What's Wrong with International Law?

Liber Amicorum A.H.A. Soons

Edited by

Cedric Ryngaert
Erik J. Molenaar
Sarah M.H. Nouwen

BRILL
NIJHOFF

LEIDEN | BOSTON

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CHAPTER 13

What is Wrong with International Standards on Social Protection?

Frans Pennings

1 Introduction

One of the major concerns of Fred Soons has been to identify what is wrong with international law. International law is a very broad term and covers many areas, including human rights, war and public security, territorial issues, but also social issues, like the right to health care, the right to food and the right to social protection. The different domains of international law are each characterized by, inter alia, specific sensitivities, balances of power, ideals and initiatives (or lack thereof). International social protection standards are an area of international law of their own.

One of the specific dimensions of social protection standards is that they require activities by the State (e.g. to reduce poverty or to establish a social security scheme for unemployment). In case of the more "classic" human rights, which prohibit certain activities, e.g. forced labour or child labour, it is easier to find consensus that such activities have to be forbidden. This may still leave the problem how to enforce such standards in all contracting parties, but in any case there is consensus that it has to be enforced. However, a standard like "everyone should be free from poverty" is much more difficult to impose, since poverty is a relative phenomenon, and the possibilities to fight poverty depend on the national context (traditions, infrastructure, structure of the economy) and the resources of the state. Since countries generally insist on remaining autonomous in organizing their social security system, there is not much support for imposing strict uniform standards.

However, despite this special character of social standards, it is essential that such standards also be adopted, developed and supervised, since, whereas constitutions and other basic documents of large international organizations, including UN and ILO, mention the fight against poverty or the right to social security as a fundamental or human right, a very large part of the world's population is still living in poverty. Moreover, other important international issues, in particular prevention of war and restoring peace are closely linked to

matters of social rest and unrest.[1] This understanding was a major reason for establishing the International Labour Organization (ILO) directly after the First World War, i.e. to promote social peace, which was seen as essential to maintain peace in the world.

In this contribution I will investigate whether something is wrong with international social standards and if so, what exactly is wrong, and what are the best ways to remedy the defects. I will do so with respect to the social standards developed by global international organisations, i.e. the United Nations and the International Labour Organization.[2]

2 The International Labour Organization

2.1 *Standard-Setting by the ILO*

The ILO was established after the First World War with the aims of promoting social peace and preventing new wars. All bodies of the ILO are designed on a tripartite basis, i.e. of representatives of governments, employers and employees and all three groups are involved in developing ILO policies and standards.

From 1919 onwards, the ILO started to adopt conventions and recommendations, containing standards on many areas of labour and social security. By now, more than 200 conventions have been adopted. The standards give minimum requirements on the contents of a particular protection scheme, for instance for old-age or unemployment, including the persons to be protected, the content and level of benefits, conditions for entitlement to benefit, and the administration of the scheme.

Some of these conventions are now already decades old and are criticized for not meeting current needs anymore and for having old-fashioned terms and concepts. However, it has been extensively argued, in particular by the ILO office,[3] that the provisions setting forth the standards express important principles. Thus, the conventions are not merely relevant to social security as it

1 It has been often remarked that several conflict areas in the world would look different if unemployment rates (of youths) in these regions were not so high.

2 There are other standard-setting organizations at the regional level, such as the Council of Europe, but in view of the limited room granted for the contributions in this book I will focus on the global organizations; see, for a discussion of these regional organizations, also U. Becker, F. Pennings and T. Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security* (Alphen a/d Rijn: Kluwer Law International, 2013).

3 See in particular, U. Kulke, "Overview of Up-to-Date ILO Social Security Conventions" in F. Pennings (ed) *Between Soft and Hard Law: The Impact of International Social Security*

existed at the time the conventions were drafted, but keep their value through time. These principles are also very important for the interpretation of the conventions.

