

# 1 UNIVERSALITY, PROGRESSIVE REALIZATION, ECONOMIC CRISES

*The ICESR Fifty Years on*

*Gábor Kardos\**

## 1.1 INTRODUCTION

The universal protection of economic, social and cultural rights primarily takes place under the UN ICESR. The UN General Assembly approved the adoption of ICESR together with the ICCPR in 1966. It is commonplace to claim that half a century later, the Covenant has become deeply embedded in the tissue of international law.

The well-established nature of the Covenant, and the interpretative work carried by the UN Committee on Economic, Social and Cultural Rights makes us ponder its fundamental questions time and again. “This work has been influential and catalytic in helping develop the conceptual framework of economic, social and cultural rights.”<sup>1</sup> Here I will elaborate on two of the most fundamental issues. First, I will address the universality of economic, social and cultural rights of the Covenant; second, I shall turn to the obligation regarding the progressive realization of those rights. A special perspective on the latter obligation was brought about by the 2008 economic and financial crisis.

## 1.2 UNIVERSALITY: DIFFERENT APPROACHES

*Why* should economic, social and cultural rights be respected universally? An appropriate starting point is the interest of the individual: the main argument in favour of social rights is the individual in need. Furthermore, autonomy is hardly separable from well-being. As Cécile Fabre points out, only if basic social rights are protected at the same level as civic and political ones can a society claim to be seriously concerned with the autonomy of the

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\* Professor, International Law Department, Faculty of Law, ELTE University, Budapest.

1 Malcolm Langford and Jeff A. King: Committee on Economic, Social and Cultural Rights. In: Malcolm Langford (ed.): *Social Rights Jurisprudence*. Emerging Trends in International and Comparative Law. Cambridge, University Press, 2008, p. 477.

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individual.<sup>2</sup> Basic human needs are rooted in the inclinations of human beings, as driving forces for survival, self-realization, and social participation. Needs related to survival are food, shelter, physical and psychological integrity, while needs underlying self-realization are cultural self-identity and expression. Finally, the needs promoting social participation are education, association and labour.<sup>3</sup> Based on the above, it is apparent that fulfilling basic human goes beyond simply guaranteeing civil and political rights, implying the realization of economic, social and cultural rights as well.

A different approach departs from the aspect of human suffering. As Asbjorn Eide and Allan Rosas pointed out:

The efforts to bring torture, arbitrary detention and capital punishment to an end are laudable and have our support. But to be somewhat provocative, what permanent achievement is there in saving people from torture, only to find that they are killed by famine or disease that could have been prevented, had the will and the appropriate control been there?<sup>4</sup>

When emphasizing basic human needs or human suffering we put the dignity of the human being in the centre of our focus. The protection of human dignity as the basis for social rights is a fundamental idea of certain religious social thought.<sup>5</sup> The right to dignity as a kind of ‘mother right’ of all human rights can also be interpreted in this way.<sup>6</sup> The Preamble of the UN International Covenant on Economic, Social and Cultural Rights declares that rights enshrined in it “derive from the inherent dignity of the human person”. Some constitutional courts, such as the German Bundesverfassungsgericht<sup>7</sup> or the Constitutional Court of South-African<sup>8</sup> have recognized the relationship between the ‘existential minimum’ and human dignity in their decisions.

The basic human needs and human suffering approaches argue in favour of the indivisibility of human rights, placing economic, social and cultural rights on the same level as civil and political rights. The concept of indivisibility leads to an integrated protection of human rights. And not only in theory: the European Court of Human Rights, the Inter-

2 Cécile Fabre: *Social rights under the Constitution. Government and the decent life*. Oxford, Oxford University Press, 2000, pp. 12-22.

3 R. Jayakumar Nayar: Not Another Theory of Human Rights! In: Conor Gearty and Adam Tomkins (Eds.): *Understanding Human Rights*. London, Pinter, 1996, pp. 171-194.

4 Asbjorn Eide and Allan Rosas: Economic, Social and Cultural Rights: A Universal Challenge. in: Asbjorn Eide – Allan Rosas and Catarina Crause (Eds.): *Economic, Social and Cultural Rights* (2nd ed.). A Textbook. Dordrecht, Martinus Nijhoff, 2001, p. 7.

5 In particular, the Catholic social thought.

6 For example, you could raise the question, to what extent the right to dignity is compatible with living on the street?

