

# Civil society campaign for the Ratification of: The International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol



## INTRODUCTION

The South African Constitution enshrines socio-economic rights- such as the **right of access to healthcare services and social security, sufficient food and water, as well as to adequate housing-alongside civil and political rights**. While South Africa has made notable progress in promoting and protecting human rights, particularly civil and political rights, as acknowledge by the government,<sup>1</sup> there are still real problems with the full realisation of socio-economic rights. The language and obligations of the Constitution echo the standards and norms of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol (OP-CESCR). Yet, to date, the South African government has not ratified the ICESCR and the OP-CESCR. This campaign calls on the government to ratify both the ICESCR and the OP-CESCR.



### ICESCR campaign in South Africa

The ICESCR campaign is a civil society campaign to advocate for the ratification of the ICESCR and the OP-CESCR), by the South African Government. The campaign is coordinated through a driver group comprising the Black Sash, Community Law Centre, National Welfare Forum (NWF), Global Call to Action against Poverty (GCAP SA), People's Health Movement SA (PHM), Socio-Economic Rights Institute of South Africa (SERI) and Studies in Poverty and Inequality Institute (SPII) and other individuals.

The campaign has been organised in response to the failure of the South African government to ratify the ICESCR, despite having signed it eighteen years ago on 03 October 1994. The campaign engages in several activities, which include: holding strategy meetings; engaging with parliament, government and state institutions (through letters and meetings) as well as with civil society organisations on ratification of the ICESCR and the OP-ICESCR; developing several materials on the campaign; engaging with the media and the press on the campaign; and hosting seminars and workshops on the ICESCR and the OP-CESCR.

### What is International Covenant on Economic, Social and Cultural Rights (ICESCR)?

The ICESCR is an international human rights treaty of the United Nations (UN). It was adopted in 1966 and came into force in 1976. Together with the International Covenant on Civil and Political Rights (ICCPR), which was adopted at the same time, the ICESCR forms the cornerstone of international human rights law and has been ratified by over 160 states around the world. Forty-eight of these are African states, including 11 member states of Southern African Development Community (SADC).<sup>2</sup> Thus, South Africa is one of three States that has signed but not yet ratified the treaty. An Optional Protocol to the ICESCR was adopted in 2008 and will come into force upon ratification by 10 states-currently 8 states have ratified the OP-CESCR.<sup>3</sup>

Dealing with economic, social and cultural rights, the ICESCR recognises that many people do not enjoy some of the most basic rights and responds to the fact that vast numbers of people live in poverty, go hungry, do not have adequate shelter and do not have access to education.

The ICESCR sets an internationally agreed framework to assess the commitments of states parties as regards the realisation of rights guaranteed under the treaty. States that have ratified the ICESCR have a legal obligation to work progressively towards realising economic, social and cultural rights, including the rights to social security (for example through social grants), adequate food and housing, healthcare and education. The Committee on Economic, Social and Cultural Rights (CESCR) has monitored states' compliance with the ICESCR mainly through the examination of state reports. States

<sup>1</sup> See for example SA Country Report to the Human Rights Council 2008; see also, address by Jacob Zuma to the president of the UN General Assembly, Geneva, 26 June 2000.

<sup>2</sup> Angola, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, the Kingdom of Swaziland, Tanzania, Zambia, and Zimbabwe

<sup>3</sup> Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Slovakia and Spain

that ratify are required to report to the CESCR within two years following ratification and thereafter, every five years, on their progress in implementing these rights. As with other UN treaty bodies, the CESCR issues recommendations on the basis of such country reports. Until recently, the CESCR lacked the power to receive individual communications relating to violations of rights guaranteed in the ICESCR. However, with the advent of the OP-CESCR, this is now an option for individuals in those states that have ratified the OP-CESCR.

The widespread ratification of the ICESCR by countries all over the world reflects the fact that the rights contained in the ICESCR and the standards that it sets are the accepted global standard for economic, social and cultural rights.

### The rights in the ICESCR include:

- The right to work and for everyone to earn a living through freely chosen work (*Article 6*)
- The right to just and favourable conditions of work (*Article 7*)
- The right to form trade unions and join a trade union of one's choice (*Article 8*)
- The right to social security, including social insurance (*Article 9*)
- The right to family protection (*Article 10*)
- The right to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living conditions (*Article 11*)
- The right to enjoy the highest possible standard of physical and mental health (*Article 12*)
- The right to education, including compulsory primary education (*Article 13*)
- The rights to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production (*Article 15*)

### What is the Optional Protocol to the ICESCR?

An optional protocol is an extra treaty that serves as an addition to or improvement of an earlier one. It is usually used to close a gap in the original treaty, or to deal with a new concern, or to make the enforcement mechanism of the original treaty stronger.

The Optional Protocol to the ICESCR was adopted by the UN General Assembly on 10 December 2008 and is yet to come into force (it will come into force after 10 states have ratified it, and at the time of writing, 8 states had ratified). Where a state has signed and ratified the Optional Protocol, individuals and groups of people in that country are able to approach the UN Committee on Economic, Social and Cultural Rights to lodge individual complaints at the international level regarding violations of their socio economic rights.

The OP-CESCR provides an important platform for individuals or groups of people in a country (as opposed to their governments) to highlight problems with their state's compliance with the ICESCR obligations. South Africa cannot sign (or ratify) this protocol until it has ratified the ICESCR. However, South Africa can ratify the OP-CESCR at the same time it ratifies the ICESCR - thus the campaign is calling for dual ratification of ICESCR and OP-CESCR.