A principle often mentioned in ILO documents is that benefits in cash have to be periodical payments that are paid throughout the contingency; therefore a lump sum instead of a periodical benefit is not sufficient for coverage. Another principle is that benefits and the administration thereof have to be paid from insurance contributions or taxes. Schemes based simply on employers' liability do not fit with this system. A third one is that the State has to assume at least general responsibility for the due provision of benefits and for the proper administration of the social security institutions. By referring to the principles underlying the conventions it is possible to interpret provisions that threaten to become outdated in view of new developments.[4]

An example is the dispute on the introduction in the Netherlands of the statutory employers' obligation to pay sick pay to his or her ill employees that replaced the right to sickness benefits on the basis of the Sickness Benefits Act. The conventions require sickness benefits at a certain level and do not refer to sick pay paid by the employer. The supervisory committees did not remark that the texts of the conventions use the term *benefits* instead of *pay*, thus leaving the room for this innovation. However, they remarked that a principle underlying the convention is that of solidarity; a system in which each employer is responsible for his own employees is not consistent with this principle and therefore inconsistent with the convention.[5] Relevant questions are therefore: does the State still guarantee an income for sick employees if the employer becomes bankrupt or refuses to pay; isn't the fact that now the individual employer is responsible an infringement of the solidarity principle, with the result that employers will be more inclined to avoid to employ persons with higher risks?

In this approach it is possible for the Committee to decide that a new development is acceptable even if the conventions have not foreseen it, provided

Standards on National Social Security Law (Kluwer Law International, The Hague: 2006) 27 *et seq*.

4 For an interesting discussion of interpretation methods, see A. Nußberger, "Interpretation of International Social Security Standards – Problems and Prospects" in F. Pennings (ed) *International Social Security Standards. Current Views and Interpretation Matters* (Intersentia, Antwerp: 2007) 40 *et seq*.

5 Committee of Independent Experts, *European Social Charter: Conclusions XIV-1 v. 2: Committee of Independent Experts* (Council of Europe, Strasbourg: 1998) 113.

that the older principles are respected. Since the principles were not respected for the Dutch sick pay, the Committee raised very critical questions.

One problem with this approach is, however, that the principles are not laid down in official documents, but have to be derived from the texts of the conventions. Therefore there can be some dispute or uncertainty about the exact wording of the principles, or even on what the real principles are and which are not. ILO documents that do mention principles contain variations in the listing and wording of principles. Since the issue is of a highly sensitive nature, the lack of accepted principles is problematic.

2.2 *Supervision of ILO Standards*

After they have ratified an ILO convention, Member States have to report periodically on the convention concerned. These reports are examined by the Committee of Experts on the Application of Conventions and Recommendation (the Committee), which is composed of 20 independent members. If necessary, the Committee may request information from governments concerning the application of conventions. The Committee's comments take the form either of *observations*, published in its reports or *direct requests* addressed directly to the governments concerned. The comments may request further information, may ask the governments to make changes, or may comment on the measures adopted to give effect to a convention.

The conclusions by the Committee of Experts are sent to the Conference Committee on the Application of Conventions and Recommendations, whose report, in turn, is presented to the International Labour Conference. The Conference has the final say in drawing the conclusions in case of infringements of standards.

Although it is possible to bring a case before the International Court of Justice in The Hague, in practice, the "naming and shaming" by the ILO Conference is the most radical sanction. Most Member States try to avoid a discussion of the non-compliance of conventions before the plenary of the Conference. For this reason, a permanent dialogue takes place between ILO bodies, in particular the ILO secretariat, and governments of the Member States.

The ILO supervision consists of collective procedures i.e. there is little room for individuals to submit reports and complaints. The conventions neither include individual complaints procedures, nor do ILO supervisory bodies take individual complaints into account.[6] This is consistent with the

6 The Committee of Experts on the Application of Conventions and Recommendations, *Social Security and the Rule of Law* (ILO, Geneva: 2011) 69 available at <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_secsoc_21980.pdf>.

fact that the conventions have been drafted in order to lay down obligations for the State. This approach assumes that the State is responsible for ensuring a certain level of social security. The minimum standards require protection for a certain percentage of the population and a certain minimum level of benefit only. Therefore individuals can, in respect to these standards, not claim that in their individual situation the standards are not observed, since the overall situation has to be taken into account. Moreover, for this purpose statistical information is needed, which is often not (easily) available.

Some countries allow individuals to invoke international standards before their national courts. However, also here it is hard to invoke a convention to improve their situations. For example, suppose that the standard requires that for 50% of the working population the benefit has to be at least 50% of their former wage in case the risk materialises. How can then be decided that this individual belongs to the 50% included or excluded?

2.3 *Major Developments in ILO Standard-Setting*

2.3.1 From Insurance Based Single Contingency Conventions to Comprehensive Conventions

The first generation of conventions after the ILO's establishment in 1919 was heavily inspired by the insurance schemes that had been established in many industrial countries at the beginning of the 20th century. These were based on the principles of compulsory affiliation, administration by non-profit organizations, and influence of insured persons in the management of the administration. Separate conventions were made for each risk, including unemployment, industrial accidents and old age.

