

**INTERNATIONAL HUMAN RIGHTS**  
**LouvainX online course - prof. Olivier De Schutter**

**READING MATERIAL**

**related to: section 1, sub-section 1: Sources of human rights**

**The Original Separation between Civil and Political Rights and Economic, Social and Cultural Rights as Human Rights: A Brief Introduction**

**NOTE.** This is an excerpt from the Editor's Introduction to O. De Schutter (ed.), *Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publ., 2013.

**Introduction**

Sixty years elapsed between the vote in favour of the Universal Declaration of Human Rights in 1948 (United Nations General Assembly 1948) and the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, providing for a right to individual communications before the Committee on Economic, Social and Cultural Rights (United Nations General Assembly 2008). It is probably no exaggeration to state that throughout this period, the history of international human rights was dominated by the controversy about the status of economic, social and cultural rights as human rights.

The foundations for the controversy were laid by the Declaration itself. Franklin Delano Roosevelt, who by then has been elected for his third term as President of the United States, had included "freedom from want" in his famous 1941 "Four Freedoms" speech (Roseman 1969, vol. 9: 672), and he had outlined a vision of a "Second Bill of Rights" in his 1944 State of the Union speech to the United States Congress (Sunstein 2004: ch. 1). Roosevelt proclaimed that "necessitous men and not free men", and his experience in constructing successive versions of the New Deal had gradually converted him -- he, the fiscally conservative presidential candidate for the 1932 presidential election -- to the idea that social and economic rights were key ingredients for recovery from economic crisis (Brinkley 1995: chap. 4).

His convictions directly influenced the work of the UN delegates building the human rights regime for the post-World War order. The draft of the Universal Declaration of Human Rights was prepared by a Working Group created in 1947 by the newly established Commission on Human Rights, itself a committee of the UN Economic and Social Council. Faithful to the vision of her late husband, Eleanor Roosevelt, the Chair of the Working Group tasked with preparing the Declaration, insisted on economic and social rights being part of the catalogue of rights that the United Nations General Assembly would adopt (Glendon 2001). She had no difficulties convincing the other members of the drafting committee on the principle, for all members agreed on the importance of the economic and social rights that were considered for inclusion -- the right to medical care, the right to education, the "right and the duty to perform socially useful work", the right to good working conditions, the right to "such public help as may be necessary to make it possible for him to support his family", the right to social security, the right to "good food and housing and to live in surroundings that are pleasant and healthy", or the right to rest and leisure. Indeed, these rights were listed among the forty-eight items

that the United Nations' Secretariat Human Rights Division, then headed by a forty-year-old Canadian professor at McGill University, John Humphrey, had identified as appearing most frequently in the human rights catalogues across the world, in the document that served as the first working document to the delegates of the Human Rights Commission.

But behind this apparent consensus, there were important disagreements on three issues related to the implementation of these economic and social rights. A first issue was whether the fulfilment of economic and social rights required an activist State to deliver the corresponding public programmes, relying on a centralized planning of the use of resources. The Soviet Union and other countries of the socialist camp believed the role of the State should be recognized; in contrast, the United States and other Western democracies considered that each State should be left free to determine how, and by whom, such rights should be implemented, and they favored a formulation that would recognize the role of the market in social progress. A second issue resulted from the fears expressed by delegates from the developing countries -- most notably Egypt and India -- that the poorer nations could only fulfil the promises of the Declaration gradually, and that they could not be expected to match the standards set by industrialized nations all at once. A third and related issue concerned the role of international cooperation, and whether rich countries had any duty to support poor countries' efforts in realizing rights to education, housing or food.

In the immediate post-World War II context, these questions were fast emerging as central both to the competition between two ideological systems, the socialist "East" and the free market "West", and the debates on decolonization. The Cold War was beginning as the Universal Declaration of Human Rights was being drafted ; and the struggle for political independence and economic emancipation of developing nations was being launched, at a time when colonial empires were already being perceived as anachronistic. It is fortunate that, at an early stage in the work of the Commission on Human Rights, three separate working groups were established, one to work on a draft (non binding) declaration, under the chairmanship of Eleanor Roosevelt and with the French delegate René Cassin as rapporteur, and the two others to work, respectively, on the text of a convention (binding for the States ratifying it) and on measures of implementation: as illustrated by the fact that it took eighteen years for two covenants to be adopted, implementing in treaty form the bold language of the Declaration, no visible progress could have been achieved in the early years if all these issues had been dealt with together, as part of a single package (Glendon 2001: 87).

