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Critical Analysis of the Applicability of Economic, Social and Cultural Rights in Armed Conflicts

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ABSTRACT

ESC rights are those that compel the state to take into account the sociocultural and economic well-being of its inhabitants and other people who live on its territory. These rights also call for the creation of certain favourable conditions, which might be challenging to think of during times of armed conflict. This is the reason that the question of whether or not ESC Rights should be implemented in armed conflict has generated a lot of debate in recent years.

There has been discussion over whether or not human rights law still applies during an armed war. This paper aims to explore the idea of ESC rights, as well as how it functions during armed conflict and its component parts. In addition to describing the flaws in the existing legal framework and offering suggestions for how to fix them, the study attempts to investigate the likely restrictions and exceptions to the ESC rights while suggesting improvements to the existing legal framework so that ESC Rights can be successfully applied during armed conflicts just like it can be during peace times.

Keywords: *International Humanitarian Law, ESC Rights, Human Rights, Armed Conflict.*

I. INTRODUCTION

The first thing we need to understand is the concept and components of right and what it is. In the common sense, the word "right" can mean many different things, but it is most often used to refer to the minimal level of conduct that is appropriate in a certain situation. It alludes to the bare minimum of conduct that the law will tolerate. Such a permitted activity is considered to be one's legal right.

Now coming to the point of what ESC rights are. Social and economic rights include employment and workers' rights, social security, health, education, access to food and water, adequate accommodation, a safe environment, and culture. (ESCR).

Economic and social rights can and should be made a fundamental component of post-conflict

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settlements in order to establish a durable peace based on the rule of law. The UN Committee on Economic, Social, and Cultural Rights (CESCR) asserts that it would also help internally displaced persons and those who fled a state during a conflict to return home.

Nevertheless, we must acknowledge that armed conflict, catastrophes such as natural disasters and other crises, as well as economic difficulties, may make it difficult or impossible for a state to maintain a civil society. Before states are permitted to limit or deviate from any ESC rights, they must adhere to clear norms designed to prevent arbitrariness in these areas. This is so that States may "take actions.., to the maximum extent of its resources, with a view to gradually attaining the full fulfillment of the rights recognised in the ICESCR by all relevant methods," as stated in the requirement.

This paper is an attempt to provide a critical discussion on the existence of ESC rights and their enforcement mechanism, whether they apply in a scenario of armed conflict or not, and if they do, what their limitations are, while painting a picture of reality and highlighting the flaws in the existing mechanism and shedding light on the possible solutions to such flaws.

II. FUNCTIONS OF ESC RIGHTS DURING ARMED CONFLICTS

Contrary to research on the relevance of civil and political rights in armed conflict and other violent circumstances, globally recognised economic, social, and cultural rights have received less attention.²

As you are talking about ESC rights, the first thought that comes into your brain is probably something along the lines of "where did we get those?". The Universal Declaration of Human Rights (UDHR) was approved by the General Assembly of the United Nations in 1948. This document outlines the fundamental civil, cultural, economic, political, and social rights that are guaranteed to all individuals. The so-called International Bill of Rights is comprised of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was first ratified as a legal right in 1966. This, along with a number of other important human rights treaties and regional organisations, is also present. When this article is being written, more than 160 states have already ratified the ICESCR. In addition, the domestic laws and national constitutions of a number of governments provide explicit support for ESCR.

(A) Do ESC rights function during Armed conflict ?

ESC rights are those rights that needs consideration of state towards the economic and socio

² Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014) 4

cultural wellbeing of citizens and other people residing in the territory of the state and it requires creation of certain favorable circumstances which may be difficult to think of at times of hostilities. This is the reason there has been a lot of discussion in recent years over whether or not human rights laws should be applied to armed situations.³

Whether or not human rights law still holds true in the midst of an armed conflict is itself a point where debate has existed. ICJ stated that,⁴ although human rights law does not fully disappear, it is in fact supplanted by international humanitarian law because the word *Lex Specialis* was not used to expressly establish that human rights law applied. (IHL). The more current Advisory Opinion on the Wall, the views of UN human rights authorities, and,⁵

Human rights law is not entirely displaced and that it can sometimes be directly applied in armed conflict situations.⁶ There could still be certain locations where this approach is opposed.⁷ In this case, however, those who are resisting are advised to give up because they are in a precarious situation and are aware that armed conflict falls under the scope of human rights law.

The start of an armed conflict does not provide one party the exclusive authority to withdraw or suspend the implementation of treaty provisions related to the protection of human people, unless specifically provided for in the treaty.⁸

III. LEGAL FRAMEWORK OF ESC RIGHTS DURING ARMED CONFLICTS

(A) Responsibilities of the state

There are three degrees of responsibilities placed on States by ESC rights, just like all other human rights: the obligations to respect, to protect, and to fulfill.⁹ In other words, Governments must abstain from interfering with the right's enjoyment, stop others from doing so, and take

³ Draper, G.I., 1971. Human rights and the law of war. *Va. J. Int'l L.*, 12, p.326.

