

## Child Rights at the Core

A commentary on the use of international law  
in South African court cases  
on children's socio-economic rights

By Solange Rosa and Mira Dutschke

A Project 28 Working Paper

May 2006



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## **Project 28**

South Africa ratified the United Nations Convention on the Rights of the Child in 1995 and, a year later, the democratic Constitution was adopted. In addition to recognising everyone's fundamental human rights, the Bill of Rights in the Constitution contains a separate children's clause – Section 28 – which echoes the same rights for children, but uses stronger wording.

This construction has been interpreted by child rights advocates to mean that there is a basic package of benefits and services to which all children are entitled and that the provision of these benefits and services for children should be prioritised by the government in its overall programme of reform and delivery. These include basic health care services, basic nutrition, shelter and social services. Section 29 in the Constitution also guarantees every child the right to basic education.

While the Bill of Rights contains clear rights for children, and child rights activists motivate strongly for an approach which prioritises children, there is still uncertainty as to:

- how children's rights should be interpreted,
- what the content of each right is,
- what the extent and nature of the obligations placed on the government are, and
- how this can be translated into practical delivery.

The Children's Institute initiated *Project 28* in 2004 to contribute to the debate towards greater clarity on these questions. The project is aimed at seeking clarity on the meaning of children's socio-economic rights, particularly with regards to the nature and extent of government's obligations to children. The production of working papers is one of the methods we have adopted to further the project's aim to promote debate. This working paper explores the pivotal role which the South African Courts can play in shaping the content of children's rights and the State's obligation to children through the considered use of international law.

If you would like to send us comments on the arguments put forward in the paper, please contact Mira Dutschke on [mira@rmh.uct.ac.za](mailto:mira@rmh.uct.ac.za).

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## **List of Abbreviations**

AfCRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Charter on Human and People's Rights
BOR	Bill of Rights
CESCR	Committee on Economic Social and Cultural Rights
CRC	Committee on the Rights of the Child
GC	General Comment
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
NGO	Non-governmental Organisation
PMTCT	Prevention of Mother-to-Child Transmission
SAHRC	South African Human Rights Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

## **Abstract**

*This paper critically analyses how the South African High Court and Constitutional Court have used international and regional human rights law in socio-economic rights cases, particularly those involving children's socio-economic rights. The democratic Constitution of South Africa, which was adopted in 1996, explicitly protects the socio-economic rights of children and adults in the Bill of Rights. When interpreting these provisions in the Bill of Rights, the Constitution states that international law 'must be considered'. This refers to binding and non-binding international legal instruments such as the treaties and the General Comments made by the supervisory bodies. This paper argues that the Courts have an essential role to play in the realisation of international human rights law. The analyses of the judgments show however that there are improvements that can be made in the Courts' use and enforcement of international and regional human rights law. In general, the Courts merely tend to mention some of the applicable international law provisions without considering them at all or not in sufficient detail. Binding international law relevant to the rights of children is not given the same attention as non-binding international law. Given this analyses, we argue that the Courts' judgments on socio-economic rights have not properly defined the scope and content of children's socio-economic rights in the Bill of Rights. Recommendations are made as to how the Courts should strengthen their role in promoting the socio-economic rights of children through the considered use and enforcement of international law.*

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## **I. INTRODUCTION**

South Africa has come a long way in recognising the rights of children since the downfall of apartheid. The adoption of a child-sensitive Constitution<sup>1</sup> and the ratification of the United Nations Convention on the Rights of the Child<sup>2</sup> (UNCRC) and the African Charter on the Rights and Welfare of the Child (AfCRWC)<sup>3</sup> are three very important achievements. South Africa is now 11 years into a democratic dispensation. It is important to assess whether these achievements have in fact resulted in the amelioration of the deplorable conditions under which many of South Africa's children live. This paper argues that the Courts are a crucial structure for facilitating the realisation of children's socio-economic rights as they ought to hold the government to its obligations under both the Constitution and international law, in particular the UNCRC, the International Covenant on Economic Social and Cultural Rights<sup>4</sup> (ICESCR), the African Charter on Human and People's Rights<sup>5</sup> (AfCHPR) and the AfCRWC.

This paper begins with an analysis of child poverty in South Africa, followed by an overview of the international human rights treaties on socio-economic rights and their mechanisms of enforcement. It then examines the specific obligations placed on States to realise children's socio-economic rights. The second part of the paper outlines South Africa's constitutional socio-economic rights obligations to children. Thereafter we assess the extent of the Courts' consideration of international law on children's rights, set out in the first section, by presenting three seminal cases on socio-economic rights in South Africa. Finally, we comment on the failure of the Courts to consider international law properly and adequately and make recommendations on what they should consider in future cases to alleviate the poverty of children in South Africa.

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<sup>1</sup> *Constitution of the Republic of South Africa Act 108 of 1996* (the Constitution).

<sup>2</sup> Signed by South Africa on 29 January 1993 and ratified on 16 June 1995.

<sup>3</sup> *African Charter on the Rights and Welfare of the Child* OAU Doc. CAB/LEG/24.9/49 (1990). Adopted by the Heads of State and Government of the OAU on 11 July 1990 and came into force on 29 November 1999. Signed by South Africa on 10 October 1997 and ratified on 7 January 2000. Thirty-five African countries had ratified the African Charter on the Rights and Welfare of the Child by 2004.

<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights* (1966) 999 UNTS 3. Signed by South Africa on 3 October 1994.

<sup>5</sup> *African Charter on Human and People's Rights* (1981) 21 ILM 59. Signed by South Africa on 9 June 1986 and ratified on 9 June 1996.

## II. CHILD POVERTY IN SOUTH AFRICA

The situation of child poverty in South Africa is dire, largely as a result of inequitable policies under apartheid. Migrant labour policies, influx control and relocation on massive scales tore families and communities apart and subjected the majority of the people to a life of grinding poverty. The apartheid system was based on racially biased allocation of resources and on the systematic assault on internationally accepted human rights. Sixty-six per cent of children (aged 0 – 17 years) in South Africa are currently living in households with an income of less than R1,200 per month. That amounts to 11.9 million children living in dire poverty.<sup>6</sup>

The struggle against apartheid was as much about civil and political rights as it was about socio-economic rights. Since the introduction of democracy, however, certain policies that have been developed and implemented to counteract the dire poverty are insufficient and inappropriate. This has failed to combat the increased levels of child poverty since the advent of democracy. Using the expanded definition of unemployment, which includes discouraged work-seekers, the unemployment rate was estimated to be 28.6 per cent since the first ten years of the democratic dispensation.<sup>7</sup> In 2005 this rate was closer to 42 per cent. Social spending and job creation have not increased at the rate that would have been necessary to counteract these job losses and their impact on families. The HIV/AIDS pandemic has deepened poverty in households where wage and informal workers have lost income due to ill-health, and where families have had to prioritise health care and funeral costs.

Poverty is more than just insufficient income. The high level of child poverty in South Africa is also visible in the following harsh facts:

- 59 per cent of children live in a household with at least one adult who is employed. The other 41 per cent, or 7.3 million children from birth to 18, do not live with an employed person.<sup>8</sup>
- 43 per cent of children live in households that can only access an inadequate supply of water. This equates to 7.8 million children.<sup>9</sup>
- The infant mortality rate (2000) is 59.1 per 1,000 live births nationally.<sup>10</sup>
- Countrywide, 49 per cent of children make use of inadequate sanitation facilities (2004 data). Inadequate sanitation refers to chemical toilets, pit latrines, bucket, no toilets, and a small group of facilities that are unspecified.<sup>11</sup>

Children who live in poverty are thus denied their basic and fundamental, constitutionally and internationally guaranteed socio-economic rights.

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<sup>6</sup> Statistics South Africa 'General Household Survey July 2004' (2005) in Children's Institute *Children Count – Abantwana Babalulekile* (2006), <<http://www.childrencount.ci.org.za>>

<sup>7</sup> J Streak & S Poggenpoel *Towards Social Welfare Services for all Vulnerable Children in South Africa: A review of policy development, budgeting and service delivery* (2005) Idasa [unpublished paper on file with the authors].

<sup>8</sup> *Children Count – Abantwana Babalulekile* (note 6 above).

<sup>9</sup> *Children Count – Abantwana Babalulekile* (note 6 above).

<sup>10</sup> D Bradshaw, N Nannan, R Laubscher, P Groenewald, J Joubert, B Nojilana, R Norman, D Pieterse & M Schneider 'South African National Burden of Disease Study 2000: Estimates of Provincial Mortality' (2004) in Children's Institute *Children Count – Abantwana Babalulekile* (2006), <<http://www.childrencount.ci.org.za>>

<sup>11</sup> *Children Count – Abantwana Babalulekile* (note 6 above).