Instead, agreement was found on a political statement of principle, that the delegates to the UN General Assembly understood as producing no binding legal effects. The Universal Declaration of Human Rights was adopted just before midnight on 10 December 1948 by forty-eight votes in favor, eight abstentions, and no vote against. The abstentions came from the Soviet Union and its satellites, South Africa, and Saudi Arabia. The Declaration includes a range of economic, social and cultural rights in articles 22 to 27. But the first of these provisions, concerning the right to social security, includes language that applies generally to all the economic, social and cultural rights recognized. It states :

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The reference to the "organization and resources of each State" encapsulated two separate ideas in one single, compromise formula. The expression was meant to convey the idea that the realization of economic, social and cultural rights was without prejudice of the means chosen by each State to this effect, and that States had a choice, in particular, between systems that rely largely on centralized planning by the State, and systems that recognize a greater role to the market. But it also included the idea that, for the implementation of economic, social and cultural rights, States require resources, and that their ability to guarantee such rights depends on the degree of development achieved. In addition, consistent with the development agenda that accompanied the establishment of the post-war Bretton

Woods order, article 28 of the Declaration referred to the need to move towards an international order that enables countries' efforts to implement economic, social and cultural rights at home, stating that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

Though the Universal Declaration of Human Rights laid the foundations, not until the 1960s did a proper United Nations human rights regime emerge, after the adoption of the first binding human rights treaties implementing in legal form the promise of the Declaration. This gradual codification process had a paradoxical impact on the separation between civil and political rights and economic, social and cultural rights. The first human rights treaty to be adopted, the International Convention on the Elimination of All Forms of Racial Discrimination, was adopted by the UN General Assembly on 21 December 1965 (United Nations General Assembly 1965). It included an undertaking "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law", notably in the enjoyment of a range of economic, social and cultural rights. The inclusion of economic, social and cultural rights in the treaty acknowledged that, for the protection against discrimination to be effective, it had to extend to the areas of life -- access to work, education, housing or healthcare -- that are considered most essential for social integration. The Convention also illustrated how the requirement of non-discrimination can constitute a bridge between different categories of rights, and a tool through which economic, social and cultural rights can be enforced by independent monitoring bodies.

By then however, the idea that economic, social and cultural rights are different in nature from civil and political rights had become a cliché, both in the academic literature and in diplomatic circles. Already in 1952, at the request of the Economic and Social Council (itself acting in answer to concerns expressed by its Commission on Human Rights), the United Nations General Assembly had adopted a resolution in which it requested that the Universal Declaration of Human Rights be implemented through two separate covenants, each corresponding to one category of rights (United Nations General Assembly 1952). Both sets of rights, the diplomats agreed, were of equal importance, and all rights were to be treated as interdependent and indivisible. But the dominant view was that the two categories of rights were sufficiently distinct from one another to warrant separate treatment, and were to be implemented through different legal techniques (De Schutter 2010a: 16-17; Eide 2001). Civil and political rights, the negotiators believed, required essentially from States that they abstain from taking measures that could lead to these rights being infringed: such (primarily negative) obligations were determinate enough, and unexpensive enough, to justify monitoring by independent experts, and the imposition of a requirement that each State guarantees access to effective remedies, preferably of a judicial nature, against instances of violation. In contrast, economic, social and cultural rights were seen as imposing positive obligations on States, requiring both the adoption of legal measures and budgetary commitments, and such rights could only be implemented progressively, depending on the resources available to each State as well as on the level of international support received (see for instance Cranston 1964: 54; Alston and Quinn 1987: 181-183).

