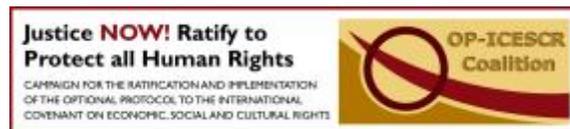


Should African States ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?

A guide to the complementarity between the human rights systems at the African regional level and the international level.



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1. What is the OP-ICESCR?

The [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#) (OP-ICESCR) is a key human rights treaty that strengthens access to justice in relation to people's economic, social and cultural (ESC) rights. It establishes an international complaints mechanism that allows organisations, individuals, and groups of individuals to claim before the United Nations [Committee on Economic, Social and Cultural Rights](#) (CESCR) that their rights under the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) have been violated by a State. It is important to note that complaints can only be considered if the relevant State has ratified (i.e. agreed to be bound by) the OP-ICESCR, and if the claimant has exhausted remedies within the State before submitting a complaint.¹

In response to a complaint, the CESCR will provide guidance to the respondent State regarding the State's ESC rights obligations, and make recommendations about appropriate redress for people affected by any violations and the ways in which underlying systemic issues could be addressed so that similar violations can be prevented in the future.

The OP-ICESCR corrected the historical imbalance between the protection of civil and political rights, on the one hand, and ESC rights, on the other. Therefore, it is an important confirmation of the universality, interdependence, and indivisibility of all human rights, and an important tool to strengthen access to justice globally.

The OP-ICESCR entered into force in May 2013 and, as at March 2017, the treaty has been ratified by 22 States and signed by an additional 26 States globally. In the African region, the States Parties include: Cape Verde, Central African Republic, Gabon and Niger. Signatory States include: Angola, Benin, Burkina Faso, Congo, DRC, Ghana, Guinea Bissau, Madagascar, Mali, Senegal and Togo.

¹ For the complete admissibility criteria, see OP-ICESCR, Article 3.

2. Did African States participate in the drafting of the OP-ICESCR?

Yes. Recognising that the OP-ICESCR would contribute to the promotion of ESC rights across Africa and globally, African States were very active in the negotiation, drafting and adoption of the OP-ICESCR, through participation in:

- **The Open-Ended Working Group on the OP-ICESCR:**² Negotiators from Africa were proactive in referencing the [African Charter on Human and Peoples' Rights](#) (African Charter) – which protects ESC rights on the same footing as civil and political rights – as an important benchmark in the development of an international treaty that secured equal protection for ESC rights. African States also championed the discussion on international cooperation and assistance, and the establishment of a supporting fund (see section 3(3) below for more detail). National experiences were influential in shaping the treaty discussions. For instance, during the first session of the Working Group, South Africa shared its experience in enforcing ESC rights through the courts – this ultimately informed the content of the OP-ICESCR, particularly Article 8(4) on the “reasonableness” standard of review, which provides for a helpful assessment of State progress with respect to ESC rights.³
- **A regional consultation in Cairo, Egypt in 2008:** Participants discussed questions that were of particular importance to the African region, as well as ESC rights experiences gained within the African regional human rights system and within individual African states. This dialogue helped build awareness and capacity in relation to the proposed treaty, ensured that key concerns from across Africa were reflected in the content of the treaty, and facilitated more focused advocacy positions in relation to the negotiation of the treaty at the international level.

² For more detail about the Open-Ended Working Group on an Optional Protocol to the ICESCR, see: <http://www.ohchr.org/EN/Issues/ESCR/OEWG/Pages/OpenEndedWGIndex.aspx>.

³ For more information on the “reasonableness” standard of review, see Bruce Porter, ‘Reasonableness and Article 8(4)’ in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (Eds.), *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. A Commentary* (2016) (Pretoria University Press), accessed at <https://www.escri-net.org/sites/default/files/ssrn-id2789733.pdf>.