After the Second World War, when it had to be acknowledged that the ILO objective to prevent war had failed and also that many people had been living in poverty so far, especially in the 1930s, the ILO decided that policies to make sure that everybody would be able to live in freedom from fear and want in a general social security system, not limited to workers, were necessary.[7] This approach was laid down in the Declaration of Philadelphia of 1944. The Great Depression of the 1930s and the experiences of war made a new starting point for ILO principles and policy necessary. The Declaration included a new concept of social security among the fundamental principles of the work of the Organization: the ILO was called upon to extend social security measures to

7 This was also a reaction to national developments, in particular the Beveridge report: W. Beveridge, *Social Security and Allied Services* (HMSO, London: 1942) in the UK, but also president Roosevelt's Social Security Act in the USA.

provide comprehensive medical care and a basic income to all in need of such protection.

Following these developments, the ILO broadened the scope of its social objectives beyond workers and extended social security measures to provide a basic income to all in need of such protection and comprehensive medical care. This led to Convention No. 102 (1952). This convention promoted the development of a single social system covering all acknowledged social contingencies, including the new branches of family benefit and medical care, and all citizens. Thus no longer one convention for each contingency was made, but a comprehensive instrument.[8] The convention has various flexibility mechanisms: a State can ratify this convention by accepting at least three of its nine branches and it can later accept obligations under other branches. To date, there have been 49 ratifications of Convention No. 102, but only seven countries have ratified all parts.[9]

Now standard-setting has been discussed in general, it is interesting to show in more detail how ILO standards are defined, in order to be able to compare this with standard-setting by other organizations. As an example, let us take a provision of Convention No. 102. According to Article 15 on sickness benefits, States have some (strictly defined) choices on how to organize their systems. Thus, a state can decide to cover employees only, but if it chooses so, 50% of them have to be covered. If a country has a system in which the total working population (i.e. including self-employed and agricultural sectors) is protected, 20% of all residents must be covered. If it has a means-tested scheme, all residents have to be taken into account. Finally a special, temporary standard applies to developing countries.

This method of standard-setting has some specific requirements. First of all, it requires adequate statistics, since otherwise it is impossible to know whether the provisions of Article 15 have been satisfied. Having adequate statistics is still a major problem in many countries. Also defining the prescribed categories requires good statistical methods.

There are also political problems with the convention. One is that for highly developed countries, the standards are still relatively low. For instance, from the text of Article 15 it follows that 50% of employees are not protected. In addition, the definition of classes of the economically active population can leave a large part of the total population unprotected.

8 See also, on its impact, U. Kulke, "The Present and Future Role of ILO Standards in Realizing the Right to Social Security" (2007) 60 *International Social Security Review* 119.

9 The Committee of Experts on the Application of Conventions and Recommendations, note 7 at 34.

Still, the standards do certainly set requirements for Member States and exclude some methods of protection. For instance, for employees a means-tested scheme is not adequate. If a country does have a means-tested scheme, all residents have to be covered.

After Convention 102 was adopted, it was deemed to be too complex to proceed to make another, more advanced general convention. Instead, higher standards were laid down in conventions, each dealing with a single contingency (e.g. old age, unemployment). Since these conventions do not follow the idea of a comprehensive convention, they are called third generation conventions. Third generation conventions aim to raise the standards that were set in pre-war conventions, the level of protection in terms of persons covered, and level and types of benefits, and followed common principles of administration and financing, in line with those used in Convention No. 102.

2.3.2 Popularity of the Conventions

The popularity of adopting standards has fluctuated over time and from region to region. For instance, in the 1950s and 1960s, Western European countries wanted to show that they complied with the standards laid down in conventions. Since the 1990s, they have become much more reluctant to adopt new standards, in any case in the form of conventions. Still, in some circumstances the popularity is bigger: in the 1990s, for instance, many of the countries that wished to accede to the EU ratified ILO conventions, in particular Convention 102. They wished to show that they now belonged to the developed world with decent minimum protection levels. It must be added, though, that it was also the European Commission that pressed them to raise the level of living conditions of the population.[10] Another example is Greece, which ratified a series of conventions after the end of the Colonels' regime in the early 1980s.[11]

Thus, at the beginning of a new era, when a country is transformed into a market economy and/or democracy, States often confirm that social protection is taken as a serious responsibility, and ILO conventions prove to be a good instrument for this purpose. In line with this, also currently new market economies as China and Russia have shown interest in adopting Convention No. 102, since this may help them to give basic protection in their societies. These countries are struggling to combine a market economy with protection for the population and the Convention gives a model for comprehensive social protection

10 See T. Dijkhoff, *International Social Security Standards in the European Union. The Cases of the Czech Republic and Estonia* (Intersentia, Antwerpen: 2011) on how these standards worked in two such states.

