the CESCR and the issuing of the relevant criteria intended to strengthen the protection of ESCRs by taking a realistic approach, facing the economic hardships at the time. Nevertheless, compared to the approach taken by the ECSR, it is evident that the CESCR could have been less flexible with states.

The ECSR on the other hand, while acknowledging the severity and scale of the crisis[328] and at times recognizing that *"the pursuit of economic goals is not incompatible"* with certain rights because of their interrelatedness with the economic situation of the state,[329] it does not recede to the necessity narrative but challenges state policies and while being realistic, does not lower its protective threshold. On the contrary, it assesses the impugned measures on a normal basis, clearly stating when they are violating the ESC. The same cannot be told however for its civil and political rights counterpart, the ECtHR, which follows to some extent the example of the CESCR, by deeming austerity measures as necessary because of the exceptional economical circumstances.[330] It uses the crisis as a reason to allow states a wider margin of appreciation and takes a step back, instead of challenging the austerity paradigm.

[325] CESCR Statement on austerity measures op.cit. (par. 2)
[326] CESCR Letter 2012 op.cit.
[327] Warwick (2016) op.cit. (257)
[328] Complaint 111/2014 Decision on the merits op.cit. (247)
[329] Complaint No. 76/2012 Decision on the merits op.cit. (par. 71)
[330] Eg *Da Conceição Mateus and Santos Januário v. Portugal* op.cit. (par. 29)

Temporariness

The last criterion related to the emergency paradigm is that of temporariness, which dictates that austerity measures should be in place only until the relevant state overcomes the crisis. As already highlighted, both the CESCR and the ECtHR refer to this criterion, albeit in a different way, while the ECSR did not use it as a criterion to assess the contested measures. The CESCR in its Letter of 2012 establishes it as one of the requirements that austerity measures should meet in order for them to be in compliance with the obligations under the ICESCR. As a result, it often reminds states of their obligation and stresses the need for such measures to be progressively waived.[331] On the other hand, the ECtHR has not established such a criterion for restrictions to rights to be considered permissible. Nevertheless, it refers to it as one of the reasons why the impugned measures are proportionate. In several cases it has found austerity measures to be proportionate due their limited duration, which means they do not impose an excessive burden upon the applicants.[332] It is evident that in the case of the CESCR this criterion intends to safeguard ESCRs against permanent austerity and ensure the restoration of the previous circumstances, although it disregards the existing suffering that right-holders underwent –even for a limited time. The ECtHR however uses it in order to justify austerity measures, disregarding the overall impact that these measures have had on the population.

3.1.3 Proportionality

Certain differences are also identified between the ECtHR and the ECSR when assessing the proportionality of austerity measures. The ECSR's application of the proportionality test, as analyzed above, demonstrates a thorough analysis of the three components of proportionality –namely necessity, suitability and proportionality stricto sensu, without introducing into the test elements such as the exceptional financial situation or temporariness of the measures. Contrary to the practice of the ECtHR, the European Committee does not use the crisis as a pretext to allow extensive restrictions to rights, but finds such restrictions disproportionate *"even*

[331] CESCR, *Concluding Observations on Greece* op.cit. (par. 20)
[332] Eg *Da Conceição Mateus and Santos Januário v. Portugal* op.cit. (par. 29)

when taking into account the particular economic circumstances in question".[333] The ECtHR on the other hand does not challenge the necessity or suitability of the measures. On the contrary, the Court has stressed that *"it is not for the Court to decide whether better alternative measures could have been envisaged in order to reduce the State budget deficit and overcome the financial crisis"*[334], a position that is in contrast with the one of the ECSR, which did not hesitate to find a violation because of the lack of consideration of alternatives.

Regarding the necessity of the impugned laws, the Court does not make any reference to the possibility of less restrictive measures, focusing on the very difficult economic situation that states are confronted with. It uses the exceptional circumstances as one of the elements that renders the impugned measures proportional,[335] placing the limit on whether such restrictions affect the *"essence of the right"* [336] and constitute a *"total deprivation of entitlements resulting in the loss of means of subsistence",*[337] a criterion that will be analyzed right below. It is quite evident that the Court's proportionality test focuses more on the existing circumstances, basing its decisions on states' arguments about the severe financial problems and the temporariness of the measures, with the ultimate limit being the complete deprivation of the relevant right. However, a stronger approach was expected from the principal guarantor of right in the European human rights protection system.

