

## FIFTY YEARS INTERNATIONAL HUMAN RIGHTS COVENANTS. IMPROVING THE GLOBAL PROTECTION OF HUMAN RIGHTS BY BRIDGING THE GAP BETWEEN THE TWO COVENANTS

**Nico Schrijver** \*

**Samenvatting** | This contribution is a reworked version of the speech held at the conference '50 years of ICCPR and ICESCR: impact, interplay, and the way forward' held at Leiden University on 19 May 2016. It traces the historical background of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which resulted in divergent paths for civil and political rights and for economic, social and cultural rights. It proposes several reforms to overcome this gap and to promote closer operation between the two supervisory bodies. Though fusing of the two bodies may be a bridge too far, a start could be made with smaller steps.

**Trefwoorden** | ICCPR, ICESCR, civil and political rights, economic, social and cultural rights, indivisibility, human rights treaty bodies.

**Wolters Kluwer Navigator** | NTM-NJCM Bull. 2016/33

### 1 Introduction

Much has been achieved since the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and hence there is good reason to celebrate their 50<sup>th</sup> anniversaries. At the same time, many things have changed since 1966. The Covenants were adopted in the heart of the Cold War and the separation into two categories of human rights, each with its own treaty and supervisory body, is to a large extent a result of then prevailing East-West rivalry. After the end of the Cold War a more integrated approach of human rights protection emerged.

Moreover, human rights became a matter of concern of all wings of society, including civil society and the business sector, and no longer only of States and their international organisations only. Meanwhile, there has been a proliferation of human rights treaties as well as of international supervisory bodies. Therefore, 2016 should not only be a year of celebrations giving rise to an evaluation of what has been achieved, but should equally be a year to look forward to the future and an occasion to contemplate how the global architecture for the protection of human rights can be improved. Following this introduction, this article reviews in section 2 the background of the two important human rights treaties. Section 3 discusses the contents of the ICESCR and section 4 addresses the proliferation of human rights treaties and their procedures. Section 5 concludes with some reform proposals.

- Prof. N.J. Schrijver is professor of International Law and Academic Director of the Grotius Centre for International Legal Studies at the University of Leiden and a member of the UN Committee on Economic, Cultural and Social Rights. This article builds on earlier contributions, including my articles 'Paving the Way Towards... One World Wide Human Rights Treaty', *Netherlands Human Rights Quarterly*, vol. 2011/29, no. 3, p. 257-260 and '50 Jahre UN-Menschenrechtspakte. Es ist Zeit für einheitlichen Vertragsorgan', *Vereinte Nationen*, 2016/64, no. 3, p. 121-125.

## 2 Background of the two International Covenants

The two international human rights covenants were adopted in 1966 in the heart of the Cold War: one on economic, social and cultural human rights (the ICESCR) and one on civil and political human rights (the ICCPR).<sup>1</sup> The first covers, amongst other rights, the right to work and to form free trade unions as well as the right to social security, an adequate living standard, education, health and family life. The second Covenant includes the right to life and protection against physical violence, the right to equal treatment and a fair trial as well as freedom of expression, religion and assembly. When the Universal Declaration of Human Rights was adopted in 1948, the original intention was to establish a Bill of Rights in the form of a *trinity*: a Declaration, a Covenant and a monitoring body. However, shortly after the adoption of the Universal Declaration, the Cold War became heated: an Iron Curtain was drawn across Europe; a Communist revolution was about to succeed in China. The UN Commission on Human Rights became increasingly ideologically divided shortly after it had successfully designed the Universal Declaration of Human Rights under the leadership of Mrs Roosevelt and professor René Cassin. A draft human rights covenant had been formulated and was tabled in 1951 but was quickly relegated to the back burner. Western countries, under the leadership of the US, increasingly focused on civil and political rights, to the exclusion of economic, social and cultural human rights. The Soviet bloc and its allies adopted the opposite position: only labour rights were of essential importance and rights to political freedom were regarded as bourgeois rights of the capitalist West. In 1952, it was decided to set up not one but two treaties: a separate treaty for each category.<sup>2</sup> However, due to the adversarial positions of the East and West, it was not possible to complete the negotiations for many years.

