South Africa’s Pending Ratification of the International Covenant on Economic, Social and Cultural Rights: What are the implications?

Demichelle Petherbridge
Doctoral Candidate and Member of SERAJ Research Group

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international legal instrument that was adopted by the United Nations on 16 December 1966 and entered into force on 3 January 1976. The ICESCR affords protection to the most extensive range of social, economic and cultural rights and, together with the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights, forms the International Bill of Rights.

South Africa signed the ICESCR on 3 October 1994 and by doing so, indicated its intention to become a party to, and thus be bound by, the ICESCR. However, as to date, South Africa has not yet ratified the ICESCR and as a result, this instrument is not yet legally binding upon South Africa. According to section 231(2) of the South African Constitution, an international agreement must be approved by both Houses of Parliament, namely the National Assembly and the National Council of Provinces, by way of a resolution of ratification before it becomes legally binding upon the Republic. The announcement by Cabinet that the ratification of the ICESCR is to be tabled before Parliament is a significant step towards obtaining Parliamentary approval. Once an agreement is tabled in Parliament, the relevant portfolio committees of both the National Assembly and the National Council of Provinces will consider the agreement. These committees will document their decision in a report which will be placed separately before both Houses. Both the National Assembly and Council of Provinces must approve and adopt the reports before the process of preparing the draft Instrument of Ratification can ensue.

Through its ratification of the ICESCR, South Africa will bind itself to the obligations, goals and standards of the ICESCR and will be bound in international law to act in such a way that it does not infringe upon the spirit of the ICESCR. Therefore, ratification of the ICESCR would necessitate aligning

---

1 Doctoral thesis title “The role of international human rights law in the interpretation of socio-economic rights in South Africa” under the supervision of Prof. Annika Rudman and Prof. Sandy Liebenberg.
2 As at 29 October 2012, the ICESCR has 70 signatories and 160 parties.
3 In accordance with section 231 of the South African Constitution, the national executive is responsible for negotiating and signing all international agreements.
4 However, in accordance with section 231(3) of the South African Constitution, if an international agreement entered into by the executive is of a technical, administrative or executive nature or does not require accession or ratification, the international agreement is binding upon the Republic without requiring the approval of both houses of Parliament. The international agreement must however still be tabled in Parliament within a reasonable amount of time.
domestic legislation and policies with the obligations contained in the ICESCR.\(^5\)

These actions would signal the Republic’s dedication to advancing socio-economic rights in South Africa and may assist in increasing its international credibility regarding its approach towards the protection of socio-economic rights.\(^6\)

State parties to the ICESCR are furthermore subject to the reporting procedures carried out by the Committee on Economic, Social and Cultural Rights (the Committee) whereby the implementation of the rights protected in the ICESCR are monitored through the assessment of State reports. This system of supervision would oblige South Africa to submit its initial report within two years after ratification to the Committee, detailing the manner in which South Africa is implementing the rights protected under the ICESCR. Thereafter, the Republic will be obliged to submit periodic reports to the Committee every five years. These reporting procedures will not only promote accountability if properly adhered to, but will also provide a platform for international and national NGO’s to submit so called ‘shadow reports’ or counter reports to the Committee during their review of the State report. This would provide a voice for organisations at grassroots level to raise their concerns and possibly influence the Committee’s recommendations. After its assessment of such periodic reports, the Committee compiles Concluding Observations that contain recommendations that would assist South Africa in improving the implementation of the rights protected in the Covenant.

The ratification of the ICESCR would also require that South African courts align their jurisprudence with the obligations set out in the ICESCR.\(^7\) This implies that the courts grant strong protection to what the UN Committee on Economic, Social and Cultural Rights refers to as the “minimum core obligation” imposed by the Covenant. This requires strong protection to an essential basic floor of socio-economic rights provisioning such as food, water, social security etc.\(^8\) In addition, state parties to the Covenant are obliged to take steps towards progressively achieving the full realisation of the rights enshrined in the Covenant. At present the South African Constitutional Court applies a reasonableness test for assessing the State’s compliance with its positive obligations in terms of the socio-economic rights entrenched in the Bill of Rights.\(^9\) One expects with the ratification of the Covenant, that the Courts would develop the reasonableness test so as to incorporate a requirement that the government accord priority protection to basic socio-

---


\(^7\) Chenwi and Hardowar (2010) ESR Review 4-5.

\(^8\) UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 ‘The nature of states’ parties obligations’ (art 2(1) of the Covenant), para 10.