### III. INTERNATIONAL LAW ON SOCIO-ECONOMIC RIGHTS

International human rights treaties are agreements between States that create rights and duties under international law. When a State first signs a treaty, it indicates an intention to become a party to the treaty. Signature does not legally bind the State but States are obliged to refrain from acts that would defeat the object and purpose of such a treaty.<sup>12</sup> When a State ratifies a treaty, it is formally 'a State party' to the treaty and is bound under international law to respect the rights and carry out the duties in that treaty.<sup>13</sup>

The ICESCR and the UNCRC are the primary international treaties incorporating socio-economic rights considered in this paper.<sup>14</sup> South Africa has ratified the UNCRC and it is therefore a State party, but it has only signed the ICESCR.<sup>15</sup> Regional human rights conventions also form part of international human rights law. The two main conventions relevant in the African region are the AfCHPR and the AfCRWC.

#### *(a) The enforcement of socio-economic rights*

States have committed themselves to international human rights through the United Nations (UN) Charter, customary international law and treaty law. The UN has no Court structure and does not have any enforcement body that can directly penalise States for non-compliance. The UN aims to enforce its treaty provisions through human rights education, conciliation, and individual complaint and reporting procedures to the UN supervisory bodies.<sup>16</sup>

Each human rights treaty has its own supervisory body. The main function of the supervisory body is to monitor and ensure that States meet their obligations under the treaty. These supervisory bodies are usually called 'Committees'. There are four main types of monitoring and enforcement mechanisms utilised by the supervisory bodies:<sup>17</sup> reporting (the Committee receives reports from the State party and makes recommendations in terms of how the party can implement the treaty better); individual complaints (the Committee can receive complaints from individuals when their rights are abused or infringed); interstate complaints (allows States to file complaints against each other); and investigatory systems (allows the Committee to investigate alleged abuses).

Unfortunately, the enforcement of economic, social and cultural rights has not been given as much emphasis in the past as civil and political rights. However, the international community is accepting more and more that the enforcement mechanisms for economic, social and cultural rights need to be strengthened.<sup>18</sup>

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<sup>12</sup> See article 8 of the Vienna Convention on the Law of Treaties (1969) 8 ILM 679 (VCLT). Adopted 22 May 1969, which codified the pre-existing international customary law on treaties. The Convention entered into force on 27 January 1980.

<sup>13</sup> Ibid. Article 12 deals with the expression of the intention to be bound by signature and article 14 deals with ratification of a treaty.

<sup>14</sup> Both emanating from the Universal Declaration of Human Rights, UN Gen Ass Res 217A (III), 10 December 1948 (UDHR).

<sup>15</sup> C Heyns & F Viljoen 'The impact of six major UN human rights treaties in South Africa' (2001) *SAPR/PL* 28, 29.

<sup>16</sup> DA Balton 'The Convention on the Rights of the Child: Prospects for International Enforcement' (1990) 12 *Human Rights Quarterly* 120-129, 126. Non-treaty mechanisms include for example UN Special Rapporteurs on Housing, Education, Food and Health. In addition, the UN also has the power of political coercion.

<sup>17</sup> S Liebenberg & K Pillay *Socio-Economic Rights in South Africa* 1 S Liebenberg et al (eds) (2000) 85.

<sup>18</sup> Ibid 88.

The ICESCR, the most important UN treaty dealing with socio-economic rights, has as its supervisory body the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR has the power to receive State reports. The implementation of the AfCHPR, which recognises the basic civil, political, social, economic and cultural rights, is supervised by the African Commission on Human and People's Rights. This Commission has fairly wide-ranging powers to receive communications from States and from individuals.<sup>19</sup>

The UNCRC, the most important international treaty dealing with the rights of children, includes civil and political and social, economic and cultural rights. Its supervisory body is the Committee on the Rights of the Child (CRC) and it has the power to receive State reports only. The AfCRWC, which also contains civil, political, social, economic and cultural rights, is supervised by the African Committee of Experts on the Rights and Welfare of the Child. This Committee of Experts has the power to hear communications from States and from any person, group or non-governmental organisation (NGO).<sup>20</sup>

The supervisory bodies also have the power to adopt General Comments which interpret the various provisions in a treaty.<sup>21</sup> The CESCR has thus far issued 16 General Comments on the ICESCR to help clarify the meaning of the rights and duties in the Covenant.<sup>22</sup> The CRC has issued seven General Comments on a number of the provisions in the UNCRC, with a particular focus on the implementation of socio-economic rights. None of the General Comments of the various human rights treaty-body committees are strictly binding under international law and they therefore remain the 'views' of these Committees. However, they are nonetheless highly persuasive as they emanate from the body with the main responsibility for supervising States parties' obligations under the relevant treaty. The

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<sup>19</sup> Articles 55-59 of the AfCHPR.

<sup>20</sup> Article 44 of the AfCRWC. The African Committee of Experts on the Rights and Welfare of the Child draws its mandate from articles 32-46 of the AfCRWC. The Charter provides for the establishment of an African Committee of Experts on the Rights and Welfare of the Child, consisting of 11 members. The functions of the Committee in article 42 include the following:

- (a) To promote and protect the rights enshrined in the Charter particularly;
  - (i) Collect and document information, commission inter disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child and where necessary give its views and make recommendations to Government;
  - (ii) Formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
  - (iii) Cooperate with other African, International and Regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.
- (b) To monitor the implementation and ensure protection of the rights enshrined in the Charter
- (c) To interpret the provisions of the Charter at the request of a state party, an institution of the OAU/AU or any other person or institution recognized by OAU/AU.
- (d) To perform such other tasks as may be entrusted to it by the Assembly of Heads of State and Government.

<<http://www.africa-union.org/child/home.htm>>.

<sup>21</sup> See rule 73 in United Nations Committee on Economic Social and Cultural Rights *General Comment 1: Reporting by States parties* (1989).

<sup>22</sup> See *ibid*, generally, and para 3:

The Committee endeavours, through its general comments, to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant.

comments issued by the various Committees complement each other and should therefore be read together.<sup>23</sup>

Under the reporting system, a States party has to issue a report periodically, explaining what it has done to implement the treaty.<sup>24</sup> The relevant supervisory body usually adopts 'concluding observations' after critically examining State reports. These concluding observations also provide an understanding of how the Committee interprets the rights and duties in the particular treaty and point out where the country has implemented the treaty well and where implementation is lacking.<sup>25</sup> However, the reporting system is weakened by the failure of States – even if they adhere to the reporting requirements – to pay much attention to the observations or recommendations of the supervisory bodies, which arise from their reports.<sup>26</sup> At the same time, the reporting procedure under the ICESCR and the UNCRC has developed into a sophisticated 'quasi-petition' procedure due to NGOs' involvement in the reporting procedures through Shadow Reports.<sup>27</sup>

The reporting system of the African regional instruments is theoretically stronger because they allow for individual complaints. An individual complaints system has the benefit that it allows individuals to use the treaty provisions against the State if the individual's rights have been violated. This system also provides information on how the supervisory body interprets the right in the treaty in the decisions it makes on individual complaints.<sup>28</sup> The African Commission has however been suffering from financial difficulties and this has negatively affected the functioning of this system.<sup>29</sup>

Unfortunately, neither the CESCRC nor the CRC have a complaints system yet, making it more difficult to hold States accountable under these treaties. A draft Optional Protocol to the ICESCR is currently being considered to enable the CESCRC to receive individual complaints against States that have ratified the Protocol.<sup>30</sup>

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<sup>23</sup> Committee on the Rights of the Child *General Comment 5: General measures of implementation of the Convention on the Rights of the Child* (2003). See detailed discussion below.

<sup>24</sup> See article 44 of the UNCRC and for the CRC's guidelines as to what must be included in the reports and the structure they must take: Reporting Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(B), of the Convention adopted by the Committee on the Rights of the Child at its first session, in October 1991 (see *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 41 (A/47/41)*, annex III) (1996). See also ICESCR articles 16 to 25 and the *Committee on Economic, Social and Cultural Rights, General Comment 1, Reporting by States parties* (1989). On the African regional instruments, see article 43 of the AfCRWC and article 62 of the AfCHPR.

<sup>25</sup> Liebenberg & Pillay (note 17 above) 92.

<sup>26</sup> For a critique of the effectiveness of the reporting mechanism under the UNCRC, see L Woll 'Reporting to the UN Committee on the Rights of the Child' (2000) *International Journal of Children's Rights* 71-81 (a six-country study which showed that the reporting process for the UNCRC was generally not used as a catalyst for domestic review, debate or policy change).

<sup>27</sup> See M Craven *The International Covenant on Economic, Social and Cultural Rights: a perspective on its development* M Craven (ed) (1995).

<sup>28</sup> Liebenberg & Pillay (note 17 above) 91. Decisions taken by the Human Rights Committee (HRC), the supervisory body for the ICCPR, have for example aided judicial decision-making in the South African Constitutional Court. See *S v Makwanyane* 1995 (3) SA 391 (CC) para 67 (death penalty a violation of the right to life and human dignity).

<sup>29</sup> DM Chirwa 'The Merits and Demerits of the African Charter' (2002) 10 *International Journal on Children's Rights* 157-177, 170.

<sup>30</sup> See Commission on Human Rights Sixtieth Session *Report of the open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Geneva, 23 February-5 March 2004) .