11 See M. Korda, *The Role of International Social Security Standards: An In-depth Study through the Case of Greece* (Intersentia, Antwerp: 2013) on Greece's ILO policy.

that is useful for building a social security system. Moreover, adoption of the convention shows to the international fora that the countries are seriously undertaking to give the internationally accepted social protection.

However, in general it can be said that the popularity of the standards has waned. An important reason has been globalization, which has led, among other things, to increased competition between countries and this often caused countries to attempt to reduce labour costs, including social security expenses. For this purpose social security systems were restructured, for instance, by making persons and employers more responsible for social protection and by making social security schemes more focused on the (re) integration of beneficiaries into the job market.

The existing standards and new or envisaged methods of protection adopted in the countries began to diverge. Many developed countries became reluctant to be (more) bound by international standards, since this would make adaptations to new developments more difficult. Therefore, as from the 1980s, there has been little support for new conventions.

Another problem is that the present conventions have become more and more associated with risks and with ways of protection that are becoming outdated, since they are related to the industrial economy of the 1950s and 1960s.[12] Since that era of industrial society, in high-income countries the services and information sectors have grown considerably and have become increasingly important. These service economies can be characterized by an increase in flexible, temporary, atypical and precarious forms of employment. These sometimes need different forms of protection.

In the same period, industrial activity increased in low-income countries, but large parts of these economies are informal, which also causes problems, although of a different sort, for adopting and implementing conventions. However, the Committee of Experts observed that in general also developing countries could do much more than actually realized. Extension of social security coverage is still far from being a priority area of national policy in the majority of developing countries, especially in Asia and the Arab States. Low-income countries account for the fact that only one in five persons in the world has social security coverage and 80% of the population lack adequate social security protection. These countries generally spend a very low percentage of their gross national product to social protection. Thus, there is room for reaching higher levels of protection.[13]

12 The Committee of Experts on the Application of Conventions and Recommendations, note 7 at 13.

13 P. Townsend (ed), *Building Decent Societies: Rethinking the Role of Social Security in Development* (Palgrave Macmillan, Geneva: 2009); see also, for a collection of case studies, W. van Ginneken, *Social Security for the Excluded Majority* (ILO, Geneva: 1999).

Therefore, more than fifty years after the Declaration of Philadelphia, the ILO had to acknowledge that the objective of ensuring a basic income to all in need has not been realized. In response to this acknowledgment, a large project was launched in order to make more progress – the so-called *Decent Work Agenda*. This required finding solutions that would increase protection and embrace respect for basic principles of social security in the context of globalization, meaning, in particular, also extending social security coverage to the Third World.[14] Since the response to this would find the form of a new type of standard-setting, I will first describe the UN in the next section, before going more deeply into this new form of standard-setting (Section 4).

3 The United Nations: The Human Rights Approach of Setting Standards

In several United Nations' documents the right to social security is expressed, e.g. in the Universal Declaration of Human Rights, adopted shortly after the Second World War (1948). Article 22 reads that everyone, as a member of society, has the right to social security. This is also laid down in a covenant, in particular in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for a general right to social security. In 2007 the UN Committee on Economic, Social and Cultural Rights published an interpretative document, *General Comment No. 19: The right to social security* (*Article 9*),[15] which specifies the obligations of the State.

Unlike ILO Convention No. 102, the Covenant does not give specific standards on the level of benefits and the minimum percentage of protection. Instead, it emphasizes that the recognition of the right to social security places an important obligation on the States Parties to the Covenant to take effective measures within their maximum available resources to fully realize the right of all persons, without any discrimination to social security, including social assistance. In order words, an active approach is expected from the States to do what they can. This obligation is essential, as the Committee is concerned about the denial of, or lack of, access to adequate social security that still exists worldwide.

