

# The UK's Compliance with the ICCPR and ECHR: A Tale of Two Treaties

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## Introduction

Despite the proliferation of international regimes in recent decades, compliance with treaty obligations remains a topic of much debate.<sup>1</sup> The field of human rights law has seen exponential growth with new treaties aimed at protecting broad categories of rights,<sup>2</sup> the rights of particular groups,<sup>3</sup> or rights within a specific geographic space.<sup>4</sup> With this range of protected rights has come an array of compliance mechanisms, some successful and others less so.

Scholars have sought to examine and measure the effectiveness of these mechanisms, to understand what works and what does not, as well as to understand why states bind themselves to these instruments. Many scholars look at this from a macro perspective, examining global compliance with particular rights, or using international measures to compare or rank states' compliance. Examples in this field include Hathaway,<sup>5</sup> Simmons,<sup>6</sup> and Landman and Carvalho.<sup>7</sup> Such works provide an important indicator of levels of compliance and the differing success of various treaties in protecting the rights they secure, but they tell us very little about how particular countries experience compliance with their human rights obligations.

This chapter, therefore, examines the question of compliance with human rights treaties at a micro level, looking at the United Kingdom's (UK) experience with the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The former is an important global treaty with a comparatively weak oversight model, the latter a regional example which is arguably one of the most successful human rights treaties in existence.<sup>8</sup> In order to carry out this examination, this chapter provides an overview of each treaty's compliance mechanism before looking at the impact they have had on the protection of human rights in the UK.

The UK has been selected as the basis of this analysis as it was heavily involved in drafting both instruments, and, whilst it has historically had a good record in relation to both, it is currently experiencing a period of significant debate around the future of its human rights protections, making questions about the protections

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<sup>1</sup> Witness the range of topics and approaches discussed at the PluriCourts Research Conference on Compliance Mechanisms in October 2021.

<sup>2</sup> For example, the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>3</sup> Such as the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 17 July 1980) 1249 UNTS 85.

<sup>4</sup> Examples here include the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS.

<sup>5</sup> O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; O. Hathaway, 'Making Human Rights Treaties Work: Global Information & Human Rights in the 21st Century' (2003) 31 *International Journal of Legal Information* 312.

<sup>6</sup> B. Simmons, *Mobilizing for Human Rights* (Cambridge University Press 2009).

<sup>7</sup> T. Landman and E. Carvalho, *Measuring Human Rights* (Routledge 2010).

<sup>8</sup> Bates describes it as having 'created the most effective system of international protection of human rights in existence', E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010) 2.

offered by treaties timely.<sup>9</sup> It is hoped that the lessons learned in the context of the UK, ICCPR and ECHR will nevertheless be relevant beyond just these contexts and will contribute to the wider debate on human rights treaty compliance. The ICCPR and ECHR have been chosen as they protect similar but not wholly overlapping sets of rights.<sup>10</sup> Whilst the fact that the UK is party to both may mean that the use of these instruments has developed somewhat differently than might be the case in a state which is party to just one, the selection of these instruments allows for a direct contrast of two comparable instruments in a single jurisdiction.

This analysis demonstrates the problems with the trade-off that takes place between designing treaties to which states will be willing bind themselves, on the one hand, and designing treaties which are possessed of strong and effective compliance mechanisms, on the other. Building on the UK experience, this chapter concludes that strong compliance mechanisms appear central to ensuring the effectiveness of human rights treaties.

### **The International Covenant on Civil and Political Rights**

The ICCPR has been called ‘probably the most important human rights treaty in the world’ in recognition of its global coverage and broad range of protected rights.<sup>11</sup> Despite its importance, however, it serves as an excellent exemplar of the trade-offs required to secure broad global adoption of a human rights treaty. Indeed, the content, compliance mechanisms and delayed entry into force of the ICCPR all serve to illustrate its difficult beginnings.

It had initially been intended by the United Nations (UN) that there would be a single treaty to protect both the civil and political rights and the economic and social rights contained in the Universal Declaration of Human Rights (UDHR).<sup>12</sup> Disagreement however meant that this was not to be, and the result was the creation of both the ICCPR and International Covenant on Economic Social and Cultural Rights.<sup>13</sup> The aim of both was to translate the UDHR into a treaty, binding on all states parties which would be ‘backed up by international supervision and enforcement.’<sup>14</sup> There was further discord between states when it came to drafting the ICCPR and in particular its compliance mechanism.<sup>15</sup> One delegate to the drafting committee described the drafting

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<sup>9</sup> The UK’s key domestic human rights legislation is currently under review and the outcome remains unclear at the time of writing. See Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (CP 588, 2021).

<sup>10</sup> For a more detailed analysis of the divergence between the two instruments see for example M. Schmidt, ‘The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments’ in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 629.

<sup>11</sup> S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights* (2nd edn, Oxford University Press 2005) para 1.01.

<sup>12</sup> S. Joseph, ‘Civil and Political Rights’ in M. Baderin and M. Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010). Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A, UN Doc. A/810.

<sup>13</sup> Joseph, Schultz and Castan (n 11) para 1.11. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>14</sup> M Hertig Randall, ‘The History of the Covenants’ in D. Moeckli, H. Keller and C. Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press 2018) 26.