The weakness of international law enforcement makes it critical to strengthen the powers of domestic Courts under the Constitution to enforce international law on socio-economic rights. The Courts have the power to use all the materials issued by the supervisory bodies, including the country reports, the concluding observations and the General Comments, in their judgments.<sup>31</sup> In this way, the Courts can create harmony between interpretations of international treaty obligations by international treaty-monitoring bodies and interpretations of the Bill of Rights. They can also ensure that the provisions of the treaties become a reality and do not just remain words on paper declaring good intentions short of enforceable rights.

## **(b) Children's socio-economic rights**

### **(i) Overview of the UNCRC and the AfCRWC**

The UN General Assembly adopted the UNCRC on 20 November 1989, and it entered into force on 2 September 1990.<sup>32</sup> The essential theme underlying the Convention is that children need special protection and priority care as a vulnerable group because they are in the developmental phase of their lives.<sup>33</sup> The international community decided there was a need to create a 'special normative visibility, and, to an extent, 'priority' for children's interests and needs due to this vulnerability'.<sup>34</sup> The UNCRC thus highlights the special vulnerability of children by particularising their rights. The Convention is remarkable in that it has been ratified by all States, except the United States of America.

The AfCRWC was adopted, shortly after the UNCRC, by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in July 1990, and was brought into force in November 1999. The Charter was conceived out of a sentiment by African member states that the Convention missed important socio-cultural and economic realities of the African experience.<sup>35</sup> However, the Charter and the Convention have very similar provisions and are intended to be complementary, both providing a framework for children and their wellbeing in Africa.<sup>36</sup>

Many of the provisions in the UNCRC and the AfCRWC are repeated in other instruments but all the treaties must be read together and are meant to complement one other.<sup>37</sup> At the same time, all the other instruments also apply to children. However, the UNCRC and the AfCRWC are unique because they address all rights of children holistically: social,

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<sup>31</sup> See *General Comment 9: The domestic application of the Covenant* (1998) para 14: 'Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts to do so is incompatible with the principle of the rule of law'. See *Makwanyane* (note 28 above) paras 33-35.

<sup>32</sup> H Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* H Steiner et al (eds) (2000) 511.

<sup>33</sup> There are a number of reasons for identifying children as vulnerable, which are particular to this group, including the lack of their political power (they cannot vote), the fact that their capacities are evolving and developing, and because they are legally dependent on an adult.

<sup>34</sup> C Scott & P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *SAJHR* 206-268, 227.

<sup>35</sup> D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127-136, 128. F Viljoen 'The African Charter on the Rights and Welfare of the Child' in C Davel (ed) *Introduction to Child Law in South Africa* (2000).

<sup>36</sup> Olowu *ibid* 128. The Charter uses the language of the provisions in the Convention.

<sup>37</sup> CRC GC 5 (note 23 above) para 5. Balton (note 16 above) 152.

economic, cultural, civil and political.<sup>38</sup> Interestingly, the UNCRC has been analysed and described in terms of rights relating to 'provision' (of services and material benefits), 'protection' and 'participation' (in society and in decisions affecting the child)<sup>39</sup>, in order to avoid the traditional categorisation of rights with its negative historical connotations.

The rights of provision refer to the rights of children to be provided with their basic economic and social needs.<sup>40</sup> The rights of provision in the AfCRWC are almost identical,<sup>41</sup> except that the AfCRWC does not contain the right of children to an adequate standard of living for the child's development or the right of parents to social security necessary for maintaining the standard of living of the child. The rights of protection refer to children's rights to be protected from harmful acts or practices.<sup>42</sup> Finally, the rights of participation refer to the rights of children to express an opinion in matters affecting them and to have that opinion heard in an age-appropriate way.<sup>43</sup> Although it is obvious that the rights of provision relate directly to poverty amongst children, the rights of protection and participation are also relevant in the context of poverty.<sup>44</sup>

Both the Convention and the Charter contain four important general principles to assist with interpretation and application of all the other articles.<sup>45</sup> Firstly, the 'best interests principle' requires that in 'all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*' (UNCRC art 3(1)) [*emphasis added*]. The Charter goes one step further by stating that the best interests principle shall be the primary consideration (art 4). Decision-makers must thus seriously consider what would be in the best interests of the child, including in actions concerning their economic welfare. Secondly, the principle of non-discrimination requires States to 'take all appropriate measures to ensure that the child is protected against all forms of discrimination' (UNCRC art 2; AfCRWC art 3). Thirdly, the principle of participation requires States parties to 'assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child' (UNCRC art 12(1); AfCRWC art 4(2) & 7).<sup>46</sup> The child's right to 'maximum survival and development' in article 6 of the

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<sup>38</sup> G van Bueren 'Alleviating Poverty Through the Constitutional Court' (1999) 15 *SAJHR* 52-74, 55. See also Steiner & Alston (note 32 above) 511.

<sup>39</sup> N Cantwell 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in S Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (1992) 19. See also T Hammarberg 'The UN Convention on the Rights of the Child and How to Make it Work' (1990) 12 *Human Rights Quarterly* 97-105, 100.

<sup>40</sup> In the UNCRC children have the right to survival and development (art 6), health care (art 24), basic economic security (art 27) and education (art 28).

<sup>41</sup> Including the rights to survival and development (art 5), education (art 11), health and health services (art 14), and adequate nutrition and safe drinking water (art 14(2)(c)).

<sup>42</sup> In this category, the UNCRC provides that children have the right to be protected from abuse and neglect (art 19), economic exploitation (art 32) and sexual exploitation (art 34). The AfCRWC contains the rights to be protected against child abuse and torture (art 16), harmful social and cultural practices (art 21), apartheid and discrimination (art 26), sexual exploitation (art 27), drug abuse (art 28) and sale, trafficking and abduction (art 29).

<sup>43</sup> Article 12 of the UNCRC. Articles 4 and 7 of the AfCRWC.

<sup>44</sup> R Howe & K Covell 'Child Poverty in Canada and the Rights of the Child' (2003) 25 *Human Rights Quarterly* 1067-1087, 1069.

<sup>45</sup> These articles are guiding principles because they are grouped together under the Reporting Guidelines issued by the CRC (note 24 above) paras 25-47.

<sup>46</sup> Howe & Covell (note 44 above) 1070. See Chirwa (note 29 above) 161, who states that the participation rights in the AfCRWC contain certain claw-back clauses which can impose restrictions on

UNCRC and article 5 of the AfCRWC is also a general principle. While 'survival' deals with the actual protection of life, the concept of 'development' is a holistic one referring to the child's physical, mental, spiritual, psychological and social development, which is aimed at preparing the child for an individual life in a free society.<sup>47</sup>

### (ii) The realisation of socio-economic rights – rights of 'provision'

Poverty, and especially persistent poverty early in the child's life, puts the healthy development of the child at risk. For this reason, the Convention gives high importance to children's basic socio-economic rights. Article 6 of the UNCRC and article 5 of the Charter direct States to 'ensure to the maximum extent possible the survival and development of the child'. More pointedly, article 27 of the UNCRC calls on States parties to implement 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development'.<sup>48</sup>

Both the Convention and the Charter recognise that parents and guardians have primary economic responsibility for the child.<sup>49</sup> However, in the case of need, the treaties direct States to provide material assistance to children either indirectly through their parents or directly to children themselves.<sup>50</sup> Both treaties recognise that different States have different financial capabilities. Thus under article 27 of the UNCRC and article 20(2) of the Charter, States parties have to fulfil their obligations 'in accordance with national conditions and within their means'.<sup>51</sup>

The Committee on the Rights of the Child has issued seven General Comments thus far in relation to specific rights or aspects of specific rights.<sup>52</sup> These Comments primarily clarify

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this right as prescribed by law. These claw-back clauses could potentially render the right of children redundant in the AfCRWC.

<sup>47</sup> R Hodgkin & P Newell 'The Child's right to life and maximum survival and development' in R Hodgkin et al (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child* (1998) 85-95, 94.

<sup>48</sup> This is missing from the AfCRWC.

<sup>49</sup> Article 18(1) of the UNCRC states that State parties shall use their efforts to ensure recognition of the principle that both parents have common responsibility for the upbringing and development of the child. The Charter also makes it clear that parents or other persons responsible for the child have the primary responsibility for the upbringing and development of the child, including 'to secure, within their abilities and financial capacities, conditions of living necessary to the child's development' (art 20(1)).

<sup>50</sup> Article 18(2) of the UNCRC states that States parties shall render appropriate assistance to parents or legal guardians in the performance of their responsibilities. Under article 27, States parties 'shall take appropriate measures to assist parents and others responsible for the child' and, when necessary, 'shall... provide material assistance and support programmes.' States parties to the Charter must 'in accordance with their means and national conditions' assist parents and other persons 'in case of need' by providing 'material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing' (art 20(2)).

<sup>51</sup> However, this clause is not to be used as an excuse for inaction. Article 4 of the UNCRC requires States parties to undertake economic measures 'to the maximum extent of their available resources and, where needed, within the framework of international co-operation.' Howe & Covell (note 44 above) 1072.