⁴ High Commissioner for Refugees UN, "Refworld | Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion" (*Refworld*) <[https://www.refworld.org/cases,ICJ,4b2913d62.html%20\[accessed%2030%20March%202023\]](https://www.refworld.org/cases,ICJ,4b2913d62.html%20[accessed%2030%20March%202023])>

⁵ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) para. 3; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69.

⁶ In the words of the Court "some rights may be exclusively matters of international humanitarian law."

⁷ See for example some of the arguments raised in M. Dennis, "ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of human rights treaties extraterritorially in times of armed conflict and military occupation," *American Journal of International Law*, Vol. 99, 2005, p. 119;

⁸ First Report on the Impact of Armed Wars on Treaties, Ian Brownlie, Special Rapporteur (Geneva: International Law Commission. Fifty-seventh session, 2005).

⁹ 'Mohammad Nazmuzzaman Bhuiyan "Protection of Education in Armed Conflict Situations: Asia-Pacific in Focus." *Asia-Pacific Perspectives on International Humanitarian Law*. Suzannah Linton et. al. (eds.) Cambridge: Cambridge University Press, 2020 .

reasonable steps to ensure its full realization.¹⁰

As stated in ICESCR Article 2, states have a duty to use all reasonable endeavors and all appropriate measures to further the realization of the Covenant rights. As a consequence, it might be claimed that the Covenant does not mandate the prompt implementation of economic and social rights after a war and that insufficient funding is available to do so. In response, it should be noted that Article 2 "imposes an obligation to work as promptly and effectively as possible" in the direction of the Covenant's objective, as stated by the CESCR in General Comment No. 3, para. Any intentionally regressive policies "would demand the most cautious scrutiny," it was added. This is in accordance with the way the CESCR states the behaviour requirement (as opposed to the obligation of result).¹¹

(B) Progressive realization and principle of non retrogression

States are obligated to gradually realize these rights in their entirety over time. Governments are immediately obligated, regardless of the availability of resources, to take the necessary actions to achieve a continuous and sustainable improvement in the enjoyment of these rights throughout time.¹²

The obligation not to regress is the "natural consequence" of the duty to achieve progress. According to the generally acknowledged Limburg Principles, the ICESCR is breached whenever a state "deliberately retards or halts the gradual realization of a right, unless it is operating within a restriction authorized by the Covenant or owing to a lack of resources." This is known as the non-retrogression theory. Retrogression may be normative (or de jure) when legal rights are removed. It may also be empirical (or de facto) when there is a decline in the actual enjoyment of rights.¹³

(C) 'Maximum Available Resources' doctrine

The need to "take action" in Article 2(1) is neither qualified or restricted in and of itself. Yet, it is acknowledged that resource limits may provide a legitimate constraint on the quantity or kinds of actions conducted. Although this does not "alone excuse inactivity," the "maximum available resources" theory seems to be a key exception to the state's need to take efforts to

¹⁰ ICRC, 'Framework for Access to Education' accessed 1 April 2023.

¹¹ THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS POST-CONFLICT by Professor Christine Chinkin

¹² Partnership, I. B. (2014, September 22). *Budgeting for Human Rights: Progressive Realization*. International Budget Partnership. <https://internationalbudget.org/budgeting-for-human-rights-progressive-realization/>

¹³ Nolan A, Lusiani NJ and Curtis C, "Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression In Economic and Social Rights" in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014).

gradually actualize ESCRs.¹⁴

Governments have the ability to adopt what they deem to be the "best acceptable policies" and "allocate resources properly" in order to achieve human rights. Hence, governments have a "broad degree of discretion" in determining the "amount of resources to be set aside to facilitate the realization of rights." The responsibility does not necessitate that a state commit all of its available resources. Nor does it compel it to "commit resources it lacks."¹⁵

(D) Minimum obligation and reasonableness

Within the activities of the CESCR, minimal core and reasonableness as cross-cutting norms in the field of ESCR may find their maximum expression. Although neither notion is mentioned in the ICESCR, both have been created by the Committee as interpretative tools to aid in determining whether or not a state has met its duties under the ICESCR.¹⁶

Following the publication of General Comment No. 3 in 1990, the CESCR started the process of creating its own interpretation of the minimum core notion. The essential structure requirement (ESCR) provides specificity and significant normative significance to the ESCR, which are often described in words that are rather general. The concept addresses obligations owed by the state, despite the fact that it works to increase the normative essence of rights. As a consequence of this, the lines delineating the responsibilities of the state have become much more distinct. A right can be realized to varying degrees, according to the minimal core notion, and a certain minimum level of manifestation will always take precedence over a more thorough embodiment of the right. This is because a certain minimum level of manifestation is the "bare minimum" required for a right to be considered realized. A few essential components of minimum core, at least as defined by the CESCR, include the duties to act in accordance with the principles of equality and non-discrimination; bear a heavy burden of proof and justify non-allocation of resources to meet minimum obligations; develop a legal and policy framework for the realization of rights; and give priority to those who are the most vulnerable.¹⁷

For analyzing State compliance under the State reporting process and in adjudicative

¹⁴ "Research Handbook on Economic, Social and Cultural Rights as Human Rights" (*Research Handbook on Economic, Social and Cultural Rights as Human Rights*) <<https://www.e-elgar.com/shop/gbp/research-handbook-on-economic-social-and-cultural-rights-as-human-rights-9781788974165.html>>

¹⁵ Research Handbook on Economic, Social and Cultural Rights as Human Rights. (n.d.). Research Handbook on Economic, Social and Cultural Rights as Human Rights. <https://www.e-elgar.com/shop/gbp/research-handbook-on-economic-social-and-cultural-rights-as-human-rights-9781788974165.html>

¹⁶ Ben T.C. Warwick, The Minimum Core's Place in Social Rights: Fixity vs Dynamism (Workshop Paper ILS Onati, 2017) 1.