3.1.4 Minimum Core Content

The concept of the minimum core content of rights has been established as one of the criteria that austerity measures should comply with by the CESCR, introducing a limit that reductions in social spending cannot cross. As a concept however, it has been developed also in national frameworks as a limit to governments' restrictions to rights, stipulating that there is an inviolable core of each right that under no circumstances can it be infringed. The ECtHR also applies this criterion in its assessment, although using a different term, talking about the *"essence of the right"*

[333] Ibid (par. 135)
[334] *Da Silva Carvalho Rico v. Portugal* op.cit. (par. 45)
[335] *Da Conceição Mateus and Santos Januário v. Portugal* op.cit. (par. 29)
[336] Ibid (par. 24)
[337] *Da Silva Carvalho Rico v. Portugal* op.cit. (par. 42)

and it examines it while assessing the proportionality of the relevant measure,[338] thus introducing it into the proportionality test. What exactly constitutes the "essence" or the "core" of a right has not been determined and, as already explained, this concept, helpful as it might be for developing countries and disadvantaged groups, it might not afford effective protection to people who did suffer extensive losses but were not at risk to cross the poverty threshold. It does however provide a necessary tool against state interferences that result in the total deprivation of rights while it can be of additional value if defined on a case-by-case basis, taking into consideration the relevant circumstances at a time depending on the situation of each state, thus determining different thresholds for different circumstances.[339]

The ECSR on the other hand follows a different approach, not making reference to the minimum core of the ESC rights but by stressing that the relevant measures concerning social benefits and cuts on salaries should ensure at least a "decent standard of living", defining it as something that *"goes beyond merely material basic necessities such as food, clothing and housing, and includes resources necessary to participate in cultural, educational and social activities".*[340] This definition takes into account that access to just basic goods does not guarantee a decent standard of living, since people will still be excluded from all forms of social life and participation in the society. On the contrary, setting the limit lower perpetuates the already existing marginalization of disadvantaged groups, excluding them from social life and depriving them of any opportunity to have a decent life on an equal footing with the rest of the population.

Moreover, the ECSR makes determinations when referring to what fair remuneration is by stressing that it should not fall below 60% of the net average wage[341] while it has also emphasized the need for the elderly's income not to be less than the poverty threshold, *"defined as 50 per cent of median equivalised income as calculated on the basis of the Eurostat at-risk-of-poverty threshold value".*[342] It is worth mentioning that when examining compliance of non EU member states the ECSR bases its

[338] *Da Conceição Mateus and Santos Januário v. Portugal* op.cit (par. 24)
[339] Kedzia (2020) op.cit. (unpublished contribution)
[340] Conclusions 2016 - Netherlands - Article 4-1, 09/12/2016 (2016/def/NLD/4/1/EN)
[341] ibid
[342] Complaint No. 76/2012 Decision on the merits op.cit. (par. 74)

assessments on the previous situation of the relevant state, by comparing their progress and the relevant resources with national poverty thresholds and indicators[343] and stressing that *"In the absence of the Eurostat at-risk-of-poverty indicator, the Committee requests that each report provide information about the poverty threshold indicator established by national statistics"*[344]. These benchmarks facilitate the ECSR's assessment while they also provide useful guidance for states, allowing them to comply with their obligations.

The ECtHR's decency threshold is somewhat different than the ECSR's, setting it lower than the European Committee does. More specifically, the Court has stressed that *"a total deprivation of entitlements resulting in the loss of means of subsistence would in principle amount to a violation of the right of property"*[345] while elsewhere it noted that *"the applicants before it had not claimed specifically that their situation had worsened to the extent that they risked falling below the subsistence threshold".*[346] This way the Strasbourg Court prohibits only the restrictions that result in applicants losing their material basic elements necessary for their subsistence. However, *"if protection against retrogression in socio-economic rights is clearly afforded only in cases of socio-economic deprivation, the standard of protection is set too low"*.[347] "Decent" does not mean ensuring the minimum essentials for subsistence and avoidance of extreme poverty does not result in a decent standard of living.[348] As Stergiou stresses, decent living means participating in a *"society of equals"* and is ensured through protection from at least relative poverty -where people only have access to the basic material goods.[349]

The CESCR also refers to the concept of decent or adequate standard of living, defining the decent standard in its General Comment 23, where it stresses that

[343] Eg Conclusions 2017 - Ukraine - Article 23, 08/12/2017, 2017/def/UKR/23/EN
[344] Conclusions 2013 - Serbia - Article 23, 06/12/2013, 2013/def/SRB/23/EN
[345] *Da Conceição Mateus and Santos Januário v. Portugal* op.cit (par. 24)
[346] *Koufaki and ADEDY v. Greece* op.cit. (par. 44)
[347] Andreas Dimopoulos, Sotiris Asimakis, "A Comparative Examination of Human Rights in the Age of Austerity in the UK and Greece: The Need for an Integrated Approach in European Human Rights Law" (2013), *2 Cyprus Human Rights Law Review*, 195, 222
[348] Aggelos Stergiou, "Τα Κοινωνικά (Αναδιανεμητικά) Δικαιώματα ενώπιον της κρίσης" (2016) [Social (Redistributive) Rights in the light of the crisis], 1 Εφημερίδα Διοικητικού Δικαίου (Administrative Law Journal), 78, 92
[349] ibid

remuneration should provide workers with a decent standard of living, meaning that it should be *"sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs".*[350] The CESCR's approach resembles the one of the ECSR's, since it does not define a decent standard of living just by referring to material needs, but recognizes that the enjoyment of other rights such as the one of education are also essential for people to live with dignity. Also, the use of the words "such as" indicates that it is not an exhaustive list, meaning that the CESCR understands the concept of decent in a quite expansive way, thus acknowledging that dignity means more than just having the minimum essentials. It should be noted however that the CESCR does not make any determinations regarding the word decent in its Concluding Observations, contrary to the ECSR. This however can be attributed to the fact that the ECSR does not follow the CESCR's practice of issuing General Comments, elaborating on its interpretative approach but elaborates on each right in its Conclusions on state reports.[351]