In the meantime, the decolonisation process unfolded and developing countries began to have an influence on the international human rights debate. According to them (as a result of their experience), individual rights to freedom were an empty shell unless peoples could freely determine their own fate. Consequently, against the wishes of the Western countries, a majority of these States decided to adopt the right to self-determination in both human rights treaties.<sup>3</sup> This right was to encompass both political and economic self-determination: all peoples have a right to political self-determination and should be able to dispose freely of their natural resources. It is striking that the right to self-determination was eventually adopted in identical terms as Article 1 in both treaties.

Subsequently, however, the paths of civil and political rights and of the economic, social and cultural rights diverged. Whereas State parties must immediately 'respect and ensure' the former, they must 'take steps' with a view to achieving progressively, and 'to the maximum of their available resources' the latter.<sup>4</sup> Furthermore, the implementation of civil and political rights were to be monitored by a treaty body (the Human Rights Committee), while for economic, social and cultural rights such a body was not foreseen. In any case, each treaty stands independently of the other; they had to be separately signed, ratified and passed into force, and

1 See on this T.C. van Boven, '50 Years of the UN Human Rights Covenants', *Netherlands Human Rights Quarterly* 2016/34, no. 2, p. 108-112.

2 See UNGA Res. 543 (VI) (5 February 1952).

3 See UNGA Res. 545 (VI) (5 February 1952).

4 See Art. 2 ICESCR.

were accorded separate international monitoring mechanisms. In order for the treaties to enter into force, 35 ratifications were needed and that number was achieved for both around the same time, in 1976.<sup>5</sup> This is not to say that the group of countries ratifying each Covenant was exactly the same; until today, for example, the United States is a party to the ICCPR but not to the ICESCR while in the case of the People's Republic of China, the opposite position holds true. Nevertheless, it is remarkable how the lists of parties to the Covenants have become increasingly similar in recent years. The ICCPR now has 168 State ratifications and the ICESCR 164.

### 3 The International Covenant on Economic, Social and Cultural Rights

The ICESCR itself is a rather concise legal instrument, consisting of a preamble and five parts with a total of 31 articles. The preamble introduces in an appealing way the relationship between freedom, justice and freedom in the world and echoes two of Roosevelt's freedoms, namely the freedom from fear and the freedom from want. It is nearly identical to the preamble of the ICCPR. Notably identical is also Part I, which includes the right of self-determination. It is provided that by virtue of this right peoples do not only freely determine their political self-determination but also freely pursue their economic, social and cultural development and to freely dispose of their natural resources. In no case may a people be deprived of its own means of subsistence. Part II, which includes the Articles 2-5, formulates some core principles of the Covenant: progressive realization, equal treatment, certain limitations within the compounds of law and prevention of misuse and abuse. Part III forms the core of the Covenant as it highlights its substantive human rights catalogue in Articles 6-15. These can be clustered in three groups: first, labour rights, including the right to work, the right to fair labour standards, freedom of association in trade unions and the right to social security. Secondly, other social rights such as the right to family life and assistance to and protection of the family, including women's and children's rights, the right to an adequate living standard and the right to health. And thirdly, the right to education and the right to culture and cultural identity. In rather hesitant terms Part IV seeks to establish a supervisory system, which in essence includes only a reporting, monitoring and consultation system (Articles 16-25). Initially, ECOSOC put a Working Group in place to discuss these reports.<sup>6</sup> Part V, the final one, regulates signature, ratification, entry into force, accession, amendments and the authentic language versions of the Covenant (Articles 26-31).

It is a widespread misunderstanding that the rights contained in this Covenant are merely programmatic and hence not capable of direct application and non-justiciable, as opposed to those contained in the ICCPR. As a matter of fact, many of the rights in the Covenant on ESC rights lend themselves to be invoked directly by citizens, including the right to fair and just working conditions, the right to adequate housing and the right to education.<sup>7</sup> Moreover, some

5 The ICESCR entered into force on 3 January 1976 and the ICCPR on 23 March 1976, in both cases upon the deposit of 35 ratifications. The Netherlands acceded to both International Covenants as late as 1978.