<sup>52</sup> The Comments produced thus far by the CRC are as follows: *General Comment 1: The aims of education - on the quality and content of education that should be provided* (2001); *General Comment 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child* (2002); *General Comment 3: HIV/AIDS and the rights of the child* (2003); *General Comment 4: Adolescent health and development in the context of the CRC* (2003); *General Comment 5: General measures of implementation of the Convention on the Rights of the Child* (2003); *General Comment 6: Treatment of unaccompanied and separated children outside their country of origin* (2005); *General Comment 7: Implementing child rights in early childhood* (2005).

duties of States in relation to what are traditionally referred to as socio-economic rights in the UNCRC. As these are complementary to the General Comments issued by the CESCR, they do not cover aspects which have been covered in the CESCR General Comments.<sup>53</sup> In addition, due to the similarity of the clauses of the UNCRC and the AfCRWC, the general comments of the Committee should also be considered in relation to the clauses in the AfCRWC.

### **(iii) Obligations of States in relation to children's socio-economic rights**

Articles 2 and 4 of the UNCRC and article 1 of the AfCRWC lay out the obligations of States parties, including in relation to socio-economic rights. These obligations are explained in greater detail below.

#### **(aa) Duty to 'respect and ensure' without discrimination**

Article 2 of the UNCRC sets out the basic duty to 'respect and ensure' all the rights in the treaty to all children in the State party's jurisdiction, without discrimination of any kind. The duty to 'respect' in article 2 implies that the State must not actively infringe the rights of the child contained in the Convention; the duty to 'ensure' the rights indicates that the State has to take positive action to realise these rights. Article 2 thus applies negative and positive obligations on the State to all rights – social, economic and cultural as well as civil and political.

Interpretation of article 2 is guided by the ICCPR, which contains a similar provision in article 2(1). The General Comments made by the Human Rights Committee (HRC) with regard to this article can be applied to the UNCRC. The HRC commented that respect for the rights alone is not sufficient; it has called for specific activities and positive steps to be taken by States parties to enable the full enjoyment of all rights.<sup>54</sup> Another important emphasis in article 2(1) of the ICCPR is the non-discrimination aspect. It implies that special measures are mandated by the Covenant to ensure equal enjoyment of all rights. What this means effectively is that vulnerable groups are entitled to special protection under the Covenant to enable their equal enjoyment of all human rights. Who qualifies for such preferential treatment obviously depends on the context of the situation at hand. This section applies to everyone, adults and children alike.

Similarly, the ICESCR contains a non-discrimination clause in article 2(2) which ought to be interpreted in the same way as article 2(1) of the ICCPR.<sup>55</sup> The ICESCR also contains a clause which identifies children as a vulnerable group. Article 10(3) states that '[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without discrimination for reasons of parentage or other conditions'. The link between special measures of protection and the principle of non-discrimination has been interpreted to mean that vulnerable groups in general are deserving of protection and that the State is under a duty not to discriminate between groups of children.<sup>56</sup>

The UNCRC further hones this notion. The preamble of the UNCRC states that '[...] there are children living in exceptionally difficult conditions, and such children need special

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<sup>53</sup> CRC GC 5 (note 23 above) para 5.

<sup>54</sup> UN Human Rights Committee *General Comment 3: Article 2 Implementation at the national level* (1981) para 4.

<sup>55</sup> UN Committee on Economic Social and Cultural Rights *General Comment 3: The nature of States parties' obligations* (2003) para 1.

<sup>56</sup> Van Bueren (note 38 above) 56.

consideration [...]'. The Committee on the Rights of the Child has also consistently underlined the need to give special attention to disadvantaged and vulnerable groups of children.<sup>57</sup> For example the CRC states that regardless of the economic situation of the country, States are required to take all possible measures to realise the rights of children, 'paying special attention to the most disadvantaged groups'.<sup>58</sup> The non-discrimination obligation requires States actively to identify individual children and groups of children who may need special measures to enable the realisation of their rights.<sup>59</sup> Guidance as to which groups of children are entitled to such special protection and assistance can come from the General Comments of both the CRC and the CESCR. These include children who are temporarily or permanently deprived of their family environment, children living in poverty, children with disabilities, refugee/foreign children and children living and/or working on the streets.<sup>60</sup>

Therefore, in the first instance, these provisions (article 2 of UNCRC, article 2(1) of ICCPR and article 2(2) of the ICESCR) can be read to mean that generally all vulnerable groups of people are deserving of special measures of protection depending on what their needs are in relation to the situation they are facing. The ICCPR and the ICESCR can also be read as providing special protection for children as a vulnerable group.<sup>61</sup> In the second instance, there must also be protection against discrimination between different groups of children. Arguably those groups of children that are most disadvantaged in enjoying their rights are deserving of the highest standard of protection.

The AfCRWC doesn't contain a duty to 'respect and ensure'.<sup>62</sup> The duty not to discriminate in article 3 however also lies at the heart of this treaty.<sup>63</sup> The Charter does not mention 'State' in the non-discrimination clause, which means that it is clear that the duty extends also to private actors. The Charter also provides for special protection of children living under various forms of discrimination and includes conditions that prevail in Africa. It therefore refers specifically to children living under apartheid or States that are subject to military destabilisation.<sup>64</sup>

(bb) Duty to undertake measures 'to the maximum extent of available resources'

Article 4 of the UNCRC speaks about implementation of the rights. It distinguishes between socio-economic rights and civil and political rights by requiring that, '*with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation*' [emphasis added]. The latter part of this article speaks to the reality that the full realisation of socio-economic rights cannot be achieved overnight as sufficient resources may not be available.

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<sup>57</sup> R Hodgkin & P Newell 'Non-discrimination' in R Hodgkin et al (eds) *Implementation Handbook for the Convention on the Rights of the Child* (1998) 19-35, 19.

<sup>58</sup> CRC GC 5 (note 23 above) para 8.

<sup>59</sup> Ibid para 12.

<sup>60</sup> Van Bueren (note 38 above) 56.

<sup>61</sup> See ICCPR article 24 which states that 'every child shall have, without any discrimination [...] the right to special measures of protection as are required by his status as a minor, on the part of his family, society and the State'.

<sup>62</sup> Article 1(1) obliges member States to '*recognize the rights, freedoms and duties enshrined in this Charter*' and to '*undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.*' [emphasis added]

<sup>63</sup> Chirwa (note 29 above) 158.

<sup>64</sup> Ibid 159.

No such distinction exists under the AfCRWC. The Charter has therefore been hailed as 'the most progressive of the treaties on the rights of the child'.<sup>65</sup> This appraisal is based on the unique features of the Charter dealing with the obligations under socio-economic rights. The Charter advances the status of socio-economic rights beyond the traditional confines of rights which may only be attained by 'progressive realisation'. For example, the rights to education, leisure, recreation and cultural activities, health and freedom from economic exploitation are more strongly worded than their equivalents in the ICESCR. This has been interpreted to mean that the negative obligations which are part of socio-economic rights are to be implemented immediately.<sup>66</sup>

The language of the implementation clause of the ICESCR, article 2, is very similar to the UNCRC. In interpreting the phrase 'to the maximum extent of available resources' the CESCR has stated that this means that States cannot be expected to do what they cannot afford.<sup>67</sup> A State is however required to show that it has used all the resources at its disposal to the maximum extent as a matter of priority.<sup>68</sup> The maximum extent of availability of resources implies that an adequate budget analysis be done. In relation to this, the Committee on the Rights of the Child has stated:

[N]o State can tell whether it is fulfilling children's economic, social and cultural rights "to the maximum extent of ... available resources", as it is required to do under article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly. Some States have claimed it is not possible to analyse national budgets in this way. But others have done it and publish annual "children's budgets".<sup>69</sup>

The UNCRC guidelines for periodic reports further state that children should be made visible in budgets.<sup>70</sup> The general comment on implementation<sup>71</sup> also requires that the progress that has been made in relation to children is monitored and evaluated.<sup>72</sup>

The CRC also concurs entirely with the CESCR in stating that, 'even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances [...]'.<sup>73</sup> Regardless of their economic situation, States must 'undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged groups'.<sup>74</sup>

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<sup>65</sup> G van Bueren *The International Law on the Rights of the Child* (1995) 402.

<sup>66</sup> Chirwa (note 29 above) 158.

<sup>67</sup> CESCR GC 3 (note 55 above) para 9.

<sup>68</sup> C Heyns & D Brand 'Introduction to Socio-economic rights in the South African Constitution' (1998) 2 *Law Democracy and Development* 153-167, 160.

<sup>69</sup> CRC GC 5 (note 23 above) para 51.

<sup>70</sup> CRC General Guidelines for Reporting (note 24 above) para 35.

<sup>71</sup> CRC GC 5 (note 23 above).

<sup>72</sup> R Hodgkin & P Newell 'Implementation of Rights in the Convention' in R Hodgkin et al (eds) *Implementation Handbook for the Convention on the Rights of the Child* (1998) 51-73, 64.

<sup>73</sup> CESCR GC 3 (note 55 above) para 11.