Regarding the concept of a decent standard of living, an interesting approach that differs from the abovementioned analysis comes from a decision by the Greek Council of State concerning cuts on pensions, where it defined this standard as entailing the provision of not only the conditions for pensioners' physical existence but also the conditions for their participation in social life, *under similar circumstances as the ones during their work life (*emphasis added).[352] This decision has been criticized, because of setting the limit too high, since it required the level of pensions to be of such an amount that they would not cause any significant change to the pensioners' life, compared to their standard of living when working. [353] This decision concerned the second package of austerity measures which imposed further

[350] CESCR, General Comment 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 27 April 2016, E/C.12/GC/23, par. 18
[351] Colm O'Cinneide (2009) op.cit. (293)
[352] Greek Council of State (Grand Chamber), Decision 2287/2015, 10 June 2015 (translated by author)
[353] George Karavokyris, "Η κρίση-μη πολιτικότητα του ελέγχου της συνταγματικότητας των νόμων – Σκέψεις με αφορμή τις ΟλΣτΕ 2287-90/2015" (2016) (The critical politicization of laws' constitutional review –Thoughts about Council Of State Decisions 2287-90/2015), 68 Δικαιώματα του Ανθρώπου (Human Rights Journal), 16 (translated by author)

cuts on pensions and salaries and followed the first decisions of Greek courts which deferred to the government and justified the first cuts due to the exceptional circumstances.[354] While the reasoning of the Court that a decent standard of living should not only be limited to guaranteeing the material essentials for living is highly welcomed, it does however place the threshold quite high, even higher than the one set by the CESCR and the ECSR. Admittedly, changes in the social security system will happen and sometimes they will be dictated by changes in the economic situation of the state. Thus, setting the threshold too high might prevent states from adopting reforms necessary for the sustainability of the social security system and the economic well-being of the state.

3.1.5 Finding of violations

One difference of particular importance between the two Committees concerns their use of violation-related language in the reporting system. It should be emphasized that in the case of the CESCR, the reporting procedure intends to be a constructive dialogue, aiming at engaging state-parties in complying with their obligations in a non-adversarial environment. This nature of the reporting procedure however does not prevent the UN Committee from being decisive when examining states' compliance with their obligations. The use of a seemingly more flexible language does not remove its effectiveness as a protective body and it provides the necessary clarity for states to understand when they have violated their obligations.

On the other hand, the ECSR after examining each right separately concludes on whether the situation in the state party under examination is in conformity or not with the relevant article,[355] stating it clearly and not expressing concern or reminding states of their obligations. The European context it operates in as well as the legitimacy it enjoys due to the proximity to its state parties, as opposed to a universal organization such as the UN, explain to a certain extent these differences between the two bodies. Nonetheless, this identified difference in the language used by the two Committees does not have any practical impact on rights' protection, since in both cases whether

[354] See Greek Council of State (Grand Chamber), Decision 668/2012, 20 February 2012 (translated by author)
[355] Conclusions 2012 - Bulgaria - Article 1-1, 7/12/2012 (2012/def/BGR/1/1/EN)

the concerned states will follow the bodies' conclusions depends on a variety of factors (such as states' political will) relating mostly to the existing enforcement mechanisms rather than on the use of strong language.

3.2 Associated concepts

3.2.1 Margin of Appreciation

The concept of the margin of appreciation is widely known both in international as well as national rights adjudication, especially when it comes to socio-economic policies. Arai-Takahashi defined it as "*the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties",* as referenced by Aharon.[356] In the national context, the judiciary usually defers to the legislative or executive branch which it deems more competent to make decisions concerning social and economic policies.[357] As far as the international context is concerned, it can be argued that monitoring bodies do not want to overstep their mandate and the principle of subsidiarity[358], thus allowing for a margin of appreciation to states concerning certain issues. However, while this is true in the European context where this doctrine has been widely used, it has rarely appeared in the UN treaty bodies' case-law.[359] The same is evident in the handling of the cases concerning austerity measures adopted in the light of the economic and financial crisis of 2008.

One of the first documents of the CESCR that mentions the concept of the margin of appreciation is its Statement of 2007 regarding the notion of maximum available resources, where the UN Committee stated that it *"will respect the margin of appreciation of the State party to determine the optimum use of its resources and to*

