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THE HUMAN RIGHTS COVENANTS AT 50

THEIR PAST, PRESENT, AND FUTURE

DANIEL MOECKLI • HELEN KELLER • CORINA HERI

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Their Past, Present, and Future

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We hope that this volume will inspire the work of the UN treaty bodies and of human rights scholars as they begin to give the Covenants the shape they will take for the coming fifty years.

Daniel Moeckli/Helen Keller
February 2018

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List of Abbreviations

AC	Appeal Cases
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACIJ	Civil Association for Equality and Justice (<i>Asociación Civil por la Igualdad y la Justicia</i>)
ACtHPR	African Court on Human and Peoples' Rights
AD	Appellate Division (of the Bangladeshi Supreme Court)
AICHR	Intergovernmental Commission of Human Rights
AIR	All India Reporter
AJIL	American Journal of International Law
ALI	American Law Institute
ASEAN	Association of Southeast Asian Nations
AU	African Union
AWC	Allahabad Weekly Cases
BGBI	Bundesgesetzblatt (Germany)
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Decisions
BT	German Bundestag
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
BvR	<i>Verfassungsbeschwerde zum Bundesverfassungs-gericht</i> (constitutional complaint to the Federal Constitutional Court of Germany)
BwCA	Botswana Court of Appeal
BYIL	British Yearbook of International Law
Cal.	Calcutta
CAR	Central African Republic
CAT	United Nations Convention against Torture (also referred to as UNCAT)
CBDR	common but differentiated responsibilities
CEDAW	United Nations Convention on the Elimination of all Forms of Discrimination Against Women
CEDMHR	Commission for Eliminating Discrimination and Monitoring of Human Rights (Sri Lanka)
CELS	<i>Centro de Estudios Legales y Sociales</i> (Center for Legal and Social Studies)
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
ch	chapter
CJEU	Court of Justice of the European Union
CMW	Committee on the Rights of Migrant Workers
CoE	Council of Europe
CPR	civil and political rights
CRC	Convention on the Rights of the Child
Cri LJ	Criminal Law Journal (India)
CRPD	Convention on the Rights of Persons with Disabilities

DLR	Dhaka Law Reports (Bangladesh)
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
ECOSOC	UN Economic and Social Council
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EFF	European Financial Stability Facility
EHRC	Equality and Human Rights Commission
EJIL	European Journal of International Law
eKLR	Kenya Law Reports
ESCh	European Social Charter
ESCR	economic, social and cultural rights
ESCR-Net	International Network for Economic, Social and Cultural Rights
ESIL	European Society of International Law
ESM	European Stability Mechanism
ETS	European Treaty Series
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court (Administrative Court)
F.Supp.2d	Federal Supplement, Second Series (US)
FAO	UN Food and Agriculture Organization
FCC	German Constitutional Court
FMSLR	Federated Malay States Law Report
GAOR	Official Records of the UN General Assembly
GATT	WTO General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GHG	greenhouse gas
Hague YIL	Hague Yearbook of International Law
HCD	High Court Division (of the Bangladeshi Supreme Court)
Hcj	Israeli High Court of Justice
HIV	human immunodeficiency virus
HL	House of Lords
HRC	Human Rights Committee
HRCSL	Human Rights Commission of Sri Lanka
HRTF	Human Rights Task Force (Sri Lanka)
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IASHR	Inter-American System on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICM	Inter-Committee Meeting
ICSID	International Centre for Settlement of Investment Disputes
ICT-BD	International Crimes Tribunal of Bangladesh
IFC	International Finance Corporation
IFIs	international financial institutions