7 First time In 1951, in the Welfare judgement.

8 See *Khosa or Mashava* cases.

American Court of Human Rights and the UN Human Rights Committee all provide indirect protection for social rights through the enforcement of civil and political rights. By invoking civil or political rights they protect social rights, for example through the vehicle of the right to life or the respect for private and family life and home they protect the right to health or the right to housing, finally, with the help of the right to property they protect the right to social security.<sup>9</sup>

A different approach emphasizes the primacy of civil and political rights, while promoting the realization of social rights at least at a minimum level as a precondition for the actual enjoyment of civil liberties. It is a benefit to all if those who have no or only negligible financial means are not exposed to political demagoguery or can at the very least express their political views and cast their votes. In this respect, H.L. Wilensky correctly claims that minimum income, food, health care, shelter and education guaranteed by the government are political rights.<sup>10</sup> T.H. Marshall introduced the concept of social citizenship underlining that membership in the political community of citizens presupposes social entitlements.<sup>11</sup>

Another line of thought justifying social rights centres on justice. J.W. Harris has come to the conclusion that it is not just to expect someone to respect the ownership of others when the society guaranteeing ownership as a basic institution does not provide the financial means to satisfy basic needs.<sup>12</sup> Jeremy Waldron analyses this thesis and agrees with it in part.<sup>13</sup> The existence of social rights legitimizes market relationships, while social rights provide legal entitlements for the redistribution of wealth to those whose interests are far less represented than other segments of the society, i.e. the poor and people in need. Such segments exist in every society, albeit in different proportions.

If we analyse the universality of economic, social and cultural rights from the point of view of the *history* of international law we cannot overestimate the importance of the Universal Declaration of Human Rights. The Declaration brought about two major developments. First, the notion of universality itself, human rights are not tied to citizenship, they are not dependent on upon the individual's membership in the nation state; second, the inclusion of economic, social and cultural rights into this universality.<sup>14</sup>

9 Look at *Courts and Legal enforcement of Economic, Social and Cultural Rights*. Comparative Experiences of Justiciability. Human Rights and Rule of Law Series, No. 2, International Commission of Jurists, Geneva, 2008, pp. 65-72.

10 H.L. Wilensky: *The Welfare State and Equality. Structural and Ideological Roots of Public Expenditure*. Berkeley, University of California Press, 1975, p. 1.

11 T.H. Marshall: *Class, Citizenship and Social Justice*. New York, Basic Books, 1965, p. 92 and following pp.

12 J.W. Harris: *Property and Justice*. Oxford, Clarendon Press, 1996, p. 285.

13 Jeremy Waldron: *Liberal Rights*. Cambridge, Cambridge University Press, 1993, pp. 225-250.

14 Daphne Barak-Erez and Aeyal M. Gross: Introduction: Do We Need Social Rights? Questions in the Era of Globalization, Privatization, and the Diminished Welfare State. In: Daphne Barak-Erez and Aeyal M. Gross (Eds.): *Exploring Social Rights*. Between Theory and Practice. Hart Publishing, Oxford and Portland, Oregon, 2007, pp. 2-3.

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What is the true relevance of universality for the community of states? It is interconnected with the universal acceptance of authority. Jack Donnelly correctly observes:

International legal universality, like functional universality, is contingent and relative. It depends on states deciding to treat the Universal Declaration or the Covenants as authoritative. Tomorrow, they may no longer accept or give as much weight to human rights as today. Today, however, they clearly have chosen, and continue to choose, human rights over competing conceptions of national and international legitimacy.<sup>15</sup>

If we take on a *formal legal* point of view, suffice to refer to the high number of states all over the world who ratified the universal instrument for the protection of social rights, the UN International Covenant on Economic, Social and Cultural Rights. Thus, from a formal legal point of view you can hardly question the universal acceptance and relevance of social rights. However, stepping into reality, the picture is hardly convincing. According to the findings of an ILO research, 80 percent of the world's population lack accesses to any kind of social security regardless of ratification by the state.<sup>16</sup>

Even within the realm of law you may be faced with the argument that interpretative *declarations and reservations* made by the ratifying states can question the true character of formal universal commitment. It is commonplace to say that the power of a state to attach declarations and reservations to multilateral treaties derives from its sovereignty, yet this sovereign right may hollow out the ratification entirely. This is a challenge also in the case of the ICESCR.