[356] Aharon op.cit. (418) ; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Hart Publishing, 2002), 2
[357] Greene op.cit. (609)
[358] Lorenza Mola, "The Margin of Appreciation accorded to States in times of Economic Crisis: An Analysis of the Decisions by the European Committee of Social Rights and by the European Court of Human Rights on national austerity measures" (2015), 5(1) *Lex Social*, 174, 182
[359]Bruce Porter, "Reasonableness and Article 8(4)", in Malcolm Langford (ed.) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, (Pretoria University Law Press 2016), 184-185

adopt national policies and prioritize certain resource demands over others"[360], while it also mentioned it in its Letter of 2012 concerning the economic crisis, where it stressed that *"States parties have, of course, a margin of appreciation within which to set national economic, social and cultural policies that respect, protect and fulfil the Covenant".*[361] This way the CESCR intended to demonstrate that it acknowledges states' competence when it comes to the design and application of their policies.[362] Nevertheless, it is also worth mentioning that this doctrine was rejected during the drafting of the Optional Protocol to the ICESCR (OP ICESCR)[363] as an assessment criterion of measures in the individual complaints procedure, because of the dangers it entailed for ESCRs adjudication as a result of the broad deference that it allows to states.[364]

Instead, the Working Group responsible for the drafting of the OP eventually included a reasonableness standard in the adjudication of individual complaints by the CESCR,[365] while also adding that *"the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant",*[366] when assessing the impugned measures,[367] thus preventing the inclusion of a doctrine that could lead to a weaker protection of rights. Kedzia argues that reasonableness constitutes a necessary tool for the assessment of whether state parties have taken steps, making use of their maximum available resources aiming at the full realization of ESCRs.[368] The concept of reasonableness ensures that the design of socio-economic policies remains with the State, thus not infringing on its decision-making competence, without however removing the

[360] CESCR Statement (2007), op.cit. (par. 12)
[361] CESCR, Letter May 2012 op.cit.
[362] Porter op.cit. (185)
[363] UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117, available at: https://www.refworld.org/docid/49c226dd0.html (last accessed 7 July 2019)
[364] Porter op.cit. (185)
[365] Ibid (184)
[366] Article 8 par. 4, OP ICESCR
[367] Porter op.cit. (186-187)
[368] Kedzia (2020) op.cit. (unpublished contribution)

protective role of the CESCR, which has the last word when it comes to adjudicating on whether these policies were reasonable.[369] As pointed out by Porter

> *Deference to States' legitimate policy choices does not entail deference to what the State argues is reasonable in relation to compliance with rights under the Covenant. That would be an abdication of the adjudicative role reserved to the Committee.*[370]

Indeed, adjudication based on the standard of reasonableness concerns whether the relevant measures have violated ESCRs and does not constitute an assessment from a perspective of social policy, confirming the role of the CESCR as a Human Rights body rather than a social policy expert.[371] It is evident that the introduction of the reasonableness standard in the OP has helped the UN Committee achieve a significant balance between respecting states' choices and maintaining its protective role, without falling into the trap that is the doctrine of the margin of appreciation.

The CESCR has not made any reference to this doctrine in its Concluding Observations during the financial and economic crisis but it did mention it in its views on an individual complaint regarding certain measures adopted in Spain during the crisis that violated the right to housing of the applicant.[372] Most specifically, the CESCR stressed that in principle, the authorities enjoy a certain amount of discretion when deciding on how to use tax revenue in fulfilling their obligations under the Covenant, which might result in the adoption of retrogressive measures.[373] Nevertheless, it stressed that such decisions should be based on *"the most thorough consideration possible"* and should take into account the totality of the rights and the use of the maximum available resources.[374] It is evident that even though the CESCR allowed a certain room for manoeuvre to the state, it did not defer completely to the state and its decisions on the design of socio-economic policies, but maintained its protective role.

[369] Ibid (187)
[370] Ibid
[371] Ibid (188)
[372] CESCR, Views on Communication No. 5/2015 op.cit.
[373] ibid (par. 17.6)
[374] Ibid

The doctrine of the margin of appreciation has been widely used by both the ECtHR and the ECSR in crisis-related cases, albeit in a different manner, resulting in a weaker protection of rights in the case of the Strasbourg Court. The ECSR has noted that States *"enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter"*,[375] while in the context of the crisis it has stressed that while states enjoy a wide margin of appreciation in defining the public interest *"this does not imply that the legislature is totally free of any constraints in its decision-making".*[376] The ECSR does not completely defer to States regarding the implementation of socio-economic policies but dares to emphasize the inadequacy of the impugned measures, which would *"force* (the persons concerned) *to shoulder an excessively large share of the consequences of the crisis" and possible make the crisis worse".*[377] As stressed by Cullen, the ECSR has prioritized rights protection over deferring to states in most cases where the margin of appreciation has been raised,[378] recognizing states' competence in certain fields without however removing its protective role.