14 Director-General ILO, *Decent Work* (ILO, Geneva: 1999).

15 For the text see: UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The Right to Social Security* (*Art. 9 of the Covenant*) (4 February 2008, E/C.12/GC/19) available at <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>. See also E. Riedel, "The Human Right to Social Security: Some Challenges" in E. Riedel (ed) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (Springer, Heidelberg: 2007) 18 et seq.

The obligations leave considerable freedom to the States in how they reach the objective of realizing social security, but they are required to realize this objective for everyone and some fundamental principles apply (e.g. non-discrimination). This is the so-called *human rights approach*, which is sometimes presented as the counterpart of the approach of the ILO conventions, in which States are required to reach specified targets (*convention approach*).

The Comment asserts that social security can be realized in various ways, e.g. by insurance; universal schemes (providing benefits in principle to everyone who experiences a particular risk); targeted social assistance schemes; privately run schemes; and self-help or other measures, such as community-based or mutual schemes. Whichever system is chosen, it must conform to the essential elements of the right to social security. These essential elements are, *inter alia*, that the system is established under domestic law and that public authorities take responsibility for the effective administration or supervision of the system. The benefits must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living, and adequate access to health care.

The Comment mentions non-discrimination as a very important principle for drafting a social protection system. It also mentions that beneficiaries of social security schemes must be able to participate in the administration of the social security system. Important is that all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups. So, if coverage cannot be complete, it should involve in particular the most vulnerable groups. Social security as a human right also requires, the Comment continues, that any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels.

The human rights approach leaves both more freedom for and requires more efforts by States: they must take steps "to the maximum of their available resources" – which is a recurring phrase – to ensure that the social security systems cover workers inadequately protected by social security, including part-time workers, casual workers, the self-employed, and those who work from home.

The Covenant mentions some core obligations which have to be fulfilled if a country is not able yet to fulfil all the obligations following from Article 9. States have to set appropriate national benchmarks; the Committee will, jointly with the States, consider the indicators and national benchmarks that will then provide the targets to be achieved during the next reporting period.

States are obliged to submit regular reports to the Committee on how the rights are being implemented. The Committee will examine each report and address its concerns and recommendations to the State Party in the form of concluding observations.

Article 16 of the Convention requires States Parties to undertake to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein. In line with this, all reports shall, according to the Covenant, be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant. The Comment remarks that States Parties to the present Covenant have to furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the Covenant after consultation with the States Parties and the specialized agencies concerned.

The Comment on Article 9 invites States Parties to set appropriate national benchmarks to reach identified appropriate indicators for the right to social security. During the periodic reporting procedure, the Committee, the Comment reads, will engage in a process of "scoping" with States Parties: scoping involves the joint consideration by States parties and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. The Comment provides that in the following five years, the States parties will use these national benchmarks to help monitor their implementation of the right to social security. Thereafter, in the subsequent reporting process, States parties and the Committee will, according to the Comment, consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered. When setting benchmarks and preparing their reports, States parties should, the Comment continues, utilize the extensive information and advisory services of the United Nations specialized agencies and programmes.

4 The ILO Recommendation on Social Protection Floors

In Section 2, I discussed the acknowledgement by the ILO that the standards had so far not been very successful, in any case not in extending social security worldwide. In order to respond to this, in the *Social Security and the Rule of Law* report the Committee of Experts proposed two methods for realizing the objective of social security for all.

First, in view of the fear that putting Convention No. 102 on the agenda for revision would lead to lowering or loss of the existing standards of that Convention, the report suggested that a simple procedure should be designed to update the existing standards, e.g. a limited revision or a protocol to integrate gender neutral language.[16]

The other approach was to develop a strategy for promoting comprehensive social security in the developing world by means of a *global social protection floor*. Initially it was proposed that the recommendation to be made for this purpose would have a rights-based approach to social protection; legal certainty and regularity of support; a guaranteed amount of benefits sufficient to maintain the family in health and decency; the provision of cash benefits throughout a contingency and medical care until the restoration to health; resource pooling, collective financing and social solidarity; sound financial governance and protection against the misuse of social security funds; the prohibition of the withdrawal or reduction of benefits except in certain well-defined cases; the right to complain and appeal, and the guarantee of due process; oversight by the representatives of the persons protected; and the overall responsibility of the state. Examples of required benefits are the basic old age pension, essential health care, the protection of children, and provisions for the poor.[17]

