

## INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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On 10 December 1949, the United Nations General Assembly, convened at Palais de Chaillot in Paris, adopted the Universal Declaration of Human Rights (General Assembly resolution 217 A (III) of 10 December 1948). The General Assembly also requested the Economic and Social Council (hereinafter “ECOSOC”) to ask the Commission on Human Rights to continue to give priority in its work to the preparation of a draft covenant on human rights and draft measures on its implementation (General Assembly resolution 217 E (III) of 10 December 1948). That was the prevalent idea among the membership of the United Nations. However, discrepancies regarding the nature of the rights to be included - and, accordingly, the rights and duties to which they gave rise and the international oversight mechanism - coupled with the political readings of those rights in the light of the Cold War - finally led to the decision of having two different treaties to be submitted simultaneously to the consideration of the General Assembly (General Assembly resolution 543 (VI) of 5 February 1952). The plenary organ underlined in its decision that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” and that the idea of simultaneous processes for the two treaties pursued the goal of showing their unity.

The International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”), together with the International Covenant on Civil and Political Rights (hereinafter “ICCPR”), were adopted by the United Nations General Assembly on 16 December 1966 by consensus, with no abstentions (General Assembly resolution 2200 A (XXI) of 16 December 1966). The ICESCR entered into force in general on 3 January 1976 and the ICCPR on 24 March 1976. Both treaties and the Optional Protocol to ICCPR resulted from some eighteen years of debates and negotiations in the new institutional context provided by the United Nations. Pressures for their adoption have been exerted by the new States issued from the decolonization movement and the Latin American States.

The fate of the ICESCR was marked by the perception of Western countries that the human rights it enshrined, the duties it imposed on States and the monitoring mechanisms were essentially different from those provided for in the ICCPR. From an opposite perspective, that was the view of the Eastern countries, too. In fact, the Cold War provided two different political, legal and economic models and each set of rights, civil and political rights (hereinafter “CPR”) and economic, social and cultural rights (hereinafter “ESCR”), was prevalent in each of them. In any case, both Western European States as well as Latin American States ratified both treaties.

Legal authorities brought into that already complex picture, elements taken from liberal constitutional law and invoked the doctrine of generations, awarding to ESCR a “second” generation of human rights, mainly programmatic and requiring important allocations of resources for implementation, compared to the “first” generation of CPR, self-executing and with a monitoring system. The stigma of non-binding commitments and the costs of the implementation of ESCR gave flesh and bones to an interpretation of these rights that became an obstacle for their progression. Today, it is clearer than 50 years ago that all human rights require positive obligations from States and that human rights have costs.

As early as 1968, the United Nations realized that it was necessary to stress that ESCR were human rights. Accordingly, the Proclamation of Teheran declared that “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”. Later on, during the World Conference on Human Rights held in Vienna in 1993, the international community stressed again that “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the

same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.

In practice, both Covenants bind almost the same constituency, 173 States Parties for the ICCPR and 171 for the ICESCR, as of 18 October 2020. The United States is only bound by the ICCPR while the Russian Federation is party to both Covenants and China only to the ICESCR. Cuba remains out of this scheme. Almost the ninety percent of the members of the State community are bound by the provisions of these two treaties.

The ICESCR is structured in five parts. The Preamble and Parts I and V are common with the ICCPR. The Preamble recalls that human rights derive from the inherent dignity of the human person and the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms. Part I, as in the ICCPR, embodies the right of all peoples to self-determination, including the permanent sovereignty over natural resources and the duty of States administering Non-Self Governing and Trust Territories to promote self-determination. By 1960, the political weight of the newly independent States was as important as their main interests: self-determination and non-discrimination. Both Covenants deal with those issues. Part V contains the Final Provisions as does Part VI of the ICCPR.

Part II embodies the main principles regarding ESCR and their implementation. Article 2 embodies the obligation of each State Party to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures, without discrimination. The different language of this provision when compared to article 2 of the ICCPR gave room to arguments on the programmatic nature of ESCR to the trend that the implementation of these rights can be delayed *sine die*, and, accordingly, that these rights are non-justiciable. The idea that the full realization of ESCR could be reached progressively and in the light of the maximum of every State’s available resources, including international assistance and co-operation, gave rise to the argument that lacking resources, no realization could be claimed.