<sup>15</sup> For discussion of the discord and geo-political divides see, for example, Hertig Randall (n 14); A. W. B. Simpson, *Human Rights and the End of Empire* (Oxford University Press 2001).

of this mechanism as ‘the most difficult and controversial aspect’ of the whole process.<sup>16</sup> It is perhaps unsurprising then that proposals for compliance mechanisms which included ‘an International Court of Human Rights empowered to settle disputes concerning the Covenant’ were not adopted.<sup>17</sup>

Whilst it may not enjoy the quasi-judicial functions some envisaged,<sup>18</sup> compliance with the ICCPR is overseen by the Human Rights Committee (HRC). The HRC is comprised of eighteen individuals who ‘are independent members who do not represent their national states or any other entity.’<sup>19</sup> It has ‘responsibility for monitoring [the ICCPR’s] implementation,’<sup>20</sup> a responsibility it discharges in three main ways: ‘the examination of States’ reports, the decision of individual communications, and the writing of General Comments.’<sup>21</sup>

The system of states parties’ reports to the HRC is governed by Article 40 of the ICCPR. These reports provide information on how states parties ‘give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights’.<sup>22</sup> The reports also ‘indicate the factors and difficulties... affecting the implementation of the [ICCPR].’<sup>23</sup> This allows the HRC to focus on issues highlighted by states parties in their self-reporting to inform dialogue between the HRC and states parties.<sup>24</sup> Processes exist to allow the HRC to request further reports where necessary or to raise the absence of a report with individual states, but, importantly, the HRC does not have any power to force states parties to accede to such requests.<sup>25</sup>

The second compliance mechanism is individual communication to the HRC, provided for within the First Optional Protocol to the ICCPR.<sup>26</sup> Parties to the protocol recognise ‘the competence of the [HRC] to receive and consider communications from individuals’.<sup>27</sup> The HRC is not empowered to issue judgments, rather its decisions are referred to as ‘views’.<sup>28</sup> These are non-binding in nature and lack the legal force of judgments;

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<sup>16</sup> Quoted in P. Alston, ‘The Committee on Economic, Social and Cultural Rights’ in P. Alston (ed), *The United Nations and Human Rights* (Clarendon 1995) 476.

<sup>17</sup> D. McGoldrick, *The Human Rights Committee* (Clarendon 1991) para 1.19.

<sup>18</sup> Between the plans for an International Court and the eventual agreement on the role of the HRC there were suggestions that it should have quasi-judicial status. See T. Opsahl, ‘The Human Rights Committee’ in P. Alston (ed), *The United Nations and Human Rights* (Clarendon 1995) 371.

<sup>19</sup> D. Harris, ‘The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction’ in D. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 22.

<sup>20</sup> Opsahl (n 18) 370.

<sup>21</sup> G. L. Neuman, ‘Giving Meaning and Effect to Human Rights’ in D. Moeckli, H. Keller and C. Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press 2018) 33. Some add inter-state communications to the list, for example Joseph, Schultz and Castan (n 11) para 1.3. This mechanism has never been used in relation to the ICCPR and is thus not discussed further here.

<sup>22</sup> HRC Rules of Procedure of 11 January 2012, Rule 66.

<sup>23</sup> Article 40(2).

<sup>24</sup> This is the language used by the HRC itself, see, for example, UN Human Rights Committee ‘Working Methods’ (Office of the High Commissioner for Human Rights) <[www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx](http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx)> accessed 19 April 2022.

<sup>25</sup> See Opsahl (n 18) 397–419 in particular for more discussion of this.

<sup>26</sup> Provided for in the (First) Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Hereafter, Optional Protocol 1.

<sup>27</sup> Optional Protocol 1, Article 1.

<sup>28</sup> Optional Protocol 1, Article 5(4).

domestic courts have frequently rejected any assertion that these views are binding.<sup>29</sup> Nonetheless, the HRC has made apparent its opinion that states parties *ought* to comply with these views and act to remedy any violation found.<sup>30</sup> Nevertheless, rates of compliance with the HRC's views are low. One study put the compliance rate at around 12 per cent, described as 'a low figure by any measure.'<sup>31</sup> There are 116 states parties to the Optional Protocol (from a total of 170 states parties to the ICCPR), but this does not include the UK.<sup>32</sup> The UK has noted that it 'remains to be convinced of the added practical value to people in the United Kingdom of rights of individual petition to the United Nations.'<sup>33</sup>

The final mechanism at the disposal of the HRC is the issuing of General Comments. These have evolved to allow for the HRC to comment on matters which are relevant to states parties to the ICCPR, such as the interpretation of specific treaty provisions or the wider obligations of states parties. To date, thirty-seven have been issued.<sup>34</sup> Whilst these General Comments are not of themselves related to enforcement of the ICCPR, they 'have proven to be a valuable jurisprudential resource' when interpreting the ICCPR.<sup>35</sup> These are not discussed in any greater detail here as they are general in nature and are not directed at individual states' compliance.

As this shows, although there are mechanisms in place to drive compliance with the ICCPR these are limited by the fact that they are non-enforceable: they require states parties to act on the HRC's dicta, albeit with a treaty obligation to uphold and protect the rights secured by the ICCPR. Particularly for individuals within states, such as the UK, which have not accepted the right to individual petition to the HRC, there is no means by which they can bring complaints against a state. Indeed, in the UK, individuals can do nothing directly to enforce their rights under the ICCPR.

Academic commentary on the effectiveness of UN treaty bodies more widely suggests that there are concerns with the level of compliance they generate. Looking at the perception of the effectiveness of the wider UN human rights treaty body system, one study noted a widespread view 'that [UN human rights] treaty bodies are only to some extent able to generate public pressure, or even not at all'.<sup>36</sup> This negative outlook is further reinforced by Krommendijk's assessment of the effectiveness of treaty body recommendations, which concluded that, in the countries he surveyed, such recommendations 'largely remained ineffective... [and]

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<sup>29</sup> For example, the Supreme Court of Ireland in *Kavanagh v. Governor of Mountjoy Prison* (2002) 3 IR 97.