<sup>74</sup> CRC GC 5 (note 23 above) para 8.

(cc) 'Progressive realisation'

The concept of 'progressive realisation' is explicitly found in article 2 of the ICESCR and referred to in GC 5 of the CRC. It is absent from the AfCRWC. The CRC states:

[Article 4] reflects a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of 'progressive realisation' of such rights: States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation...<sup>75</sup>

The above excerpt introduces the concept of 'progressive realisation' to the CRC as a reflection of the reality that some rights cannot be realised on demand. However it was not meant to be an escape clause. How progressive the realisation measures are, is dependent on the availability of resources.<sup>76</sup> The CESCR has interpreted the term as imposing an obligation to move as 'expeditiously and effectively as possible' towards the full realisation of the rights.<sup>77</sup> Any retrogressive measures would obviously fall foul of this requirement.<sup>78</sup> As pointed out earlier, the CRC has stated that the General Comments of the HRC and the CESCR on the overall implementation obligations of States parties should be complementary to General Comment 5 of the CRC. This statement could be taken further to argue for the complementarities of all General Comments of the HRC and the CESCR to the UNCRC that deal with similar provisions in the treaties. This would make the General Comments of those Committees also highly persuasive on States parties to the UNCRC.

(dd) 'Minimum core' obligations

The CESCR has stated that, apart from the duty to realise a socio-economic right progressively, 'a minimum core obligation to ensure the satisfaction of, at the very least, *minimum essential levels of each of the rights* is incumbent of every State party' [*emphasis added*].<sup>79</sup> The standard of a minimum core can be translated to mean that a minimum level of subsistence is necessary for a dignified human existence. What the minimum core consists of must be read from the ICESCR and the General Comments made in relation to the individual rights. The CESCR has delineated these minimum levels in relation to the right to adequate housing,<sup>80</sup> the right to adequate food,<sup>81</sup> the right to education,<sup>82</sup> the right to

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<sup>75</sup> Ibid paras 7 and 60 state, amongst other things, that programmes of donor States should be rights-based and the Committee encourages State parties that receive international aid and assistance to allocate a substantive part of that aid specifically to children.

<sup>76</sup> P Alston & G Quinn 'The Nature and Scope of the States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156-180, 174.

<sup>77</sup> CESCR GC 3 (note 55 above) para 9.

<sup>78</sup> Ibid. See also the Constitutional Court's endorsement of the Committee's views on retrogressive measures in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 45; and P de Vos 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67-101, 98.

<sup>79</sup> CESCR GC 3, *ibid* para 10. See also how the standard of minimum core obligations have been made more stringent in GCs 14 and 15 (i.e. they are characterised as non-derogable obligations): Committee on Economic, Social and Cultural Rights *General Comment 14: The right to the highest attainable standard of health* (2000); Committee on Economic, Social and Cultural Rights *General Comment 15: The right to water* (2002).

<sup>80</sup> Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing* (1991) para 10.

<sup>81</sup> Committee on Economic, Social and Cultural Rights *General Comment 12: The right to adequate food* (1999).

<sup>82</sup> Committee on Economic, Social and Cultural Rights *General Comment 13: The right to education* (1999).

the highest attainable standard of health<sup>83</sup> and the right to water<sup>84</sup>. The concept of a minimum core applies to both adults' and children's socio-economic rights.<sup>85</sup>

The Maastricht Guidelines on Violations of Economic Social and Cultural Rights state that 'the minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors or difficulties'.<sup>86</sup> The CESCR has also stated that, while the minimum core applies irrespective of the availability of resources, the resources available to the State must still be scrutinised: a State that has failed to discharge even the minimum core of obligations must show 'that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>87</sup> This then shifts the onus strongly onto the State to show that it does not have sufficient resources to meet even its minimum core obligations. The minimum core approach thus mandates priorities in resource allocation and thereby gives the Courts the power to review whether these priorities have been honoured. This is not to say that all resources must be shifted from non-core needs to core needs but the Court should utilise a stricter standard of review with regard to these minimum core entitlements than the standard for non-minimum core rights.<sup>88</sup> In relation to the latter rights, the State must show that it has 'taken all appropriate measures to the maximum extent of their available resources'. In relation to minimum core rights, such measures must be taken as a matter of priority.

The minimum core obligations also imply that States must provide detailed information about those groups within society that are most vulnerable and disadvantaged.<sup>89</sup> This obligation is of immediate effect, independent of the availability of resources.<sup>90</sup> Furthermore, the planning obligations of States are also seen as a core obligation, including requiring detailed strategies and plans; transparent and participatory processes; benchmarks and indicators for measuring progress.<sup>91</sup>

In relation to children, when assessing if the minimum core has been met, the Court must apply the general principles of the UNCRC and the AfCRWC. The court must therefore scrutinise whether due priority has been given to vulnerable groups of children, that the best interests of children are protected, that the level of the minimum core is such that it facilitates the survival and development of the child and, finally, that the child's views have been respected in the process.<sup>92</sup>

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<sup>83</sup> CESCR GC 14 (note 79 above).

<sup>84</sup> CESCR GC 15 (note 79 above).

<sup>85</sup> The jurisdiction of the ICESCR encompasses adults' and children's rights. Furthermore, as indicated above, the General Comments to the ICESCR and UNCRC are complementary; therefore the minimum core obligations interpreted by the CESCR are relevant to the CRC as well. See also Hodgkin & Newell (note 72 above) 57.

<sup>86</sup> 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691-701, principle 9.

<sup>87</sup> CESCR GC 3 (note 55 above) para 10. However, the later general comments appear not to allow resource constraints as an excuse at all for failing to meet core obligations. It is debatable whether the latter is the appropriate approach given that the law should not generally demand the impossible as an obligation – but certainly that there should be a strict standard of review for resource limitations when dealing with core obligations.

<sup>88</sup> S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 436-472.

<sup>89</sup> See for example CESCR GC 4 (note 80 above) paras 11 & 13 with regard to housing.

<sup>90</sup> *Ibid* para 13.

<sup>91</sup> *Ibid* para 12.

<sup>92</sup> CRC GC 5 (note 23 above) generally.

The general principle of the UNCRC and the AfCRWC, that States parties must ensure the maximum survival and development of the child, informs the right of every child to a standard of living adequate for the child's development.<sup>93</sup> Article 27 points out that the primary responsibility lies with the parents and other persons caring for the child to provide such a standard of living within their abilities and financial capacities.<sup>94</sup> Article 20(1) does the same under the AfCRWC. Both these sections oblige the State to assist parents in meeting their responsibilities, including the provision of material assistance and support programmes in terms of food, clothing and housing.<sup>95</sup> The State therefore has a duty to help the parents in providing for their children when parents are unable or unwilling to do so.

In some cases, the minimum core rights of children and of parents have to be realised together. In relation to housing for example, it is undesirable to separate children from their families – the minimum core rights of children and their families should thus be realised together.<sup>96</sup> The CESCR GC 4 on the right to adequate housing supports this notion because it states that the right to adequate housing applies to persons *and their families*.<sup>97</sup> In these cases, the minimum core rights of everyone, including parents, children and other members of the community should be realised together.<sup>98</sup>

The CRC provides additional considerations for determining the minimum core for children. In recognising that children may have special needs that differ from adults, the Committee also states, for example, that special attention should be paid to the shelter needs of vulnerable children such as children living on the street, refugee children, and children who are victims of sexual exploitation.<sup>99</sup> Thus, the concept of a minimum core applies equally to adults and to children but the content may differ depending on the right in question and the context. The exact content of the different minimum core rights must be assessed from the General Comments of the respective Committees of the UNCRC and the ICESCR.

#### (ee) Measures of implementation

The CRC has identified a range of measures that are needed for effective implementation of the UNCRC.<sup>100</sup> Implementation is the process whereby States parties take action to ensure the realisation of all rights in the UNCRC for all children in their jurisdiction. Article 4 requires States parties to take 'all appropriate legislative, administrative and other measures' for implementation of the rights in the UNCRC. While it is the State which takes

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<sup>93</sup> Article 27(1) UNCRC.

<sup>94</sup> Article 27(2) UNCRC.

<sup>95</sup> R Hodgkin & P Newell 'Child's right to an adequate standard of living' in R Hodgkin et al (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child* (1998) 355-368, 358 and 361. The notion that the child is best placed in a family or in a family-like environment is widely accepted in international law. See for instance *Plan of Action for the Survival and Development of Children, World Summit for Children, 29-30 September 1990*, <<http://www.unicef.org/wsc>> and *World Summit Declaration on Social Development, Copenhagen, 1995*, <<http://www.un.org/esa/socdev/wssd>>. See also UDHR (article 16); ICCPR (article 17, 23, 24); ICESCR (article 10); and the European Social Charter (article 16).

<sup>96</sup> This was the reasoning of Davis J in *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

<sup>97</sup> See para 6: 'The right to adequate housing applies to everyone... [T]he concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.'

<sup>98</sup> *Ibid.* See also the reasoning of Yacoob J in *Grootboom* (note 78 above) para 71.

