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UN High Commissioner for Human Rights
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OHCHR REGISTRY

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Number	Recipients: <i>H.C. Cooreys</i>	Date	December 23, 2011
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Subject	<i>P.D.</i>	Contact	Prof. dr. N.J. Schrijver

Dear High Commissioner, dear Madam,

As a member of the CESCR I have taken note with great interest of the two reports on the reform of the treaty body system issued in 2011 (UN docs A/66/175 and A/66/344) and the consultation round on these issues. I found these reports very informative as well as inspiring and prospective.

I take the liberty to send to you a brief commentary on treaty body reform which focuses on the interrelationship between the HRC and CESCR, published in the *Netherlands Quarterly of Human Rights*, vol. 29 (2011), issue 3, pp. 257-260. I hope my views are of some interest to you and your staff. If so, please feel free to use it in whatever way it may suit OHCHR purposes.

I take the opportunity to wish you a very happy and peaceful 2012 and look forward to meeting you again.

Yours sincerely,

*with my warm personal regards,
Nico*

Professor dr. N.J. (Nico) Schrijver,
Chair of public international law and
Academic Director of the Grotius Centre for International Legal Studies
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Cc Dr Ibrahim Salama, OHCHR, Chief Human Rights Treaties Branch

COLUMN

PAVING THE WAY TOWARDS... ONE WORLDWIDE HUMAN RIGHTS TREATY!

NICO SCHRIJVER*

In 1966, in the heart of the Cold War, two important international human rights covenants were adopted: one on civil and political human rights (the ICCPR) and one on economic, social and cultural human rights (the ICESCR). The first 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. The second covenant covers the right to work and to form free trade unions as well as the right to social security, education, health and family life. When the Universal Declaration 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. The Iron Curtain came down in Europe, a Communist revolution was about to succeed in China and the UN Commission on Human Rights which, under the leadership of Eleanor Roosevelt and René Cassin, had so successfully designed the Universal Declaration, became increasingly ideologically divided. A draft human rights covenant had been formulated but quickly disappeared to the back burner. Western countries, under the leadership of the US, increasingly focused exclusively on the civil and political rights and neglected international economic, social and cultural human rights. The Soviet bloc adopted the opposite position: rights to political freedom were regarded as bourgeois rights of the capitalist West. This column submits the thesis that nearly 50 years after the adoption of the two international covenants and with the Cold War behind us, it is timely to call for a creative approach of how to strengthen in a coherent way the implementation of both categories of human rights. The author advocates the conclusion of a new technical protocol in order to facilitate co-operation between the treaty bodies of the two covenants, with a view to establish in future joint monitoring mechanisms and joint complaints procedures of all treaty bodies and ultimately to pave the way towards one worldwide human rights treaty.

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BACKGROUND

Notwithstanding the differences between the two categories of human rights, there are also many similarities in the two treaties. However, ultimately they are currently independent and distinct from one another. In 1952, it was decided to set up not one but two treaties: a separate treaty for each category.¹ However, due to the adversarial positions of 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 influence 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.² This right was to encompass both political and economic self-determination: a people should be able to dispose freely of its natural resources and in no case should a people have its means of subsistence taken from it. It is striking that the right to self-determination was adopted in identical terms as Article 1 in both treaties. Subsequently, however, the paths of the civil and political rights and of the economic, social and cultural rights diverged. In any case, each treaty stands independently of the other, had to be separately signed and passed into force, and was accorded separate international monitoring mechanisms. In order for the treaties to pass into force, 35 ratifications were needed and that number was achieved for both in 1976. This is not to say that the group of countries ratifying each covenant was exactly the same; until today, for example, the US 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 list of parties to the covenants have become increasingly similar in recent years. The ICCPR now has 167 State ratifications and the ICESCR 160.

The ICCPR has an Optional Protocol that provides for an individual right of complaint which came into being after a joint initiative of the Netherlands and Nigeria in 1966. This Protocol now has at least 113 parties, many of which have come on board since the early 1990s. In December 2008, a similar protocol was adopted for the ICESCR that was opened for signature from September 2009. This Optional Protocol has until now been signed by 34 States including the Netherlands. To enter into force, ten ratifications are necessary which are expected to be achieved by 2012. Both treaty committees will then 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 to form free trade unions. The secretariat of both committees is provided by the Office of the High Commissioner. Of course, there are a great number

¹ See UNGA Res. 543 (VI), 5 February 1952.

² See UNGA Res. 545 (VI), 5 February 1952.

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.³ 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. This is even more important now, after the Cold War, when the conviction that all human rights are universal, indivisible and interrelated is gaining ground. This new policy position was powerfully expressed in the Vienna Declaration of the World Human Rights Conference, which was adopted by consensus in 1993, and has been repeatedly confirmed since then. 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, the idea that only civil and political rights, but not economic, social and cultural rights, can be invoked in court is generally incorrect.

PROLIFERATION OF HUMAN RIGHTS TREATIES

In addition to the ICCPR and ICESCR, a large number of new global human rights treaties has come into being, mostly on specific subjects (such as racial discrimination or torture) or for special groups (such as women, children and migrant workers). Virtually every treaty has its own monitoring committee; at the moment, nine in total and very soon ten. Each treaty committee 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 five years but many States often submit reports too late). In addition to these reports by the States themselves, known as 'self-reporting', the custom 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 past 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, the practice has developed in recent years that States can prepare one core document for all human rights reports which is then supplemented by a further report that specifically addresses the observance of human rights covered by the relevant treaty.

Various treaty committees also have an individual complaints procedure, for example, in the area of racial discrimination, discrimination against women, torture

³ See Netherlands Advisory Council for International Affairs, advice no. 57, The Hague, 2007, available at www.aiv-advice.nl.

and other civil/political rights. It is gratifying that, certainly 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. Several new treaties have also come into being, including one on persons with a disability and one on forced disappearances. 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.⁴ 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 former South African Judge Navanethem Pillay, and in the treaty committees, for example in their annual ‘inter-committee meetings’, discussions are being held on how to achieve more cooperation and synergy and how to further streamline the reports. Until now, mostly only minor adjustments have been achieved (such as the common core document and general reporting guidelines), although they can be important on the work floor, particularly if a number of adjustments can be applied in combination. 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.

THE FUTURE: THE NEED FOR A CREATIVE APPROACH

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 demand creativity and a visionary approach. Perhaps a start should be made with smaller steps: a cautious cooperation between the various treaty committees could be facilitated by streamlining their procedures, assessing partially integrated reports in a mutually consistent manner and perhaps (partial) joint conclusions and recommendations. In the future, such cooperation can hopefully result in a joint protocol that establishes a joint monitoring mechanism and joint complaint procedures, starting with those of the ICESCR and the ICCPR. If all of this comes about (for example, on the 50th anniversary of the ICCPR and the ICESCR in 2016), we can perhaps hopefully look forward, in a distant future to that single world human rights treaty with a strong monitoring mechanism that was intended in 1948! However, achievement of this goal requires the first steps to be taken now.

⁴ See UN Doc. A/RES/60/251, 3 April 2006.