\(^9\) Minister of Health & others v Treatment Action Campaign & others (No 2) 2002 5 SA 721 (CC), Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC) and Mazibuko and others v City of Johannesburg and others 2010 4 SA 1 (CC). See also S Liebenberg Socio-Economic Rights: Adjudication under a Transformative Constitution (2010) Chapter 4.
economic needs. This would ensure that our jurisprudence aligns better with the UN Committee’s authoritative interpretation of the obligations imposed by the ICESCR. Many of the rights in the ICESCR are protected through the socio-economic rights contained in the Bill of Rights of the South African Constitution. Several of these constitutional provisions and their formulations were inspired by, and resemble the provisions of the ICESCR. Furthermore, a range of legislative and policy measures in South African protect rights contained in the ICESCR. The General Comments issued by the Committee will play a significant role in assisting courts in maintaining a consistency between these domestic laws and policies and South Africa’s obligations under the ICESCR.\textsuperscript{10}

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) was adopted by the General Assembly on 10 December 2008\textsuperscript{11} and was opened for signature on 24 September 2009. The OP-ICESCR is however, not yet in force.\textsuperscript{12} Only State Parties to the ICESCR are eligible to sign and ratify this instrument and consequently, South Africa is unable to become a party to the OP-ICESCR. However, once South Africa has ratified the ICESCR, it should give immediate consideration to signing and ratifying the OP-ICESCR as this instrument will enable individual victims of socio-economic rights violations to seek redress where adequate domestic remedies are not in place. In this regard, the OP-ICESCR allows for the submission of communications by or on behalf of individuals or groups of individuals to the Committee, alleging that their State has violated the rights contained in the ICESCR.\textsuperscript{13} The Committee therefore undertakes a quasi-adjudicative role and provides an international complaints mechanism which will be accessible after domestic remedies have been exhausted or in cases where the application of domestic remedies is unreasonably prolonged.\textsuperscript{14} If under such an examination, South Africa will be subject to the scrutiny of the Committee through its views and recommendations.\textsuperscript{15}

Furthermore, the OP-ICESCR also provides for inter-state communications procedures whereby a State Party to the OP-ICESCR can address the non-fulfillment of the obligations required under the ICESCR by another State Party.\textsuperscript{16} Lastly, the OP-ICESCR provides for an inquiry procedure whereby the Committee may examine information and submit its observations. Under this procedure, the Committee may also conduct its own inquiry into the

\textsuperscript{10} Liebenberg (1995) \textit{SAJHR} 375.
\textsuperscript{11} Resolution A/RES/63/117.
\textsuperscript{12} Article 18 of the OP-ICESCR states that the OP-ICESCR will only enter into force three months after the date of the deposit of the tenth instrument of ratification or accession with the UN Secretary-General. As to date, there are 41 signatories and 8 parties to the OP-ICESCR. These parties include Argentina, the Plurinational State of Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Slovakia and Spain.
\textsuperscript{13} Article 2 of the OP-ICESCR. South Africa has already signed and ratified the First Optional Protocol to the ICCPR which allows the Human Rights Committee to receive and consider complaints from individuals against the State, alleging the violations of rights protected by the ICCPR.
\textsuperscript{14} Article 3(1) of the OP-ICESCR.
\textsuperscript{15} Article 9 of the OP-ICESCR.
\textsuperscript{16} Article 10 of the OP-ICESCR. This is subject to both State Parties having recognised the competence of the Committee to receive and consider communications in this regard.
activities of a State Party based on information it receives which indicates grave or systematic violations of the rights protected in the ICESCR.\textsuperscript{17} Such an inquiry also allows the Committee to transmit comments and recommendations in this regard. Therefore, signing and ratifying the OP-ICESCR will mean that South Africa will be subject to these procedures, and therefore subject to a high standard of accountability that necessitates a high degree of transparency.

Furthermore, the OP-ICESCR requires State Parties to distribute the ICESCR, the OP-ICESCR and views and recommendations which the Committee has made, as widely as possible. Widespread knowledge of the obligations imposed upon South Africa by the Covenant as well as of the individual complaints mechanisms can be a powerful tool in increasing civil society’s awareness of their socio-economic rights and facilitate their involvement in holding the government accountable for the domestic implementation of socio-economic rights in South Africa. It has also been submitted that ratifying the OP-ICESCR will improve the State’s adherence to its obligations under the ICESCR as the communication and inquiry procedures will motivate States to fully incorporate the ICESCR into its municipal law and policies.\textsuperscript{18}

South Africa has much to gain from the ratification of the ICESCR as well as the OP-ICESCR as these instruments will assist in strengthening the protection and implementation of socio-economic rights in South Africa as well require higher standards of accountability and transparency from government in their endeavor to respect, protect and fulfill the socio-economic rights contained in the Bill of Rights.

\textsuperscript{17} Article 11 of the OP-ICESCR. This is subject to the State Party recognising the competence of the Committee in this regard.

\textsuperscript{18} Chenwi and Hardowar (2010) \textit{ESR Review} 5.