¹⁷ Yeshanew SA, "Yeshanew, S A - African Human Rights Law Journal (AHLJ)" (*Yeshanew, S A - African Human Rights Law Journal (AHLJ)*) <<https://www.ahrlj.up.ac.za/yeshanew-sa-2011>>

circumstances under the OP-ICESCR, the CESCR has also applied the minimal core level of review.¹⁸

Each State party is obligated to make sure that each right is upheld to at least the bare minimum required level. The CESCR states that A State cannot argue that a deficiency in resources is to blame why it is unable to fulfill its fundamental obligations unless it can "show that every attempt has been made to deploy all resources at its disposal in an endeavor to satisfy, as a matter of priority, those minimum requirements." The CESCR has also emphasized that there must be any derogations from and no gradual application of fundamental principles.¹⁹

Many national authorities, like Canada and South Africa, have used reasonableness as a review criteria. The Canadian case²⁰ regarding interpretation services for deaf persons in the context of health care, the court ruled that the principle of equality imposes duties on government actors to spend resources to guarantee that disadvantaged groups may fully use public benefits. It was determined that the government failed to provide a valid cause for refusing medical interpretation services. The court ruled that the relevant regulation in this instance be postponed for six months, allowing the government to devise a suitable alternative, adding that "the government had a variety of choices open to it."²¹

The Constitution of South Africa was written in such a way that it incorporates the reasonableness requirements into its own words. In a number of high-profile cases, the Constitutional Court of the country has unequivocally ruled against the core approach. Irene Grootboom, et al. v. Government of South Africa Republic, petitioners, who were forced by deplorable living conditions to unlawfully occupy property, were violently ejected and, in despair, settled on a sports pitch and in a park. The case is known as Government of South Africa Republic v. Irene Grootboom, et al. The Constitutional Court found that there was a violation of the right to sufficient housing, which is outlined in Section 26 of the Constitution (which deals with the right to have access to suitable housing). This judgment, which established reasonableness as the review standard for state compliance with constitutionally protected ESCRs, was held to be the primary responsibility of the state since it established reasonableness as the evaluation criterion. This criterion of reasonableness as stated by the Court requires, among other things, considerable programming. In order to fulfill short-

¹⁸ "Trujillo Calero v. Ecuador, Decision, 42278 (CESCR, May. 17, 2015)" (*Trujillo Calero v. Ecuador, Decision, 42278 (CESCR, May. 17, 2015)*) <http://www.worldcourts.com/cescr/eng/decisions/2015.05.17_Trujillo_Calero_v_Ecuador.htm>

¹⁹ CESCR, G. Comment No.3(1990).

²⁰ "Eldridge v. British Columbia (Attorney General) - SCC Cases" (*Eldridge v. British Columbia (Attorney General) - SCC Cases*, March 31, 2023) <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do>>

²¹ Ibid.

medium-, and long-term needs while giving priority to those who are the most vulnerable and economically disadvantaged on the basis of the criteria of reasonableness, the Court came to the conclusion that the current state housing system did not meet the threshold of reasonableness because it was irrational.

The fundamental criticism of the reasonableness criteria, often in regard to the minimal core, is that it is too lenient, which lends normative substance to rights, is that the reasonableness criterion fails to grant such content. substantial substance to ESCR, making it extremely subjective in nature.²² Currie has argued as much. "it is documented that" "Reasonableness is only a relational criterion - aims weighed against methods. It is not an absolute norm. In this sense, socioeconomic rights are not a right, but rather a duty to offer something particular. access, for instance, a roof over one's head or antiretroviral medication, but only after assessing the rationality in the context of a choice to supply or not provide these items."²³

(E) Combination approach

In the context of South Africa, it has been suggested that if the South African court utilized the reasonableness test in conjunction with the minimum core approach, the aforementioned primary criticism regarding content would be addressed, and socioeconomic rights would be realized more effectively. Minimal core review might be used to evaluate particular rights content, and then reasonableness could be used to assess a state's compliance with its human rights commitments.²⁴

Take into consideration the fact that the overarching concepts of reasonableness and essential core make up a very small fraction of what transforms abstract legalese into concrete rights. It's possible that a purely strategic approach to reviewing criteria won't be very helpful. It is necessary to fulfill a number of other requirements before the transformative potential of ESCR can be fully realized. These factors include respect for the rule of law, political will, judicial independence, and the momentum of active civil society organizations and social movements.

IV. LIMITATIONS AND DEROGATIONS OF ESC RIGHTS

Some scholars feel that although it is not clearly stated, the right to derogate exists in every

²² Pieterse, Marius. (2007). Eating Socio Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited. *Human Rights Quarterly*. 29. 796-822. 10.1353/hrq.2007.0032.