<sup>30</sup> UN Human Rights Committee 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc. CCPR/C/GC/33, para 14.

<sup>31</sup> D. C. Baluarte, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations 2010) 119–20. This report, although from an NGO rather than the HRC, has been cited as accurate. See for example, W. Sandholtz, 'Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue' (2021) 10 *Global Constitutionalism* 439.

<sup>32</sup> UNGA 'Report of the Human Rights Committee' UN GAOR 73rd Session Supp No 40 UN Doc. A/73/40, para 1. Country specific information regarding treaty status is available at <<http://indicators.ohchr.org/>> accessed 19 April 2022.

<sup>33</sup> UN Human Rights Committee 'Seventh periodic reports of States parties due in July 2012: United Kingdom, the British Overseas Territories, the Crown Dependencies' (29 December 2012) UN Doc. CCPR/C/GBR/7, para 192.

<sup>34</sup> The most recent being UN Human Rights Committee 'General comment No 37 (2020) on the right of peaceful assembly (article 21)' (17 September 2020) UN Doc. CCPR/C/GC/37.

<sup>35</sup> Joseph, Schultz and Castan (n 11) para 1.42.

<sup>36</sup> V Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 *International Studies Quarterly* 1079, 1083–85.

have either been rejected by governments or they have been so vague and broad that they simply did not elicit any follow-up measures.<sup>37</sup> Against this backdrop, the UN has itself noted in respect of treaty bodies that 'While there have been many cases which could be considered as "success stories", it is clear that a large number of States fail to apply the remedies as recommended.'<sup>38</sup> The analysis which led to this pronouncement included an examination of compliance with the HRC's views, therefore it seems reasonable to suggest that the general trends seen in relation to the treaty bodies extend to the HRC.

### **The UK and the International Covenant on Civil and Political Rights**

Although the UK played a significant role in the drafting of the ICCPR,<sup>39</sup> no steps have been taken to translate the protections afforded by the ICCPR into UK domestic law.<sup>40</sup> It is hard to point to any direct impact that treaty membership has had on UK legislation. In the 1980s, 'the United Kingdom Government's representative to the UN Human Rights Committee was unable to identify even one case in which the British Courts had made reference to the Covenant.'<sup>41</sup> A decade later, Klug, Starmer and Weir noted that 'The United Kingdom ratified the [ICCPR] in May 1976, but has since done nothing substantial to give effect to ratification or even publicly to recognise it.'<sup>42</sup>

The ICCPR obliges states parties to give effect to the treaty in their own laws,<sup>43</sup> but how this happens is a matter for states themselves.<sup>44</sup> In the UK, despite suggestions to the contrary from the HRC, successive governments have been 'content to assume... no changes [to UK domestic law] were necessary because the rights and freedoms recognised in the Covenant are inherent in the United Kingdom's legal system and are protected by it and by Parliament.'<sup>45</sup>

The lack of mandatory oversight of individual cases by a judicial or quasi-judicial treaty body has been suggested as a reason for the UK's lack of engagement with and knowledge of the ICCPR. It has meant that 'the HRC has had no opportunity to give a ruling upon United Kingdom compliance with its obligations under the ICCPR in the context of individual communications.'<sup>46</sup> This in turn has deprived the UK courts of an opportunity to engage more directly with the HRC's decision-making. Although the HRC is not a court and so dialogue in the sense seen with international courts may not occur, Sandholtz has noted that in states which accept the right to individual petition, views of the HRC relating to that state are 'available to activists,

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<sup>37</sup> J. Krommendijk, 'The (In)Effectiveness of UN Human Rights Treaty Body Recommendations' (2015) 33 *Netherlands Quarterly of Human Rights* 194.

<sup>38</sup> UN Human Rights Institutions, 'Follow-up procedures on individual complaints' UN Doc. HRI/ICM/WGFU/2011/2 (15 December 2010) para 25.

<sup>39</sup> This is discussed in much depth in the magisterial *Human Rights and the End of Empire*, Simpson (n 15).

<sup>40</sup> With the exception of s 133 of the Criminal Justice Act 1988 which gives effect to Article 14(6) of the ICCPR, there has been no coordinated action to give domestic effect to these rights.

<sup>41</sup> R. Clayton and H. Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) para 2.56.

<sup>42</sup> F. Klug, K. Starmer and S. Weir, 'The British Way of Doing Things: The United Kingdom and the International Covenant of Civil and Political Rights, 1976-94' [1995] *Public Law* 504, 504. That the name of ICCPR is incorrect in the title of this paper suggests the extent to which it has entered into legal consciousness in the UK.

<sup>43</sup> ICCPR Article 2(2).

<sup>44</sup> M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition, Engel 2005) 57.

<sup>45</sup> Klug, Starmer and Weir (n 42) 505.