6 See ECOSOC Decision 1978/10 (3 May 1978) by which it established a Sessional Working Group on the Implementation of the ICESCR. For the working methods of the Working Group see ECOSOC Resolution 1979/43 (11 May 1979) and Decision 1981/158 (8 May 1981).

7 See e.g. M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press 2008.

rights clearly overlap with those contained in the ICCPR, such as freedom from discrimination, the right to equality between men and women and the right to form and associate in trade unions. Therefore, it is important to note that already the Tehran Human Rights Proclamation, adopted in 1968 on the occasion of the twentieth anniversary of the Universal Declaration, declared the 'indivisibility of human rights'. Its paragraph 13 provides:

'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.'<sup>8</sup>

In a similar vein, twenty-five years later the World Conference on Human Rights in 1993 authoritatively reaffirmed that all human rights are universal, indivisible, interrelated and interdependent.<sup>9</sup> Ever since, this phrase has been repeated time and again by the UN General Assembly as well as the Human Rights Council. Initially, the ICESCR did not have its own specialized treaty body since this had not been provided for by the treaty itself, in contrast to the Human Rights Committee which derives its establishment and authority from the ICCPR itself. In order to remedy this lacuna, ECOSOC decided in 1985 to establish the Committee on Economic, Social and Cultural Rights,<sup>10</sup> which became operational in 1987.

Four functions of the CESCR can be identified:

### 3.1 The examination of State party reports

A first function is that each treaty body examines the reports of the States that are party to the treaty in which these States report on their compliance with the human rights laid down in the treaty. In principle, this should take place every four or five years but many States often submit reports too late. In addition to these reports by the States themselves, known as 'self-reporting', the practice has developed that the United Nations itself, national human rights institutes and non-governmental organisations report on the human rights situation in the country in question, known as 'shadow reporting'. It is not uncommon to see a colourful procession of NGOs parade across the monitoring committees to argue that the actual human rights situation is less positive than the government of the country itself claims. As the reports for the various committees overlap and their preparation requires considerable time, in recent years the practice has developed that States can prepare one core document for all human rights reports. This is then supplemented by a further report that specifically addresses the observance of human rights covered by the relevant treaty.

8 See Proclamation of Tehran, Tehran 22 April to 13 May 1968, (13 May 1968), *Final Act of the International conference on Human Rights*, UN Doc A/CONF.32/41, par. 13.

9 See the *Vienna Declaration and Programme of Action* (25 June 1993), adopted by the World Conference on Human Rights, UN Doc A/CONF/157/23, preamble and par. 5: 'We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.'

10 ECOSOC, Review of the composition, organization and administrative arrangements of the Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights (28 May 1985) ECOSOC Res. 1985/17.

### 3.2 The drafting of General Comments

As a second function most Committees issue at regular intervals General Comments in which they clarify, interpret and elaborate upon the contemporary meaning of the specific rights contained in the treaty concerned. So far, the Human Rights Committee under the ICCPR has published 35 General Comments, among other on topics such as liberty and security of person, freedom of movement, rights of the child and the position of aliens under the Covenant. The Committee on Economic Social and Cultural Rights has issued 23 General Comments on a variety of topics, including the right to education, the right to water, labour rights and sexual and reproductive health rights. Each Committee works separately on its own General Comments, while the right under review in the General Comment may well relate to the competence of more than one Committee. Recently, there has been one encouraging precedent for a joint General Comment, namely one on harmful practices adopted by the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.<sup>11</sup> While these General Comments are of a non-binding nature, they can be viewed as an authoritative interpretation of the particular articles in a human rights treaty by the principal body in charge of monitoring its implementation.

### 3.4 Participating in the global protection of human rights

All human rights treaty bodies are part and parcel of the general framework for the protection of human rights. Their interaction and co-operation with other treaty bodies, special rapporteurs, international organizations and with NGOs are an essential element of their work.