²³ Currie, Iain., and Johan. De Waal. *The Bill of Rights Handbook* / by Iain Currie, Johan de Waal. 6th ed. Cape Town: Juta, 2013. Print.

²⁴ "Poverty and Fundamental Rights" (*Poverty and Fundamental Rights - Hardcover - David Bilchitz - Oxford University Press*) <<https://global.oup.com/academic/product/poverty-and-fundamental-rights-9780199204915>>

IHRL system and should be recognised as such. Nevertheless, how widespread is this derogation? What degree of survivability during a war is guaranteed if not derogated?²⁵

There are two grounds for limiting human rights. Firstly, limitations draw attention to the reality that these rights are seldom absolute or unqualified, which simplifies the human rights framework. The majority of human rights, in contrast, demonstrate a balance between private and collective (public) interests. ECtHR made reference to the ECHR in its decision in the case of *Soering v. United Kingdom* and made the following point very clear: A fair balance between the needs of the community's overall interests and the needs of safeguarding each person's basic rights is a key goal of the whole Convention.²⁶ So, for reasons of public order, public health, public morality, national security, or public safety—which constitute these "public interests"—certain civil and political rights as well as other ESC rights may be lawfully restricted.²⁷

Second, limitation clauses express the necessity to address rights disputes, such as those involving the right to privacy, the right to free speech, and the right to exercise one's religion. While still allowing for the exercise of another right, one right may be restricted in order to "defend the rights and freedoms of others." Other people's rights and freedoms may not always need to be mentioned in the same papers when they are used to limit a particular right.²⁸

There are further requirements that nations must satisfy in order to legitimately restrict human rights, in addition to the requirement that restrictions be imposed primarily for a justification specified in the applicable human rights agreement. Limits are only acceptable if they are "essential" and "must be stated by law."²⁹ "Necessary in a democratic society," or "necessary." is the requirement³⁰ Proportionality requirement, which is essential for assessing if restrictions are required, is included in the final set of criteria. It necessitates that the scope and severity of any rights limitations correspond to the objective being achieved.³¹

²⁵ Allan Rosas and Monika Sandvik-Nylund, 'Armed Conflicts' in Asbjørn Eide and others (eds), *Economic, Social and Cultural Rights, A Textbook* (2nd edn Martinus Nijhoff 2000) 413.

²⁶ A 161 (1989).

²⁷ Jayawickrama N, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002).

²⁸ High Commissioner for Refugees UN, "Refworld | The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (*Refworld*) <<https://www.refworld.org/docid/4672bc122.html>>

²⁹ ICCPR Art. 12(3), 18(3), and 19(3), ACHR Art. 12(3) and 13(2), and ACHPR Art. 11 and 12.

³⁰ Art.6(1), 8(2), 9(2), 10(2), and 11 of the ECHR.

³¹ High Commissioner for Refugees UN, "Refworld | The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (*Refworld*) <<https://www.refworld.org/docid/4672bc122.html>>

(A) Requirement of promoting the general welfare

Many have claimed that "general welfare" in relation to Article 4³² ICESCR must be interpreted strictly. Although "general" The travaux préparatoires do not elaborate on welfare, it is clear that this concept is not implicitly covered by the term "general welfare" given that allowing restrictions on grounds of upholding public decency, public order, and consideration of others' rights and liberties was categorically rejected during the drafting process. "National security" is conceptualized similarly. This was never used as a justification for ESC rights restrictions throughout the authoring process.

Hence, "general welfare" in the ICESCR context should be interpreted to principally relate to the population's and community's economic and social well-being.³³

(B) Requirement of 'democratic society'

The condition that they be acceptable "in a democratic society" significantly restricts the range of restrictions that are permitted under Article 4 ICESCR. It introduces a second, independent legitimacy criteria that restrictions must satisfy.³⁴ Moreover, the concept of "general welfare" is impliedly tied to the statement "in a democratic society." The general restriction provision was "essential importance" because, in the absence of it, "[the limitation clause] may very well work to destroy a democratic society," the Greek representative noted when the ICESCR was being negotiated.³⁵

ICESCR's relevance to armed conflict is a topic that is seldom covered in literature. The Covenant does, in fact, apply, according to Rosas and Sandvik-Nylund.³⁶ According to Lubell, it may be taken as applicable. No a priori argument against its applicability can be made. Instead, there are unquestionable signs that suggest it does. First off, no suspension or derogation of any kind occurs during armed conflict according to the ICESCR. Derogation clauses in the ECHR and ICCPR show that the provisions are nonetheless effective even if States decide not to or are unable to do so. So the lack of a derogation clause does not logically

³² Ssenyonjo, M. (Ed.). (2011). *Economic, Social and Cultural Rights* (1st ed.). Routledge. <https://doi.org/10.4324/9781315257044>

³³ Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/432/Rev.2 (1983) at 123-4.

³⁴ O.M. Garibaldi, "On the Ideological Content of Human Rights Instruments: The Clause 'In a democratic society'", in *Contemporary Issues in International Law. Essays in honour of Louis B. Sohn, T. Buergenthal* (ed.), Kehl am Rhein, Engel Verlag, 1984, 23-68.