Certain declarations have a different relationship with universality. Namely, some declarations have raised the problem of limitations to sign the Covenant, since these were considered to be inconsistent with the universal character of the Covenant. These declarations were clearly politically motivated. These types of declarations attached to universal treaties by the socialist states at the time posed no worry over the universality the rights enshrined therein, yet there was disappointment since the GDR – not a member of the UN – could not sign the treaty.<sup>17</sup> The declarations of certain Arab states – Iraq, Libya, Syria, and Yemen – try to limit universality in a way, because of their 'no recognition policy' towards Israel emphasizing that their ratifications in no way imply the recognition of Israel and do not entail any obligation towards it. Other states, such as India or Indonesia –

15 Jack Donnelly: The Relative Universality of Human Rights. *Human Rights Quarterly* 29 (2007) p. 289.

16 To see the report look at Michael Cichon and Krzysztof Hagemeyer: *Social Security for All*. Investing in Global and Economic Development. A Consultation. Discussion Paper 16, Issue in Social Protection Series, ILO Social Security Development, Geneva, 2006.

17 See the Declaration of Hungary for example, also to see other quoted declarations and reservation: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en).

motivated by the preservation of the unity of their countries – declared that the right to self-determination laid down in Article 1 of the Covenant does not apply to sovereign independent states. The declaration made by Turkey also limits universality by stating that Turkey will implement the provisions of this Covenant only towards the states with which it has diplomatic relations.

This problem of hollowing out universality also appears in other cases. Certain states will commit to an obligation, however, under the prevailing conditions they opt out or do not consider the implementation of the given obligation to be expedient. That was the case with the declarations of Kenya, Madagascar and Zambia. In the second and third cases the respective states could not guarantee that primary education be compulsory and available to all for free due to their financial difficulties. But the most problematic reservations – as Manisuli Ssenyonja correctly emphasizes – are those that subject the Covenant or some core provisions of the same to the constitution or domestic law in general.<sup>18</sup> Pakistan for example subjected the Covenant to the constitution while Kuwait subjected it to the Kuwaiti law, prompting numerous objections. In other cases in line with the Vienna Convention on Law of Treaties, states use precise language making it possible to determine the scope of their reservations, as Norway or New-Zealand did. All in all, it is difficult to say that the obligations stemming from the Covenant are generally hollowed out: the international community has committed itself to implementing the Covenant, yet this can largely be traced back to the aspirational character of its text.

It is possible to argue against the universal acceptance and relevance of social rights by referring to the United States – a highly important member of the international community – which had failed to ratify the Covenant. Without delving into the reasons behind that behaviour I would like to emphasize that the American approach towards social rights is somewhat ambivalent. The US Supreme Court consistently refused to recognize the existence of social rights in the American constitutional system, claiming that these are not included into the Constitution, yet it applied fair trial guarantees towards social allowances granted by legislation. Furthermore, Louis Henkin rightly stated:

Let there be no doubts. The United States is now a welfare state. But the United States is not a welfare state by constitutional impulsion. Indeed, it became a welfare state in the face of powerful constitutional resistance... Jurisprudentially the United States is a welfare state by grace of Congress and of states... In theory the Congress could probably abolish the welfare state system at will, and states could probably end public education. But it is a theoretical theory. The welfare system and other rights granted by legislation (for example, laws against private

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18 Manisuli Ssenyonja: *Economic, Social and Cultural Rights in International Law*. Hart Publishing, Oxford and Portland, Oregon, 2009, p. 218.

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racial discrimination are so deeply imbedded as to have near-constitutional sturdiness...<sup>19</sup>

Consequently at least informally, a certain degree of acceptance exists.<sup>20</sup>

### 1.3 PROGRESSIVE REALIZATION

The essence of the international legal obligation to implement social rights is captured in Article 2 Paragraph 1 of the UN International Covenant on Economic, Social and Cultural Rights. According to this, each state party undertakes to take steps to the maximum of its available resources, with a view to progressively achieve the full realization of the rights recognized in the Covenant. Obviously, this is not an obligation of result. As Robert E. Robertson points out: ‘maximum’ refers to idealism and ‘available’ refers to reality.<sup>21</sup> The former provides teeth to human rights idealism, while the latter secures an escape route for the state, because it is not clear how much of the resources should be devoted to this purpose. We know from the text of Article 2 Paragraph 1 that state parties should provide resources individually and through international co-operation and assistance, yet the notion of resource is ambiguous, as the *travaux préparatoires* demonstrates.<sup>22</sup> Even more importantly, there is no guidance on how we could determine the extent of resources sufficient for compliance. Moreover, it is also uncertain how we are to understand progressive realization in time – with other words, what is the true meaning of not immediately? Thanks to the interpretative work carried out by the UN Committee on Economic, Social and Cultural Rights we know that a state should move expeditiously and effectively towards realization, arbitrary taken retrogressive measures as a rule are forbidden and the use of maximum of the resources cannot sacrifice other essential services.<sup>23</sup>

19 Louis Henkin: International Human Rights and Rights in the United States, in: Theodor Meron (ed.): *Human Rights in International Law* (1984) p. 43 quoted by Henry J. Steiner and Phillip Alston (Eds.) *International Human Rights in Context. Law, Politics, Morals* (2nd edn) Oxford, Oxford University Press, 2001, p. 251.