IFOR	International Fellowship of Reconciliation
IHRL	international human rights law
IHRR	International Human Rights Reports
ILA	International Law Association
ILDC	Oxford Reports on International Law in Domestic Courts
ILO	International Labour Organization
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
JCHR	the UK Parliament's Joint Committee on Human Rights
Ker.	Kerala
LeCA	Lesotho Court of Appeal
LNTS	League of Nations Treaty Series
LOIPR	List of Issues Prior to Reporting
LR	Law Review
MENA	Middle East and North Africa
MLJ	Malayan Law Journal
NASC	Namibian Supreme Court
NCHR	National Commission for Human Rights (Pakistan)
NCHRT	National Committee for the Implementation of International Human Rights Treaties (North Korea)
NDCs	nationally determined contributions
NGO(s)	non-governmental organization(s)
NHRC	National Human Rights Commission (India)
NHRIs	national human rights institutions
NIHRC	the Northern Ireland Human Rights Commission
NMRF	National Mechanism for Reporting and Follow-up
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP1-ICCPR	First Optional Protocol to the ICCPR
OP-ICESCR	Optional Protocol to the ICESCR
PACE	Parliamentary Assembly of the Council of Europe
PCIJ	Permanent Court of International Justice
PSNR	permanent sovereignty over natural resources
RCC	Russian Constitutional Court
(R)ESCh	(Revised) European Social Charter
RSC	Russian Supreme Court
SAR	Special Administrative Region
SC	Supreme Court
SCC	Supreme Court Cases (India)
SCGLR	Supreme Court of Ghana Law Reports
SCHR	the Scottish Human Rights Commission
ScotCS	Scottish Court of Session
SCR	Supreme Court Reports (India)
SeCC	Senegalese Court of Cassation
SLR	Sri Lankan Law Reports
SPR	Simplified Reporting Procedure
SUHAKAM	National Human Rights Commission of Malaysia (<i>Suruhanjaya Hak Asasi Manusia</i>)

UDHR	Universal Declaration of Human Rights
UgCC	Ugandan Constitutional Court
UK	United Kingdom
UKSC	Supreme Court of the United Kingdom of Great Britain and Northern Ireland
UNCAT	United Nations Convention against Torture (also referred to as CAT)
UNGA	United Nations General Assembly
UNGP	UN Guiding Principles on Business and Human Rights
UNTB	UN human rights treaty bodies
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
ZACC	Constitutional Court of South Africa
ZASCA	Supreme Court of Appeal of South Africa
ZWHHC	Zimbabwe Harare High Court

1

Introduction

Helen Keller and Daniel Moeckli

Human rights protection today marks a cornerstone of international law and belongs to its most developed areas. Human rights are enshrined in international conventions, as well as national constitutions, and form the subject of innumerable treatises. As compared to many other subject areas of international law, human rights have a considerable advantage: they can be asserted before international adjudicative bodies or courts. Their recognition is ‘the foundation of freedom, justice and peace in the world’, as the preambles of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ and the International Covenant on Civil and Political Rights (ICCPR)² proclaim. However, the international system of human rights protection has been facing a number of major challenges, such as how to deal with the distinction between different categories of rights or how to design effective monitoring mechanisms. The system is very likely to continue to attract a great deal of attention over the next few years, as it is faced with the question of how to guarantee human rights in times of globalization, financial crises, environmental disasters, and climate change, war, and terrorism. The reader will find some answers to these questions in the present book, which contains papers that were presented during a symposium held in Zurich, Switzerland, in 2016 on the occasion of the fiftieth anniversary of the adoption of the ICESCR and the ICCPR.³

Half a century ago, on 16 December 1966, the UN General Assembly adopted the two UN human rights Covenants. While their adoption was celebrated all over the world, their fiftieth anniversary has received very little attention from the international community.⁴ The present volume marks this anniversary by taking stock of the first half-century of the existence of what are probably the world’s two most important human rights treaties. It does so by reflecting on what the Covenants have achieved (or failed to achieve) in the years that have passed, by determining

¹ International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

² International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³ The Symposium was organized by the Institute for Public International Law of the University of Zurich together with the European Society of International Law (ESIL) and took place on 14–15 April 2016.

⁴ See, for one of the rare exceptions, Eibe Riedel, ‘Reflections on the UN Human Rights Covenants at Fifty’ (2016) 54 *Archiv des Völkerrechts*, 132–54.

and comparing their current influence in the various regions of the world, and by assessing their potential roles in the future.