Finally the protection floor was laid down in a recommendation, Recommendation 202, adopted during the June 2012 ILO Conference. The recommendation appeared to be less ambitious than the original proposal.[18] It obliges Member States to give at least access to a nationally defined set of goods and services, constituting essential health care, including maternity care; basic income security for children; basic income security, at least for persons who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and basic income security for older persons. It leaves considerable discretion to the States to define the precise criteria, but important is that the basic social security guarantees should be established by law, and the laws should specify the conditions and levels of the benefits. Complaint and appeal procedures should be specified

16 The convention still refers to the male breadwinner as a standard beneficiary.

17 See also ILO, *Social Protection Floors for Social Justice and a Fair Globalization* (ILO, Geneva: 2011).

18 For the discussion on the text and amendments see the following report: The Committee on the Social Protection Floor, *Elaboration of an Autonomous Recommendation on the Social Protection Floor* (ILO, Geneva: 2012).

(Article 7).[19] The latter rule is an elaboration of the principle that Member States have to ensure a legal right to social security.

In addition, Part III encourages Member States to extend their social security system and for this purpose they should aim to achieve the range and level of benefits set out in Convention 102 or conventions with more advanced standards.

Monitoring is to be done by the Member States themselves. For this they should have appropriate nationally defined mechanisms, regularly convene national consultations and collect an appropriate range of social security data.

Recommendation 202 can be considered as part of a human rights approach, since it does not mention obligations for the State to realize, but it gives the States the task to elaborate provisions to which individuals have legal rights. Although the Recommendation is a result of high ambitions, the actual elaboration is still rather disappointing, even if one takes the narrow margins which existed for making such an instrument into account. First, the Recommendation gives very little room for supervisory bodies to check progress in implementing its obligations. Second, the initial paper on social protection floors proposed that the floors should exist of a guaranteed amount of benefits sufficient to maintain the family in health and decency; the provision of cash benefits throughout a contingency and medical care until the restoration to health; and the prohibition of the withdrawal or reduction of benefits except in certain well-defined cases. These targets are not found in the Recommendation. Nor are general criteria for progress and monitoring quality defined, and there is not even an obligation to report to the ILO on how the recommendation is followed.

Article 19(6) of the ILO constitution obliges Members to do the following in respect of Recommendations. Recommendations are communicated to all Members for their consideration with a view to effect being given to them by national legislation or otherwise. This Article further provides that, apart from bringing the Recommendation before their competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such

19 The rule that these procedures should be free of charge can also constitute problems for some developed countries.

modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

5 Analysis and Conclusions

5.1 *Analysis*

Is something wrong with international social standards? The answer to this question is in the affirmative. To start with, relatively few of the ILO conventions have been ratified. Second, States sometimes fail to submit reports on the conventions to the ILO, and if problems are reported, it often takes considerable efforts for the ILO bodies to have the situation adjusted to comply with the conventions. A third problem is that it cannot be said that overall poverty has been reduced, though this is seen as a paramount objective of the ILO. Although the UN does not have the problem that only very few conventions are ratified, it has not made much progress with elaborating the provision on the right to social security either. The national reports and the follow-up still have to be submitted.

The next question is what the reason is for the problems. The problem with the ILO conventions is not in the first place a *conceptual* shortcoming. The conventions mention minimum standards based on principles that are still seen as important, such as solidarity. The wording of the conventions has, however, become outdated, since this wording is the reflection of the situation in the 1950s and 1960s in Western Europe, namely a highly industrialised economy with a predominantly male full-time working population. Even if the underlying principles are still valid, the wording makes an old-fashioned impression. In reply to the questionnaire linked to the ILO Report *Social Security and the Rule of* Law, some countries mentioned issues that are more relevant to them, including poverty, effects of natural disasters and wars, the need for long-term care provisions, the position of migrant workers, HIV/AIDS, and the large informal economy. A problem with the issues mentioned is, however, that they do not require a specific approach, and the solution does not lie in developing new standards on particular benefits or measures. States should rather take the initiative and organize ways to improve knowledge among their peoples about risks and invent incentives to change the informal to the formal economy. Therefore their reasons mentioned not to adopt standards do not correspond to the values underlying the Conventions.

The UN way of standard-setting is very different, since the standard in the Treaty "simply" reads that everyone has a right to social security. This does not raise the problem that language and concepts have become old

fashioned. However, the concept is so open that it does not itself impose any standard on a Member State. Therefore the Comment of the Committee on Article 9 is a necessary and interesting instrument, since it gives an extensive explanation of the general obligation to develop social security and gives also room for choices for Member States while still taking into account their actual situation. It is, however, not clear yet, how authoritative the interpretation laid down in the Comment is considered by the Member States and whether they will use it as a basis for activities in their own country.