On the other hand, the ECtHR has followed a different approach. Generally speaking, the ECtHR has thoroughly developed the doctrine of the margin of appreciation and it has often stated that *"State authorities are in principle in a better position than the international judge"* to decide on certain matters.[379] Regarding socio-economic policies in particular, it has emphasized that "*Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds"* while it notes that this margin is even broader when it concerns allocation of resources.[380] One possible explanation for this broad deference could be that the Court lacks a clear mandate on this field.[381] It should be mentioned however that the Strasbourg Court does stress that such margin is not unlimited and the

[375] Complaint No. 31/2005, Decision on the merits of 18 October 2006, par. 35
[376] Complaint No. 111/2014, Decision on the merits op.cit. (par. 85)
[377] Mola op.cit. (185); Complaint No. 65/2011, Decision on the merits of 23 May 2012, par. 18
[378] Cullen op.cit. (90)
[379] Cullen op.cit. (88); *Handyside v. the United Kingdom,* App. No. 5493/72 (ECtHR 7 December 1976), par. 48
[380] *Da Conceição Mateus and Santos Januário v. Portugal* op. cit. (par. 22)
[381] O' Cinneide (2014) op.cit. (191)

relevant measures should be proportional, thus setting the criterion of proportionality as a limit to this margin of discretion,[382] while also stressing that states' discretion will be respected unless the measures are *"manifestly without reasonable foundation".*[383] Nonetheless, as Pervou stresses, the wider the margin of appreciation the more likely for the Court to find the measures proportional,[384] rendering these limits to States' discretion irrelevant in the crisis-related jurisprudence.

A very significant case demonstrating the Court's use of the margin of appreciation during the crisis is Koufaki-ADEDY v. Greece where the ECtHR relied to a great extent on a decision issued by the Greek Council of State, which deemed the impugned measures constitutional.[385] In particular, the Strasbourg Court stated that *"the margin of appreciation available to the legislature in implementing social and economic policies is a wide one",*[386] while later on, when talking about alternative solutions, it stressed that *"it is not for the Court to say whether the legislation represented the best solution for dealing with the problem".*[387] This particular statement is especially important when compared to the ECSR's stance against possible alternatives, which clearly stated that the mere non-examination of alternative solutions signified a violation of the Charter.[388] The ECtHR therefore adopted a very lenient approach towards austerity measures, granting states a very broad margin of appreciation, which, as noted by Dimopoulos et al. *"essentially closes the door to effective protection against infringements in the peaceful enjoyment of one's possessions".*[389]

3.2.2 Cumulative effect

One of the most important elements identified in the ECSR's crisis jurisprudence regards its holistic approach when assessing the permissibility of austerity measures, demonstrating a true will to live up to its protective role and safeguard economic and

[382] *Da Conceição Mateus and Santos Januário v. Portugal* op. cit. (par. 23)
[383] Ibid (par. 22)
[384] Pervou op.cit. (120)
[385] *Koufaki and ADEDY v. Greece* op.cit. (par.36)
[386] Ibid (par. 39)
[387] Ibid (par. 48)
[388] Complaint No. 111/2014, Decision on the merits op.cit. (par. 90)
[389] Dimopoulos ; Asimakis, op.cit. (217-218)

social rights during an austerity era. This holistic approach is evident in several of its conclusions and decisions concerning austerity measures, where it took under consideration the cumulative effect that such measures have on the population, which has led to *"a significant degradation of the standard of living and the living conditions"*[390] of the persons concerned. This has allowed the European Committee to find violations in cases where even though each individual measure did not amount to a violation of the Charter, the cumulative impact however did cause a situation that was not in conformity with States' obligations.[391] Consideration of the cumulative impact has also been referred to, albeit only once, by the CESCR in its Concluding Observations, where it expressed concern over the lack of assessment by the state of the cumulative impact of austerity measures on the realization of ESCRs.[392]

On the contrary, the ECtHR's approach is somewhat different, since it does not take into account the cumulative impact that austerity measures have had on the population, but rather adopts a narrow stance assessing each individual measure separately. This is particularly important in the case of the Strasbourg Court, since this integrated approach could enforce the protection of socio-economic rights, a protection that, as already analyzed, has been introduced in the Court's jurisprudence. As Dimopoulos et al. stress, *"Austerity measures which interfere with ECHR rights, which in turn are linked to socio-economic rights, should be scrutinized as to their combined effect",* taking into account austerity's *"ripple effects"* and thus affording effective protection to rights.[393] This integrated approach could be supported by considering the right to property a welfare right, as proposed by Pervou, and more specifically as a *"foundation of one's well-being, a prerequisite for the enjoyment of other human rights".*[394] Conferring a subsistence quality to the right to property could make the ECtHR take into account the "humanitarian aspects of the crisis" [395] and adopt a more holistic approach.

[390] Eg. Complaint No. 76/2012, Decision on the merits op.cit. (par. 78)
[391] Ibid (par. 77-78)
[392] CESCR, *Concluding observations on United Kingdom of Great Britain and Northern Ireland* op.cit. (par. 18)
[393] Dimopoulos; Asimakis, op.cit. (223-224)
[394] Pervou op.cit. (131)
[395] Ibid (138)

3.2.3 Conflicting obligations

Last but not least, the three bodies' stance towards governments' arguments relating to austerity measures being applied due to other obligations states have to International Organizations is worth mentioning. The CESCR has frequently stressed the need that states take their obligations under the Covenant into consideration when negotiating with International Financial Institutions (IFIs) on loaning agreements and their conditions[396] and is the only of the three bodies which has clearly stated that obligations towards ESCRs are not binding only for borrowing states but for lending parties as well, either states or international organizations.[397] This is a very significant step forward, since it not only creates a strong protective framework of ESCRs against the risks posed by loaning agreements, but also paves the way for the accountability of IFIs and other international organizations, which usually –if not always- have the upper hand in lending negotiations, thus leaving little room for the borrowing states to decide on their own terms.