3. Why should African States ratify the OP-ICESCR if they are already part of the African regional human rights system?

(1) The regional and international human rights systems are envisioned to be complementary

- **At the African regional level:** Each of the key regional human rights treaties – including the African Charter, the [Protocol to the Charter on Human and Peoples' Rights on the Rights of Women in Africa](#) (Maputo Protocol), and the [African Charter on the Rights and Welfare of the Child](#) (Children's Charter) – specifically recognise the complementarity, and affirm the importance of cooperation, with the international human rights system. For example, the African Charter makes numerous references to the United Nations and international standards throughout its preamble, articles on rights and duties, and articles on the mandate and guiding principles of the African Commission on Human and Peoples' Rights (ACHPR).⁴ Among other things, the African Charter notes the agreement of States Parties to “promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights”. In this context, ACHPR Resolution N° 223 of 2012 explicitly called on member States to ratify the OP-ICESCR.⁵
- **At the international level:** In turn, the United Nations – which all African States are members of – recognises the complementarity between the United Nations human rights treaty bodies and the regional human rights mechanisms. This understanding is put into practice through regular dialogue and activities aimed at enhancing cooperation between the institutions and stakeholders dedicated to the realisation of human rights in Africa. The report of one such meeting records that such interaction is “instrumental in reaffirming the dedication and commitment of participants to a global vision for the promotion and protection of human rights as embodied in the African and international human rights instruments”.⁶
- **Complementary systems:** In order to ensure that the systems operate in a harmonised way in practice, the stakeholders involved are committed to ongoing communication regarding, among other topics: the development of joint information-sharing processes, to avoid repetition of work and to build on each other's competencies and output; strategies for promoting implementation of their respective recommendations; approaches to ensuring coherence between decisions from different decision-making bodies and avoiding the fragmentation of international human rights law; and cooperation to mainstream ESC rights.⁷

⁴ See African Charter's preamble, and Articles 18(3), 21(3), 23(1), 45(1)(c), 56(7), 60 and 61. Similarly, see relevant references in: the Maputo Protocol preamble and Articles 5, 10(2)(b), 11, 13(d) and 31; and the Children's Charter preamble and Articles 1(2), 11(2)(b), 15(2), 22, 23, 24, 28, 42(a)(iii) and (d), 44 and 46.

⁵ African Commission on Human and Peoples' Rights, '223: Resolution on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2012), accessed at <http://www.achpr.org/sessions/51st/resolutions/223/>.

⁶ UNGA, 'Report of the Chairs of the human rights treaty bodies on their twenty-fourth meeting', UN Doc. A/67/222 (2 August 2012), para 18.

⁷ Ibid. See also: United Nations High Commissioner for Human Rights, *Workshop on regional arrangements for the promotion and protection of human rights*, UN Doc. A/HRC/28/31 (19 December 2014).

(2) The complementary systems provide greater and more cohesive understanding of ESC rights in practice and can therefore strengthen ESC rights enjoyment in Africa

Currently, 50 African States have ratified the ICESCR, meaning that these States have guaranteed to respect, protect and fulfil the rights contained in that treaty. It is important to recognise that the OP-ICESCR does not add any new rights to those already included in the ICESCR. Instead, it will help clarify the obligations of States Parties to the ICESCR in practice. This is important in four main respects:

- **Strengthened accountability in connection with ICESCR obligations:** States committed to ensuring their obligations under the ICESCR will welcome the OP-ICESCR as an avenue to facilitate such accountability and provide a clear source of remedy for rights-holders. The OP-ICESCR is the only international complaints mechanism that provides a remedy for the majority of ESC rights. Prior to its entry into force, rights-holders were effectively denied remedy at the international level unless the relevant violations were experienced by, for example, a particular group (such as women, racial minorities, persons with disabilities, or children), or linked to situations which involved violations of civil and political rights such as the right to life or the prohibition on torture or cruel, inhuman or degrading treatment or punishment.
- **Strengthened understanding of ESC rights:** Uncertainty remains regarding the actual boundaries of ESC rights and when and how they might be enforced. At the regional level, the ACHPR (responsible for monitoring the implementation of the African Charter and the Maputo Protocol), has interpreted and enforced ESC rights in a number of specific cases.⁸ Similarly, the African Committee of Experts on the Rights and Welfare of the Child (responsible for monitoring the implementation of the Children's Charter) has considered ESC rights in relation to children in a few cases.⁹ However, as there have not been many ESC rights cases so far, some commentators have noted the need for more clarity regarding the interpretation of ESC rights in terms of immediate obligations and progressive realisation.¹⁰

