

ICESCR Comparison Document

Report: Comparing the International Covenant on Economic, Social and Cultural Rights to South Africa's Constitutional and International Obligations to These Socio-Economic Rights

South Africa Has Already Committed to the Rights in the ICESCR – Now It's Time to Ratify the Covenant

Summary

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the UN's major international frameworks for human rights. Nelson Mandela signed the Covenant on South Africa's behalf fifteen years ago, but the Government has still failed to act on ratification.

The article below compares the text of the language protecting rights in the ICESCR, the South African Constitution, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. It demonstrates that, in our own Constitution and in these other agreements that we have ratified, South Africa has already committed to protecting the vast majority of the rights enumerated in the ICESCR. South Africa should thus ratify the Covenant to maintain its place as a global leader on human rights and ensure that its international commitment in signing the ICESCR is followed-up on by ratification of rights that the government has already supported.

In particular, rights in the ICESCR have been addressed by South Africa as follows:

Human Dignity – The ICESCR recognizes that human dignity is a foundational principle of socio-economic rights, an approach that is taken in African Charter on Human and Peoples' Rights (African Charter) and embraced – perhaps more strongly than in any other legal document in the world – in South Africa's constitution and the jurisprudence of South Africa's Constitutional Court.

Self-Determination – The ICESCR characterizes the pursuit of and self-determining nature of one’s economic, social and cultural development as basic tenets of socio-economic human rights. South Africa has clearly supported this notion through the African Charter, which states that self-determination and right to pursue economic and social development are “inalienable.”

Equality – Equality is a nearly universal goal and an actionable claim under the Constitution. Equality is protected more strongly in the Constitution than in the ICESCR.

Right to Work – The ICESCR provides that the State Parties recognize a right of persons to seek employment as well as the steps necessary to achieve this right, including training programmes and policies and programmes to achieve “steady” and “productive” employment. The Constitution is not as specific as the ICESCR, though it does recognize the right to pursue employment freely. However, South Africa has committed itself to a right to work that is almost identical to the ICESCR in the CEDAW.

Working Conditions – The ICESCR focuses on equality and safety in working conditions. Again, the Constitution does not address specifics in this area; however, South Africa has already made similar commitments to the ICESCR in the African Charter and the CEDAW.

Trade Unions/Striking – The ICESCR and the Constitution contain quite similar provisions regarding the right of persons to join trade unions and to strike, with the Constitution providing stronger rights in this area than even the Covenant.

Social Security – The ICESCR, the Constitution and the CEDAW provide for the right to social security. The most modest protections are likely those in the ICESCR, with the CEDAW providing the most specific right to social security.

Family, Mothers, Marriages – The Constitution does not explicitly include the same recognition of the centrality of the family to society as does the ICESCR. However, the same rights that the Covenant recognizes are embodied in the African Charter, the CEDAW and the African Charter on the Rights and Welfare of the Child. The rights specified in those agreements include the equal rights of women to work, property and parental rights as men, among others.

Children – The ICESCR provides that States should take special measures to protect children from exploitation, such as minimum working ages. Through the African Charter and the African Charter on the Rights and Welfare of the Child, South Africa has already committed to much more detailed protections for children, and such protections are further enshrined in the Constitution.

Adequate Standard of Living – Like the CEDAW, the ICESCR includes the right to progressive realization of an adequate standard of living and food, clothing and housing. In addition to the CEDAW, South Africa has committed to rights to food and housing in the Constitution.

Food – The ICESCR, like the Constitution, includes a right to food and a commitment that State Parties will take steps towards realising that right.

Highest Attainable Standard of Physical and Mental Health – The right to access to health care is contained in varying forms in the ICESCR, the Constitution, the African Charter and the CEDAW. The text of the ICESCR imposes no material burdens on government to which South Africa has not already committed through either the Constitution or the African Charter.

Education – The ICESCR, like the Constitution, includes a right to basic education. Further, the details of the rights to primary education and access to secondary and higher education are almost identical to those to which South Africa has committed itself in the African Charter on the Rights and Welfare of the Child. However, the ICESCR provides the right to education in more detail than the Constitution.

Culture and/or Science – The ICESCR, the Constitution, the African Charter and the CEDAW all provide for a right for persons to follow the traditions of their culture.

Government Statements vs Government Action

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 official statement or timeline from the President regarding ratification, and Parliament has not formally taken up the matter.

This paper highlights 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.”

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.¹

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

Our representatives at the UN have been telling the UN for at least three years that South Africa is “in the process” of ratifying the Covenant and, more recently, that there is “no political hurdle” to ratification.

In May 2008 a UN working group asked South Africa about why it had not ratified the ICESCR. South African Delegate Mtshali indicated to the UN 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”²

But, one month before the “report back” claim, in April 2008, South Africa’s Country Report to the Human Rights Council reported that “South Africa is in the process of signing and ratifying the following core human rights instruments: . . . The International Covenant on Economic, Social and Cultural Rights.”³

In addition, in May 2006, South Africa claimed the following to the United Nations: “The Permanent Mission of the Republic of South Africa to the United Nations herewith encloses an Aide Mèmoire outlining South Africa’s voluntary pledges and commitments with respect to the promotion and protection of human rights as a requirement of the United Nations General Assembly resolution 60/251 of 15 March 2006: Instruments in the Process of Ratification – The South African Government is in the process of ratifying the following important human rights instruments: The International Covenant on Economic, Social and Cultural Rights (ICESCR).”⁴

What United Nations Officials Have Said...

Navi Pillay, UN High Commissioner for Human Rights, speaking in Cape Town on 1 July 2009, called for South African ratification of the ICESCR.

On 1 July 2009, 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.”⁵

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 *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 the United Nations Committee on Economic, Social and Cultural Rights in its discussion of the fact that “socio-economic rights contain a minimum core.”⁶ 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.”⁷

What Our Other Key Government Officials Have Said...

Some of our top Government officials have supported the ICESCR, claiming that it “would be ratified.”

In April of this year, then Minister of Foreign Affairs, now Minister of Home Affairs, Nkosazana Dlamini-Zuma told the UN Human Rights Council the following: “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.”⁸

In her June 2009 budget statement, Minister of International Relations and Cooperation, Maite Nkoane-Mashabane, 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.”⁹

In September 2004, Deputy Minister for Foreign Affairs, Susan van der Merwe, told an African Charter conference the following 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).”¹⁰

In a briefing in May 2007 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.¹¹

What Presidents, International Representatives, and Government Officials Have Done...

Despite all of these statements of support and progress on ratification, the ICESCR remains unratified, and Government has demonstrated that it is unwilling or unable to provide an update on its status and its real prospect 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." Yet nearly fifteen years later, ratification has not been made a political priority and has not occurred.¹²

Lobbying efforts as far back as 1999 focused on the Department but to no avail.¹³

In 2007 the UN Special Rapporteur undertook a mission to South Africa at the Government's invitation to address housing, standard of living, and discrimination issues. One of his recommendations was for "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."¹⁴ Yet the Government has not taken the opportunity to ratify.

South African civil society organizations, such as the Community Law Centre, have repeatedly written key Government officials and members of Parliament regarding the treaty but have only received acknowledgement of these letters. Government has

provided no answer as to what, if anything, is occurring with ratification.