<sup>46</sup> Harris (n 19) 46.

advocates and courts... to support the expansion of rights' and courts have been willing to engage with the HRC's views as they would other courts' judgments.<sup>47</sup>

The periodic reporting structure does not appear to have spurred UK lawmakers into action when it comes to the protection of the rights contained within the ICCPR. Klug, Starmer and Weir assert that:

From the UK's very first report... the [HRC has] been sceptical about the ability of arrangements here to protect human rights in the absence of either constitutional [sic] guarantees of such rights or the incorporation of the Covenant in domestic law... scepticism increased when [the HRC] found that the 1979 report failed to refer to the legislative texts and judicial decisions which the government claimed gave protection to the rights and freedoms provided for in the Covenant.<sup>48</sup>

This scepticism has not met with any concerted action on the part of the UK's legislature, despite the HRC going so far as to question whether 'the United Kingdom was in fact in a position to "ensure" that the Covenant's provisions were given proper effect'.<sup>49</sup> Whilst this situation may have developed to some extent since the HRC said this in 1984, the Committee has continued to raise concerns even after the UK legislated for the protection of some rights more formally in the UK via the Human Rights Act 1998 (HRA).<sup>50</sup>

Given the reticence of the UK to address in any depth its compliance with the ICCPR, and the lack of action to enhance compliance by means of domestic law, it is hard to point to any concrete difference made by the ICCPR to the protection of individual rights in the UK.<sup>51</sup> This lack of change brought about by the ICCPR within the UK is confirmed by an examination of the comments of the HRC in response to the UK's periodic reporting which consistently highlight concerns.<sup>52</sup> McGoldrick and Parker suggest that the ICCPR has had some limited impact in the United Kingdom,<sup>53</sup> but the idea that the ICCPR plays any great role is hard to square with the observations of the HRC, or with research by the author and that carried out some time ago by Klug, Starmer and Weir.<sup>54</sup> Even McGoldrick and Parker themselves went on to note that 'the Covenant is yet to make a marked impact on the consciousness of the British public or on much of the government.'<sup>55</sup>

This general apathy towards the ICCPR in the UK is further demonstrated in the lack of reference to the treaty in domestic judgments. Thus, there were only six references in reported judgments in England and Wales

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<sup>47</sup> Sandholtz (n 31) 452 and generally.

<sup>48</sup> Klug, Starmer and Weir (n 42) 506–7.

<sup>49</sup> UN HRC's comments on the United Kingdom's report submitted 3 September 1984, quoted in *ibid.* 507.

<sup>50</sup> The HRC has noted that the HRA does not offer protection for all the rights contained in the ICCPR. See UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc. CCPR/C/GBR/CO/6, para 6.

<sup>51</sup> The sole exception to this being the Criminal Justice Act 1988 as noted above.

<sup>52</sup> See for example the issues raised in the 2008 Concluding Observations (n 50) and those in 2015, UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc. CCPR/C/GBR/CO/7.

<sup>53</sup> D. McGoldrick and N. Parker, 'The United Kingdom Perspective on the International Covenant on Civil and Political Rights' in D. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon 1995) 88.

<sup>54</sup> S. White, 'Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?' (PhD thesis, University of Dundee 2021). Klug, Starmer and Weir (n 42).

<sup>55</sup> McGoldrick and Parker (n 53) 89.

which mentioned the ICCPR prior to the passage of the HRA.<sup>56</sup> These six cases themselves, moreover, highlight the unwillingness of the courts to engage with the ICCPR in any depth, even when it is directly mentioned. Of the six, the case which addressed the ICCPR in the most detail related to s 133 of the Criminal Justice Act 1988.<sup>57</sup> The rest did not engage with the ICCPR beyond an initial mention or observation,<sup>58</sup> and one rejected the use of the ICCPR outright.<sup>59</sup>

The marked lack of engagement with the ICCPR by the UK courts prior to 1998 did not radically improve thereafter with the passage of the HRA and the creation of a greater culture of human rights literacy. In the years post-1998 the number of references to the ICCPR by the courts increased significantly. Nonetheless, these increased references did not generate any significant shift in the quality of the UK's compliance with the ICCPR.<sup>60</sup> Indeed, in the majority of cases, the ICCPR was only mentioned briefly and in passing and did not see the courts engaging in any depth with the protections offered. As Figure 1 shows, despite an increase in references by courts to the ICCPR there is no clear trend in use in the first 20 years after the HRA.

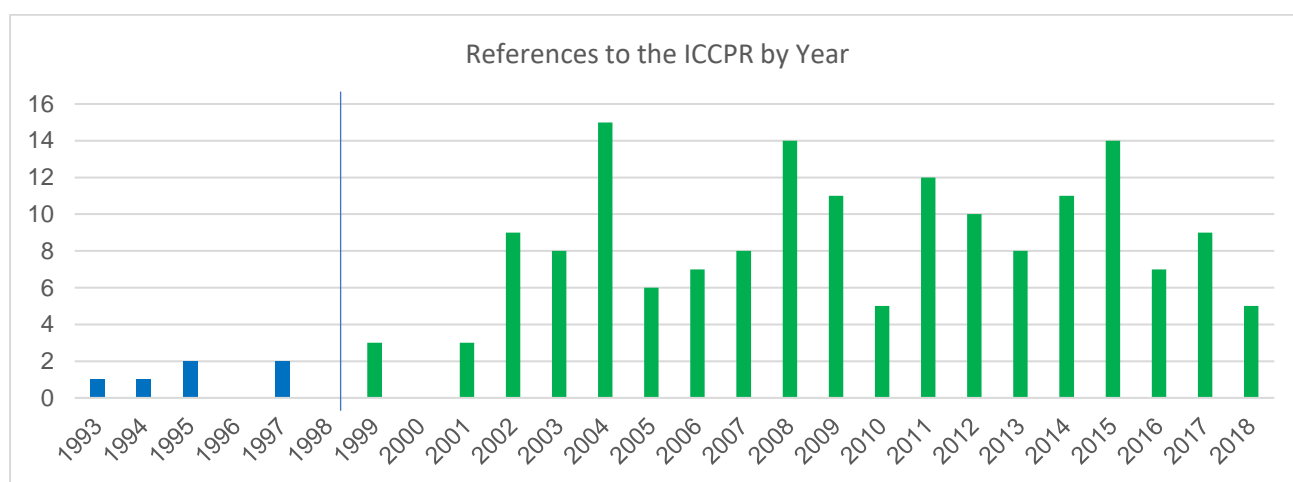


Figure 1 – Number of cases per year in the higher courts of England and Wales making reference to the ICCPR.

