INTRODUCTION

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly in 1966. It came into force in 1978 and together with its sister Covenant, the International Covenant on Civil and Political Rights (ICCPR), forms part of the International Bill of Human Rights.

The ICESCR is composed of thirty-one articles contained in six sections: the preamble and parts I to V.

1. Part I, which is identical to the parallel part of the ICCPR and comprises solely article 1, proclaims the right of all peoples to self-determination, including the right to freely pursue their economic, social and cultural development and to freely dispose of their natural wealth and resources. Although the inclusion of a right of people may be problematic, it could be said to provide a necessary context within which the realization of rights within the Covenant is to take place.
2. The heart of the Covenant is found in part III, articles 6-15, which outlines the rights to be protected. These include, broadly, the right to work (Art. 6), the right to fair conditions of employment (Art. 7), the right to join and form trade unions (Art. 8), the right to social security (Art. 9), the right to protection of the family (Art. 10), the right to an adequate standard of living, including the right to food, clothing, and housing (Art. 11), the right to health (Art. 12), the right to education (Art. 13) and the right to culture (Art. 15).

The protection given to economic rights in the Covenant is broad but general. Article 7, for example, provides for a right to equal remuneration for work of equal value (rather than just the more restrictive equal pay for equal work), and gives recognition to a wide range of other rights such as the right to safe and healthy working conditions and the right to reasonable limitation of working hours. Similarly, article 8 provides not only for the right to join and form trade unions but also for the right of trade unions to function freely and the right to strike.

SCOPE OF ICESCR

The *ICESCR* guarantees a comprehensive range of substantive rights including:

- The right to self-determination (Article 1);
- Equal rights for men and women (Article 3);
- The right to work (Article 6);
- The right to just and favourable conditions of work (Article 7);
- The rights of workers to organize and bargain collectively (Article 8);
- The right to social security and social insurance (Article 9) and protection and assistance for the family (Article 10);
- The right to an adequate standard of living (Article 11) which includes:
    - Adequate food
    - Adequate clothing
    - Adequate housing;
- The right to freedom from hunger (Article 11);

- The right to the highest attainable standard of physical and mental health, including the right to health care (Article 12);
- The right to education (Article 13); and
- The right to culture and to benefit from scientific progress (Article 15).

Article 2 binds States parties to guarantee that all rights within the *ICESCR* will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is not exhaustive. This provision of the *ICESCR* has been interpreted to require States parties to prohibit private persons and bodies from practising discrimination in any field of public life.

LIMITATIONS

While the Covenant benefits from an impressive scope, it does suffer from the fact that its terms are phrased in an excessively general manner. For example, whereas the European Social Charter has three articles dealing with the right to social security, the Covenant merely has the briefest of statements. Similarly, the rights to food and housing, which are clearly complex and ill-defined concepts, are given little, if any, further substance in the text of the Covenant. The amount of detail to be included in the provisions of the Covenant was the subject of much debate in the drafting of the Covenant. Although it was noted that more general wording could leave the way open to divergent and conflicting interpretations, generally phrased provisions were often preferred in order to avoid restricting the scope of the articles and to prevent conflict with the standards established by the specialized agencies (particularly the ILO). The generality and breadth of the Covenants terms could be said to contribute to its longevity by providing scope for a dynamic interpretation of its provisions. It does, however, place a heavy burden on the supervisory body whose central role inevitably becomes one of developing and defining the content of the norms. Although the drafters clearly envisaged a continuing process of standard-setting (particularly under the auspices of the ILO), the fact that this must take place after ratification leaves the way open to conflicts in interpretation that might ultimately undermine the integrity of the Covenant itself.

One particular failing of the Covenant, especially when compared with the European Social Charter, is that it does not identify those groups that might be considered to need special protection. Specific mention is made only to the position of women and children (Arts. 3 and 10). Ideally, one might have hoped that mention would be made of the position of aliens, migrant workers, the elderly and those with physical or mental disabilities. It would be wrong, however, to suppose that the Covenant fails to offer any protection in that respect. The rights to which the Covenant refers are the rights of everyone; the only limit *ratio personae* is to be found in article 2(3), which permits developing countries to determine the extent to which they would guarantee economic rights to nonnationals. Equally, article 2(2) prohibits discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or

social origin, property, birth *or other status* (emphasis added). The term other status, as far as the UN Committee on Economic, Social and Cultural Rights (CESCR; see below) is concerned, includes advanced age and disability. It is also arguable that it may be interpreted to prevent discrimination on other grounds, such as nationality, age, health status or sexual orientation.