³⁵ High Commissioner for Refugees UN, "Refworld | The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (*Refworld*) <<https://www.refworld.org/docid/4672bc122.html>>

³⁶ Giacca G, "Economic, Social, and Cultural Rights in Armed Conflict" (*OUP Academic*, October 2, 2014) <<https://academic.oup.com/book/32689>>

entail that certain clauses automatically expire in particular circumstances. In reality, one might contend the opposite. Derogation provisions in the ICCPR and ECHR were considered essential to maintain the option for States parties to suspend certain rights in exceptional situations. The general obligations-related derogation wording in Article 2(1), however, was deemed "sufficiently flexible" by the writers of the ICESCR, negating the need for it. Also, given the nature of the rights, they could have thought the evidence was "less convincing" for a derogation.³⁷

In their Article 4-related reports, States all too often provide choices to restrict or renege on civil and political rights.³⁸, without giving any other information, only claim that they are completely compliant with Article 4. Take the Philippines as an example. Research found that the Covenant's guaranteed rights were the only ones that were subject to legal restrictions. If such limitations do apply, they are consistent with the fundamental character of rights and are only used in free society to advance social welfare. Several nations claim that ESC rights are unrestricted.³⁹ These claims can occasionally be called into question.

Considering the exceptions to ESC rights enumerated in Articles 6, 7, and 8 of the ICESCR, some governments appear to imply that these exceptions also apply to the right to strike or other labor-related rights. For example, the official report from Slovenia describes a procedure under Slovene law by which employees may be compelled to perform forced labour in the aftermath of a major natural disaster or other emergency, or to ensure the nation's effective defence in the face of a direct military threat.⁴⁰

The rights outlined in the International Covenant on Economic, Social, and Cultural Rights need to be incorporated into International Humanitarian Law "in some form or another" (ICESCR). Other titles for it include "categories of economic and social rights addressed by IHL," the phrase "ESC rights inherent in IHL treaty-based norms," and "economic and social rights addressed by IHL."⁴¹ Due to the fact that a substantial portion of its regulations are created to ensure that civilians who are not currently engaged in hostilities or have stopped doing so are not refused care via the provision of food, water, shelter, or other basic necessities,

³⁷ "The Nature and Scope of States Parties' Obligations under the Internat" (*The Nature and Scope of States Parties' Obligations under the Internat*) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9781315257044-2/nature-scope-states-parties-obligations-international-covenant-economic-social-cultural-rights-philip-alston-gerard-quinn>>

³⁸ HRC, First Report, Tajikistan, 11 April 2005, paras 52–8, CCPR/C/TJK/2004/1.

³⁹ Mexico, Third Periodic Report, CESCR, E/1994/104/Add.18, paragraph 52, 27 January 1998.

⁴⁰ First Report by the CESCR, Slovenia, May 26, 2006, E/1990/5/Add.62, paras. 53, 99–105.

⁴¹ Mastorodimos, Konstantinos. (2011). *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* by Yutaka Arai-Takahashi [Martinus Nijhoff Publishers, Leiden, 2009, 760pp, ISBN 978-90-04-16246-4, €207.00 (h/bk)]. *International and Comparative Law Quarterly*. 60. 1098-1099. 10.1017/S0020589311000522.

or denied access to either.⁴²

Due to the fact that IHL regulations refer to the obligations of contractual parties rather than the rights of persons, one may question the validity of such a qualification. persons, but also because IHL standards do not generally match the majority of ESC rights requirements under human rights legislation. Other than the events covered by IHL, armed conflicts encompass a larger range of situations. Clarifying the connection between ESC rights and IHL, it is also necessary to explore these claims and descriptions. While discussing IHL, it is critical to comprehend what is meant by the term "ESC rights." There are over a thousand treaty provisions that deal with IHL, and many of these articles implicitly address certain features or parts of substantive ESC rights in connection with the following concerns: health;⁴³ food and disaster relief⁴⁴ employment and work;⁴⁵ Family protection, particularly that of women and children;⁴⁶ cultural issues;⁴⁷ safeguarding natural resources;⁴⁸ and the environment preservation.⁴⁹

IHL laws were developed to provide for the requirements of people living in some of the most severe circumstances, such as armed combat. More significantly, it can be said that the contribution of IHL has a wider scope: abiding by its principles in conflict situations creates conditions that are favorable not only for peace but also for the recovery of the involved nation, allowing it to better fulfill its duties to realize socio-economic rights.

(C) Right to the highest attainable standard of physical and mental health

The UDHR article 25; the ICESCR article 12; the CESCR general comment number 14; the GC IV articles 55 (requiring the occupying power to ensure the population has access to medical supplies) and 56; the GC P1 article 10; the GC PII articles 7(2) and 8; all guaranteed

⁴² "Human Rights in Times of Conflict and Terrorism" (*Human Rights in Times of Conflict and Terrorism - Louise Doswald-Beck - Oxford University Press*) <<https://global.oup.com/academic/product/human-rights-in-times-of-conflict-and-terrorism-9780199578948>>

⁴³ R. 25–30, 109–11, and 118 of the ICRC Customary Law Study; Art. 16–32 GCIV; Art. 8–20 API, Art. 7–12 of the APII. Art. 5–6 Protocol V of the 1980 Convention on Conventional Weapons.