An examination of the HRC's two sets of concluding observations since 1998 provides examples of the areas of concern. The 2008 document noted 23 separate issues for concern in relation to the UK's compliance with

<sup>56</sup> This data was collected by the author using a key word search (for 'International Covenant on Civil and Political Rights') of published judgments of higher courts in England and Wales, the High Court, Court of Appeal and House of Lords/Supreme Court. A wider analysis cited in Klug, Starmer and Weir found a similar number, and showed that mentions in Parliament were even less frequent: Klug, Starmer and Weir (n 42) 508. Hunt's research also serves to confirm this, Murray Hunt, *Using Human Rights in English Courts* (Hart 1997) Appendix 1. Analysis of published judgments in the other jurisdictions carried out by the author of the UK suggests that these findings are mirrored in Northern Ireland and Scotland.

<sup>57</sup> *R v. Secretary of State for the Home Department, ex p Bateman* (1995) 7 Admin LR 175.

<sup>58</sup> For example, *Airedale NHS Trust v. Bland* [1993] AC 789.

<sup>59</sup> *R v. Ministry of Defence, ex p Smith* [1995] EWCA Civ 22, [1996] QB 517.

<sup>60</sup> This is clear from the HRC's concluding observations post-1998 which do not show a vast shift in levels of satisfaction with the UK's compliance, see for example, UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc. CCPR/C/GBR/CO/7. This was the last report by the HRC in relation to the UK.

the ICCPR.<sup>61</sup> These included areas such as the detention without charge of terror suspects for extended periods under the Terrorism Act 2006,<sup>62</sup> the control order regime under the Prevention of Terrorism Act 2005,<sup>63</sup> and delayed access to lawyers for those detained under the Terrorism Act 2000.<sup>64</sup> Such concerns, and the others listed, suggest that there are areas in which the protections afforded to individuals under UK law fall short of those offered by the ICCPR. This is despite the fact that the HRA translates the ECHR rights into UK law; the HRC has noted that a range of 'Covenant rights are not included among the provisions of the [ECHR] which has [sic] been incorporated into the domestic legal order through the [HRA]',<sup>65</sup> meaning there can be no challenge under the HRA.

In 2015, the HRC again raised concerns about the UK's compliance with the ICCPR. In its concluding observations the HRC elaborated further misgivings about the lack of direct applicability of the ICCPR in the UK.<sup>66</sup> The HRC additionally noted concerns about 'the lack of a comprehensive mechanism for reviewing existing gaps and inconsistencies between the domestic human rights legal framework and the rights as set forth in the Covenant.'<sup>67</sup> The long list of other issues suggests that although concerns had shifted slightly from those of the previous reporting cycle, there remained serious reservations on the part of the HRC about the UK's general level of compliance with its treaty obligations. Thus, for example, the HRC again highlighted counter-terrorism powers under the Terrorism Act 2000,<sup>68</sup> the power to deprive persons of citizenship and potentially rendering those persons stateless,<sup>69</sup> and the use of closed material procedures under the Justice and Security Act 2013 in civil cases where issues of national security are raised.<sup>70</sup>

These two sets of concluding observations serve to highlight the range of issues of concern to the HRC in respect of the UK's compliance with the ICCPR. It is clear from the HRC's observations that it believes that the current framework of legal protection for human rights is not sufficient to protect all those rights guaranteed under the ICCPR. As is argued below, this is at least partially attributable to the ability of those in the UK directly to approach the HRC by means of individual petition, combined with the lack of strong enforcement powers on the part of the HRC. It also serves to show that the UK's self-assurance of compliance with the ICCPR is misplaced.

## **The European Convention on Human Rights**

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<sup>61</sup> UN Human Rights Committee 'Concluding observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc. CCPR/C/GBR/CO/6.

<sup>62</sup> *Ibid.*, para 15.

<sup>63</sup> *Ibid.*, para 16.

<sup>64</sup> *Ibid.*, para 19.

<sup>65</sup> *Ibid.*, para 6.

<sup>66</sup> UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc. CCPR/C/GBR/CO/7, para 5.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, para 14. Including again the length of detention without charge and denial of bail for those arrested under the 2000 Act.

<sup>69</sup> *Ibid.*, para 15.

<sup>70</sup> *Ibid.*, para 22.



In common with the ICCPR, the UK had an important role in the development of the ECHR.<sup>71</sup> However, the UK's motives were at times questionable; Bates asserts that main driver for the UK's entry into the ECHR system may have been 'political, "face-saving" considerations.'<sup>72</sup> There was opposition in the UK to the idea of individual petition with concern that it 'might be used as a weapon of political agitation'.<sup>73</sup> Nevertheless, although sometimes fraught, the ECHR's drafting process did not present the same levels of difficulty as had the ICCPR.<sup>74</sup>

The ECHR's system of protection has developed over time.<sup>75</sup> The early system of enforcement was complex and stemmed, at least in part, from the difficulties in securing agreement for the establishment of a judicial enforcement mechanism, to which various states, including the UK, had been opposed.<sup>76</sup> Some felt that the 'machinery set up for enforcing the [ECHR] should not be purely judicial but should be able and competent to give due weight to political as well as legal considerations.'<sup>77</sup> However, as time went on this system was overhauled, and the original process was replaced by Protocol 11 which substituted this dual approach to decision-making with a permanent European Court of Human Rights (ECtHR), with the new system taking effect on 1 November 1998.