Regulatory shortcomings in the ILO conventions are that even quite old texts have not been updated. It was feared that revising the text would incur the risk that amendments would be made that would affect essential elements of the present text and thus lead to a weaker instrument. Only recently it was suggested that a light procedure could be followed for updating the text.

In respect of the UN Covenant one can wonder whether the Comment on Article 9 ICESCR is sufficient in terms of regulation. The Comment does not give specific rules against which the situation of a Member State can be tested; it is an interpretation document that can easily be set aside. Maybe it is better to transpose the interpretation into a regulation, which can be more easily updated than a convention, but it is very uncertain whether this fits in a UN context.

Have decision makers developed *questionable* interpretations of international law? Here, the decision makers are committees of experts, a supervision body often connected to conventions with social standards. It has the advantage over a court in that court decisions – as binding texts – are feared to have too much impact on national sovereignty, while States want to keep this in any case in the area of social protection.

The advantage of a committee of experts is that experts can have an impartial and fresh look at the rules and their application to the facts. However, their reports are often quite limited in their arguments for a particular interpretation, while court judgments are generally (much more) elaborated, since they have to convince all parties.

One has to take into account, however, that committees of experts have to read numerous country reports on large numbers of conventions. This can, of course, not be compared with the caseload of a court. It could, however, be argued that a court could have an important function in dealing with the controversial cases alongside with the work by the committee of experts.

One could also word the foregoing differently. Social security is an important human right, but States allow little or no interference by others, mainly because they fear the financial effects of supranational rules or interference.

Thus, only by using relatively soft instruments progress can be made. For this reason, the mix of declarations, precise standards, expert committees, and, for the EU, the Open Methods of Coordination is quite appropriate. However, are these instruments forceful enough?

5.2 *A Relation between Strictness of Standards and Supervision?*

In this contribution we saw that the ILO approach in Recommendation 202 and that of the UN Committee on the ICESCR seem to be converging.[20] Both organizations declare social security to be a human right, but because of its nature, it cannot be invoked as such, and elaboration in comments, guidelines or recommendations is necessary. Although the human rights instruments setting social security standards (the UN Comment on Article 9 and ILO Recommendation 202) have a weaker legal meaning than conventions, since they are not elaborated in a legal instrument (treaty) as such, they strongly recommend States to realize social protection in the form of legal rights. The human rights approach thus works in terms of principles and reporting methods. It is remarkable that the principles mentioned in the UN Comment resemble those mentioned as underlying the ILO conventions: e.g. responsibility of the State for social protection, the need for the participation by the social partners, and the need for sustainable governance.

Therefore I will compare ILO conventions, Article 9 ICESCR and Recommendation 202 in view of their regulatory force, the way of supervision, the extent to which they bind the Member States and whether they give rights to individuals.

In the foregoing we saw that conventions have been criticized since their provisions are rather strictly worded, they are said to be difficult to implement in low income countries, and they give only limited protection if we take the whole population into account. These characteristics limit the possibility to impose the standards strictly, to supervise them strictly and to impose them on all Member States.

Therefore the human rights approach is or seems to be winning ground since it entails a more flexible approach, gives maximum room to States to follow their own approaches, and also encourages the States to organize adequate protection to all persons within the resources of the State. This should give room for strict supervision, since countries are not required to do more than they can and they have the room to explain why they made particular choices.

20 This was also noted by The Committee of Experts, *Social Security and the Rule of Law* (ILO, Geneva: 2011) 67.

Is this link between the strictness of the provisions and the strictness of supervision confirmed in the instruments discussed in this contribution? Let us put them in a comparative table.

Table 13.1 shows that although the texts of the human rights instruments (the ICESCR and the ILO Recommendation) leave much more room for the Member States, the supervision and the need for States to account for their results are even weaker than in the ILO convention approach. Of course, the obligations for the Member States in the human rights approach differ from those of the ILO conventions, but their efforts can be investigated, including what they have done in view of the recommendation/comment, what they are planning, what their resources are and what they have done.

Still, the supervision of the efforts and results is much weaker than in the convention approach, since no transparent reporting system and reports by an international committee are published.