⁴⁴ Art. 19–33, 38, 72–3, 109–114 GCIV; Art. 36–8, 49, 83–92, 94, 127–8, GCIII; R. 121, 131, ICRC Customary Law Study. Art. 23, 55–7, 59–62 GCIV; Art. 69–71 API; Art. 18 APII; Art. 25–8 in 1907 Hague Regulations; Art. 48–60 API; Art. 13–15 APII; R. 1–24, 35–7, 42, 49–52, ICRC Customary Law Study.

⁴⁵ Art. 49–62 GC3, Articles 39–40, 51–2, 95–6 GCIV; R. 95, ICRC Customary Law Study.

⁴⁶ Art. 46 1907 Hague Regulations; Articles 25–27, 49, 82 GCIV; Art. 74 API; Art. 4 § 3(b) APII; R. 105, 114, 117 ICRC Customary Law Study; Art. 14, 16–18, 23, 91 GCIV; Art. 8(a), 70(1), 76 API. Art. 24, 50, 94 GCIV; Art. 4(3)(a), APII; Art. 77 API, Art. 4(3)(c), APII; R. 135–7, ICRC Customary Law Study.

⁴⁷ Art. 53, API; Art. 16, APII; Art. 27, 56, HR; R. 38–41, ICRC Customary Law Study; 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols.

⁴⁸ Art. 21, ACHPR; Art. 54, API; Art. 14, APII; Rule 54, ICRC Customary Law Study; Art. 28, 47 HR; Art. 33 GCIV; Art. 4(2)(g), APII; R. 52, ICRC Customary Law Study. Art. 55, HR.

⁴⁹ Art. 24 ACHPR; Art. 35(2), 55, API. R. 45, ICRC Customary Law Study; R. 43, 44 ICRC Customary Law Study; Art. 1, 1976 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

this right.

1. Right to Food and water:

The UDHR article 25; ICESCR article 11; and CESCR general remark no. 12 on the right to appropriate nourishment, paragraph 15, all guarantee this right: States have a responsibility to actively fulfill (supply) a person's right to sufficient nutrition "where an individual or group is unable, due to reasons beyond their control, to enjoy that right through the methods at their disposal." Those who have been affected by events such as natural disasters are subject to this commitment.; GC IV, art. 55 (responsibility of occupying authority to ensure food for population); GC IV, art. 59 (occupying power must accede to relief measures if required); GC P1, art. 70;

2. Right to Shelter

Article 25 of the UDHR, Article 11 of the ICESCR, General Comments Nos. 4 and 7 of the CESCR, and the phrase "an appropriate standard of life" are all references to human rights, the latter of which stated that "the reference to himself and his family" in ICESCR, article 11, "cannot be read today as implying limitations upon the applicability of the right to individuals or to female headed households," ICESCR, Article 9, GC P1, Article 69, and CESCR, General Comment No. Principles 12–14 in ESC; Articles 12–14 in ESC Part II;

V. SHORTCOMINGS OF EXISTING LEGAL FRAMEWORK

The legal protections linked to employment, food, housing, healthcare, social security, or education are not normally considered as a priority in the face of pervasive armed conflict since other rights impacted, such as those connected to life, liberty, and security, usually get more attention.⁵⁰ Some of the shortcomings of existing legal framework are discussed below :

From its comments, it is possible to infer the Committee's opinion on ESC rights limitations;⁵¹ The Committee's stance on prospective ESC rights derogations and the legal basis for them, however, is currently unclear.⁵²

For a considerable amount of time, the conditionality of the language used in the International Covenant on Economic, Social, and Cultural Rights (ICESCR or Covenant) was viewed as a

⁵⁰ Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014) 4.

⁵¹ CESCR General Comment 14: Right to the highest attainable standards of health (art. 12), 11 August 2000, E/C.12/2000/4; 8 IHRR 1 (2001), at para. 28. CESCR General Comment 13: Right to education (art. 13), 8 December 1999, E/C.12/1999/107; IHRR 303 (2000) at para. 42; and CESCR General Comment 14: Right to the highest attainable standards of health (art.12).

⁵² CESCR, *Poverty and the ICESCR: Declaration to the Third United Nations Conference on Least Developed Countries*, 10 May 2001, E/C.12/2001/10 at para. 18.

flaw - a "escape hatch" that could allow governments to delay efforts to implement ESCR by citing economic constraints. This belief persisted for many years.

Each state party acknowledges and accepts their responsibility to "take acts... to the greatest of its available resources, with the aim of progressively attaining the full realization of the rights recognized in the present Covenant," as stated in the first paragraph of Article 2 of the Covenant.

Similar language may be found in the constitutions of a number of states, in addition to being included in a number of international and regional human rights instruments.