<sup>99</sup> Hodgkin & Newell (note 95 above) 362.

<sup>100</sup> CRC GC5 (note 23 above).

on obligations under the UNCRC, the task of implementation needs to engage all sectors of society, including children themselves.<sup>101</sup> In the first instance, all domestic legislation must be fully compatible with the Convention and the Convention's principles and provisions must be directly applicable and enforceable.<sup>102</sup> In addition, the CRC has identified a wide range of measures that are needed for effective implementation, including 'the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels'.<sup>103</sup>

The CRC states that a children's rights perspective is required throughout Government, Parliament and the judiciary for effective implementation of the whole Convention, including in particular with respect to the general principles in articles 2, 3(1), 6 and 12.<sup>104</sup> Other notable measures of implementation include: the development of a comprehensive national strategy rooted in the Convention that goes 'beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social and cultural and civil and political rights for all children';<sup>105</sup> coordination of the implementation of the Convention amongst different departments involved in implementing the rights of children;<sup>106</sup> monitoring implementation via child-impact assessment and evaluation;<sup>107</sup> the need for collection of data and analysis and the development of indicators;<sup>108</sup> and making children visible in budget allocation to determine the amount of resources being spent on children as a group.<sup>109</sup> Rigorous monitoring of implementation is also required by all levels of Government and independently by national human rights institutions, NGOs and others.<sup>110</sup>

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<sup>101</sup> Ibid para 1.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid para 12.

<sup>105</sup> Ibid paras 28-46.

<sup>106</sup> Ibid para 37-39.

<sup>107</sup> Ibid paras 45-47.

<sup>108</sup> Ibid paras 48-50. Hodgkin & Newell (note 72 above) 56.

<sup>109</sup> Ibid paras 51 & 52.

<sup>110</sup> Ibid para 27 & 65. See also CRC GC 2 (note 52 above).

#### IV. SOUTH AFRICA: MEETING ITS SOCIO-ECONOMIC OBLIGATIONS TO CHILDREN THROUGH THE COURTS

##### *(a) Constitutional provisions*

The Constitution of the Republic of South Africa, 1996, aims to address past injustices.<sup>111</sup> The Bill of Rights (BOR) recognises the indivisibility of socio-economic and civil and political rights necessary to achieving this outcome.<sup>112</sup> The BOR contains a wide range of socio-economic rights in sections 26, 27, 28, 29 and 35 of the Constitution.

Section 26(1) entrenches the right of 'everyone'<sup>113</sup> 'to have access to adequate housing'<sup>114</sup>, and section 27(1) guarantees the right of everyone 'to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.<sup>115</sup> The rights in sections 26 and 27 are qualified by a second subsection that requires the State to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. In addition, these rights are subject to the general limitations clause in section 36.<sup>116</sup>

A second category of socio-economic rights, referred to as 'basic' rights, entrenches children's socio-economic rights<sup>117</sup>, the right of everyone to basic education, including adult basic education,<sup>118</sup> and detainees' rights to adequate accommodation, nutrition, reading material and medical treatment.<sup>119</sup> This category of rights is not qualified by reference to

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<sup>111</sup> This is recognised in the preamble of the Constitution and in the equality clause, amongst others. See also P de Vos 'Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258-276.

<sup>112</sup> N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-economic rights' (1992) 8 *SAJHR* 451-63 and G Budlender *Submission to the Constitutional Assembly for the Final Constitution: The enforcement and Application of Social and Economic Rights* (September 1995).

<sup>113</sup> 'Everyone' includes non-citizens such as permanent residents, as decided in *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and others* 2004 (6) BCLR 569 (CC) paras 46-47.

<sup>114</sup> Note that section 26(3) prohibits unfair evictions.

<sup>115</sup> See generally S Liebenberg 'Socio-Economic Rights' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (2004).

<sup>116</sup> Section 36 states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>117</sup> Section 28(1)(c). Like the UNCRC, the child rights clause includes both socio-economic and civil political rights:

- (1) Every child has the right [...]
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation; [...]
- (2) A child's best interests are of paramount importance in every matter concerning the child. [...]

<sup>118</sup> Section 29(1)(a).

reasonable measures, progressive realisation or resource constraints; however, the rights are still subject to the limitations clause section 36.<sup>120</sup>

In interpreting the socio-economic rights in the BOR, the Courts should, for several reasons, refer to international human rights law.<sup>121</sup> Firstly, since South Africa has ratified the UNCRC, AfCRWC and the AfCHPR, as a general rule of treaty law this assumes the obligation to give effect to those treaties' provisions.<sup>122</sup> Given that the ICESCR has only been signed, the obligation is limited to not taking steps which defeat the object and purpose of the treaty.<sup>123</sup> Therefore, there is in international law a presumption that Courts would not rule contrary to the country's international treaty obligations.

Secondly, the drafters of the South African Constitution included the key concepts found in the UNCRC and the ICESCR. The children's rights clause – the result of persuasive submissions based on the UNCRC<sup>124</sup> – for example incorporates the key concepts in the UNCRC so that interpretations of the children's rights clause would refer to the more extensive provisions in international law.<sup>125</sup> Since the children's rights that have been encapsulated in the Constitution are justiciable in the Courts, it can also be concluded that the UNCRC has acquired legal significance via the Constitution.<sup>126</sup> Similarly with the ICESCR: the socio-economic rights in section 27 of the Constitution contain only subtle

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<sup>119</sup> Section 35(2)(e).

<sup>120</sup> See I Currie & J De Waal 'Socio-Economic Rights: Housing, Health Care, Food, Water, Social Security' in *Bill of Rights Handbook* (2005) 568; Liebenberg (note 115 above) 41-48, 41-47.

<sup>121</sup> See *Makwanyane* (note 28 above) para 35 in relation to international law in the Interim Constitution:

Customary international law and the ratification and accession to international agreements is dealt with in *section 231* of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of *section 35(1)*, public international law would include non-binding as well as binding law. They may both be used under the *section* as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three. [footnotes omitted]

<sup>122</sup> J Dugard *International Law: A South African Perspective* (2000) 53. For example, see obligations under article 4 of the UNCRC and article 3(1) which refers specifically to 'courts of law' and suggests that the judiciary, as an arm of Government, is bound where possible to advance the implementation of the children's rights contained in the treaty. See also J Sloth-Nielsen 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137-156, 138-139. In most countries where local legislation to incorporate provisions of binding treaties has not been enacted, judges would probably not consider themselves obliged to give effect to the international provisions for they have not acquired legal status in municipal law. Sloth-Nielsen explains the position in relation to South Africa at 153 fn 8:

The question as to whether a provision in an international agreement is self-executing in any particular country is one that is regulated not by international law but by municipal law. South Africa follows a dualist system and section 231(4) of the Constitution provides that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic of South Africa unless it is inconsistent with the Constitution or an Act of Parliament'.

<sup>123</sup> Article 8 of the VCLT. The interpretive functions of the Courts would qualify as actions or activities of a States party.

<sup>124</sup> Submissions based on the UNCRC were made by civil society organisations, including the National Children's Rights Committee.

<sup>125</sup> L du Plessis & H Corder 'The genesis of the sections entrenching specific rights' in L du Plessis et al (eds) *Understanding South Africa's Transitional Bill of Rights* (1994) 84, 98. See also *Constitutional Assembly Explanatory Memorandum: Draft Bill of Rights* (October 1995) 159.

<sup>126</sup> Sloth-Nielsen (note 122 above) 139.

differences to the provisions in the ICESCR. The Constitution refers to the rights to 'access', which the ICESCR does not. The ICESCR obliges States parties to take 'appropriate steps' that must include legislation, whereas the Constitution requires the State 'to take reasonable legislative and other measures'.<sup>127</sup> Furthermore, the Constitution places both positive and negative obligations on the State by requiring it in section 7(2) to 'respect, protect, promote and fulfill the rights in the Bill of Rights'. This is like the obligation to 'respect and ensure' in article 2 of the UNCRC. These words were intended to mirror the obligations at international law.<sup>128</sup>

Thirdly, the Constitution contains specific provisions which require the Courts to consider international law in their deliberations. The first of these is section 39(1)(b), which provides that the Courts 'must consider' international law – binding and non-binding – in interpreting the BOR. In relation to socio-economic rights, this would include: the UNCRC; the AfCRWC; the ICESCR; the AfCHPR; General Comments, Country Reports and other documents produced by the Committees in charge of implementing these treaties,<sup>129</sup> and decisions of tribunals dealing with comparable instruments.<sup>130</sup> The value attached to international human rights law will vary. A binding international law agreement like the UNCRC should in principle be directly applicable in the Court, whereas a non-binding agreement is technically only of influential value.<sup>131</sup> In any event, the duty to 'consider' international law does not mean it has to be applied but it means that at the very least the Court must take note of the provisions and, should it choose not to apply it, give reasons why.<sup>132</sup> Furthermore, section 233 instructs Courts to afford preference to an interpretation of statutory law that is 'consistent with international law' whenever such an interpretation would be reasonable.