Through the development of international case law, the OP-ICESCR will contribute to a greater understanding of the meaning and scope of the rights contained in the ICESCR and to clearer guidance for States Parties regarding how to comply with ESC rights obligations. The transition from abstract principles to concrete cases will help clarify the substantive

⁸ For discussion of ESC rights jurisprudence in Africa, see Manisuli Ssenyonjo, 'The Protection of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in Danwood Mzikenge Chirwa and Lilian Chenwi (Eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) (Cambridge University Press), pp. 91–119, and Danwood Mzikenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (Ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) (Cambridge University Press), pp. 323–338.

⁹ See Julia Sloth-Nielsen, 'Socio-economic rights under the African Charter on the Rights and Welfare of the Child: progress and prospects' in Danwood Mzikeng Chirwa and Lilian Chenwi (Eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) (Cambridge University Press), pp. 155–179.

¹⁰ Danwood Mzikenge Chirwa, above note 7, p. 338.

content of ESC rights in practice, as well as explain ICESCR concepts such as “maximum available resources”¹¹ or “reasonableness”¹² (see part 4 below for more detail). Further, the OP-ICESCR allows the CDESCR (upon State agreement) to investigate grave or systematic ESC rights violations, a mechanism not currently possible in the African regional human rights system.¹³

- **A cohesive framework of ESC rights across Africa:** At the regional level, the African Charter includes many ESC rights but does not make explicit reference to a number of internationally recognised ESC rights, such as the rights to food, social security, adequate housing, or an adequate standard of living. While some of these are included in the Maputo Protocol and the Children’s Charter, the protection is not comprehensive.

At the national level, the reach of justiciable ESC rights is quite wide and manifests in different ways. For example: a number of national constitutions provide for ESC rights as justiciable rights; some include these rights as Directive Principles of State Policy (DPSP), which therefore serve as a guide to the executive, legislature or judiciary; and others include both justiciable ESC rights and DPSP.¹⁴ However, the protection of ESC rights and their enforcement by courts is limited. For instance, only a handful of constitutions include the right to housing, food or water. Therefore, ratification of the OP-ICESCR would serve to strengthen the domestic protection of these rights by providing more framework guidance on all ESC rights to all African countries, regardless of the current differences in national level legal frameworks.

- **Encouragement of domestic protection of ESC rights:** Despite the wide ratification of ICESCR, the treaty is often not fully implemented in domestic law. The CDESCR continues, in its concluding observations on reports submitted by different African countries, to urge States Parties to strengthen their efforts to give full effect to the ICESCR in domestic law and ensure its direct application in domestic courts.¹⁵ As Article 3 of the OP-ICESCR requires States to address potential violations domestically before a complaint can be heard by CDESCR, this should encourage the full incorporation of the ICESCR into domestic law, the formal recognition of all ESC rights as justiciable rights (i.e. rights that can be claimed in court), and the use and development of mechanisms for the enforcement of ESC rights at the national level.

¹¹ ICESCR, Article 2(1).

¹² OP-ICESCR, Article 8(4).

¹³ OP-ICESCR, Article 11. A State Party to the OP-ICESCR must expressly declare that it recognises the competence of CDESCR to undertake such inquiries, under Article 11(1).

¹⁴ Frans Viljoen, *International Human Rights Law in Africa* (2012, 2nd edition) (Oxford University Press), pp. 544–557.