The reverse situation would have been expected: if the requirements are adjusted to the possibilities of a State, if they do not have to do more than is possible within their resources, then there is no reason why a State cannot account for its activities. Therefore supervision can be stronger when the standards are more flexible.

Instruments that give a comprehensive list of areas in which Member States have to undertake action within the maximum of their efforts and which is done without discrimination and by giving legal rights to individuals are therefore a very important complement to existing instruments, but this flexibility should be accompanied by an appropriate supervision structure. Maybe this supervision can make use of more modern and flexible methods, such as reporting to peer groups of experts of the same region instead of a committee of experts. However, countries should be asked to report in public and also the conclusions of the experts should be published. In addition also the national NGOs should be allowed to comment on the report of their country in view of the instruments involved.

Since the instruments concerned have basic commitments – no country is asked the impossible – such an approach should be feasible for all Member States.

6 Conclusions

In this contribution I discussed the ways of standard-setting in the area of social protection by the ILO and the UN. The ILO follows a system of conventions, in which minimum standards are laid down. This system has important

TABLE 13.1 *Comparison of the convention and the human rights approach*

Standards	Regulatory power	Supervision	Binding member states	Rights for individuals
ILO convention	Strict texts (though allowing for choices and flexibility), becoming out dated Not easy to adjust	By committee of experts: medium strength	Those who ratified the particular convention: medium level of enforcement in case of non-compliance Those who did not ratify: no	No, unless (in case of ratified conventions in exceptional cases national court applies the standard)
ICESCR	Very general treaty provision Elaborated in Comment on Article 9: considerable flexibility Comment can be adjusted by committee	By committee: Reports are required (on implementing the whole covenant) National benchmarks are compared with indicators	Addressed to all States that ratified the covenant: weak level of enforcement in case of non-compliance	States are asked to give enforceable rights. No rights can be derived from Article 9 ICESC or the Comment on Article 9
ILO social protection floor recommendation	Recommendation: draft text was amended in order not to impose strict obligations	By Member States themselves	Addressed to all Member States weak (or no) enforcement in case of no compliance	States are asked to give enforceable rights. No rights can be derived from the international instrument

limits in its effect, since only Member States that ratified a Convention concerned are bound by it, since the Conventions only give minimum provisions, so there are still gaps in coverage, and since provisions of the Conventions threaten to become outdated. Still, they have important values in requiring the Member States bound by them to reach a certain level of protection. In addition, principles are derived from the Conventions, which make that the interpretation and application of the Conventions can be adjusted to present-day situations.

Article 9 of the ICESCR mentions the right to social security, without further elaboration. However, a Comment on this Article has given specific interpretations of the Article, which lead to requirements to Member States to design their own system. This approach is not limited to specific provisions, as found in the ILO Conventions, but requires Member States to do their utmost. This text leaves more room to the individual Member States, requires more than the minimum if this is possible in the circumstances and is, if necessary, easier to change than Conventions.

In ILO Recommendation 202 the ILO, too, now has a more flexible approach than in the Conventions, laying down certain principles for the further development of the social security systems. We could call this also a human rights approach.

It is therefore interesting to discuss the desirable development of the instruments. Convergence of conventions and human rights provisions on social protection is not really feasible, since they use two different techniques. They do, however, certainly complement each other. After all, the conventions contain important provisions which can be imposed on the States which have ratified them, where in the human rights' approach no enforceable obligations have been imposed on the States. The human rights approach, following from the Comment on Article 9, is necessary in order to require a minimum protection for everyone on the essential elements. This could be the division of work: the human rights approach requires the bare minimum; the conventions guide the further development of the system.

The human rights approach also has the advantage that it binds all countries that ratified ICESCR. There is therefore no problem to convince States to ratify a particular convention.

The human rights approach should, however, be strictly supervised, since otherwise it simply means that the standards are weaker and no (serious) reports are made and analysed. In case it is not strictly supervised, but still replaces developing strict standards in the form of Conventions we lose an instrument that is appropriate to set standards without having an adequate replacement.

We can thus conclude that there are developments to make standards on social protection more dynamic and more global. Requiring Member States to report on the national situation is a useful instrument to realise the standards, since it gives States the room to adjust the system and report to the national situation. However, enforcing the duty to report and the recommendations developed in the supervisory bodies is still problematic. An important reason for this is that normally a State has no own advantage in accepting the standards. International organisations should therefore investigate whether it is possible to increase the remuneration for accepting and following standards, for instance by linking the conventions to subsidy and restructuring programmes or to other conventions.