### 3.5 Petition procedures

Very new for the CDESCR, from May 2013, is its mandate to serve as a quasi-judicial body in receiving and pronouncing on communications by individuals and groups of individuals who claim their rights have been violated, often referred to as a complaints or petition procedure. On 10 December 2008, a similar protocol to that of ICCPR was at last adopted for the ICESCR that was opened for signature from September 2009.<sup>12</sup> Its entry into force required ten ratifications, a number which was reached after a few years. As a result, the Optional Protocol could enter into operation on 5 May 2013. Currently, this Optional Protocol has now been ratified by 21 States and signed by a further 24 States. So far (by September 2016), CDESCR has received 14 individual communications and took a final decision upon five of these cases: in one case

11 See CEDAW/CRC, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices (14 November 2014) CEDAW/C/GC/31 – CRC/C/GC/18.

12 See on the birth, the contents and the implications of this Optional Protocol E. Riedel, 'New Bearings on Social Rights? The Communications Procedure under the ICESCR', in U. Fasterrath e.a. (eds), *From Bilateralism to Community Interest. Essays in honour of Judge Bruno Simma*, Oxford: Oxford University Press 2011, p. 574-589.

a violation was found with respect to the right of housing,<sup>13</sup> in another case no violation was established while three other cases were found to be inadmissible.<sup>14</sup>

#### 4 Proliferation of the human rights treaties

In addition to the ICCPR and ICESCR, a large number of global human rights treaties has come into being, mostly on specific subjects (such as racial discrimination, torture or enforced disappearances) or for special groups (such as women, children, migrant workers and persons with disabilities). It is gratifying that, especially since the end of the Cold War, the number of parties to human rights treaties has risen considerably. For instance, in recent years Indonesia, Pakistan and Turkey have acceded to both the ICCPR and the ICESCR, while South Africa recently ratified the ICESCR. Virtually every treaty has its own monitoring committee; ten in total at the moment. Their functions are essentially the same four as highlighted above for CESC. <sup>15</sup> Furthermore, within the framework of the new UN Human Rights Council, there is now the Universal Periodic Review (UPR), a procedure in which all Member States of the UN – regardless of whether they are party to human rights treaties or not – are subjected to a public human rights review in which they are required to cooperate.<sup>16</sup> At the same time, a certain degree of ‘treaty congestion’ and reporting fatigue is becoming evident.

Within the Office of the High Commissioner for Human Rights – currently occupied by the Jordanian Prince Zeid Ra’ad Al Hussein – and within the treaty committees, for example in their annual meeting of chairpersons (previously ‘inter-committee meetings’), discussions are being held on how to achieve more cooperation and synergy and to further streamline the reports. Until now, some mostly minor adjustments have been achieved such as the common core document (a general report for all reporting procedures on the constitutional structure, population, economy and general human rights situation in a particular country), general reporting guidelines and a reporting calendar. Yet, these adjustments can be important on the work floor, particularly if a number of them can be applied in combination.<sup>17</sup> Nevertheless, it is clear that more bold steps will be necessary if the current system is not to degenerate into different and partially overlapping procedures that will render it unworkable.<sup>18</sup>

13 See CESC, Communication No. 2/2014, I.D.G. v. Spain, Views of the Committee adopted on 17 June 2015.

14 See the website of CESC on [www.ohchr.org](http://www.ohchr.org) under treaty bodies.

15 W. van den Hole, *The Procedures Before the UN Human Rights Treaty Bodies. Divergence or Convergence*, Antwerp-Oxford: Intersentia 2004.

16 See UN Doc A/RES/60/251 (3 April 2006). For a review see Hilary Charlesworth & Emma Larkin (eds.), *Human Rights and the Universal Periodic Review, Rituals and Ritualism*, Cambridge: Cambridge University Press 2015.

17 See on the treaty bodies strengthening process the key document of the UNSG (26 June 2012), ‘*United Nations Reform: measures and proposals*’, UN Doc A/66/680, and the important follow-up by the UN General Assembly, (21 April 2014), ‘*Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System*’ UN Doc A/RES/ 68/268.

18 For a general analysis of this problem see M. Koskenniemi, ‘Analytical study of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (16 April 2006) UN Doc A/CN.4/L.882.