The difficulties in assessing conformance with such a vaguely defined and resource-dependent obligation were interpreted as evidence that these rights were more indeterminate and aspirational than civil and political rights (CPR), and thus less suited to adjudication and legal enforcement. In other words, the difficulties in assessing compliance with a vaguely defined and resource-dependent obligation were interpreted as evidence.⁵³

When countries' reports fail to distinguish between limitations and exceptions, the CESCR never notifies them. As the government is not required to use the standards of decency to support blatant bans, Article 4 is mentioned often in the ICESCR's "constructive conversation" with states parties. For example, the CESCR voiced worry over Uzbekistan's decreased annual per capita public health spending despite a rise in GDP in its Final Comments on the Uzbek State Report from 2006, which is available online.⁵⁴ The Uzbek government was not required under the ICESCR to defend its actions in light of each Article 4 clause. Two other specific examples may be found in the Committee's Final Observations on Sudan and the Democratic People's Republic of Korea.⁵⁵

In reaction to unanticipated resource shortages, governments may undertake or be compelled to implement "retrogressive measures," and the CESCR has begun to define criteria by which it will evaluate these actions.⁵⁶

According to Article 2 of the International Covenant on Economic, Social, and Cultural Rights, ESC rights shall be progressively implemented by governments in line with the resources at

⁵³ Felner E, "Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights" (*OUP Academic*, November 1, 2009) <<https://academic.oup.com/jhrp/article/1/3/402/2188791>>

⁵⁴ Concluding Observations Regarding Uzbekistan, 24 January 2006, E/C.12/UZB/CO/1 at para. 30, and Concluding Observations Regarding Albania, 24 November 2006, E/C.12/ALB/CO/1 at para. 33, as well as CESCR. Final Remarks Regarding Tajikistan, 24 November 2006, E/C.12/TJK/CO/1 at paras. 35 and 41.

⁵⁵ Final Remarks Concerning Sudan, 1 September 2000, CESCR. E/C.12/1/Add.48, para. 25, and CESCR's Final Remarks on the Democratic People's Republic of Korea. E/C.12/1/Add.95, paragraph 21, 12 December 2003.

⁵⁶ G. Comment 14. at p32, 48; G. Comment 13. at p.45.

their disposal (1). This serves as the evaluation's normative base, therefore pay attention to it. the permissibility of distinguishing between "limitations" of ESC rights brought on by other circumstances and "retrogressive measures" brought on by financial constraints;

The degree of power over the land and the level of hostilities had a role in determining the circumstances for the implementation of ESC rights. These criteria are defined by taking into account crucial variables. This means that even though their applicability can be assumed, obligations may be deemed to change depending on the circumstance. This is especially true in situations in which the territorial state lacks authority over and control over a part of its own national territory, such as when those powers are exercised by a foreign state or an armed non-state actor; in situations in which the state is engaged in a military operation or occupation abroad through its own agents; and in situations in which armed non-state actors control a part of the territory.

VI. SCOPE OF IMPROVEMENT

The following is a discussion of some ideas and suggestions that have been made in order to strengthen the current legal framework and the procedures for protecting ESC rights during times of armed conflict:

Clauses that prohibit discrimination against all recognized vulnerable groups and that stipulate the right to post-conflict economic and social reconstruction with the possibility of enacting temporary special measures for their fulfillment are required to be included in peace accords and other types of settlements. These clauses must also stipulate the right to post-conflict economic and social reconstruction with the possibility of enacting such measures (for example, SC resolutions).

The subject state, any occupying power, any multinational force, and any international and regional organizations should all be bound to these commitments by the articles that should be included in peace settlements and agreements. These specifications will be presented at donor conferences.

Increasing a group's capability to exercise its economic and social rights after a dispute has been resolved Peace settlements and accords should call on states to enact national legislative plans as soon as it is practical to do so in order to ensure that the foundation for economic and social rights is laid. Training on economic and social rights is provided to those who work in law enforcement and other national security professions. The justiciability of economic and social rights will be explored during the course of judicial education at some point.

It is a given that ESCR in situations of (post-)conflict won't be able to solve all of the issues that arise. It is troublesome when social issues include systemic violations of economical, cultural, and human rights. The attempts that have been made to raise public understanding of the repercussions of military conflicts on the economy, society, and culture have not yet proven effective.

centered on ESCR to the greatest feasible degree, while also making the most of the legal framework provided by international treaties. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which is a component of the International Bill of Rights, may be used to assist national-level initiatives to improve ESCR defense. ESCR difficulties that are peculiar to armed conflicts, such as being displaced, having access to medical care and rehabilitation, education, or having discrimination made worse by armed conflict, are mentioned. The filing of reports by states to the The professionals may give guidance about vulnerable war and post-conflict situations via the supervisory CESCR.

If the findings of UN entities are strategically used by stakeholders on both the local and international levels, they carry an enormous amount of weight. The Committee has, in the past, offered some counsel and recommendations about the supply of for decades in the most recent years. restitution for breaches of the European Convention on Human Rights. In particular, it has made it abundantly apparent that States Parties are required to provide reasons for why they view the actions adopted are the most appropriate given the circumstances at the time.

