



## STATEMENTS VERSUS GOVERNMENT ACTION ON THE RATIFICATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR) AND ITS OPTIONAL PROTOCOL

### Introduction

*South African Government officials have stated on several occasions that Parliament and the President are in the process of ratifying the ICESCR, but Government is yet to follow through on ratification.*

*South Africa has also been very supportive and played an active role in the drafting and adoption of the Optional Protocol to the ICESCR.*

In 1994, in his first visit to the United States as head of state, Nelson Mandela signed the ICESCR on behalf of South Africa. By signing the treaty, South Africa indicated its intention to ratify the treaty and incurred an international obligation not to act contrary to the object and spirit of the treaty. However, South Africa has since failed to ratify the instrument and has not been forthright with the international community about ratification efforts at home.

The South African Government has been telling the international community that it is working on ratification, going as far as to describe ratification as being 'in progress'. Yet, there has been no timeline from the President regarding ratification.

Further, despite the strong leadership role South Africa took in the negotiations during the drafting of the Optional Protocol to the ICESCR, it has not signed this Protocol and cannot ratify it because ratification of ICESCR is a prerequisite for ratifying the Optional Protocol.

Below are some of the statements made by President Zuma, members of Parliament and other officials regarding ratification.

### What Our Presidents Have Said...

*Our leaders have said that South Africa respects and values human rights and human rights treaties and is committed to leading the world on human rights.*

- Writing in 1993, **Nelson Mandela** pledged that 'human rights will be the light that guides our foreign affairs'. A free South Africa, he said, would take its place 'at the

forefront of global efforts to promote and foster democratic systems of government'.<sup>1</sup>

- In 2000, now-**President Jacob Zuma** stated that the 'ratification and implementation of international human rights instruments', along with the 'mechanisms to monitor the implementation and protection of such rights', are a key component of the global human rights agenda.<sup>2</sup>
- In 2009, during his inauguration as South Africa's fourth President, **Jacob Zuma** said that 'we shall not rest, and we dare not falter' in ensuring access to socio-economic goods and services and in addressing discrimination and poverty. He also emphasised South Africa's commitment 'to continue to be an active member of the international community'.<sup>3</sup>
- In 2010, in his address at the National Women's day Celebration (east London), President Jacob Zuma reiterated South Africa's commitment to socio-economic rights and said that 'our primary focus is to improve access to socio-economic rights'. He stated the following as justification for the focus on socio-economic right, in relation to women: 'We focus on socio-economic rights because the emancipation of women cannot be separated from the fight to eradicate poverty and to improve access to basic services. For scores of poor women, emancipation means access to electricity, water, decent shelter, access to income generating activities or decent jobs, roads and transport, education and training for themselves and their children.'<sup>4</sup>
- In 2010, in his reply to a question posed by Parliament on why South Africa has not ratified the ICESCR, **President Jacob Zuma** said that 'South Africa signed the ICESCR on 3 October 1993 with the view to ratify at a later stage'. He also said that delay in ratification has been as a result of a possible conflict between the ICESCR and the Constitution, and the difficulties in identifying a lead department to oversee its implementation, but that 'the issue has been on the agenda of both the Social protection and Community Development Cluster and the Forum of South African Directors-general management Committee and I am sure that a resolution will be found shortly'.<sup>5</sup>

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<sup>1</sup> Nelson Mandela, 'South Africa's future foreign policy' (1993) 72 (5) *Foreign Affairs*. Available at <http://www.anc.org.za/ancdocs/history/mandela/1993/nm9311.html>.

<sup>2</sup> Address by Deputy President Jacob Zuma to the President of the General Assembly of the United Nations, delivered in Geneva, 26 June 2000.

<sup>3</sup> Address by His Excellency Mr Jacob Zuma on the occasion of his Inauguration as fourth President of the Republic of South Africa, 9 May 2009. Available at <http://www.thepresidency.gov.za>.

<sup>4</sup> Zuma: Address by the President of South Africa, at the National Women's Day celebrations, East London, 09/08/2010. Available at <http://www.polity.org.za/article/sa-zuma-address-by-the-president-of-south-africa-at-the-national-womens-day-celebrations-east-london-09082010-2010-08-09>,

<sup>5</sup> Parliamentary Monitoring Group, 'Questions and replies: Question No. 1225', submitted on 4 May 2010. Available at <http://www.pmg.org.za/node/21347>.

