

**DRAFT GENERAL COMMENT ON SCIENCE AND ECONOMIC, SOCIAL & CULTURAL RIGHTS**

**SUBMISSION TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (FEBRUARY 2020)**

**Summary**

*The Draft General Comment, while very welcome, could be improved in respect of its handling of several of the ICESCR general obligations. The changes suggested, while modest, would improve the consistency between this Draft General Comment and the Committee’s recent approaches to the general obligations. Besides consistency, the suggestions below are also aimed at ensuring the Draft is clear and actionable for States and civil society. The analysis and recommendations made are grounded in and explained further in the more extended academic writing that is cited.*

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**Introduction**

1. A Draft General Comment on Science is a very welcome development. However, as the general obligations of the ICESCR continue to develop incrementally it is important that there is specific attention to them. In particular it is important that the content of the Draft does not confuse or water down the content of any of these general obligations. This submission addresses aspects of the ICESCR general obligations and highlights some terminological and conceptual issues that should be addressed in order to maintain coherence across the CESCR’s work. In due course, a comprehensive and authoritative restatement of the general obligations in a dedicated General Comment would be welcome in order to provide a single point of reference and avoid such inconsistencies arising.

**Non-Retrogression**

1. It is significant positive step that the Draft includes examples of possible retrogressive measures. This has been a deficiency in many previous General Comments, and has impeded the development of clarity surrounding, and use of, the doctrine of non-retrogression.[[1]](#footnote-1) However, there are a number of other changes made to the expression of the doctrine and it is not clear that they are deliberate or will be sustained through other of the Committee’s work.
2. The Draft General Comment notes that retrogressive measures ‘[i]n principle … should be avoided’[[2]](#footnote-2) and in doing so partially borrows the language of General Comment 22 on Sexual and Reproductive Health.[[3]](#footnote-3) However, the Draft adds ‘in principle’ which appears to water down the requirement upon States. A contrast can be made with stronger language in the Letter to States on the Crisis which ‘underlined’ that States ‘should avoid at all times taking decisions which might lead to the denial or infringement of economic, social and cultural rights’.[[4]](#footnote-4) The vast majority of other General Comments use much language noting the ‘strong presumption of impermissibility of any retrogressive measures’.[[5]](#footnote-5)
3. Retrogression has ordinarily been considered by the CESCR to be *prima facie* impermissible with there being a possibility of the retrogressive measure being justified (and therefore permissible) in some limited circumstances. The Draft General Comment does not (clearly) adopt this structure. While such a move away from the complexity that is added by the presumption/ justification structure would be welcome,[[6]](#footnote-6) it is important for clarity and the effectiveness of the doctrine that it occurs explicitly and is a conscious change that will continue in future normative work of the Committee.
4. In ordinary expressions of the prohibition of retrogression, the Committee has underscored the State’s responsibility for proving that a *prima facie* impermissible retrogressive measure is in fact permissible. The terms often used are; ‘the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified’.[[7]](#footnote-7) There is currently no note to this effect in the Draft, leaving open the question of who is required to show (non-)retrogression.
5. Finally, and most significantly, the justificatory criteria that the Draft General Comment adopts are those that were forged in the Committee’s Letter to States on the Crisis.[[8]](#footnote-8) These criteria have a strong emergency character and adopt derogation-style ideas that are alien to the ICESCR (inevitable, temporary, necessary and proportionate).[[9]](#footnote-9) These criteria offer significantly more flexibility to States and assume that retrogression occurs solely or primarily during periods of crisis (when it is an everyday phenomenon). They also frame retrogression in terms of balancing rights against other external priorities in a manner that is both difficult to do in practice and inappropriate in principle.[[10]](#footnote-10) Instead, the Draft should use sets of justificatory criteria such as those seen in General Comments 18[[11]](#footnote-11) or 21,[[12]](#footnote-12) or if more justificatory flexibility for States if deemed necessary then those in General Comment 19.[[13]](#footnote-13)

**Minimum Core**

1. The approach to the minimum core and resource constraints in the Draft returns the CESCR to an earlier stage in its normative development. In the Draft it is noted that limited resources should directed as a priority to the realisation of the minimum core.[[14]](#footnote-14) This is the approach taken in early General Comments.[[15]](#footnote-15) However, more recently, the Committee has noted that ‘States have a core obligation … even in times of natural or other disasters’[[16]](#footnote-16) (i.e. regardless of resource constraints). The idea that States’ obligations continued even in times of disaster was not a new one, the Committee having made this clear in its earliest outline of the obligations.[[17]](#footnote-17) However, the Committee’s insistence that disasters (and their assumed impact upon resources) do not negate obligations was only more recently emphasised alongside the Core obligation.[[18]](#footnote-18) Around this same period of time, the Committee made its shift in approach explicit when it categorically noted that ‘the minimum core content would not be subject to the notions of progressive realization and resource availability’ and that ‘the strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations’.[[19]](#footnote-19) Given the importance of the minimum core as an absolute baseline, this exclusion of resource-based justifications is entirely appropriate and should be maintained in the Draft. Practically, in the face of national resource constraints (which cannot be met by reprioritising non-rights or non-core expenditures in order to meet the core), States still have open the possibility of seeking international assistance.
2. In many General Comments the Committee has included, as part of the core content of a right, a provision to avoid damaging another right.[[20]](#footnote-20) This can be seen in, for example, the Committee’s statement that a core obligation in relation to the right to intellectual property, requires States to ‘strike an adequate balance between the effective protection of the moral and material interests of authors and States parties’ obligations in relation to the rights to food, health and education’.[[21]](#footnote-21) Such an acknowledgement would be welcome as part of the core obligations of the Draft General Comment. In the scientific context, there are frequently interactions between scientific ethical frameworks and the rights to food, health, water, education, social security and housing.