In addition, the Committee's method of dealing with armed conflicts and the actions taken to heal after wars continue to be spotty and inconsistent in their application. This article makes the argument that the Committee ought to interrogate the state delegations more thoroughly. It is possible that the activities taken to resolve the concerns relating to ESCR may be deemed "appropriate methods" in accordance with the ICESCR's Article 2 of a Conflict if they are successful. The CESCR has to take a look at any and all existing and prospective processes. Consider both the positive and negative aspects of using these techniques in an attempt to strengthen the protection of ESCR and ensure that they are met. using methods of transitional justice, such as truth commissions or programs for reparations, among other similar methods. If they so wish, members of civil society and other interested parties should request that the Committee choose an approach that is more sensitive to issues of conflict. providing the CESCR with accurate and up-to-date information on the linkages between the realization of ESCR and particular issues relating to conflicts. Last but not least, increasing the ability of committee members and OHCHR support personnel in connection to transitional justice systems will increase the prospect of synergies between the Maximizing CESCR and

transitional justice. According to a proposal that has been around for a very long time in the body of research on how to deal with violent conflicts, large-scale abuses of human rights cannot be rectified by the courts alone, and instead, large-scale reparations are necessary.

There is a need for corrective actions and methods employed in extensive programs.⁵⁷ Precisely in accordance with how the malleable ICESCR laws allow it. In post-conflict situations, it is often difficult to determine how to set priorities for past wrongdoings, modern concerns for human rights, and what actions to take. Yet, findings from national talks with experts from the UN Committee indicate that ESCR should be addressed. Monitoring of the implementation of the ICESCR has been placed, at least in part. The Committee has made it abundantly clear that a current or past armed conflict does not absolve the State Party of its responsibility to make concerted efforts to identify and use all appropriate methods to realize the rights recognized in the ICESCR, particularly by providing compensation for harm caused by conflicts. This was made clear in a statement that was distributed to all members of the Committee.

Organizations that monitor human rights have pointed to corruption as a problem that is tied to human rights on a consistent basis.

about the theft of money from the public coffers of their country. In its most recent concluding remarks, the Committee on Economic, Social, and Cultural Rights (CESCR) has produced a standard set of recommendations to nations regarding the intensification of anti-corruption operations. These recommendations are meant to encourage nations to take anti-corruption efforts more seriously. Even if the Committee appears to be working on this, there is opportunity for more important and strategic ideas in this area.

In addition to corruption, wasted and ineffective expenditures have been a focus of human Institutions that oversee human rights. Also, a number of organizations have urged authorities to guarantee that restricted Public and private resources are used most effectively and efficiently to support the achievement of human rights; to spend all allotted funds or at least describe the reasons for not doing so. Underspending; ensuring that authorized monies are not misappropriated; and enhancing audits to prevent waste, fraud, and abuse. Inefficient and irregular spending. The Special Rapporteur on Health emphasized, Whether it is public, private, or a combination of the two, the method for providing inexpensive, high-quality medications remains the same. "Must acquire excellent value for money, reduce waste, and

⁵⁷M Minow, *Between Vengeance and Forgiveness* (Beacon 1998); and R Falk, 'International Law, and Global Justice: A New Frontier' in P de Greiff (ed), *The Handbook of Reparations* (OUP 2006).

prevent corruption."⁵⁸

Another important question to ask is whether or not privatization and public-private partnerships (PPPs) lead to an effective and profitable use of assets. The negative impact that privatization and public-private partnerships (PPPs) might have on the supply of high-quality goods has been brought to the attention of a large number of groups that monitor human rights. Education and, to a lesser extent, health care are priorities. It's possible that a better understanding of the issue may be reached by using the principle of the biggest accessible resources..⁵⁹

VII. CONCLUSION

Concerns regarding discriminatory resource distribution, as well as the socioeconomic deprivations and disparities it causes, can no longer be shielded from investigation. This is an issue that the human rights community is becoming more aware of. Consequently, there has been an increase in the number of efforts to implement the "progressive realisation" requirement and examine new accountability mechanisms where it may be triggered and enforced. The language of Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights, which emphasises the relationship between rights and resources, is not a weakness but a strength.

Human rights become an issue when nations identify and invest in their policy objectives through the budget. According to Olivier De Schutter, such decisions "cannot be left to the caprice and arbitrariness of states," but must be reviewed by tribunals and other human rights monitoring authorities.⁶⁰

I have provided a thorough analysis of the concept of ESC rights, as well as its constituent components and operation during armed conflict. As part of my explanation of the legal framework for enforcing ESC rights, I have also examined the probable limitations and exceptions to those rights. This was done while explaining the legal framework's defects and how they could be corrected. This paper is limited in many ways because it is unable to cover every possible aspect of ESC rights and armed conflict; nonetheless, it is an attempt to fill the void regarding the application of ESC rights during armed conflicts. The analysis continues by drawing parallels between the actual circumstance and an alternative scenario. It provides

⁵⁸ CESCR, General Comment No. 24: Obligations in the Context of Business Activities (10 August 2017) E/C.12/GC/24 para 18.

⁵⁹ *The Abidjan Principles*. (2023, March 9). The Abidjan Principles. <https://www.abidjanprinciples.org>

⁶⁰ De Schutter O and Sen A, "Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation" in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019).

a critical analysis of the framework of ESC rights during armed conflict, and I believe that this small effort will contribute to the development on this topic.