The result was that the International Covenant on Civil and Political Rights established the Human Rights Committee, a body of independent experts sitting in their individual capacity to assess the reports submitted by States on the implementation of the Covenant under their jurisdiction, and an Optional Protocol to the Covenant authorized the Committee to receive individual communications and express views on information thus received (International Covenant on Civil and Political Rights 1966); in contrast, no such monitoring mechanism was included in the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights 1966): the reports periodically submitted by States under this instrument were addressed to the Economic and Social Council, a body composed of diplomats which was neither equipped, nor in fact willing, to provide any significant follow-up. In addition, the latter covenant included a provision, article 2, para. 1, essentially inspired by article 22 of the Universal Declaration of Human Rights, affirming the specific nature of economic, social and cultural rights in order to take into account the concerns expressed by developing countries. The provision introduced the notion of "progressive

realization" and noted the role of international assistance and cooperation in supporting each country's efforts towards the fulfilment of these rights. It read:

Each State Party to the present Covenant undertakes 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 present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Both the civil and political rights and the economic, social and cultural rights covenants were adopted on the same day, on 16 December 1966, and they entered into force almost simultaneously ten years later; but the damage caused to the understanding of human rights and to how they relate to States' duties took half a century to repair.

### **I. The nature of economic, social and cultural rights**

The essays collected in this volume are a chronicle of the efforts that developed over the past two generations to bridge the gap between the two categories of rights. The battle was fought on different fronts. The controversies initially centered on the nature of civil and political rights, on the one hand, economic, social and cultural rights, on the other hand, and whether the two families of rights could be assimilated to one another. The dispute first unfolded in the 1970s and 1980s. Together with the Belgian jurist, Mark Bossuyt (Bossuyt 1978), the Dutch lawyer E.W. Vierdag from the University of Amsterdam was among the most vocal opponents to the assimilation of both sets of rights. Vierdag's article reproduced in this volume (Chapter 1) is significant not only for the summary of the arguments it provides, that helps understand the widespread scepticism that existed then towards economic, social and cultural rights as human rights, but also for the time at which it appeared: by 1978, the two 1966 covenants had only recently entered into force, forming together with the Universal Declaration of Human Rights the "International Bill of Rights", and the national authorities -- including courts -- were confronted with the first time with the question of which duties were imposed under these respective instruments. The position of Vierdag was that the "rights" listed in the Economic, Social and Cultural Rights Covenant were neither enforceable in a court of law, nor sufficiently well-defined -- though it was unclear whether the lack of definability of economic and social rights was considered a cause of their lack of justiciability, or rather a consequence of courts being denied the power to adjudicate such rights. Though contested by some (in particular van Hoof 1984), that position was consistent with the prevailing opinion at the time : it was, to a large extent, conventional wisdom. It was said by a law and development scholar that though the International Covenant on Economic, Social and Cultural Rights "speaks in the language of rights, [it] refers to the realities of programs" (Trubek 1984: 231); Brownlie, a leading international law scholar, described the Covenant as "programmatically and promotional" in the third edition of his *Principles of Public International Law*, published in 1979 (Brownlie 1979: 572-3).

In parallel however, efforts developed to overcome the apparent vagueness of the International Covenant on Economic, Social and Cultural Rights, and to bridge the gap between the two sets of rights. A first major doctrinal contribution in this direction was the introduction by Asbjørn Eide, in the early 1980s, of a threefold typology of States' duties corresponding to the rights of the individual. By the late 1970s, Eide had come to the conclusion that an effective guarantee of human rights required that the individual be protected from interference by the State in the exercise of certain freedoms ; that the State protect the individual from interference by other actors, whose conduct the State is in a position to control ; and that the State provide certain public goods that would be undersupplied if their provision were left to market mechanisms. Eide presented this tripartite typology of obligations in 1981 at a United Nations Seminar (Eide 1984); at about the same time, a similar framework for the definition of States' obligations was being put forward separately by Henry Shue, a political philosopher at Princeton, in a book dedicated to the role of human rights in U.S. foreign policy (Shue 1980).