20 According to an American diplomat what is actually important for people in need is food, employment and health care and not formal guarantees. Philip Alston: U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy. *American Journal of International Law*, Vol. 84 (1990) No. 2, p. 375.

21 Robert E. Robertson: Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights. *Human Rights Quarterly*, Vol. 16, No. 4 (1994) p. 694.

22 Philip Alston and Gerard Quinn: The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social, and Cultural Rights. *Human Rights Quarterly*, Vol. 9, No. 1 (1987) pp. 156, 178-179.

23 General Comment No. 3 (Report of the Committee on Economic, Social and Cultural Rights, UN Doc. /1991/23).

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The UN Committee dealing supervising the implementation of the Covenant gives priority to the minimum core obligations arising from the protected rights. If the Covenant fails to provide at least a minimum set of obligations *vis-a-vis* each right, it loses its *raison d'être*. For compliance the state should provide evidence that it gave priority to fulfil the minimum set of obligations using the maximum of its resources to satisfy basic human needs and to provide basic services. The progressive realization is indicative of the recognition that full compliance cannot be reached immediately, the aim is much rather to achieve incremental improvements in universal access to basic goods and services – states the UN Economic, Social and Cultural Rights Committee. This wording provides enough room for the Committee to consider obstacles arising in a state. During the drafting of the Covenant the states declined to grant the supervisory body the competence to adopt legally binding conclusions fearing such a power of interpretation. It is possible to lower the standards, but the state must prove that it is justified to refer to such obstacles in case of all protected rights and that it used the maximum of its resources to fulfil its obligations. The Limburg Principles<sup>24</sup> and the Maastricht Guidelines,<sup>25</sup> as unofficial guidance on the implementation of internationally guaranteed social rights emphasize that progressive realization means to start implementation immediately and that progressivity does not extend to freedoms having social context such as the right to organize trade unions. In case of such rights the obligation of immediate and full realization applies.

There is an approach to the supervision of the international protection of social rights called “violation approach.” Its starting point is the efficiency of the norm is reinforced in case a violation is established – *even if no further legal consequences are applied*. I don't believe this thesis is correct, at least not if such conclusions reached in great number, since such practice undermines the belief in the implementation of the norm. This is the reason why the UN Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights is cautious in this respect. It is also important to emphasize that the violation approach proved to be very useful by providing an analytical tool on what to concentrate when the implementation reports of the states are under scrutiny. Audrey R. Chapman correctly identifies three major issues: the implementation of core minimum obligations, – remember it is the *raison d'être* of the regulation – discrimination issues, – these are easier targets – and finally government policy issues.<sup>26</sup> In the latter case analysis concentrates on the effects and side effects of government reforms in the field of social security, health system, etc. To draw correct conclusions it is important to rely on

24 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN Doc. E/CN4/1987/17.

25 The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights. *Human Rights Quarterly*, Vol. 18, No. 3 (1998).

26 Audrey R. Chapman: A “Violation Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*, Vol. 18, No. 1 (1996) p. 43.

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indicators and benchmarks. Two types of the same can be identified, the first group reflects the capability of the state to perform, the second the achievements in light of capability. The first group mainly includes statistical data, the second should contain data reflecting the change in the social settings of those who live at bottom of the social ladder, data reflecting that the government has given priority to the implementation of its international obligation to protect social rights, and data reflecting compliance with indicators of a specific social right.<sup>27</sup> Consequently, a universal methodology to analyse state reports on the implementation of social rights exists. Yet this does not mean that the scale is actually universal. The scale must be adapted from ratifying state to ratifying state. As far as freedom of opinion and other civil and political rights are concerned, the same standards may be applied from Sweden to Zimbabwe, but in case of social rights one cannot expect the same level of implementation because expectations should reflect individual economic development and the actual amount of 'maximum resources'.

