



HELP PROTECT OUR HUMAN RIGHTS!

Support our campaign to ratify the 'International Covenant on Economic, Social and Cultural Rights' and its 'Optional Protocol'!

Why South Africa should ratify the ICESCR and its Optional Protocol NOW!

Introduction

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 became obliged not to act against the object and spirit of the treaty. However, South Africa has since failed to ratify the instrument. It is only when a country ratifies a treaty that the treaty becomes legally binding on that country.

The ICESCR is the only one of the six major UN human rights Conventions that South Africa has not ratified. Other African states that have not yet ratified the ICESCR are Botswana, Comoros, Mozambique and Sao Tome and Principe.

South Africa indicated to the Human Rights Council in 2006 that the government was in the process of ratifying the ICESCR.¹ In joining the Human Rights Council, South Africa undertook to ratify the Covenant. However, this has not happened.

An Optional Protocol to the ICESCR was adopted in 2008. South Africa supported the adoption of this Protocol and played an active role in its drafting and adoption. It made 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. During the discussions on the Optional Protocol, South Africa presented its experience in enforcing socio-economic rights through the courts, which informed the text of the Protocol, particularly article 8(4) of the OP-ICESCR.

Considering South Africa's role in the adoption of the OP-ICESCR and its enforcement of socio-economic rights at the national level, it is therefore logical for South Africa to become a party to the Optional Protocol.

¹ Note No 142/06 and No 143/06, both of 02 May 2006; Amnesty International, *Summary overview of forward-looking pledges and commitments made by countries seeking election to the Human Rights Council* (08 May 2006).

Why has South Africa not yet ratified the ICESCR and its Optional Protocol?

There is no simple answer, but it appears that lack of political interest is the cause, which should not be a reason to fail to protect basic human rights.

A 1995 study of the Covenant's adoption in Africa noted that South Africa 'can be expected to join the ratifiers of the instruments.'² Yet nearly sixteen years after signing the Covenant, ratification has still not been made a political priority and has not occurred.

In a recent statement to Parliament, in response to a question on why South Africa has not ratified the ICESCR, President Jacob Zuma said the following:

*'South Africa signed the ICESCR on 3 October 1994 with a view to ratify at a later stage. I am informed that the delay in the ratification has been caused firstly by concerns that the ICESCR was in conflict with provisions of the Constitution of the Republic of South Africa and secondly due to problems identifying a lead Department that can oversee the implementation of the treaty once ratified by South Africa. With regard to the latter, Government Departments had indicated that the wide scope of the ICESCR goes beyond their individual mandates and therefore it is difficult for them to take responsibility for its implementation. Government Departments also felt they lack the authority and coordinating capacity to instruct and organize other Government Departments for the implementation of this human rights treaty. The Department of Labour was initially identified as a lead Department but the scope and content of the ICESCR goes beyond their mandate. This administration has been attempting to resolve the matter and 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.'*³

With regard to the Optional Protocol to the ICESCR, ratification of the ICESCR is a prerequisite for ratifying the Protocol. As a result, ratification of the Optional Protocol has not yet been an issue since its ratification depends on the ratification of the ICESCR.

Why should South Africa ratify the ICESCR NOW?

There are FIVE main reasons:

1. **Ratification would fulfil South Africa's express desire 'to take its rightful place as a sovereign state in the family of nations' (Preamble of the South African Constitution) and prevent South Africa from falling behind the rest of the international community in protecting basic human rights.**

South Africa's failure to ratify the ICESCR threatens its image before the international community. Writing in 1993, Nelson Mandela pledged that 'human rights will be the light

² Joe Oloka-Onyango, *Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa*, 26 CAL. W. INT'L L. J. (1995).

³ Parliamentary Monitoring Group, 'Questions and replies: Question No. 1225', submitted on 4 May 2010. Available at <http://www.pmg.org.za/node/21347>.

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.’⁴

Ratification of the ICSECR will enhance the ability of the South African government to play a meaningful role as one of the key advocates for social, economic and cultural rights in the international arena.