The tripartite typology of States' obligations gradually gained broad acceptance, first among scholars working on the right to food, and then in the broader area of economic, social and cultural rights. It was imported into the UN system by Eide himself, after he joined in 1981 the Sub-Commission on the Promotion and Protection of Human Rights (then called the Sub-Commission on Prevention of Discrimination and Protection of Minorities), as the distinction was elaborated upon in a series of reports he prepared on the right to food at the request of the Sub-Commission (United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1983, 1987 and 1999). The mental view of jurists working on economic, social and cultural rights gradually came to resemble a three-pillar structure, with each category of the State's obligations calling for specific types of reasoning and relying on different legal techniques:

Obligation to respect	Obligation to protect	Obligation to fulfil
Obligation not to interfere with existing levels of enjoyment	Obligation to intervene in order to control the conduct of non-State actors	Obligation to take proactive steps to move towards the full realization of the right
Non-discrimination		

The establishment in 1986 of the Committee on Economic, Social and Cultural Rights provided a further impetus to these efforts aimed at clarifying the normative content of the rights listed in the International Covenant on Economic, Social and Cultural Rights. Ten years after the Covenant entered into force, the Economic and Social Council had finally decided to create a body of eighteen independent experts, modeled on the Human Rights Committee, after it came to realize that it would be unable to monitor the implementation of the Covenant on its own. The newly established Committee was facing the considerable challenge of having to clarify the content of the Covenant on Economic, Social and Cultural Rights. The expectations were high, and there were very few precedents it could build upon (Alston 1987).

An expert meeting organized in Maastricht in 1986 provided the opportunity to further advance the understanding of the legal significance of economic, social and cultural rights, beyond the right to food on which most efforts had been converging until then. The timing was propitious: it was held after the members of the Committee had been appointed (and four of them were present in Maastricht), but before they held their first session, and at a time when, although the significance of the Covenant on Economic, Social and Cultural Rights was clearly recognized, it listed rights that were still largely underexplored by human rights scholars and underenforced by courts.

The Limburg Principles that were adopted at the Maastricht meeting marked an important advance in the understanding of economic, social and cultural rights (Dankwa and Flinterman 1988), and their influence further increased after they were officially transmitted to the Commission on Human Rights at the request of the Netherlands (see UN document E/CN.4/1987/17). But only ten years later, when another expert meeting convened in Maastricht between 22 and 26 January 1997, was the tripartite framework of States' obligations taken as a departure point. In contrast to the Limburg Principles, which provided a set of examples of how economic and social rights could be violated, and qualified all the obligations imposed on States by a reasonableness criterion (see paragraph 71), the document adopted at that second meeting, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (later reissued as UN document E/C.12/2000/13), offered guidance across the full range of rights listed in the Covenant (see Chapter 2 in this volume). The Maastricht Principles stated in paragraph 6 :

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may

amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

By the mid-nineties, the advantages of such an approach were increasingly recognized. Focusing on the obligations of the State obligations rather than simply on the rights of the individual, makes it possible to move economic and social rights away from their initially "programmatic" nature to becoming enforceable rights, determinate enough for a "violations" approach to become plausible. However, useful though as it is as an analytical tool, the respect-protect-fulfil typology of States' obligations does not provide all answers. For the typology remains essentially static. It does clarify what conduct may be expected from States given a certain level of enjoyment of the right to food, the right to education, or the right to housing. It is consistent with the idea, put forth already in the late 1970s, that at a minimum, a good faith interpretation of the Covenant requires that States move towards the realization of the economic and social rights that it enumerates, which renders highly suspect any deliberately retrogressive steps. But the typology is unhelpful, in and of itself, to determine how much efforts the State must make in order to gradually improve the level of enjoyment of the right in question, or the speed at which the State must go about "progressively realizing" the right. Moreover, it presents a major disadvantage: in low-income countries, where the rights of the Covenant are only realized to a weak degree, it clearly cannot be enough to demand from the government that it "respects" existing levels of enjoyment of the right, and that it "protects" such enjoyment by controlling private actors, while leaving it to the State's appreciation how much more it should do beyond that. The respect-protect-fulfil typology, in sum, provides a grid of analysis; but it remains insufficient to provide a benchmark.

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