The process has since been reformed again by Protocol 14 which Bates summarises as aiming 'to maximise economy of procedure at Strasbourg'.<sup>78</sup> Judgments of the ECtHR do not provide detail on the action which member states must take to address the violations where these are found: such action is at the discretion of the member state itself.<sup>79</sup> Where a case is 'exceptional' a reference may be made to the Grand Chamber of 17 judges for judgment.<sup>80</sup> Any judgment of the Grand Chamber is final, whilst other judgments become final where the parties indicate that they do not wish to refer the judgment to the Grand Chamber, where three months has elapsed since the judgment, or where the Grand Chamber rejects such a request to refer the judgment.<sup>81</sup> A decision of the ECtHR is binding on member states.<sup>82</sup>

Article 46 of the ECHR, as amended by Protocol 14, charges the Committee of Ministers, a body comprised of the foreign ministers of each member state, with overseeing the enforcement of the ECtHR's judgments. Under Protocol 14, the Committee of Ministers may now refer a member state to the ECtHR for non-

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<sup>71</sup> This role is discussed in depth in G Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42 *International and Comparative Law Quarterly* 796.

<sup>72</sup> Bates (n 8) 98.

<sup>73</sup> Marston (n 71) 825.

<sup>74</sup> See generally Bates (n 8).

<sup>75</sup> Whilst there is not space here to discuss the earlier system, it is examined extensively in Bates, *ibid.*

<sup>76</sup> Simpson (n 15) 655–6.

<sup>77</sup> UK Foreign Office minute, written after a meeting of senior officials, quoted in *ibid.*, 701.

<sup>78</sup> Bates (n 8) 500.

<sup>79</sup> The ECtHR is made up of judges appointed in respect of each member state by the Parliamentary Assembly.

<sup>80</sup> Article 43.

<sup>81</sup> Article 44.

<sup>82</sup> Article 46(1) reads 'The High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties.' Although 'Judgments of the [ECtHR] are not directly enforceable in a manner similar to that of judgments of domestic courts.' W. A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 860.

compliance.<sup>83</sup> In addition to the Committee of Ministers and the ECtHR, the Parliamentary Assembly of the Council of Europe also plays a role in enforcement; its recommendations, resolutions and opinions inform the work of the Committee of Ministers.<sup>84</sup> The ECtHR enjoys good levels of compliance with its judgments and the system as a whole has been described as ‘astoundingly successful’,<sup>85</sup> suggesting that this mix of mandatory judicial oversight (the ECtHR) combined with political supervision (the Committee of Ministers) is highly effective. Indeed, as is argued below, the relative strength of the combination of mandatory judicial oversight and individual petition is closely linked with the UK’s high level of compliance with the ECHR.

### The UK and the European Convention on Human Rights

Although the ICCPR has not resulted in any significant changes to the human rights landscape in the UK, the same is not true of the ECHR. Even before the ECHR was a part of the UK’s domestic law, Lord Bingham asserted that it had played a role in ‘the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.’<sup>86</sup> Examining these areas, it seems fair to assert that even prior to the reception of the rights protected by the ECHR into UK law by way of the HRA, the ECHR’s impact was significant. Summarising the use of international human rights treaties in England and Wales prior to the HRA, Hunt suggests that ‘During... the mid-1970s, domestic judges displayed not only a willingness to interpret domestic law in the light of international human rights instruments, but often considered themselves under an obligation to do so.’<sup>87</sup> However, as Hunt’s own analysis illustrates this willingness seems to have been almost exclusively focused on the ECHR.

Much of this development was driven by discourse between the UK courts and the ECtHR. The overall number of violations by the UK remained comparatively low during this period, but there was sufficient opportunity for the ECtHR to rule on matters of UK law, giving the UK courts the chance to engage with Strasbourg’s judgments to develop their own reasoning. The judgments of the ECtHR directly impacted the UK’s own relationship with the ECHR system. Thus, while Masterman notes that ‘to think that [ECtHR] jurisprudence could be followed or applied in the manner of precedents would be a mistake’,<sup>88</sup> Beloff and Mountfield show, UK courts set some store by the ECtHR’s rulings when making decisions.<sup>89</sup> For example, relying directly on jurisprudence of the ECtHR in relation to freedom of expression.<sup>90</sup> It is therefore evident that the domestic courts were willing to look to the ECtHR as part of their decision-making process, suggesting that the courts saw the benefit of dialogue between themselves and the ECtHR for the protection of human rights in the UK. This dialogue would not have been possible without the right of individual petition; a right entirely absent in the case of the protections offered by the ICCPR.

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<sup>83</sup> Article 46(4).

<sup>84</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 5.

<sup>85</sup> H. Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge 2017) 101.

<sup>86</sup> *R v. Lyons* [2003] 1 AC 976 para 13.

<sup>87</sup> Hunt (n 56) 160.

<sup>88</sup> R. Masterman, ‘Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and “the Convention Rights” in Domestic Law’ in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 64.