THE SUPERVISION SYSTEM

The system of supervision devised for the ICESCR differs from that for the ICCPR principally in so far as it does not possess the equivalent of the Optional Protocol to the ICCPR for the purpose of receiving individual petitions. It was considered during the drafting of the Covenant that the progressive nature by which the rights were to be implemented rendered it impossible for individual complaints to be entertained. It would not be possible to speak of violations in a context where all that was being considered was the sufficiency of legislative and administrative programs. Accordingly, the ICESCR was left with a reporting system as a means of supervision, to be undertaken not by an expert committee like the Human Rights Committee, but by the Economic and Social Council (ECOSOC) as one of the political organs of the United Nations.

According to articles 16 and 17 of the Covenant, states are required to submit reports, at intervals to be defined by ECOSOC, on the "measures which they have adopted" and the "progress made" in achieving observance of the rights in the Covenant. The reports are to be sent to the UN Secretary-General, who is required to transmit them to ECOSOC "for consideration." ECOSOC may, in turn, transmit the state reports to the Commission on Human Rights "for study and general recommendations or . . . for information," (art.19) and may invite the UN specialized agencies (which are to be sent copies of the relevant parts of the state reports) to report to it on the progress made in achieving observance of the rights. (art. 18) Finally, ECOSOC may "from time to time" submit reports and recommendations "of a general nature" to the General Assembly (Art. 21), and may bring to the attention of other UN organs and specialized agencies any matters that "may assist such bodies in deciding . . . on the advisability of international measures likely to contribute to the effective progressive implementation of the . . . Covenant." (Art. 22)

The system envisaged in part IV of the Covenant does not clearly identify which body has central responsibility for supervision (ECOSOC or the Commission on Human Rights), nor does it stipulate the precise content of the reports to be submitted by states parties or the nature of the scrutiny to be undertaken by the UN bodies mentioned. What is clear under part IV is that nobody has the ability to interpret the Covenant in a manner that binds states parties, and that states are merely under an obligation to submit reports at periodic intervals. Any further participation in the supervisory process is entirely voluntary. Reading between the lines, it would appear that what was envisaged was a system in which ECOSOC would act as a conduit for the transmission of requests for international assistance, both economic and technical. It was not expected that ECOSOC would "assess" the state reports or evaluate state performance with respect to the implementation of obligations under the Covenant. This, however, is not how the supervision system has ultimately developed.

THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The CESCR is composed of eighteen experts, sitting in an independent capacity, chosen with due regard to equitable geographical distribution. It officially meets in Geneva each year for a single three-week session, although additional sessions are frequently arranged. As of May 1998, the committee has held eighteen sessions. Unlike other human rights committees created by virtue of the respective treaties, the committee is technically only an organ of the United Nations. It was created by ECOSOC, and its mandate is merely to assist ECOSOC in the consideration of state reports. Although it operates in a manner broadly similar to that of other human rights treaty bodies, it has not been hampered by the constraints of a detailed constitutional instrument and has therefore been able to develop its working methods quickly and flexibly. As a result it now boasts one of the most advanced reporting procedures in the UN human rights system.

Under the reporting procedure as it now operates, states are required to submit a report on the domestic implementation of the articles in the Covenant once every five years. To assist states in that regard, the CESCR has adopted a set of reporting guidelines that outline the issues to be addressed by states parties. The reports, once submitted, are considered initially by a pre-sessional working group (consisting of five members of the committee), which drafts a list of specific questions regarding further information to be requested. When the committee comes to consider the report in plenary, a representative of the state concerned is invited to attend the committee's meeting and present the report. In doing so, the representative is requested initially to address the list of questions drafted by the pre-sessional working group. Thereafter individual members of the committee ask further questions to which the state representative will endeavour to respond. At the conclusion of this process, the committee will draft a set of Concluding Observations in which it will lay out the principal subjects of concern to the committee and any suggestions and recommendations that it might have. A number of aspects of this process are worthy of further comment.

Criticism: One of the enduring criticisms of reporting systems in general is their reliance on the cooperation of states, not only in terms of their submission of reports but also in their participation in the constructive dialogue. The unwillingness of certain states to cooperate in that regard has posed problems with respect to the ICESCR. For example, as of May 1996, there were 97 overdue reports from 88 states parties and 17 states had failed to submit a single report in ten years. The committee has taken action to address such problems by, inter alia, scheduling for consideration the situation in states in absence of a report. This has met with some success in so far as states have often responded by submitting a report at the next session, but it clearly runs counter to the ethos of the constructive dialogue and arguably exceeds the competence of the committee to consider "state reports."