## What Members of Parliament Have Said...

*Members of parliament have questioned why South Africa has not yet ratified the ICESCR.*

- In 2009, the **Chairperson of the Portfolio Committee on Justice and Constitutional Development** asked the South African Human Rights Commission (SAHRC) ‘to explain why South Africa had yet to ratify the International Covenant in relation to social, economic and cultural rights’. The SAHRC responded that it ‘was given to understand that Cabinet had taken the decision to ratify the Covenant , but the process included making available that Covenant to all the departments that might be affected by or have an interest in it ... Ratification of the Covenant would certainly have implications for South Africa, but ... these were not insurmountable’.<sup>6</sup>
- In 2010, **Ms LH Adams** of COPE asked the President why South Africa has not ratified the ICESCR despite signing it on 3 October 1994 (the president’s response is stated above).<sup>7</sup>

## What Our Representatives Have Said at the United Nations...

*Our representatives at the UN have been telling the UN for several years that South Africa is ‘in the process’ of ratifying the ICESCR and that there is ‘no political hurdle’ to ratification.*

*During the drafting process of the Optional Protocol to the ICESCR, our representatives at the sessions of the UN Open-Working Group on an Optional Protocol to the ICESCR made a significant effort to ensure that the Protocol affirmed and built on the African experience and did not weaken it by setting a lower standard of review at the international level.*

- In 2000, during the consideration of the initial report of South Africa submitted to the UN Committee on the Rights of the Child, one of the South African representatives, **Ms. Swepaul** stated that ‘the Government had signed the International Covenant on Economic, Social and Cultural Rights in 1994, and Parliament was in the process of ratifying it’.<sup>8</sup>
- In 2006, as a member of the Human Rights Council, **South Africa voluntarily made pledges and commitments** with respect to the promotion and protection of human rights and the ratification of human rights instruments, stating that ‘the *South African*

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<sup>6</sup> Parliamentary Monitoring Group, ‘South African Human Rights Commission: Briefing’ (2009). Available at <http://www.pmg.org.za/report/20090708-south-african-human-rights-commission-matters-interest-briefing>.

<sup>7</sup> Parliamentary Monitoring Group, ‘Questions and replies: Question No. 1225’, submitted on 4 May 2010. Available at <http://www.pmg.org.za/node/21347>.

<sup>8</sup> UN Committee on the Rights of the Child, Summary record of the 609th meeting: Initial report of South Africa, Un doc. CRC/C/SR.609, 1 February 2000, para 48.

*Government is in the process of ratifying* the following important human rights instruments: *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*'.<sup>9</sup>

- In 2008, **South Africa's Country Report** to the Human Rights Council stated that '*South Africa is in the process of ... ratifying* the following core human rights instruments . . . *The International Covenant on Economic, Social and Cultural Rights*'.<sup>10</sup> Also, when the UN Working Group on the Universal Periodic Review asked South Africa about why it had not ratified the ICESCR and other international instruments, the South African delegate, **Ms. Claudine J. Mtshali**, indicated that 'South Africa will report back in due time when it will be in a position to ratify those instruments and *reaffirmed that there was no political hurdle*'.<sup>11</sup>
- During the drafting of the Optional Protocol to the ICESCR, South Africa said the following at the UN Open-Ended Working Group on an Optional Protocol to the ICESCR: In 2005, South Africa suggested that all rights in the ICESCR should be the subject of communications through a comprehensive Optional Protocol to the ICESCR.<sup>12</sup> In 2006, South Africa said that both individuals and groups should be allowed to bring complaints before for the UN Committee on Economic, Social and Cultural Rights.<sup>13</sup> In 2008, South Africa emphasised in support of the Optional Protocol that **all** economic, social and cultural rights can be adjudicated.<sup>14</sup>

## What the Constitutional Court Has Said...

*The Constitutional Court has relied on the ICESCR in interpreting the socio-economic rights that we possess under the Constitution.*

- In *S v Makwanyaye and Another*<sup>15</sup> and *Government of the Republic of South Africa and Others v Grootboom and Others*,<sup>16</sup> the Constitutional Court stated that international

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<sup>9</sup> Note No 143/06, 02 May 2006, UN Human Rights Council (emphasis added).

<sup>10</sup> South Africa's Country Report to the Human Rights Council's Universal Periodic Review Mechanism, UN doc. A/HRC/WG.6/1/ZAF/1, 15 April 2008, at 11(iii) (emphasis added).

<sup>11</sup> Report of the Working Group on the Universal Periodic Review: South Africa, UN doc. A/HRC/8/32, 23 May 2008, para 65 (emphasis added).

<sup>12</sup> Report of the open-ended working group to consider options regarding the elaboration of an Optional Protocol to the ICESCR on its second session, UN doc. E/CN.4/2005/52, 10 February 2005, para 87.

<sup>13</sup> Report of the open-ended working group to consider options regarding the elaboration of an Optional Protocol to the ICESCR on its third session, UN doc. E/CN.4/2006/47, 14 March 2006, para 43.

<sup>14</sup> Report of the open-ended working group to consider options regarding the elaboration of an Optional Protocol to the ICESCR on its fifth session, UN doc. A/HRC/8/7, 6 May 2008, , para 10.