Fourthly, Courts should rely heavily on international law in order to guarantee that international human rights standards are more than just words on paper.<sup>133</sup> Before ratification, the State has to show that the resources to implement the treaties are available or will be available in the near future.<sup>134</sup> The Court can therefore ensure that the social priorities, which the State has bound itself to, are realised.

The Courts have only had a few chances to engage with socio-economic rights. Below we look at how the High Court and the Constitutional Court have interpreted socio-economic rights – specifically those of children – and how they have or haven't used the international law applicable to the cases.

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<sup>127</sup> *Explanatory Memorandum: Draft Bill of Rights* (note 125 above). The explanatory memorandum addresses each right individually and sets out the content and scope of the rights at international law.

<sup>128</sup> Technical Committee 4 'Explanatory Memorandum: The State must Respect, Protect, Promote and Fulfil the Rights in the Bill of Rights' (1996) [unpublished copy on file with the Children's Institute].

<sup>129</sup> The materials developed by the Committees are non-binding international law, but they are highly persuasive because they contain interpretations of the rights by the official body charged with implementing the treaty.

<sup>130</sup> These documents provide the framework within which the BOR can be understood. See de Vos (note 78 above) 77; and *Makwanyane* (note 28 above) para 35.

<sup>131</sup> Yacoob J in *Grootboom* (note 78 above) para 26.

<sup>132</sup> *Ibid.*

<sup>133</sup> J Sloth-Nielsen 'The Contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4 *International Journal of Children's Rights* 323-344, 324.

<sup>134</sup> Van Bueren (note 38 above) 59.

## ***(b) Jurisprudence of the Constitutional Court***

### **(i) Facts of the cases in summary**

This section sets out the facts of the case in so far as it is necessary for the purpose of this paper, namely to analyse how effectively the courts use the wealth of international law to give effect to the socio-economic rights of children. The first case we deal with is the well-known case of *Grootboom*.<sup>135</sup> The applicants lived in an informal settlement under deplorable conditions. In winter the conditions at the settlement became unbearable so the respondents erected shacks on nearby vacant land that had better drainage. Unfortunately, the land was privately owned. In due course the respondents were evicted in a very hostile and destructive manner: their shacks were bulldozed and their properties burnt. To make matters worse, the eviction occurred a day earlier than planned, which meant that people did not have a chance to salvage their basic belongings such as clothes, furniture and building materials.<sup>136</sup> Their former sites had by this time been filled by others so the respondents sheltered on a nearby sports field under temporary structures, such as plastic sheets, that provided little protection against the elements.

In the High Court<sup>137</sup>, Judge Davis did not find a violation of the rights of access to housing in section 26(1) and (2). The Court considered GC 3 of the ICESCR and the notion of a minimum core but found that the right in section 26(1) had not been breached because the section does not create an immediate right. The right is only to be realised progressively. Davis J did however find a violation of section 28(1)(c) – children's right to shelter. The right of children to family care,<sup>138</sup> read with the right of children to shelter and the best interests of the child principle,<sup>139</sup> were together interpreted to mean that children should be housed with their parents. The Court made a declaratory order in terms of which the applicants' children and their parents were to receive shelter through the unqualified right of children to shelter.<sup>140</sup>

The State appealed against this decision to the Constitutional Court.<sup>141</sup> The Constitutional Court's judgment was based on sections 26(1), 26(2) and 28(1)(c). In the main judgment, the Court distinguished between children who lived with and children who lived without family support.<sup>142</sup> In terms of the Constitution and international law, children were found to have a right to parental care in the first place and to alternative care by the State only where that is lacking. The Court held that the obligation to provide shelter to children therefore rests primarily on the parents and only in the alternative on the State. The State's direct obligation only kicked in in relation to children who, for example, were removed from the family environment.<sup>143</sup>

The State's obligations towards children who live in the family environment were to provide the legal and administrative infrastructure necessary to ensure that children are afforded the protection encapsulated in section 28. This should be done by providing

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<sup>135</sup> *Grootboom* (note 78 above).

<sup>136</sup> *Ibid* 33.

<sup>137</sup> *Grootboom* (note 78 above).

<sup>138</sup> Section 28(1)(b).

<sup>139</sup> Section 28(2).

<sup>140</sup> *Grootboom* (note 96 above) 17.

<sup>141</sup> *Grootboom* (note 78 above). See also generally K Pillay 'Implementation of Grootboom: Implications for the Enforcement of Socio-economic Rights' (2002) 6 *Law, Democracy and Development* 255, 277.

<sup>142</sup> *Grootboom* (note 78 above) 77.

<sup>143</sup> *Ibid* 77.

families with access to adequate housing and other socio-economic rights on a programmatic and coordinated basis.<sup>144</sup> The Constitutional Court stated that section 28 therefore does not oblige the State to provide shelter on demand to parents and their children, as was held in the High Court.<sup>145</sup>

The main thrust of the judgment concerned section 26. The Court used the 'reasonableness standard' to determine if the action taken by the State was constitutional. This concept takes into account the following factors: the programme must be reasonable in conception and implementation; it must be balanced and flexible; it must pay attention to crisis situations; it must deal with long, medium and short-term needs and it may not exclude a significant segment of society.<sup>146</sup> Finally, the programme must prioritise the needs of the most desperate.<sup>147</sup> The Court found that the State's housing programme was unreasonable because it did not make provision for people who were in crisis and ordered the State to amend its housing policy to provide for these people.<sup>148</sup>

The second case is the *Minister of Health and Others v Treatment Action Campaign and Others (TAC)*.<sup>149</sup> The case concerned the government's programme to prevent mother-to-child transmission (PMTCT) of HIV/AIDS via the provision of the drug Nevirapine in the public health sector. The government's programme provided the drug to HIV-positive women in two selected test sites in each province across the country. The government had restricted the availability of the drug despite the fact that it was available free of charge and had been approved by the South African Medicines Control Council and the World Health Organisation (WHO). A significant number of HIV-positive pregnant women and their children, who lived outside the test sites areas and who could not afford private hospitals where the drug could also be administered, were therefore prevented from accessing that service. The first issue before the Court was therefore whether those women and children had been unjustifiably excluded. The second issue was whether Government was constitutionally obliged to plan and implement an effective, comprehensive and progressive programme for the provision of PMTCT of HIV throughout the country.<sup>150</sup>

The High Court<sup>151</sup> ordered the government to make the drug available to pregnant women who give birth in public hospitals to which the programme had not been extended. The government was also ordered to plan an effective, comprehensive national programme to reduce mother-to-child transmission, including the necessary counselling and testing and other appropriate elements.<sup>152</sup>

When the matter was appealed in the Constitutional Court, the Court recognised that the right to have access to health care had a negative obligation in terms of which the government could not prevent people from accessing the right. The fact that the policy only reached 10% of HIV-positive mothers in South Africa had implications for the reasonableness of the programme because a significant number of people were excluded.<sup>153</sup>

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<sup>144</sup> Ibid 78.

<sup>145</sup> Ibid 79.

<sup>146</sup> Ibid 39-44.

<sup>147</sup> Ibid 43.

<sup>148</sup> Ibid 66, 99.

<sup>149</sup> *Minister of Health and others v Treatment Action Campaign and others* 2002 (10) BCLR 1033 (CC).

<sup>150</sup> Ibid 1-5.

<sup>151</sup> *Treatment Action Campaign and Others v Minister of Health and Others* Transvaal Provincial Division case number 21182/ 2001.

<sup>152</sup> Ibid 8.

<sup>153</sup> This follows *Grootboom* (note 78 above).

The programme was thus found to be unreasonable because it prevented doctors at public hospitals from providing the drug and because it failed to make provision for counsellors at hospitals and clinics other than the research and training sites to get training on the PMTCT programme and the correct use of the drug.<sup>154</sup>

The rights of children were also considered. This case concerned a drug that could save the lives of many newborn babies and it was therefore an issue of life and death. The Court expanded on *Grootboom* and declared that the State had a duty to support children who were lacking family care because of their parents' financial inability to, for example, provide the necessary medical care.<sup>155</sup>

The third case is *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*.<sup>156</sup> The applicants, who were permanent residents in South Africa but nationals of Mozambique, challenged certain provisions of the Social Assistance Act<sup>157</sup> that reserved the Old Age Pension and Child Support Grants for South African citizens only, thereby excluding permanent residents. The challenge was based on section 27 of the Constitution in terms of which 'everyone' has the right to have access to social security. The case was initiated in the High Court as two separate cases, neither of which attracted a reply by the respondents. In both cases the High Court found the contested provisions to be unconstitutional. The High Court judgment will not be discussed here further as it does not add much to the discussion at hand. The Constitutional Court judgment however raises a number of interesting issues. This was, after all the first socio-economic rights case in which the exclusion of the applicants was also challenged as unfair discrimination under section 9.