It is often the case that during the process of the constructive dialogue issues arise which the state representative is unable to address immediately to the satisfaction of the CESCR. In those cases, states are generally requested to provide additional information in time for the committee's next session. In urgent cases, the committee may request the information to be provided at an earlier date, within a specified number of months. On receipt of the additional information the committee will generally merely declare its satisfaction at receiving the

requisite information, but on occasion it will adopt a number of concluding observations outlining those matters which remain of concern to the committee.[25]

Reformatory approach: Recently, however, the committee has gone considerably further in its approach to situations of grave and immediate concern. In the cases of Panama and the Dominican Republic, the committee considered that the information provided by the state party did not entirely dispel its concern as to allegations of housing rights violations. Accordingly, it requested each state to accept a mission, consisting of two members of the committee, which would visit the state concerned predominantly for the purpose of information-gathering. Although both states initially resisted, they eventually accepted the proposal and a mission was dispatched to Panama in early 1995 and to the Dominican Republic in 1997. Although the mission reports themselves were confidential, the committee has adopted a set of observations as to the results of each visit. This procedure, while not unknown in the context of UN practice, is a significant development in the work of the committee and may ultimately offer opportunities for it to develop a far more constructive role in the reporting process.

One of the major theoretical drawbacks of the reporting system as a system of supervision is its inability to respond to specific individual claims that might arise in relation to the enjoyment of the rights in particular states. To some extent those claims might be championed by interested NGOs participating in the work of the committee, but thus far, such action has tended to be limited to the field of housing rights. The lack of a formal complaints procedure has two main drawbacks: not only does it deprive individuals of the opportunity to seek an international outlet for their complaints, but it also limits the committee's ability to develop a deeper understanding of the content of the rights in the Covenant.

As regards the latter point, the CESCR has attempted to remedy the lack of case law by producing "General Comments" in which it attempts to outline its understanding of both substantive and procedural aspects of the Covenant. As of June 2000, the committee had produced thirteen such general comments, seven of which relate to substantive rights, namely the right to housing (and forced evictions), food, education and the rights of persons with disabilities, and the rights of the elderly. These all go some way towards elucidating the committee's understanding of the rights and obligations within the Covenant, and, indeed, its perception of the difficulties facing states in implementation. The latter point was developed, in particular, in a recent General Comment where the committee expressed its deep concern about the deleterious effect that UN-imposed sanctions appeared to have upon the welfare of vulnerable groups in the target states. It reiterated the importance of the standards in the ICESCR and asked that those concerned with implementation take necessary cognizance of the ESC rights of the population affected.

CHALLENGES

As mentioned above, one of the major shortcomings of the ICESCR as a human rights instrument is the fact that it does not possess the equivalent of a system for the consideration of individual or group petitions. Although the CESCR has recently drawn up a draft Optional Protocol to allow for the consideration of individual communications, it is unlikely that this will be adopted by states in the near future. The present situation, however, is not without its opportunities. First of all, individuals and groups do have the opportunity to submit information to the CESCR alleging violations of rights within the Covenant, and this, on occasion, may induce the committee to ask states for a particular response. To some extent, therefore, the

system operates in a “quasi-judicial” manner in providing at least a potential outlet for complainants.

Secondly, it is apparent that there is a substantive overlap between the ICESCR on the one hand and the ICCPR on the other, and that if a state is party to the Optional Protocol to the latter, petitions in relation to ESC rights may be submitted to the Human Rights Committee. The clearest examples arising in practice have related to article 26 of the ICCPR concerning equality before the law. In several cases, the Human Rights Committee has come to consider the legitimacy of discriminatory social security legislation in the Netherlands under that provision, notwithstanding the fact that the right to “social security” is found in the ICESCR, not the ICCPR. Other potentially fruitful overlaps include the right to join and form trade unions and the right of members of ethnic, cultural and linguistic minorities to take part in the cultural life of their community (art. 27). A similar situation prevails in relation to the Convention against Racial Discrimination (CERD) which has led, in the past, to certain ESC rights being considered under CERD’s petition system. Cases of relevance include the *Yilmaz-Dogan* case and *L.K. v. The Netherlands*.