In the same reasoning, the ECSR, replying to the Government's argument that austerity measures were imposed as part of their obligations to third parties, stressed that states *"should – both when preparing the text in question and when implementing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter".*[398] It also clarified that *"despite the later international obligations of Greece, there is nothing to absolve the state party from fulfilling its obligations under the 1961 Charter",*[399] not succumbing to the pressure exerted by the EU and IFIs on borrowing states through their market-driven and neoliberal policies.

On the other hand, the ECtHR, while not dealing with the obligations imposed on states by the loaning agreements with the EU institutions and IFIs it did however made a reference to one obligation EU member states have according to EU law, by stressing that austerity measures were necessary in order for states to reach their

[396] Eg. CESCR, *Concluding observations on Sudan,* op.cit. (par. 18)
[397] CESCR Statement (2016) op.cit.
[398] Complaint No. 76/2012, Decision on the merits op.cit. (par. 51)
[399] Ibid (par. 52)

obligations concerning their budget deficit[400], which cannot be over 3% of the GDP.[401] More specifically, the ECtHR stressed that *"the Netherlands were entitled in principle to take far-reaching measures to bring its economy back into line with its international obligations"*[402] and *"in common with Greece, Portugal and other Member States of the European Union, the Netherlands was concerned to meet its obligations under European Union law without delay".*[403] While not disregarding the obligations EU member states have undertaken when accessing the EU, when such obligations aim mostly at the achievement of purely economic goals at the expense of the protection of rights, the principal guarantor of human rights in the European region is expected to raise its voice in favor of safeguarding them especially when they are sacrificed for economic goals.

[400] Eg *Plaisier B.V. v. The Netherlands*, App. No. 46184/16 (ECtHR, 14 November 2017)
[401] As stipulated by EU law: Article 126 of the consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 and Article 1 of the Consolidated version of the Treaty on the Functioning of the European Union- Protocol (No 12) on the Excessive Deficit Procedure, OJ C 202, 7.6.2016, p. 279–280
[402] *Plaisier B.V. v. The Netherlands* op.cit. (par. 78)
[403] Ibid (par. 88)

Conclusions

This research has demonstrated the way that three principal human rights bodies have reacted to the economic crisis of 2008 and has underlined these elements that, once introduced in their responses, affected their conclusions to a great extent. During an economic crisis it comes as natural that certain adjustments will be needed and, due to the close relation of ESCRs to economic and social policies, it is often the case that the realization of these rights is going to be affected. It is true that adopting measures aiming at ensuring financial stability is also crucial for the protection of human rights, because of the risks posed to people's living in case of economic collapses.[404] No one denies the importance of an economically prosperous state for the realization of human rights, especially concerning ESCRs which depend almost exclusively on state resources such as social security benefits, public healthcare etc. As a result, approaching austerity measures from a purely legal point of view would disregard the catalytic role that the economic state of a country plays in their realization and would likely lead to their weaker protection.[405]

Nevertheless, this is not to say that in cases of economic crises the adopted measures should disregard socio-economic rights of people, using economic recovery and growth as the reason for which they should bear the cost of the crisis. On the contrary, obligations towards ESCRs should be integrated in the socio-economic decision making and should constitute guideposts for the development of such policies.[406] This has been highlighted by both the CESCR and the ECSR which have reiterated that states should take into consideration their obligations resulting from the ICESCR and the ESC when designing their economic policies during crisis.[407] Despite the eagerness of both to safeguard ESCRs in times of crisis, this research has demonstrated that the UN Committee has proved more flexible in its examination of state reports concerning austerity measures, by accepting their necessity due to the

[404] Dowell-Jones (2015) op.cit. (200)
[405] Ibid (195)
[406] Ibid (201)
[407] Eg. CESCR, *Concluding observations on Sudan,* op.cit. (par. 18); Complaint No. 76/2012, Decision on the merits op.cit. (par. 51)

difficult economic context and by avoiding using violation-related language which would result in stricter thresholds set to states.

This does not mean that the CESCR's contribution to the protection of ESCRs during the crisis has not been significant. Its firm stance in favor of the protection of the vulnerable groups severely hit by the crisis demonstrates that despite the admittance of austerity's necessity, the UN Committee makes a remarkable effort to safeguard the ones that will most likely be affected. Moreover, the introduction of the temporariness criterion, even though linked to the emergency doctrine adopted by the CESCR, serves as a key shield intended to prevent the normalization of austerity and the maintenance of such measures even after the exit from the crisis. The lenience of the CESCR can be understood when taken into account the specific context in which it operates. The UN's nature as a universal organization inevitably means that sometimes certain leeway will be left to states, aiming at engaging them to respect at least a certain extent of their obligations, instead of pushing them outside of the protection system entirely.