Implementation does not make it mandatory to enshrine social rights into the constitution, but as the UN Committee stated in its general commentary, it is highly important to have the necessary domestic framework legislation in place. Such framework legislation may serve as the main vehicle for the national implementation strategy by setting forth goals, the timeframe, the ways and means, institutional responsibility and if possible, legal remedies. In practice, however, governments are frequently reluctant to enact legislation setting out clear goals and a timeframe, fearing the consequences of such an express commitment.

The Covenant has not been designed to be self-executing. The implementation of certain internationally protected social rights, such as the right to social and health assistance as it is enshrined in Article 13 Paragraph 1 of the European Social Charter, and as it was clarified by the European Committee of Social Rights – requires an enforceable procedural right of the individual to turn to an independent body or court.<sup>28</sup> It is also important to note that this does not mean that the individual case could directly be based on the text of the Charter itself. It suffices if the case is based on domestic legislation implementing the above mentioned right.<sup>29</sup> The recognition of the direct effect of the articles of the European Social Charter is a slow process, even in the Netherlands – where domestic legal culture accepts the justiciability of social rights – this has taken a long time.<sup>30</sup> As far as the UN Covenant is concerned, reluctance is greater, even in cases of freedom type obligations.

27 Asbjorn Eide: The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights. In: Asbjorn Eide, Catarina Krause and Allan Rosas (Eds.): *Economic, Social and Cultural Rights. A Textbook*. Dordrecht, Martinus Nijhoff, 2001, p. 531. old.

28 *Case Law on the European Social Charter, Supplement No. 2*, p. 25.

29 Martin Scheinin: Economic and social rights as legal rights. In: Asbjorn Eide, Catarina Krause and Allan Rosas (Eds.): *Economic, Social and Cultural Rights. A Textbook*. Dordrecht, Martinus Nijhoff, 2001, p. 44.

30 Aalt Willem Heringa: Social Rights in the Dutch legal order. Paper presented at the *Conference on Justiciability of Social Rights*. Strasbourg, 12-23 November, 1991, pp. 4-5.

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That is the reason why Matthew Craven is correct in emphasizing that the main function of the domestic application of the Covenant is to contribute to the interpretation and development of open constitutional and statutory regulation.<sup>31</sup>

The international enforcement mechanism of the Covenant was reinforced by the Optional Protocol allowing individual, group or inter-state communications indicating the violation of the Covenant. The Optional Protocol has entered into force; what's more, the first decision on merits was rendered in 2015.<sup>32</sup> All's well that ends well – but the process of preparing the Optional Protocol has not been an easy one. It was not by chance that many states insisted on a lengthy discussion regarding the question what criteria should be used in addressing the issue of resource allocation.<sup>33</sup>

## 1.4 IN TIME OF CRISES, THE LETTER

The authors of the Covenant probably thought, if a state ratified the treaty it was a clear sign that it possessed the necessary resources for its implementation, or at least it had an optimistic outlook that it will have sufficient resources. Moreover, they believed in the idea of the social state, a state that “plays a proactive role in distributing resource sand regulating markets to ensure the material well-being and dignity of its population at large.”<sup>34</sup> In the middle of the golden sixties of the last century, under Keynesian economic policy, when permanent economic development seemed to last forever, there was reason to believe in a step by step implementation. Today, thanks to monetarist consensus and mainly because of the effects of globalization the *Zeitgeist* is different, the once enabling social environment is now discouraging, and more and more questions are raised about the ability of the state to properly secure social rights. In his analysis, Danilo Türk, special *rapporteur* of the UN, raises the question whether the attitude of the states towards their obligation to implement social rights is adequate and whether an increasing number of states regard themselves to be less able to comply with their respective obligations? His conclusion is not a recommendation to increase relevant resources – he is a realist –, instead, he advocates for a tolerance towards *de facto* solutions, such as the existence of

31 Matthew Craven: The Domestic Application of the International Covenant on Economic, Social and Cultural Rights. *Netherlands International Law Review*, Vol. XL, No. 3 (1993) p. 364.

32 Committee on Economic, Social and Cultural Rights, Communication No. 2/2004.

33 Malcolm Langford: Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. *Nordisk Tidsskrift for Menneskerettigheter*, Vol. 27, No. 1 (2009) p. 14.

34 Joe Wills: The world turned upside down? Neo-liberalism, socioeconomic rights, and hegemony. *Leiden Journal of International Law*, Vol. 27, No. 1 (2014) p. 17.