As noted above 8 states have ratified the Optional Protocol and 32 others, including some African states, have signed it.

### The following procedures are established under the OP-CESCR:

Individual complaints procedure providing an opportunity for an individual or group of individuals to bring a complaint alleging violations of their rights in the ICESCR (*Article 2*).

Inter-state complaints procedure, providing an opportunity for a state party to bring a complaint against another state party that is not fulfilling its obligations under the ICESCR (*Article 10*)

Inquiry procedure, empowering the UN CESCR to initiate an investigation into grave and systematic abuses of the ICESCR (*Articles 11 & 12*).



When South Africa ratifies the ICESCR and the OP-CESCR, it will clearly signal South Africa's commitment to the full range of human rights that are recognised under international law and to develop effective remedies for victims of socio-economic rights violations. This will signal South Africa's dedication to alleviate poverty and ensure social justice for all.

# WHY SOUTH AFRICA SHOULD RATIFY THE ICESCR AND ITS OPTIONAL PROTOCOL 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 and OP-CESCR threatens its image internationally. 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>4</sup>Ratification of the ICESCR and OP-CESCR will enhance the ability of the South African government to play a meaningful role as one of the key advocates for economic, social 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 with South Africa's apparent and on-going reluctance to ratify the ICESCR and OP-CESCR.<sup>5</sup>

**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<sup>6</sup>

Yet, many international media outlets have questioned the Government's commitment to human rights. Ratifying the ICESCR and the OP-CESCR would reaffirm South Africa's

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. Ratification of the ICESCR and the OP-CESCR will indicate a clear and unambiguous South African commitment to the plight of its poor and development opportunities for all.<sup>7</sup>

Whilst ratification of the ICESCR and the OP-CESCR may not improve rights immediately, it would serve as evidence that South Africa regards economic, social and cultural rights as critical basic rights and as legitimate for international oversight.<sup>8</sup>

**3. The adoption of the Optional Protocol to the ICESCR provides a fresh opportunity for ratifying both the ICESCR and the OP-CESCR**

The OP-CESCR is an important tool to help strengthen the protection of economic, social and cultural rights worldwide. It helps empower vulnerable and marginalised groups, which is mandated 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, but South Africa cannot ratify it until it is a state party to the ICESCR.

Importantly, South Africa was instrumental in the negotiating and drafting of the OP-CESCR and should not exclude itself at this stage from such a great achievement for human rights.

**4. South Africa has recognised the importance of socio-economic rights and protected them in the Bill of Rights, yet internationally, it is also known for its failure to ratify the ICESCR.**

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,<sup>9</sup> making it even more surprising that South

<sup>4</sup> 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>.

<sup>5</sup> Mashava (2000).

<sup>6</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>7</sup> Mashava (2000).

<sup>8</sup> M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights* (2005).



Africa is one of the last countries that is yet to ratify the ICESCR. Moreover, the language of the South Africa's Bill of Rights is very similar to the ICESCR.

Ratification of the ICESCR and the OP-CESCR 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 advances and develops in harmony with the standards set by the leading international treaty on these rights.

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

Unlike many countries that have had to develop many new laws after ratifying the Covenant because their constitutions did not provide for socio-economic rights as justiciable rights, or they did not have legislation on these rights, South Africa's ratification of the ICESCR would require little changes in our national law. This is because by virtue of the Bill of Rights and national legal frameworks on socio-economic rights, South Africa has already assumed the obligations to respect, protect and fulfil these rights. This is an obligation that is required under the ICESCR. Thus, upon ratification, South Africa would just have to ensure that national legislation and policies are aligned with the rights and principles in the ICESCR.

Crucially, the ICESCR, like the South African Constitution, recognises that economic and social rights cannot be achieved overnight -the rights must be realised progressively. Moreover, as one study rightly observed, the ICESCR 'imposes no greater duties than the South African Constitution already imposes on government'.<sup>10</sup> Therefore, ratification of the

ICESCR and its Optional Protocol would serve as benefits rather than burden to the South African government.

### 6. The benefits of ratifying the ICESCR and the OP-CESCR?

South Africa's ratification of the ICESCR and the OP-CESCR will deepen the enforcement of socio-economic rights in the country as the government will need to be accountable to the CESCR regarding the steps taken to promote and protect socio-economic rights. Moreover, the OP-CESCR complaint procedure will provide South Africans the opportunity to seek redress for government's failure to realise socio-economic rights within the country.

Over the years South Africa has continued to play important role in entrenching democratic norms, good governance and respect for human rights regionally and internationally. Therefore, ratification of the ICESCR and the OP-CESCR will boost the image of the country and further confirm its commitment to advancing human rights generally and socio-economic rights in particular. Ultimately, South Africans citizens will be the greatest beneficiaries of this development as they will now have more avenues to ensure the realisation of their socio-economic rights.

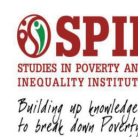
At the conclusion of the 51st Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission ) held in Banjul, The Gambia from 18 April to 2 May 2012, the African Commission adopted a resolution calling on all Africa states that are yet to ratify the ICESCR and the OP-CESCR to do so immediately. Also, during the Universal Peer Review process in May 2012, many countries that participated in the review called on the South African government to consider ratifying the ICESCR and the OP-CESCR. It will therefore be important that all South Africans lend their voices to the call for South Africa's ratification of the ICESCR and the OP-CESCR.

<sup>9</sup> Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W), para 15

<sup>10</sup> With the exception of the rights to education and work where obligations under the ICESCR are slightly greater see arts 13 and 7 of the ICESCR

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