¹⁵ For example: CDESCR, *Concluding Observations on the Combined Initial and Second and Third Periodic Reports of Chad*, UN Doc. E/C.12/TCD/CO/3(2009), para 9; CDESCR, *Concluding Observations on the Initial to Third Periodic Reports of Angola*, UN Doc. E/C.12/AGO/CO/3(2008), para 9; CDESCR, *Concluding Observations on the Second Periodic Report of Benin*, UN Doc. E/C.12/BEN/CO/2(2008), para 30; CDESCR, *Concluding Observations on the Initial Report of Zambia*, UN Doc. E/C.12/1/Add.106(2005), para 33.

(3) The OP-ICESCR offers enhanced international assistance and cooperation

The OP-ICESCR provides guidance about the international assistance and cooperation measures already included in the ICESCR. Article 2(1) of ICESCR notes that States Parties must take steps “individually and through international assistance and co-operation” to achieve progressively the full realisation of the rights in ICESCR. In turn, Article 14 of the OP-ICESCR provides that the CDESCR may, with the consent of the State involved, connect the State with “United Nations specialized agencies, funds and programmes and other competent bodies” to facilitate technical advice or assistance and any “international measures likely to contribute to assisting [the State] in achieving progress in implementation of the rights recognized in the Covenant.”

Further, Article 14 provides for the establishment of a trust fund “with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of ESC rights in the context of the present Protocol.” In this regard, the role of the CDESCR in relation to the OP-ICESCR is not to ‘punish’ States but to work with them in constructive ways to fully realise ESC rights in practice. Finally, international co-operation and assistance is an objective of the African Union¹⁶

(4) The OP-ICESCR offers new avenues to combat poverty in Africa

Poverty remains a huge challenge across Africa and its eradication is a priority for governments of the continent.¹⁷ In situations of impoverishment, people generally have the least enjoyment of ESC rights such as housing, food, social security and health, among others. The full realisation of ESC rights is therefore critical to overcoming this challenge. The OP-ICESCR opens up avenues for combating poverty as it provides a mechanism through which accountability for poverty can be strengthened and underlying systemic issues linked to poverty can be identified and addressed.¹⁸

(5) The OP-ICESCR offers an opportunity for African States to show that they are serious about protecting *all* human rights

As noted above, African States were very active in the negotiations and drafting of the OP-ICESCR. In addition, the African Charter recognises the indivisibility of all human rights – civil, cultural, economic, political and social – and the need for them to be protected to the same degree. Ratifying the OP-ICESCR would correspond well with the gains made so far at the regional as well as national levels to protect ESC rights as justiciable rights.

¹⁶ Constitutive Act of the African Union, Article 3, accessed at <https://www.au.int/web/en/constitutive-act>.

¹⁷ African Union, ‘Common African Position (CAP) on the Post-2015 Development Agenda’ (March 2014), accessed at <http://www.un.org/en/africa/osaa/pdf/pubs/2014cappost2015.pdf>.

¹⁸ For more information, see OP-ICESCR Coalition, *A Toolkit for Action, Booklet 3: Why Should States Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?* accessed at <https://www.escr-net.org/resources/toolkit-action-op-icescr>, pp. 3-4.

4. Will OP-ICESCR ratification result in decisions with significant budgetary implications, against African States with severe financial constraints?

A concern that is sometimes put forward about the OP-ICESCR is that a complaints procedure for ESC rights at the international level might impose large financial burdens on States. It is sometimes suggested that States would be condemned as rights violators simply because they lack sufficient resources to comply with the ICESCR. However, it is important to clarify that the ICESCR does not impose unreasonable resource-related obligations upon States. State obligations under the ICESCR are subject to available resources, and many of these obligations do not require large amounts of financial resources.