Slowly but surely, the discussion about the progressive versus immediate character of the obligations derived from the ICESCR shifted into the understanding that ESCR, like any rights, require the adoption of legal rules and public policies so that individuals can exercise said rights and, if needed, demand their enforcement through legal action. Also, the growing shared understanding that progressivity does not imply the absence of immediate obligations created room for the intervention of courts and tribunals, which exerted a great influence on the content of the obligations imposed on the State in relation to ESCR. General Comment 3 by the Committee on Economic, Social and Cultural Rights (hereinafter “CESCR”) advanced the debate when it stated that the Covenant “imposes an obligation to move as expeditiously and effectively as possible towards that goal [the full realization of the rights in question]”. At the same time, it clarified that some engagements could be immediately satisfied like the principle of non-discrimination. The CESCR elaborated further on States’ obligations to respect, to protect and to fulfil. It also pointed out that any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. Article 3 refers to the equal rights of men and women regarding ESCR. Article 4 provides criteria for the permissible limitation of these rights. It points to limitations as determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. These criteria will be complemented by the Limburg Principles on the Implementation of the ICESCR (1987) and the Maastricht Guidelines on Violations of ESCR (1998). Finally, article 5 prevents the misuse of the Covenant prohibiting larger limitations of the protected rights than provided for in the Covenant and the restriction or derogation of human rights not included in the Covenant, mirroring the same provision in the ICCPR.

Part III deals with the protected rights: the right to work; the right to the enjoyment of just, and favourable conditions of work; the right to form and join trade unions; the right to social security, including social insurance; the right to the protection of the family; the right to an adequate standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; the right of everyone to education; and the right to take part in cultural life.

Considering both Covenants, only three of the human rights embodied in the Universal Declaration of Human Rights have not found their place in the treaties: the right to seek asylum, the right to a nationality and the right to property. Disagreements, mainly grounded on political reasons, prevented any consensus.

Part IV of the ICESCR provides for the submission of periodical reports by States Parties to the ECOSOC regarding the measures which they have adopted, and the progress made in achieving the observance of the protected rights. The Council would transmit the reports to the Commission on Human Rights.

As different from ICCPR, the ICESCR does not provide for the establishment of a treaty body. The current Committee on Economic, Social and Cultural Rights is a pretorian creation of the United Nations and its Member States. In 1978, the ECOSOC established a sessional working group on the implementation of the ICESCR (decision 1978/10 of 3 May 1978), which in 1985 was transformed into a Committee on Economic, Social and Cultural Rights, composed by 18 independent experts elected, through secret ballot, from a list proposed by States Parties to the Covenant (resolution 1985/17 of 28 May 1985).

The CESCR - as other treaty bodies - is in charge of the examination of periodical reports submitted by State Parties, and to that end, it adopts General Comments on the scope of the protected rights and indicating the areas on which information should be provided. At the same time, the Committee provides treatment to the complaints lodged with it as provided for in the Optional Protocol to the ICESCR adopted on 10 December 2008, which entered into force in general on 5 May 2013 and binds 25 States as of 18 October 2020. It also conducts the inquiry procedure provided for in article 11 of the Optional Protocol to the ICESCR in cases of grave and systematic violation of protected rights.

The influence of the ICESCR on legal developments, including treaties and jurisprudence, has been substantive. It elaborated and turned into legal rules the so-called “social rights” on which the International Labour Organization had been working since the end of the First World War, like work, social security, hours of work, work accidents, minimum working age, freedom of association and the right to form and join trade unions, non-discrimination in employment, among others. It also deals with some of the subjects which the World Health Organization and the Food and Agriculture Organization work on.

The Covenant became the source of regional rules as those embodied in the Banjul Charter, the African Charter on Human and Peoples Rights (1981), the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) and the Protocol of San Salvador, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988). It also influenced the development of the jurisprudence of the African Commission on Human Rights as well as that of the Inter-American System, especially before the entry into force of the Protocol of San Salvador on 16 November 1999. It also had impact on the constitutional protection of ESCR in African Constitutions and on the jurisprudence of national courts in Latin America.

The Covenants reached fifty years, a mature age. We hope they will be illuminating the way forward.

## **Related Materials**

### ***A. Legal Instruments***

Universal Declaration of Human Rights, Paris, 10 December 1948.

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, p. 3.

Proclamation of Teheran, Teheran, 13 May 1968.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008.

### **B. Documents**

General Assembly resolution 217 E (III) of 10 December 1948 (Preparation of a Draft Covenant on Human Rights and Draft Measures of Implementation).

General Assembly resolution 543 (VI) of 5 February 1952 (Preparation of two Draft International Covenants on Human Rights).

General Assembly resolution 2200 A (XXI) of 16 December 1966 (International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights).

Economic and Social Council decision 1978/10 of 3 May 1978.

Economic and Social Council resolution 1985/17 of 28 May 1985.

Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights, Annex "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (E/CN.4/1987/17, 8 January 1987).

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 1998.

### **C. Doctrine**

D. Moeckli & H. Keller with C. Heri (ed.), *The Human Rights Covenants at 50: Their Past, Present, and Future*, Oxford University Press, Oxford, 2018.

E. Riedel, "Committee on Economic Social and Cultural Rights (CESCR)" in *Max Planck Encyclopedia on Public International Law*, Oxford University Press, 2010.

E. Riedel, "International Covenant on Economic, Social and Cultural Rights (1966)" in *Max Planck Encyclopedia on Public International Law*, Oxford University Press, 2011.