<sup>15</sup> *S v Makwanyaye and Another* 1995 (3) SA 391 (CC), para 35.

<sup>16</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169, para 26

law provides a framework within which the rights in the Constitution can be evaluated and understood.

- In *Government of the Republic of South Africa and Others v Grootboom and Others* the Constitutional Court relied on the rights provided for in the ICESCR as well as General Comments of the United Nations Committee on Economic, Social and Cultural Rights. The Court went on to explain that the meaning of ‘progressive realisation’ in the ICESCR ‘is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document [the ICESCR] from which it was so clearly derived’.<sup>17</sup>

### What Our Other Key Government Officials Have Said...

*Some of our top Government officials have supported the ICESCR, stating that it ‘would be ratified’.*

- In 2004, the **Deputy Minister for Foreign Affairs, Ms. Susan van der Merwe**, told an African Charter conference that ‘the vast majority of African countries have also ratified the six fundamental human rights treaties of the United Nations that elaborate in detail the Universal Declaration of Human Rights, namely . . . the International Covenant on Economic, Social and Cultural Rights (ICESCR)’.<sup>18</sup>
- In 2007, in a briefing to Parliament on a different treaty obligation, **Louise Graham, Deputy Director of the Department of Foreign Affairs**, referred to the ICESCR as if South Africa had already ratified it, comparing South Africa’s obligations under the Convention on Rights of Persons with disabilities to those she seemed to imply—erroneously—South Africa was already following under the ICESCR.<sup>19</sup>
- In 2007, during a briefing by the Office on the Status of Disabled Persons to Parliament on a different treaty, **Mr Benny Palime** said that ‘as a matter of principle, the time between signing and ratification should not be prolonged’.<sup>20</sup>

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<sup>17</sup> *Grootboom*, para 45.

<sup>18</sup> Statement of Deputy Minister Susan van der Merwe to the Seminar on Economic, Social and Cultural Rights under the African Charter Pretoria 13 September 2004. Available at <http://www.dfa.gov.za/docs/speeches/2004/merw0913.htm>.

<sup>19</sup> Statement of Louise Graham, Deputy Director Department of Foreign Affairs, Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Disabled Persons, 25 May 2007. Available <http://www.pmg.org.za/minutes/20070524-convention-rights-persons-disabilities-briefing-office-status-disabled-persons-depa>.

<sup>20</sup> Parliamentary Monitoring Group, ‘Convention on the Rights of Persons with Disabilities: Briefing by the Office on the Status of Disabled Persons & Department of Foreign Affairs’ (2007). Available at <http://www.pmg.org.za/minutes/20070524-convention-rights-persons-disabilities-briefing-office-status-disabled-persons-depa>

- In 2009, then **Minister of Foreign Affairs**, now Minister of Home Affairs, Dr. **Nkosazana Dlamini-Zuma** told the UN Human Rights Council that: ‘Our present government is fully committed to comply with all its international treaty obligations. In this regard, International Covenant on Economic, Social and Cultural Rights would be ratified. The Bill of Rights in our Constitution goes beyond the rights enshrined in the Convention itself.’<sup>21</sup>
- In 2009 the **Minister of International Relations and Cooperation, Ms. Maite Nkoane-Mashabane** in her budget statement highlighted the fact that ‘the promotion of democracy, the respect for human rights and the improvement of governance are vital for our success as a continent’.<sup>22</sup>
- In 2009, **Pitso Montwedi, Chief Director: Human Rights and Humanitarian Affairs, Department of International Relations and Cooperation**, in a presentation at a conference on socio-economic rights said that ‘the government is committed to respect for, promotion, protection and fulfilment of human rights’. He also said that ‘Cabinet decided the Department of Labour would be the implementing agent for ICESCR. However, because this Department does not have to power to police an instrument which cuts across all government departments, government could not become a state party to ICESCR. *Our Department is hoping the nascent National Planning Commission will take notice of this issue.*’<sup>23</sup>

### What United Nations Bodies And Officials Have Said...

*United Nations bodies and officials have called on South Africa to ratify the ICESCR and pointed out the importance of ratifying this treaty.*

- In 2000, the **UN Committee on the Rights of the Child** asked if South Africa intends to ratify the ICESCR.<sup>24</sup> The Committee later said that it ‘is of the opinion that the ratification of [the ICESCR] would strengthen the efforts of [South Africa] to meet its obligations in guaranteeing the rights of all children under its jurisdiction’. The

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<sup>21</sup> Statement by the Minister of Foreign Affairs at the 10th Session of the Human Rights Council, 3 April 2009. Available at <http://www.polity.org.za/article/sa-dlamini-zuma-statement-by-the-minister-of-foreign-affairs-at-the-10th-session-of-the-human-rights-council-04032009-2009-03-04>.