The ICESCR imposes three different types of obligations on States, namely the obligations to respect, protect and fulfil. Under the obligation to *respect*, States have to themselves refrain from interfering with the enjoyment of ESC rights (e.g. avoiding carrying out forced evictions in the absence of adequate legal safeguards, compensation or resettlement). Under the obligation to *protect*, States have to prevent abuses of these rights by non-State actors (e.g. through regulating the actions of private landlords or health providers). In such situations, the realisation of ESC rights generally does not involve significant finances.

The obligation to *fulfil* rights may require the use of significant amounts of public resources (e.g. to create an enabling environment for the right to housing, including provision of social housing and related infrastructure, measures to prevent homelessness, and so on). However, because State obligations under the ICESCR are subject to available resources, where ESC rights are not realised due to a genuine lack of resources, there is no violation of such rights. The CESCR has issued guidance as to how it will assess, under Article 8(4) of the OP-ICESCR, the “reasonableness” of States Parties’ actions or inactions.¹⁹ A government that believes it is taking reasonable steps to realise ESC rights within its available capacity and resources should have no concern about allowing those living under its jurisdiction to test this belief before the CESCR.

Further, in situations where the CESCR determines that the ESC rights of complainants in a particular country are unrealised due to a lack of resources, it will (as noted in Section 3(3) above) work in a constructive way to support the State in working towards realisation of the particular rights. Also, as the CESCR has explicitly stated, States have the opportunity under Article 22 of ICESCR to identify in their reports any particular needs they might have for technical assistance or development cooperation.²⁰ Additionally, Article 14 of OP-ICESCR, (as mentioned above in Section 3.3) provides clarifications and options regarding international assistance and cooperation.

¹⁹ CESCR, *Statement by the Committee: An evaluation of the obligation to take steps to the “Maximum of available resources” under an optional protocol to the Covenant*, UN Doc. E/C.12/2007/1 (21 September 2007), accessed at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2007%2f1&Lang=en.

²⁰ CESCR, *General Comment No. 2, International technical assistance measures*, UN Doc. E/1990/23, para 10.

5. Will OP-ICESCR ratification result in parallel decisions, i.e. the same case being decided twice and/or in contradictory case decisions from different decision-making bodies?

No. The OP-ICESCR guards against the potential duplication of work between different mechanisms by including a provision, under Article 3(2)(c), that prevents the CESCR from examining a case that has been or is being examined under another procedure of international investigation or settlement.²¹ In addition, the CESCR is authorised, under Article 8.3 of the OP-ICESCR, to consult, as appropriate, documentation from UN bodies, specialised agencies, funds, programmes and mechanisms and other international organisations, including regional human rights systems.

6. What do States need to do at the national level to ratify the OP-ICESCR?

The process of ratification is specific to each State, but will generally require the legislative branch to authorise the government to ratify the treaty, in accordance with any procedures established through the State's constitution or legal framework generally. Unless the legal framework in a particular State allows for treaties to apply at the domestic level automatically, the State will need to take necessary steps to give domestic effect to the OP-ICESCR. This may involve enacting new legislation and/or reviewing and harmonising existing legislation. Such steps can take place following ratification and with the support (if required) of national legal experts and/or regional offices of the United Nations Office of the High Commissioner for Human Rights.

For detailed information about ratifying the OP-ICESCR, please see the Toolkit for Action for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.²²

²¹ See also a similar provision in Article 56(7) of the African Charter.

²² OP-ICESCR Coalition, *A Toolkit for Action for the OP-ICESCR*, accessed at <https://www.escr-net.org/resources/toolkit-action-op-icescr>.

NGO Coalition for the OP-ICESCR

The NGO Coalition for the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (OP- ICESCR), coordinated by ESCR-Net, led the international NGO Campaign for the OP-ICESCR and continues to support national efforts for the ratification and implementation of the OP-ICESCR to ensure that individuals and groups have access to justice for violations to their economic, social and cultural rights.

For more information, please visit: <https://www.escr-net.org/op-icescr>