Judging from the international instruments South Africa has ratified to date, it seems that more emphasis is placed on civil and political rights than on socio-economic rights. Support for this claim lies in the ratification of the International Covenant on Civil and Political Rights, compared to South Africa’s ongoing reluctance to ratify the ICESCR.⁵

As one study has explained, ratification of the ICESCR, even if it does not improve rights immediately, would be evidence that South Africa regards economic, social and cultural rights as critical basic rights and as legitimate for international oversight.⁶

2. This is an opportunity for the Government to show the world that it is serious about protecting basic human rights.

President Jacob Zuma has a long record of declaring his support for South Africa’s role at the forefront of human rights. In 2000 he said 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.⁷

Yet, many international media outlets have questioned the new Government’s commitment to human rights. Ratifying the Covenant would be a direct, easy way for South Africa to reaffirm its commitment as the leader of Africa and a true world leader on human rights.

In addition, President Zuma has emphasised the importance of poverty alleviation and assistance to the poorest members of society. As noted in one study, ‘ratifying the ICESCR is an ideal opportunity to reiterate our commitment to alleviating poverty and ensuring social justice for all. Ratification of the ICESCR will indicate a clear and unambiguous South African commitment to the plight of its poor and development opportunities for all.’⁸

⁴ See Simon Tisdall, *Where are Human Rights in Zuma’s Plan*, MAIL & GUARDIAN, 21 Apr. 2009, available at <http://www.mg.co.za/article/2009-04-21-where-are-human-rights-in-zumas-plan>.

⁵ Mashava (2000).

⁶ M. Evans and R. Murray, *The African Charter on Human and Peoples’ Rights* (2005).

⁷ Address by Deputy President Jacob Zuma to the President of the General Assembly of the United Nations, delivered in Geneva, 26 June 2000.

⁸ Mashava (2000).

3. The adoption of the Optional Protocol to the ICESCR provides an opportunity for ratification

The Optional Protocol to the ICESCR is an important tool to help strengthen the protection of economic, social and cultural rights worldwide. It helps empower vulnerable and marginal groups, which is encouraged by the South African Constitution. It is also an important mechanism in the fight against poverty, discrimination, and neglect.

The Optional Protocol was opened for signature by states parties to the ICESCR in September 2009. South Africa cannot ratify this until it is a state party to the Covenant. Importantly, South Africa has been instrumental in the negotiating and drafting of the Optional Protocol and must therefore not exclude itself at this stage from such a great achievement for human rights merely because it has not ratified the Covenant, which it could do so.

4. South Africa has recognised the importance of these rights and protected them in the Bill of Rights, yet abroad, it is also known for its failure to ratify the Covenant.

The ICESCR clearly served as a major source of inspiration for the drafting of the provisions on social and economic rights in the South African Constitution. As stated by the South African Constitutional Court, South Africa's Bill of Rights is 'clearly modelled' on the ICESCR,⁹ making it even more surprising that South Africa is one of the last nations that has yet to ratify the Covenant.

Ratification would serve to strengthen the protection of these rights through policy, legislation (laws) and jurisprudence (decisions of the courts) in South Africa. It would promote the culture of accountability to national and international human rights standards which the Constitution encourages. It will also help ensure that our jurisprudence on social and economic rights develops in harmony with the standards set by the leading international treaty on these rights.

Currently, one study notes that, 'South African jurisprudence on social rights thus far seems rather paradoxical. It simultaneously embraces and rejects international law principles aimed at the vindication of social rights ...'.¹⁰ The study ascribes this partly to the non-ratification of the ICESCR.¹¹

5. South Africa will not have to pass additional legislation upon ratification, and the ICESCR does not impose greater duties

⁹ *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), para 15.

¹⁰ M Pieterse, *Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience* (2004) HUMAN RIGHTS QUARTERLY 882, 902-903.

¹¹ Pieterse (2004) 903.

Unlike many countries which have had to change and develop many new laws after ratifying the Covenant. However if South Africa ratifies it would require little or no changes in our national law. This is because the South African Bill of Rights is actually modelled on the ICESCR.

Most of the socio-economic rights included in the South African Constitution are echoed in the ICESCR. However, the ICESCR does guarantee other rights that are not clearly protected in the Constitution, such as the rights to education and work. Ratification would correct any gaps that arise from South Africa's current partial recognition of the full range of international human rights law.