<sup>22</sup> Statement of Ms Maite Nkoane-Mashabane, Minister of International Relations and Cooperation, Minister of International Relations and Cooperation Budget Vote briefing , 18 June 2009, available at <http://www.pmg.org.za/briefing/20090619-minister-international-relations-and-cooperation-budget-vote-briefi>.

<sup>23</sup> Norwegian Centre for Human Rights, ‘Securing Socio-Economic Rights in Southern Africa: Learning from Practice – Improving Strategy Key Points from the Plenary Sessions of a Conference held in Cape Town, 31 August to 2 September 2009 (emphasis added). Available at <http://www.phuhlisani.com/oid%5Cdownloads%5Csecuring%20SER%20workshop%20report%2031%20Aug%20o%202%20Sep%2009%20draft%203%20w%20exec%20summary.pdf>.

<sup>24</sup> UN Committee on the Rights of the Child, Summary record of the 609th meeting: Initial report of South Africa, UN doc. CRC/C/SR.609, 1 February 2000, para 32.

Committee then encouraged South Africa ‘to reinforce its efforts to finalize the ratification of this instrument’.<sup>25</sup>

- In 2007, the then **UN Special Rapporteur on adequate Housing**, Millon Kothari, following a visit to South Africa recommended the following: ‘The Special Rapporteur encourages South Africa to consider ratifying the International Covenant on Economic, Social and Cultural Rights, so as to reflect in its international legal obligations the same progressive approach enshrined in its Constitution ...’.<sup>26</sup>
- In 2009, the UN High Commissioner for human rights, and South African human rights leader, **Dr. Navi Pillay** called on South Africa to ratify the ICESCR, stating, ‘It is my hope that South Africa will soon ratify the International Covenant of Economic, Social and Cultural Rights, which it signed in 1995, as well as its Optional Protocol when it opens for signature, accession and ratification in September’.<sup>27</sup>

### What Presidents, Government Officials and Others Have Done...

*Despite all of these statements of support and progress on ratification, the ICESCR has still not been ratified, and Government has not provided any real prospect and timelines for ratification.*

- **Nelson Mandela** provided the most support to date for ICESCR, signing the Covenant in New York in 1994, but since that time, Government has missed opportunities to ratify the Covenant.
- As long ago as 1995, a study of the Covenant’s adoption in Africa noted that ‘ratification of the instrument by African states remains an outstanding question’, but stated that South Africa ‘can be expected to join the ratifiers of the instruments’.<sup>28</sup> Another study noted that ‘following the signature of the [ICESCR], the Department of Foreign Affairs has indicated that ratification on behalf of South Africa can be expected in the near future’.<sup>29</sup> Yet nearly sixteen years later, ratification has not been made a political priority and has not occurred.

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<sup>25</sup> UN Committee on the Rights of the Child, Concluding observations: South Africa, UN doc. CRC/C/15/Add.122, 22 February 2000, para 11.

<sup>26</sup> Miloon Kothari, Report of the Special Rapporteur on adequate housing: Mission to South Africa, UN doc. A/HRC/7/16/Add.3, 29 February 2008, para 106.

<sup>27</sup> Statement of Navi Pillay, UN High Commissioner for Human Rights, Sixth Annual Dullah Omar Lecture, University of Western Cape, 1 July 2009, available at [http://www.uwc.ac.za/usrfiles/users/1/6th\\_ANNUAL\\_DULLAH\\_OMAR\\_MEMORIAL\\_LECTURE\\_2009.pdf](http://www.uwc.ac.za/usrfiles/users/1/6th_ANNUAL_DULLAH_OMAR_MEMORIAL_LECTURE_2009.pdf).

<sup>28</sup> Joe Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT’L L. J. (1995).

<sup>29</sup> S Liebenberg ‘The International Covenant on Economic, Social and Cultural rights and its implications for South Africa’ (1995) 11(3) South African Journal on Human Rights 371.

- Several studies have explained the benefits of ratification of the ICESCR and its Optional Protocol for South Africa.<sup>30</sup>
- South African civil society organisations, such as the Community Law Centre, have repeatedly written to key Government officials and members of Parliament regarding the treaty but have only received acknowledgement of these letters.
- The adoption of the Optional protocol to the ICESCR in 2008 and its opening for signature in 2009 presented an opportunity for South Africa to ratify the ICESCR, but Government failed to seize this opportunity.

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<sup>30</sup> Lilian Chenwi & Rishi Hardwar, 'Promoting socio-economic rights in South Africa through ratification and implementation of the ICESCR and its Optional Protocol' (2010) 11(1) ESR Review 3; Ariranga G. Pillay, 'The International Covenant on Economic, Social and Cultural Rights: Time to ratify (2000) 3(1) ESR Review 3; Lawrence Mashava, 'Time to ratify the International Covenant on Economic, Social and Cultural Rights (2000) 2(3) ESR Review 18.