One characteristic example, albeit outside the scope of the ICESCR, relates to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[408] and the allowance of certain states' reservations to core provisions that otherwise would be deemed impermissible. Nevertheless, engaging those states to commit to certain of the CEDAW obligations is more desirable than them not being state-parties of this convention at all. In the same reasoning, it is possible that the CESCR recognizes its limitations due to the universal context and makes an effort to maintain a cooperating and non-adversarial environment in its reporting procedure. What is more, the scale of the 2008 financial crisis might have also played an important role in the CESCR's approach, acknowledging states' austerity policies as a necessary response to this severe risk of economic collapse. Nonetheless, despite all these limitations inherent in the function of the UN Committee, it seems that there is still room for a small step forward towards the protection of ESCRs. Being realistic to

[408] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: https://www.refworld.org/docid/3ae6b3970.html [accessed 19 July 2019]

the international reality and concerns over pushing states away inevitable poses the risk of not going forward.

In the European context, it could be argued that because of the proximity inherent in regional organizations as opposed to universal ones, the former enjoy more legitimacy when adjudicating on states' compliance, while at the same time their state parties, despite their differences, present more similarities and common values, which facilitates the monitoring bodies' assessment. The ECSR for example in its reporting procedure is not hesitant to declare when the situation in a state party is not in conformity with the ESC making clear determinations. What is more, the European Committee does not embrace the crisis narrative, remaining adamant as a human rights protection body and maintaining its protection threshold high enough to guarantee the safeguarding of socio-economic rights during crisis. On the other hand, the Strasbourg Court has not proved a strong ally against the catastrophic impact of the age of austerity. While its reluctance can be understood to some extent, owing to its lack of mandate when it comes to socio-economic policies, its crisis jurisprudence demonstrates a step back in its protective role and its unwillingness to contest states' arguments that prioritize economic goals over human rights, utilizing the public interest and the economic emergency as their very own Trojan horse in order to succeed the adoption of austerity measures and the satisfaction of economic interests.

Except for the way that the relevant bodies applied the criteria, another point that had an impact on the protection of ESCRs was the preciseness of these criteria- or lack thereof. For example, regarding the issue of the indicated amount of resources to be devoted to the realization of socio-economic rights as demonstrated above, there is a lack of precise standards and indicators, with the exception of the examination of EU member states by the ECSR. Reminding states or requesting them to use their maximum available resources does not provide them with specific guidelines as to what can be considered an adequate amount of resources that they should spend on socio-economic rights.

This lack of preciseness is related to the general attitude towards ESCRs as opposed to civil and political ones.[409] Admittedly, compared to the past there has been wide progress in developing protective standards for socio-economic rights and a great variety of states have included them as fundamental rights in their Constitutions.[410] Nonetheless, it is true that the obligations imposed to states relating to certain ESCRs are less clear and decisive than obligations relating to civil and political rights.[411] For example, this is evident in one of the key principles that could be used to safeguard ESCRs during crisis, namely non-retrogression, where the constant change in the criteria by the CESCR could result in an unclear framework for states,[412] preventing them from integrating human rights principles in their socio-economic decision making. In fact, the 2008 crisis has shown that human rights were almost excluded from such decision-making, with policy makers not integrating them into their agendas.[413] It is therefore evident that the lack of accuracy in ESCRs protective standards has downgraded their respect and protection especially during crisis.

However, the principal reason behind governments' austerity policies as well as the disregard for ESCRs lies with the way neoliberalism reigns as the principle system dictating how the world works.[414] The implementation of human rights cannot be seen independently from the context in which they exist and politics play a catalytic role in their protection and respect. As a result, it comes as natural that the relevant bodies responsible for rights protection will have to function within the limitations imposed to them by the system they operate in. This however leads to the conclusion that if we wish for a world where economic, social and cultural rights are better protected there has to be a change in the current governing system. Neoliberalism and its underlying values and objectives are inconsistent with the realization of ESCRs, leading to their retrenchment rather than their promotion.[415] As a matter of fact, state policies have been characterized by *"macroeconomic stability, fiscal discipline and the*

[409] Nolan (2015) op.cit. (372)
[410] Ibid (365)
[411] Ibid (372)
[412] Wills; Warwick op.cit. (653-658)
[413] Dowell-Jones (2015) op.cit. (199)
[414] Wills; Warwick op.cit. (630)
[415] Ivan Manokha, "Financial Crisis and Economic and Social Rights" (2010), Les Dossiers du CERI, 17

establishment of a 'flexible' labour market", while also aiming at limiting the welfare state.[416] These economic goals have been central in the design of austerity measures adopted in the context of the 2008 economic crisis and have resulted in the sacrifice of ESCRs for the sake of economic growth. A typical example comes from Greece where billions of Euros that were lent to the state went to the bail-out of Greek and European Banks.[417] This is not to say that states should not comply with their lending obligations. It is a matter of priorities and economic interests that are chosen over the protection of human lives, and the current system seems unsuitable to serve the sake of the latter.