<sup>89</sup> M. Beloff and H. Mountfield, ‘Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales’ [1996] *European Human Rights Law Review* 467.

<sup>90</sup> *Rantzen v. Mirror Group Newspapers* [1994] QB 670, 696.

The HRA and the translation of the ECHR rights in UK domestic law marked a significant shift in the protection of human rights in the UK. Arguably, the effectiveness, in both legal and political terms, of the ECtHR in identifying breaches of individual rights in respect of the UK was a major factor in the decision to move the primary responsibility for the protection of individual rights into the domestic sphere. Indeed, concern that traditional methods of human rights protection in the UK were ineffective was 'reinforced by a perception that the European Court of Human Rights was finding the United Kingdom in violation of the [ECHR] with disquieting frequency.'<sup>91</sup>

Not only this, but the nature of the ECHR's enforcement system appears to have been one of the reasons behind the decision to enact the HRA. The Government of the day noted:

The European Convention is not the only international human rights agreement to which the United Kingdom and other like-minded countries are party, but... it has become one of the premier agreements defining standards of behaviour across Europe. It was also for many years unique because of the system which it put in place for people from signatory countries to take complaints to Strasbourg and for those complaints to be judicially determined. These arrangements are by now well tried and tested... They therefore afford an excellent basis for the Human Rights Bill which we are now introducing.<sup>92</sup>

Since the HRA entered into force there have been increasingly few applications from the UK to the ECtHR and 'the UK has among the lowest number of applications per year allocated for a decision. It also has a lower percentage of these applications declared admissible than most and loses proportionately fewer of the cases brought against it than most'.<sup>93</sup>

Whilst the biggest driver in the increased compliance in the last two decades is undoubtedly the HRA and its translation of the ECHR rights into domestic law, a number of points should be made. First, the fact that the courts of the UK are now required to view human rights questions through the lens of the rights protected by the ECHR means that there is increased opportunity for proceedings in the national courts to address complaints under the ECHR. In addition, this allows the national courts to develop their dialogue with the ECtHR.<sup>94</sup> Thus, judgments of the ECtHR still play an important role in the protection of the Convention rights within the UK. Second, the political importance and power of enforceable judgments of the ECtHR should not be underestimated. As the row between the UK Parliament and the ECtHR on prisoner voting showed, it is very hard to face down the legal and political pressure of an adverse ruling by the Court even where political red lines have been drawn.<sup>95</sup>

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<sup>91</sup> D. W. Vick, 'The Human Rights Act and the British Constitution' (2002) 39 *Texas International Law Journal* 329, 348.

<sup>92</sup> Home Department, *Rights Brought Home: The Human Rights Bill* (1997) para 1.3.

<sup>93</sup> A. Donald, J. Gordon and P. Leach, *Research Report 83: The UK and the European Court of Human Rights* (Equality and Human Rights Commission 2012) 42.

<sup>94</sup> For example, this was discussed in M. Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 *International and Comparative Law Quarterly* 557.

<sup>95</sup> The most recent judgment of the ECtHR in this matter, finding that there had been a violation of Hirst's right to vote, was *Hirst v. United Kingdom (No 2)* (2006) 42 EHRR 41. The situation was finally resolved in 2017 when the right to vote was extended to prisoners released on temporary licence (see 'Oral statement to Parliament: Secretary of State's oral statement on sentencing' (UK Government, 2 November 2017) <[www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing](http://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing)> accessed 19 April 2022).

It is clear, therefore, that the design of the enforcement mechanism of the ECHR plays an important role in the high level of compliance the UK enjoys and the way in which the UK has developed its domestic human rights protections to reflect those of the ECHR. The nature of the judgments has allowed the domestic courts to engage with their counterparts in the ECtHR on questions of law. Moreover, the success of the ECHR system, coupled with the political impact of adverse judgments of the ECtHR, was a major factor in the decision to enact the HRA and bring the rights contained in the ECHR 'home' into UK domestic law.<sup>96</sup>

## Analysis

As Heyns and Viljoen have noted, 'The success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices on the domestic... level.'<sup>97</sup> With this in mind, the wide gulf between the impact of ICCPR and ECHR in the UK suggests that the ECHR has been a much greater success.

Whilst the UK's track-record at the ECtHR has improved over the past decades, an improvement which has accelerated significantly since 1998, there was already a movement towards use of the ECHR in domestic courts long before this was envisaged by domestic law. Commentators and judges have pointed to the relatively broad impact of the ECHR on a range of areas, 'the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.'<sup>98</sup> Since 1998 the HRA has translated ECHR rights into UK domestic law, empowering judges more overtly to have regard to the dicta of the ECtHR in their own decision-making.<sup>99</sup> More recently still the UK's Supreme Court has demonstrated its willingness to keep British jurisprudence pegged to the ECtHR's interpretation of the ECHR,<sup>100</sup> further highlighting the continuing relevance of the ECtHR as a point of reference for domestic courts.

By contrast, the UK's compliance with the ICCPR receives little attention from the UK courts or from Parliament and has not dramatically improved over the course of the UK's involvement with the treaty.<sup>101</sup> Whilst there may be a number of reasons at play for this vast disparity, including the UK's membership of both systems, given the ECtHR's role in driving compliance with the ECHR it is impossible to underplay the importance of mandatory judicial oversight of treaty bodies in ensuring that states comply with their treaty obligations. As the majority of interaction between the UK and HRC takes place quietly by means of periodic reporting and concluding observations and receives little publicity, public awareness and ownership of the rights protected by the ICCPR are almost non-existent.<sup>102</sup> Moreover, the nature of periodic reports and concluding observations

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<sup>96</sup> The White Paper which led to the HRA used this terminology, *Rights Brought Home* (n 92).