Some fundamental issues that are addressed by the contributors to this book are as old as the two Covenants themselves. They concern, for example, the division of human rights into first- and second-generation rights, and the questions of whether there should be one central monitoring body—possibly a world court—or more than just one, and whether such a body or bodies should be able to issue legally binding decisions or ‘only’ recommendations. Other important questions dealt with in this book are how human rights treaties should be interpreted—in compliance with the Vienna Convention on the Law of Treaties or, rather, *sui generis*—and who is bound by the Covenants—only State actors or also private individuals. However, the contributors go beyond such questions, which have been explored before; they develop new answers to old questions and point to new challenges.

The book begins by looking back to the origins of the Covenants. The Covenants’ story began with the ambitious goal of creating an International Bill of Human Rights. In 1945, the first milestone in this regard was reached with the proclamation of the Universal Declaration of Human Rights (UDHR).⁵ The next step was to be the inclusion of the UDHR rights in a binding human rights treaty. After years of tough negotiations, the two binding UN human rights covenants were finally adopted on 16 December 1966. In her chapter entitled ‘The History of the Covenants: Looking Back Half a Century and Beyond’, MAYA HERTIG RANDALL gives a detailed account of that time and the political context of the negotiation process.

The ICCPR and the ICESCR have played an important role in the protection of human rights in the last decades. The fact that a large number of States have ratified the twin Covenants can certainly be regarded as a success.⁶ Furthermore, the introduction of different monitoring and enforcement mechanisms—from the State reporting process to the individual application system—is another important achievement. With regard to the implementation of the Covenants, much depends on the actors involved, including the treaty bodies—the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC)—and non-governmental organizations (NGOs). In this context, GERALD L NEUMAN, in his chapter ‘Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members’, presents and discusses the multiple roles that the members of the HRC play with regard to the implementation of the rights guaranteed in the ICCPR. He argues that the members’ most important contribution is their credible and professional interpretation of the ICCPR rights, thereby providing an objective framework for criticizing States’ failure to respect these rights. DANIEL MOECKLI, on the other hand, comments on the—disputed—techniques that the CESCR has developed in order to interpret the ICESCR. His chapter ‘Interpretation of the ICESCR: Between Morality and State Consent’ argues that,

⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

⁶ 165 States have ratified the ICESCR and 169 States have ratified the ICCPR. See Office of the High Commissioner for Human Rights, ‘Ratification of 18 International Human Rights Treaties’ <<http://indicators.ohchr.org/>> accessed 6 June 2017.

for its interpretive practice to be legitimate, the CESCR must adhere to a set of interpretive principles, apply these principles in a coherent manner, and lay bare how a particular interpretive outcome is reached. PATRICK MUTZENBERG, in his contribution on ‘NGOs: Essential Actors for Embedding the Covenants in the National Context’, illustrates the position and the tasks of NGOs within the work of the Committees, as well as their crucial role in the process of implementing the recommendations of the Committees at the national level.

Almost half of the chapters of this book are dedicated to the assessment of the current influence of either the ICCPR or the ICESCR in one of the world’s regions. The authors—namely MANISULI SSENIONJO for Africa, BAŞAK ÇALI for the Middle East, MÓNICA PINTO and MARTÍN SIGAL for Latin America, YOGESH TYAGI for Asia, and AMREI MÜLLER for Europe—were provided with the same set of non-exhaustive questions as a starting point for their contributions. They were asked to identify broad trends and challenges within the respective regions, or rather within States parties belonging to these regions, by considering, *inter alia*, the impact of the Covenants on national legislation and on the jurisprudence of national and regional courts; the influence of the General Comments, concluding observations on State reports, and Views concerning individual communications issued by the HRC and the CESCR; the impact of the Universal Periodic Review process with regard to the Covenants; the impact of the Covenants’ standing on legal scholarship; and the availability of the relevant UN documents in the respective local languages as well as the accessibility of these documents.