**5 Towards closer co-operation between the two supervisory bodies of the two International Covenants: some reform proposals**

The Human Rights Committee and the CESCR now each have similar complaint procedures both for individuals and States. Both committees have 18 independent members. Despite all the differences, their mandates partially coincide, for example, on the rights to equal treatment and the right to form free trade unions. The secretariat of both committees is provided by the Office of the High Commissioner for Human Rights in Geneva and there is a joint petition unit for all Committees. It would only be logical to seek to further streamline their respective procedures and to evaluate their functioning at 50 years Covenants in terms of complementarity rather than in mere co-existence, let alone competition. Of course, there are a great number of practical objections and legal obstacles to fusing both treaty committees and their treaties. One single body is hence, at best, something for the distant future.<sup>19</sup>

However, that is not to say that institutionalised co-operation and joint monitoring could not be instrumental for a better and more coherent implementation of human rights. It is important to treat the civil and political rights and the economic, social and cultural rights increasingly as one group of rights, consonant with the original idea behind the Universal Declaration in which both categories of human rights were adopted and are still positioned fraternally next to each other. With the Cold War behind us and half a century after the adoption of the two international covenants, it is time to call for a creative approach of how to strengthen the implementation of both categories of human rights in a coherent way. The reform proposals here submitted do not reflect blueprints, which are appealing but politically beyond reach.<sup>20</sup> Rather the argument is made to make a start with some small practical steps that certainly if taken in combination or successively can make a difference in a substantial improvement of the global protection of human rights. This is even more important now, after the Cold War, when the conviction that all human rights are universal, indivisible, interrelated and interdependent is gaining considerable ground. This policy position was powerfully expressed by the Vienna Declaration and Programme of Action of the World Human Rights Conference, which was adopted by consensus in 1993, and has been repeatedly confirmed since then.<sup>21</sup> In a large number of States, citizens are resorting to the courts to stand up for their right to education, decent housing or equal treatment. Consequently, both civil and political rights and economic, social and cultural rights, can be invoked in domestic courts and their judgments can in some circumstances be subject to subsequent international review.<sup>22</sup>

In terms of substance, the necessity of enforcing indivisibility and universality, and the growing practical unworkability of the greatly fragmented system of international monitoring of human rights both demand creativity and a visionary approach. Perhaps a start should be made with smaller steps. These could first of all include establishing some kind of a cautious

19 See Netherlands Advisory Council for International Affairs, *The UN Human Rights Treaty System: Strengthening Step by Step in a Politically Charged Context*, Advice No. 57, The Hague: AIV 2007, available at [www.aiv-advice.nl](http://www.aiv-advice.nl).

20 See also C. Tomuschat, *Human Rights. Between Idealism and Realism*, Oxford: Oxford University Press 2008.

21 See World Conference on Human Rights (25 June 1993), *Vienna Declaration and Programme of Action*, UN Doc A/CONF. 157/23, adopted by consensus.

22 See Langford 2008 (*supra* note 6). See also I. Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Obligations: Avenues Under UN Human Rights Treaties', 56 *Netherlands International Law Review* 2009/2, p. 167-2005.

cooperation between the various treaty committees or to make a beginning between only some of them. This could be facilitated by streamlining some of their procedures, assessing partially integrated State party reports in a mutually consistent manner and perhaps (partial) joint Concluding Observations and Recommendations. In the future, such cooperation in practice can hopefully result in the somewhat bigger step of concluding a joint technical protocol that establishes a joint monitoring mechanism and joint complaint procedures, starting with those of the ICESCR and the ICCPR. The 50<sup>th</sup> anniversary of the ICCPR and the ICESCR provides an adequate momentum in 2016 to explore and test some new forms of co-operation.

If all of this comes about, human rights supervisory procedures will be better streamlined and empowered to more adequately fulfil their ultimate function of promoting the respect for human rights in the State parties and providing as best they can remedies for the victims of human rights violations. In such case the human rights procedures will be instrumental in putting into practice the UN Charter's goal 'to promote social progress and better standards of life in larger freedom'.<sup>23</sup>

23 Preamble of the UN Charter, adopted on 26 June 1945.