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the grey or black labour market.<sup>35</sup> The shift in the intellectual context of economic and social rights led to certain conceptual changes. The holders of these rights are more and more regarded as market citizens “whose rights consist of opportunity to secure goods in the marketplace rather than have them as legal entitlements *vis-à-vis* the state.”<sup>36</sup>

This was the social rights landscape before the 2008 economic and financial crisis erupted. As a consequence of the crisis fiscal adjustment policies were introduced, austerity measures were taken, public social spending was cut back in the fields of healthcare, education, and social benefits, labour protection was diminished, restrictive pension reforms took place in several countries. Those steps had a detrimental effect on the protection of economic, social and cultural rights. The right to work, the right to an adequate standard of living, the right to social security and social protection, rights to shelter, food and water and right to education suffered austerity related setbacks.<sup>37</sup>

The response to this challenge to the guarantees under the Covenant came in the form of a Letter dated 16 May 2012 written by the Chairperson of the UN Committee to the state parties.<sup>38</sup> The dilemma the Committee faced was the following, “economic and financial crises and a lack of growth impede the progressive realization,” “some adjustments...are inevitable,” but state parties should not breach their obligations: how is this possible?

Article 4 of the Covenant – besides the limitations inherent in the scarcity of resources (Art. 2 Para. 1) – provides some room for further limitations. Any “limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society” are acceptable. This was obviously the starting point for Committee. But another starting point was even more important, namely the recognition of the gravity, the exceptional nature of the economic problems, and that state parties had to adopt difficult, complex and painful austerity measures. Consequently, the Committee had to reflect the difficulties and lower the standards generally employed to evaluate the performance of those state parties which were facing ‘ordinary’ – or as Ben T.C. Warwick put it – ‘business as usual’ troubles. As he points out, standards for ordinary difficulties were elaborated in detail in the General Comment on the right to social security setting six preconditions: reasonable justification, carefully examined alternatives, the genuine participation of the affected groups, the

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35 *The Realization of Economic, Social and Cultural Rights*. Second Progress Report prepared by Danilo Türk, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1991, pp. 17, 56.

36 Joe Wills: op. cit. p. 31.

37 CommDH/IssuePaper(2013)2 04 December 2013 *Safeguarding human rights in times of economic crisis*. Issue paper published by the Council of Europe Commissioner for Human Rights. pp. 14-16.

38 CESCR/48th/SP MAB/SW.

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exclusion of direct or indirect discrimination, securing the essential minimum level, the existence of independent review of measures.<sup>39</sup>

The Letter introduces four criteria: the temporary, necessary and proportionate character of the relevant measures, the exclusion of discrimination, and securing the minimum core. Consequently, the Committee abandoned the reasonable justification, which is understandable, since the justification was the gravity of the crisis. As far as the carefully examined alternatives are concerned this was simplified to the necessary and proportionate character of measures taken. Why did this amount to a simplification? It was a simplification because the careful examination of alternatives includes a thorough investigation of all alternatives, but in case of the latter, only two criteria must be substantiated. Moreover, these two criteria must only be proven with respect to the preferred measure. The genuine inclusion of affected groups into decision-making and the existence of an independent review of measures were clearly abandoned. Perhaps the urgent nature of decision-making can justify such a turn.

The temporary nature of such measures is evident. The necessary and proportionate character as well as the criteria of non-discrimination criteria serve here as the classical points of judicial review. What is left is the crown jewel of the Committee, the minimum essential core of obligations. *Ceterum censeo* the Letter highlights the importance of international cooperation for the realization of economic, social and cultural rights, emphasizing that state parties should respect their obligation when taking decisions on official development assistance, including in the framework of international financial or regional integration organizations.

Fifty years on, the Covenant seems to be universally authoritative on the protection of economic, social and cultural rights, although nobody can deny that in many parts of the world grave problems persist in the access to the most basic services. As a result of the thorough conceptual work of the UN Committee on Economic, Social and Cultural Rights we now have a universal scale for evaluating the level of compliance even in a time of worldwide economic and financial crisis. The introduction of the complaint system hardly changes the essence of supervision which remains guidance and constructive dialogue. This seems to be in harmony with the main approach of the New Haven School of international law, according to which international law should be better understood as a decision-making process where permanently new options must be made rather than as a set of rules simply waiting for implementation.<sup>40</sup>

39 Ben T.C. Warwick: Socio-economic rights during economic crises: a changed approach to non-retrogression. *International and Comparative Law Quarterly*, Vol. 65, No. 1 (2016) pp. 253, 258.

40 See Stefan Oeter: International Law and General Systems Theory. *German Yearbook of International Law*, Vol. 44 (2001) Berlin, Duncker und Humblot, 2002, p. 83.