The differences between the methodological approaches adopted by the authors of the five regional reports and the results they reached are striking. This might already be taken as an indication of the different underlying perceptions of the Covenants within the various world regions. None of the reports is based strictly on empirical studies. In other words, it is not possible to scientifically establish what kind of impact the Covenants have—or rather have had in the past—on the relevant national societies or on individuals, or the extent of such an impact. However, each of these reports contains the appraisal of a human rights expert—or, in the case of the Latin American report, two experts—who knows the relevant region and gives professional insight into the situation. It goes without saying that these assessments are subjective. Nevertheless, in the words of SAMANTHA BESSON, ‘the five reports . . . provide the first opportunity for a global or universal comparison of the influence of the two Covenants in domestic law’.⁷ BESSON accepted the challenge of comparing the regional reports. In her chapter, entitled ‘The Influence of the Two Covenants on States Parties across Regions: Lessons for the Role of Comparative Law and of Regions in International Human Rights Law’, she not only presents a study in comparative international human rights law, but also provides a contribution to its methodology. Furthermore, she explores a central and recurring issue, namely the legitimacy of the Committees’ interpretations of their respective Covenants, from

⁷ Samantha Besson, ‘The Influence of the Two Covenants on States Parties Across Regions: Lessons for the Role of Comparative Law and of Regions in International Human Rights Law’, Chapter 11 in this volume.

a comparative perspective. She argues that a comparison of regional approaches to human rights issues may provide the Committees with a fruitful avenue for identifying and consolidating an international consensus around Covenant rights, and that such a region-by-region approach may ease this process as compared to a purely State-by-State approach.

Finally, the book dares to take a look into the future. What challenges will the Covenants have to face? What role will they play in the years to come? Is there a need for institutional changes to ensure better implementation of the human rights enshrined in these treaties? Possible answers to these questions are found in STEPHEN HUMPHREYS's chapter, 'The Covenants in the Light of Anthropogenic Climate Change'. He predicts a rather bleak future for the Covenants given that climate change has a huge and growing impact on the human rights system. He claims that the gap between the nominal rights enshrined in the Covenants and the legal remedies available to assert their breach is widening and beginning to appear unbridgeable. Hence, in a warming world, the promise of the Covenants to protect human rights cannot be kept. CHRISTINE KAUFMANN, for her part, elaborates on the nature of financial crises, their impact on human rights, and the role(s) of the States bound by the Covenants. Her chapter, entitled 'The Covenants and Financial Crises', proposes three key elements for an effective implementation of the Covenants in times of financial crises: a people-oriented, rights-based perspective, a process to foster coherence, and a fresh paradigm which she calls 'translational human rights'. Finally, in 'The Institutional Future of the Covenants: A World Court for Human Rights?', FELICE GAER discusses and analyses the proposal by Manfred Nowak and Martin Scheinin to introduce a 'world court of human rights' to overcome the problem of the weak implementation system for Covenant rights. She advocates, instead of aiming at the creation of a 'world court' as a new 'big idea', a thorough analysis of the existing treaty body system in order to achieve the ultimate goal: providing greater human rights protection and enforcement of individual complaint decisions. In this analysis, one would, *inter alia*, need to consider the question of how to respond to the phenomenon that the human rights treaty bodies' reactions are notoriously late in many cases. Or, to put it differently: how can human rights bodies discuss imminent human rights violations in good time, in order to prevent them from taking place?

The added value of this book, we believe, lies in the diversity of its essays. Due to the different regional, theoretical, and professional backgrounds of the contributors, the volume gives the reader a unique, comprehensive, and practical insight into the multifaceted and contentious nature of human rights from different perspectives.

In times when the human rights system is constantly challenged, the international community would do well to pay (more) attention to the fiftieth anniversary of the two human rights treaties that are probably the most important and well-known instruments of their kind worldwide, to recall the—positive and negative—experiences made with them in the past half-century, and to learn from them. Today's challenges call for an effective human rights system. This book tells us that the ICESCR and the ICCPR undoubtedly contribute to the powerful protection of human rights throughout the world.

PART I

THE PAST

What Have the Covenants (Not) Achieved?