<sup>97</sup> C. Heyns and F. Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 *Human Rights Quarterly* 483, 483.

<sup>98</sup> *Lyons* (n 86) para 13.

<sup>99</sup> Section 2, HRA.

requires the UK courts to 'take into account' decisions of the ECtHR.

<sup>100</sup> *R (AB) v. Secretary of State for Justice* [2021] UKSC 28, paras 56-9, per Lord Reed.

<sup>101</sup> A review of the HRC's concluding observations shows that the only area which has seen continuous improvement is the situation in Northern Ireland, but this owes more to the peace process than attempts to secure ICCPR compliance.

<sup>102</sup> A search of polling data from the polling company YouGov suggests that there is also a paucity of polling on the ICCPR in the UK.

means that the courts are unlikely to engage with these in developing their own jurisprudence, preferring instead the surer ground offered by decisions of courts and treaty bodies.

Examining the UK experience, it seems fair to conclude that strong, judicial compliance mechanisms are essential in ensuring the effectiveness of human rights treaties. However, it is acknowledged that this may deter states from becoming party to such conventions. Hathaway, drawing together empirical research on the effect of international human rights law, highlights the apparent trade-off between states' participation in and the effectiveness of human rights treaties.<sup>103</sup> States are more likely to participate in treaty systems with weaker compliance models. As Hathaway notes, 'Where enforcement is stronger, all else being equal fewer countries should be expected to commit. However, those fewer adherents will be more likely to comply with the treaty than they would be if the treaty were less strongly enforced.'<sup>104</sup>

This raises an important question: are the gains of greater compliance significant enough to justify the loss of engagement? In 'Do Human Rights Treaties Make a Difference?' Hathaway presents some concerning findings in relation to states' willingness to engage with human rights treaties: in some cases, membership of such treaty systems was shown to correlate with poorer performance in terms of compliance with the protected rights.<sup>105</sup> This suggests that the dichotomy might be starker than first presented. On the one hand strong compliance systems provide protection for human rights but may discourage states from becoming signatories because of the risks associated with breaching treaty obligations. However, on the other hand, weaker systems allow states cynically to tether themselves to such structures to gain from the wider political and economic benefits they may bring without raising human rights standards in any meaningful way.<sup>106</sup> Simmons is rather more optimistic about the positive changes brought about by instruments, such as the ICCPR, auguring that they can effectively empower domestic actors to bring about change.<sup>107</sup> Nevertheless, she acknowledges that such treaties cannot 'solve all problems'.<sup>108</sup> Whilst there is not enough space to explore this dichotomy in greater depth here, it is a question which merits further research, particularly in the context of increasing antagonism to global institutions, such as the UN.

In any event, the UK's experience with the ICCPR and ECHR serves to underline the difference which a compliance mechanism can make to the domestic effectiveness and relevance of a human rights treaty. Given the broad range of rights protected by the ICCPR, the lack of engagement represents a missed opportunity for the further development of human rights in the UK. If the pattern witnessed here is mirrored with respect to other human rights instruments in the UK, as well as in other states more broadly, it should give pause for thought about the way in which human rights are protected, and what can be done to strengthen the oversight of these protections within existing frameworks.<sup>109</sup>

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<sup>103</sup> O. A. Hathaway, 'The New Empiricism in Human Rights: Insights and Implications' (2004) 98 *American Society of International Law Proceedings* 206, 208.

<sup>104</sup> *Ibid.*

<sup>105</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n 5).

<sup>106</sup> Hathaway discusses these benefits in greater detail, *ibid.*

<sup>107</sup> Simmons (n 6).

<sup>108</sup> *Ibid.*, 366.

<sup>109</sup> Although Krommendijk points to over a decade of 'futile attempts' to strengthen the UN treaty body system suggesting that any attempt to drive improvement will be difficult, J. Krommendijk, 'Less Is More: Proposals for How UN Human Rights Treaty Bodies Can Be More Selective' (2020) 38 *Netherlands Quarterly of Human Rights* 5.

## **Conclusion**

This chapter illustrated the differing outcomes brought about by differing models of compliance mechanism in human rights treaties. Using the UK's experience with the ECHR and ICCPR as a lens it has argued that the former, characterised by a strong, judicial compliance mechanism can be linked with better human rights outcomes. By contrast, the ICCPR, with its weaker, reporting-based compliance monitoring and opt-in right of individual petition has not had the same impact.

Building on the UK experience it seems reasonable to conclude that strong compliance mechanisms are important in ensuring the effectiveness of human rights treaties. Whilst these findings relate to the UK, there is no reason to believe that the lessons learned in this context cannot be applied more widely to contribute to the debate on how human rights are best protected. Whilst a regime of human rights protection centred on strong compliance monitoring may deter states from becoming party to a human rights treaty, the benefits for individuals' rights protection may be enough to outweigh this. Further, pressure on states to bind themselves to such treaties, and the wider benefit derived by states from doing so, is unlikely to be diminished by such an approach.

Despite this conclusion, this chapter does not seek to argue that the vast advances in rights protection since 1945 have not dramatically improved the attainment of human rights. Rather, it aims to help to safeguard the gains achieved and to allow these to be further built upon to ensure that rights protection is strengthened and that human rights treaty bodies are in a better position to ensure that the rights they steward are respected, protected and fulfilled.