Unlike other human rights treaties that South Africa has ratified, the ICESCR, like the Constitution, recognises that economic and social rights cannot be achieved overnight - the rights must be realised progressively - following the path along which South Africa is already travelling.

Moreover, as one study rightly observed, the ICESCR 'imposes no greater duties than the South African Constitution already imposes on government'.¹²

Why should South Africa ratify the Optional Protocol to the ICESCR NOW?

There are Five main reasons:

1. Ratification would reinforce South Africa's a leadership role in the African

Ratification of the Optional Protocol will enable South Africa to assume a leadership role in human rights at the African regional level. Failure to ratify the Protocol would not correspond well with the gains made thus far at the African regional as well as by South African courts to protect socio-economic rights as enforceable rights.

2. The Optional Protocol contributes to addressing poverty and empowering civil society, and promotes a culture of accountability

Poverty remains a huge challenge in South Africa. In situation of poverty, people have the least access to socio-economic rights such as housing, food, social security and health, among others. The full realisation of socio-economic rights is therefore critical to overcoming this challenge.

The Optional Protocol opens up avenues for combating poverty. It provides a mechanism through which accountability for poverty can be strengthened and abuses linked to poverty can be identified and addressed. In other words, as one study states, it provides a means through which the people's concerns that have been neglected can be brought

¹² Ariranga G. Pillay, *The International Covenant on Economic, Social and Cultural Rights: Time for South Africa to ratify* (2002) 3(1) ESR REVIEW 3.

to the fore front, thus complementing the state reporting procedure. The identification of deficiencies and concerns in turn helps in setting the agenda for addressing them.¹³

By opening up avenues for combating poverty through providing a mechanism through which accountability for poverty can be strengthened and abuses linked to poverty can be identified and addressed, the Optional Protocol thus promotes the culture of accountability and helps empower poor, vulnerable and marginal groups. These are both encouraged by the South African Constitution.

3. Ratification would strengthen the domestic protection of socio-economic rights

Ratification of the Optional Protocol would serve to strengthen the domestic protection of socio-economic rights through policy, legislation and jurisprudence. Article 3 of the Protocol requires the exhaustion of all available domestic remedies before a complaint can be heard by the UN Committee on Economic, Social and Cultural Rights. This thus encourages the use, development and strengthening of mechanisms at the national level for the enforcement of these rights.

Though adjudication of socio-economic rights is possible within the South African context, it is important to provide victims with the choice of approaching an international body where they have not been able to obtain an appropriate remedy from the courts.

Moreover, ratification of the Optional Protocol will be illustrative of South Africa's acceptance of enhanced accountability by giving the UN Committee on Economic, Social and Cultural Rights the authority to receive complaints and give its views and recommendations on addressing the challenges identified.

4. The Optional Protocol enhances compliance with the ICESCR

Ratification of the Optional Protocol will enhance South Africa's compliance with the ICESCR. Through the communications and inquiry procedures, the Government would be encouraged to take steps towards the full incorporation of the ICESCR into domestic law and policies and the effective implementation of the rights contained therein. Individual complaints mechanisms at the international level have been associated with rights improvements. As one study states, 'the possibility that an individual right of standing before a body of experts helps improve rights outcomes on average provides a strong rationale for ratification'.¹⁴

5. The Optional Protocol facilitates international assistance for states with serious resource constraints

The Optional Protocol facilitates international assistance for states with serious resource constraints. The South African Constitution, like the ICESCR, recognises that full

¹³ Beth A. Simmons 'Should States Ratify? - Process and Consequences of the Optional Protocol to the ICESCR' (2009) 27 (1) Nordic Journal of Human Rights 64, 69.

¹⁴ Ibid. at 66 & 81.

implementation of socio-economic rights is dependent on resources. The Optional Protocol encourages and facilitates international assistance and cooperation and also provides for the establishment of a fund. These would assist states facing serious resource constraints in implementing the recommendations of the UN Committee on Economic, Social and Cultural Rights.

This complements the opportunity that states have under article 22 of the ICESCR to identify in their reports any particular needs they might have for technical assistance or development cooperation.