Another gap identified in the protective normative framework developed by the examined bodies is the human rights obligations of IFIs such as the International Monetary Fund (IMF) and other international organizations such as the EU. The IMF in particular has played a catalytic role in the Eurozone crisis, being one of the lending parties and having contributed to a great extent to the adoption of austerity measures aiming at increasing public resources. However, the IMF has not proceeded in adopting a clear legal framework concerning the protection of human rights, considering itself not bound by the ICESCR. [418] This clear gap in the accountability of a lending party that has been engaging in states' financial aid for decades, influencing –if not dictating- their socio-economic policies[419] raises serious concerns over the effectiveness of the system. The power relations implicated in the lending procedures especially when it comes to developing countries or small EU states like Greece raise serious questions on whether they have any negotiating power at all to determine their socio-economic policies. Of course, this is not to say that borrowing states are not responsible for the situation in their territory[420]. As reiterated also by the ECSR, no

[416] O' Cinneide (2014) op.cit. (182)
[417] Dowell-Jones (2015) op.cit. (200)
[418] UN Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights,* 8 May 2018, A/HRC/38/33, par. 18
[419] Salomon (2015) op.cit. (13)
[420] Margot E. Salomon; Olivier De Schutter *"Economic policy conditionality, socio-economic rights and international legal responsibility: The case of Greece 2010-2015"* (2015), Legal Brief prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee), 15

matter what obligations states have towards international organizations, this does not strip them off their obligations towards ESCRs.[421]

The only body from the ones analyzed in this research that has taken a stance in favor of recognizing the human rights obligations of IFIs such as the IMF is the UN Committee, in its Statement on austerity measures, where it underscored that such organizations are bound by international human rights law, particular the rules stipulated in the Universal Declaration on Human rights, as part of customary international law and the general principles of law.[422] The ECSR on the other hand, while highlighting that other international obligations should not be a priority over the realization of socio-economic rights[423] has not proceeded in a more decisive statement concerning the obligations of non-state actors. One possible explanation could be that its mandate is limited in examining compliance of states and not other actors. The same however applies to the CESCR but in this case it did not prevent it from raising its voice and acknowledging that IFIs play such an important role in the design of socio-economic policies that they should be taken under consideration when talking about the effective protection of ESCRs. Despite this progress however, there is still a very big gap in engaging non-state actors with human rights obligations since human rights law has always been considered as being a responsibility of the state.[424] This is why, especially in an era where power has somewhat been transferred from states to non-state actors such as IFIs and big corporations, a stricter framework regarding the latter's obligations towards human rights should be developed in order to achieve effective protection of human rights.

Last but not least, one of the major accountability gaps identified in the global financial crisis of 2008 relates to the European Union and the way it handled the crisis.[425] Even though the EU started as a purely economic organization, as the years proceeded it started committing itself to other values, resulting in the current Treaty

[421] Complaint No. 76/2012, Decision on the merits op.cit. (par. 51)
[422] CESCR Statement (2016) op.cit. (par. 7)
[423] Complaint No. 76/2012, Decision on the merits op.cit. (par. 51)
[424] Nolan (2015) op.cit. (367)
[425] Margot Salomon, "Austerity, human rights and Europe's accountability gap" (Open Democracy, 18 March 2014), available at <https://www.opendemocracy.net/en/openglobalrights-openpage-blog/austerity-human-rights-and-europes-accountability-gap/> last accessed 23/07/2019

on the European Union (TEU) dictating that *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".*[426] Legally speaking, the EU institutions are bound by the Charter of Fundamental Rights of the European Union[427] as well as customary international law, general principles of law and other human rights treaties they might have ratified.[428] As a result, and taking into consideration the values that the EU declares to commit to, it was expected that as a negotiating part in the lending processes it would promote the respect and protection of human rights and especially ESCRs which were most at risk. A decade after the beginning of the crisis, it is evident that this has not been the case.

On the contrary, the whole procedure of financial stabilization was designed in a way that would happen outside of the EU legal framework, creating a legal void where safeguards included in the EU Charter would not apply.[429] What is more, there was no consideration of human rights implications of the proposed measures, and only in 2015 did the European Commission undertake a social impact assessment concerning the third package to Greece.[430] The EU's principal concerns have been purely economic ones, such as economic integration and macroeconomic stability,[431] goals that have been adopted by its Member States too, disregarding the severe impact of these policies on ESCRs. As Salomon argues

> *Europe proclaims its commitment to 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights'but in the grip of institutionalised austerity these values have been very hard to find.*[432]

[426] Consolidated Version of the Treaty on European Union (TEU), OJ C 326, 26.10.2012, p. 13–390, Article 2
[427] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407
[428] UN Human Rights Council (HRC), *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to institutions of the European Union,* 28 December 2016, A/HRC/34/57/Add.1, par. 19
[429] FIDH; Hellenic League for Human Rights, "*Downgrading rights: the cost of austerity in Greece*", November/ No 646a, 65
[430] HRC, Independent Expert Report (2016) op.cit. (par. 65-66)
[431] O' Cinneide (2014) op.cit. (186)
[432] Salomon (2015) op.cit. (27) quoting art. 2 TEU

For all these reasons it is imperative that these gaps in the protection of rights are properly addressed through the development of a strong protective framework that takes into consideration new challenges that have emerged in today's globalized world and improves existing shortcomings that diminish the safeguarding of rights.

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