**All Appropriate Means**

1. In listing the measures that are part of ‘all appropriate means’ the Draft General Comment lists only legislative and budgetary measures.[[22]](#footnote-22) This is in contrast to the fuller, and more satisfactory, list provided in the Committee’s most recent General Comment on work. There, all appropriate measures are listed to include ‘legislation [and] provision of judicial and other effective remedies that include, but are not limited to, administrative, financial, educational and social measures’.[[23]](#footnote-23) Absent a clear rationale for the variance between the right to work and right to science contexts (which is not apparent), there are good reasons for promoting consistency across the CESCR’s work and adopting the fuller list of ‘appropriate means’ in the Draft General Comment.

**Limitations**

1. The normative approach to limitations in the Draft maps closely the approach in the General Comment on cultural life.[[24]](#footnote-24) This approach is successful and appropriate given the parallels between, and shared ICESCR article of, the two rights. However, two minor amendments could further improve the approach taken.
2. The first is the need for the provision of an additional note that limitations cannot be of a scale or scope that defeats rights provision. In General Comment 21, this is provided in the two surrounding paragraphs to emphasise that cultural diversity and the right to cultural life cannot be used to defeat or destroy rights.[[25]](#footnote-25) The Draft General Comment currently lacks such an explicit explanation.[[26]](#footnote-26) While arguably (and legally) such ideas are captured in the provision on ‘the general welfare in a democratic society’, further clarity would be welcome.
3. The second is the lack of acknowledgement of the need to consider non-ESCR rights when assessing limitations. In General Comment 21, the Committee sets out that limitations to cultural rights must also take account of the (civil and political rights), ‘to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association’.[[27]](#footnote-27) Such an acknowledgement is missing from the Draft General Comment, but is arguably just as relevant.

**Summary of Suggested Changes**

1. Make clear the strong presumption against any retrogressive measures.
2. Make clear that retrogression is *prima facie* impermissible under the ICESCR and that the justificatory burden rests with the State.
3. Modify the derogations approach in the Draft General Comment to return to the more stringent justificatory criteria of previous General Comments.
4. Change the approach to the minimum core to disallow resource constraints as an excuse for not meeting core obligations.
5. Add to the core content the obligation not to permit scientific activity or approaches that damage other rights.
6. Expand the range of ‘all appropriate means’ to include administrative, financial, educational and social measures.
7. Note that limitations cannot be used to defeat rights.
8. Add non-ESCR rights as relevant to assessments of limitations.
1. Aoife Nolan, ‘Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights (Hart 2013) 47. [↑](#footnote-ref-1)
2. CESCR, Draft General Comment on Science and Economic and Social Rights (2020), para 32. [↑](#footnote-ref-2)
3. CESCR, General Comment 22 (2016), para 38. [↑](#footnote-ref-3)
4. Chairperson of the CESCR, ‘Letter Dated 16 May 2012’ (2012) UN Doc HRC/NONE/2012/76. [↑](#footnote-ref-4)
5. CESCR, General Comment 13 (1999), para 45. [↑](#footnote-ref-5)
6. Ben TC Warwick, ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights?’ (2019) 19 Human Rights Law Review 467, 489. [↑](#footnote-ref-6)
7. CESCR, General Comment 13 (1999), para 45. [↑](#footnote-ref-7)
8. Chairperson of the CESCR, ‘Letter Dated 16 May 2012’ (2012) UN Doc HRC/NONE/2012/76. [↑](#footnote-ref-8)
9. For a full critique of this approach see Ben TC Warwick, ‘Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression’ (2016) 65(1) International and Comparative Law Quarterly 249. [↑](#footnote-ref-9)
10. Ben TC Warwick, ‘Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression’ (2016) 65(1) International and Comparative Law Quarterly 249, 259-261. [↑](#footnote-ref-10)
11. CESCR, General Comment 18 (2006), para 21. [↑](#footnote-ref-11)
12. CESCR, General Comment 21 (2009), para 54. [↑](#footnote-ref-12)
13. CESCR, General Comment 19 (2008), para 42. [↑](#footnote-ref-13)
14. CESCR, Draft General Comment on Science and Economic and Social Rights (2020), para 54. [↑](#footnote-ref-14)
15. CESCR, General Comment 3 (1990), para 10. [↑](#footnote-ref-15)
16. CESCR, General Comment 12 (1999), para 6. [↑](#footnote-ref-16)
17. CESCR, General Comment 3 (1990), para 12. [↑](#footnote-ref-17)
18. CESCR, ‘Report on the Eighteenth and Nineteenth Sessions’ (UN Doc E/1999/22), para 499(b). [↑](#footnote-ref-18)
19. CESCR, General Comment 21 (2009), para 59. [↑](#footnote-ref-19)
20. Ben TC Warwick, ‘Social Minima at the UN Treaty Bodies: Minimal Consistency?’ in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Hart 2019) 217. [↑](#footnote-ref-20)
21. CESCR, General Comment 17 (2006), para 39. [↑](#footnote-ref-21)
22. CESCR, Draft General Comment on Science and Economic and Social Rights (2020), para 31. [↑](#footnote-ref-22)
23. CESCR, General Comment 23 (2016), para 50. [↑](#footnote-ref-23)
24. CESCR, General Comment 21 (2009), para 19. [↑](#footnote-ref-24)
25. CESCR, General Comment 21 (2009), paras 18 & 20. [↑](#footnote-ref-25)
26. CESCR, Draft General Comment on Science and Economic and Social Rights (2020), para 30. [↑](#footnote-ref-26)
27. CESCR, General Comment 21 (2009), para 19. [↑](#footnote-ref-27)