2

The History of the Covenants

Looking Back Half a Century and Beyond

Maya Hertig Randall

I. Introduction

The adoption of the Universal Declaration of Human Rights (UDHR)¹ on 10 December 1948 realized the first of the three limbs of an international bill of rights: (1) a declaration of rights, to be complemented at a later stage by (2) a binding human rights treaty and (3) international measures of implementation.² Whilst the adoption of the UDHR undoubtedly marked a milestone in the history of international human rights and has rightly been celebrated as a tremendous achievement,³ the realization of the second and third prongs was no less important. Casting the rights contained in the UDHR into binding treaty law was a paradigm shift,⁴ raising many intricate questions:⁵ how precisely should the rights be worded? Under which circumstances and conditions should it be possible to limit or to suspend them at times of emergency? Should States be free to enter reservations to binding human rights provisions or would this undermine the universal aspiration of the

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

² See ECOSOC (UN Economic and Social Council) Res 1/5 (16 February 1946).

³ As the UDHR did not provide for legal institutionalization, international lawyers' early reactions were, however, marked by scepticism. See Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 EJIL 903, 903–10.

⁴ When the UDHR was adopted, many State representatives stressed the fact that it did not create any legal obligations. The representative of the United States, for instance, made the following statement before the General Assembly: '[i]n giving our approval to the Declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation' ('Remarks by Mrs Franklin D Roosevelt' (1948) Department of State Bulletin 19 751, as cited in Hersch Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 BYIL 354, 358). The United States' insistence that the UDHR was not a treaty reflected its stance during the drafting process. Like the Soviet Union, it had been pushing for a nonbinding document (see Christopher NJ Roberts, *The Contentious History of the International Bill of Human Rights* (CUP 2015) 68).

⁵ The negotiations on most of these questions are described in Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (University of Indiana Press 2008) 197–242.

International Bill of Human Rights?⁶ What obligations would States precisely have under a binding human rights treaty? Should these obligations extend to all levels of government or should the federal structure of States be taken into account?⁷ Should the human rights treaty to be drafted extend to dependent territories? Drafting a binding human rights treaty required agreement on these vexing legal issues.

Providing for international supervision and enforcement mechanisms for the rights enshrined in a binding treaty was even more challenging: it required 'States to submit to international supervision their relationship with their own citizens, something which has been traditionally regarded as an absolute prerogative of national sovereignty'.⁸ Accepting international implementation signified 'a revolutionary change in the status of the individual',⁹ based on the insight that the most fundamental rights of every human being are a matter of international concern transcending the interest of any single State.¹⁰

The members of the United Nations (UN) grappled with the tremendous obstacles entailed in completing the International Bill of Human Rights for almost two decades. The Commission on Human Rights (hereafter 'the Commission') finished its task in 1954. As is well known, its work resulted in two draft treaties, instead of one as originally envisaged.¹¹ The subsequent negotiation and review process of the two draft Covenants within the UN General Assembly (UNGA) (mainly within its Third Committee) lasted twelve years. By the time the UNGA adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹²

⁶ As no agreement could be reached, the Covenants are silent on this issue. On the negotiations, see *ibid* 232–40.

⁷ The United States, supported by other federal States, namely Canada and Australia, pressed for over a decade for a so-called federal clause, which would have enabled federal States to limit the applicability of the covenant to the federal government. Due to strong opposition, this view did not prevail. ICCPR art 50 and ICESCR art 28, as finally adopted, read: '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.' On the controversy raised by the federal clause, see Normand and Zaidi, *Human Rights* (n 5) 224–32; AW Bryan Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (paperback edn, OUP 2004) 470–71.

⁸ Speech by John Humphrey (1 January 1952) UN Archives/Geneva, SOA 317/4/01 (C), quoted in Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (3rd edn, University of Pennsylvania Press 2011) 232.

⁹ Hersch Lauterpacht, *An International Bill of the Rights of Man* (OUP 2013) 194–95.

¹⁰ *ibid*.

¹¹ For the decision to adopt two Covenants instead of one, see UNGA Res 543 (VI) (5 February 1952) UN Doc A/RES/543(VI). The General Assembly requested ECOSOC to instruct the Commission on Human Rights 'to draft two Covenants on Human Rights, to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible, particularly in so far as the reports to be submitted by States on the implementation of those rights are concerned' (para 1). For a detailed analysis of the process leading to the split into two Covenants, see Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010) 113–14 (ch 6).

¹² International Covenant on Economic, Social and Cultural Rights (ICESCR) (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.