The Constitutional Court found that a number of rights were at stake. Apart from the right to social security, the case also affected the right to life, dignity, and equality. This prompted the Court to build on the reasonableness test. Additional factors that had to be taken into account in determining if the State's action was reasonable were: the purpose served by social security; the impact of the exclusion on permanent residents; the relevance of the citizenship requirement to that purpose; and the impact that this has on other intersecting rights.<sup>158</sup>

The Court noted that social grants are targeted at vulnerable indigent people who found themselves in dire circumstances in order to realise constitutional objectives in line with international obligations.<sup>159</sup> It emphasised that basic needs have to be met to ensure that society values the fundamental dignity of the people.<sup>160</sup> The Court found that the discrimination between citizens and permanent residence was unfair and offended a person's dignity – especially because the strictly means-tested grant is aimed at people in poverty. In this regard, the Court pointed out that the Constitution mandates special protection for children and that the denial of support infringes on their rights.<sup>161</sup> The cost of including the groups was held to be small in comparison to the overall amount that was

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<sup>154</sup> *TAC* (note 149 above) 125.

<sup>155</sup> *Ibid* 76-79.

<sup>156</sup> *Khosa* (note 113 above).

<sup>157</sup> Act 59 of 1992.

<sup>158</sup> *Ibid* 49.

<sup>159</sup> *Khosa* (note 113 above) 51. The Court unfortunately does not specify to which international law obligations it refers.

<sup>160</sup> *Ibid* 52.

<sup>161</sup> *Ibid* 86.

allocated to grants,<sup>162</sup> therefore the Court ordered that the Old Age Pension and the Child Support Grant should be available to children and old persons who are permanent residents too. The Court therefore held that the applicants were a vulnerable group in need of constitutional protection. The effect on the dignity of the exclusion of this group of vulnerable people – namely poor permanent residents caring for elderly people and children – was not outweighed by the comparably small cost to the State to affect their inclusion. The exclusion was therefore unreasonable and the State had not proved that this was a justifiable limitation.<sup>163</sup>

## (ii) Analysis of the judgments

(aa) Failure to ‘consider’ and use international law properly to establish the scope and content of the rights

The Courts have thus far not set out the full scope and content of socio-economic rights, let alone children’s socio-economic rights, by using the wealth of available international human rights material.<sup>164</sup> The cases discussed above deal with human rights issues on the agenda of the international human rights bodies like the CRC, the CESCR, the African Commission and the African Committee of Experts. The materials produced by these bodies aim to implement and advance human rights. Although the materials are not strictly binding, they should be ‘considered’ in defining the full scope and content of the rights in the BOR.

The Courts are the institution best situated to set out such definitions. Government would thereby have clear guidelines as to what is expected of it in the short, medium and long term. Government may not be aware of what the full scope and content of the rights are. Courts are specialists in analysing international law obligations and should therefore provide guidance in terms of the full scope and content of the different rights so that this can be incorporated in the planning and designing of government plans. The full obligations of the State therefore ought to be set out by the Court so that the State can plan and monitor accordingly.<sup>165</sup>

The High Court and the Constitutional Court in *Grootboom* did not use the UNCRC or the AfCRWC and the related instruments satisfactorily. No mention at all is made of the AfCRWC in the judgements. The Constitutional Court only mentions that the UNCRC obliges States parties to ensure that the rights of children are protected. Section 28 of the Constitution is cited as the main mechanism to ensure that this happens.<sup>166</sup> The Court said that the rights of children are protected in the first place by compelling parents to care for

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<sup>162</sup> Ibid 62.

<sup>163</sup> Ibid 56.

<sup>164</sup> One of the main critiques of the Court’s model of reasonableness review for the positive duties imposed by socio-economic rights is its failure to engage sufficiently with the substantive scope and content of the various socio-economic rights. See D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?" in H Botha et al (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33-56; S Liebenberg *The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor* (2005) 14; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1-26, 5-11; M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383-417, 406-407.

<sup>165</sup> Amicus submission by the Community Law Centre *In re Certain Amicus Curiae Applications relating to Minister of Health and Others vs Treatment Action Campaign and Others* 19,

<[http://www.communitylawcentre.org.za/ser/docs\\_2002/TAC\\_MTCT\\_Case\\_Heads\\_of\\_Arguments.doc](http://www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc)>.

<sup>166</sup> *Grootboom* (note 78 above) 75.

their children and this is enforced through legislation, criminal and civil law and through social welfare programmes.<sup>167</sup> The Court seems to underplay the fact that many parents are willing but financially unable to provide the standard of living that children have a right to in terms of the UNCRC and the AfCRWC.<sup>168</sup> It is correct that the UNCRC and the AfCRWC oblige parents to provide this standard of living for their children in the first instance.<sup>169</sup> The State must however provide assistance to parents in case of need as housing is specifically mentioned in the UNCRC.<sup>170</sup> The State therefore has a secondary duty to secure the conditions of living necessary for the child's development<sup>171</sup> through the provision of 'material assistance'. The Court should have at least acknowledged the fact that the UNCRC and the AfCRWC oblige the State to provide material assistance and support programmes in cases of need to parents of children.<sup>172</sup>

The duty of the State to assist parents in their child-rearing responsibilities was later acknowledged by the Court in the *TAC* case. The Court corrected the misconception created in *Grootboom* by clearly stating that the State has an obligation to assist parents in caring for their children if they are financially unable to do so.<sup>173</sup> This is in line with article 27(3) of the UNCRC and 20(2) of the AfCRWC. Unfortunately, the Court did not say that it was bringing the jurisprudence in line with international law. It also did not find that children had a direct entitlement to basic health care services when their parents were too poor to afford these services. It relied instead on the rights of children to basic health care services to conclude that the restrictive policy on Nevirapene was unreasonable.<sup>174</sup>

International law on children's socio-economic rights could have been given greater consideration in *TAC*. The jurisprudential foundations that the Court laid down in that case are arguably flawed due to the Court's non-consideration of key international law relevant to the case.<sup>175</sup> The Court attempted to side-step the need to give content to the right to access to health care services in section 27(1)(a).<sup>176</sup> It emphasised that the rights in sections 26(1) and 27(1) were inextricably linked to the right to have reasonable measures taken within the available resources to achieve the progressive realisation of the right in sections 26(2) and 27(2). The reasonableness of the measures will therefore be assessed in relation to whether they are aimed at the progressive realisation of the right in section 27(1) – not at whether they will eventually lead to the full realisation of the right. As a result, the Court makes no mention as to what the full scope of the right in section 27(1) actually entails.<sup>177</sup> The Court should have defined the full scope and content of the right in section 27(1) before embarking on the reasonableness inquiry. To this end the Court should have used the ICESCR, the AfCHPR, the UNCRC, the AfCRWC and the relevant interpretative materials.

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<sup>167</sup> Ibid 76.

<sup>168</sup> Article 27 of the UNCRC and article 20(1) of the AfCRWC.

<sup>169</sup> Article 27(2) of the UNCRC and article 20(1) of the AfCRWC. Note that these provisions are almost exactly the same.

<sup>170</sup> Article 27(3) of the UNCRC and article 20(2)(a). Note both these articles also mention nutrition and clothing.

<sup>171</sup> S Detrick 'The right of a child to an adequate standard of living' in S Detrick (ed) *A Commentary on the United Nation Convention of the Rights of the Child*. (1999) 453-470, 459.

<sup>172</sup> Ibid 460.

<sup>173</sup> *TAC* (note 149 above) 79.

<sup>174</sup> Ibid 78.

<sup>175</sup> Bilchitz (note 164 above) 2.

<sup>176</sup> Ibid 6.

<sup>177</sup> Ibid 7.

Both the ICESCR and the AfCHPR recognise the right to the 'highest' (ICESCR) and the 'best' (AfCHPR) attainable standard of health.<sup>178</sup> The ICESCR specifically recognises that the full realisation of this right must include steps to provide for the reduction of still birth rates and of infant mortality and for the healthy development of the child.<sup>179</sup> These steps under the ICESCR must include the prevention, treatment, and control of diseases.<sup>180</sup> It also explicitly refers to the prevention and control of epidemics.<sup>181</sup>

A number of provisions in the UNCRC and the AfCRWC are also directly relevant to establishing the scope and content of the right and the obligations of the State in relation to children's right to basic health care. Article 24 of the UNCRC and article 14(1) of the AfCRWC oblige States parties to recognise the right of the child to the enjoyment of the 'highest' or 'best' attainable standard of health respectively.<sup>182</sup> To this end the State must provide facilities for the treatment of illness. No child shall be deprived of the right to access such facilities. Articles 24 of the UNCRC and 14 of the AfCRWC respectively state that infant mortality shall be 'diminished' and 'reduced'.<sup>183</sup> They also point to the duty to ensure pre- and post-natal health care for mothers<sup>184</sup> and recognise the duty to provide health care for expectant and nursing mothers.<sup>185</sup>

These articles state also that disease shall be combated through the provision of adequate nutritious food and clean drinking water.<sup>186</sup> This is acutely relevant to the *TAC* case because Nevirapine can prevent mother-to-child transmission at birth but cannot reduce the chance of transmission of the virus if the child is being breastfed. This means that PMTCT requires mothers to have access to clean drinking water, formula feed, bottles and education about the dangers of breastfeeding. A full interpretation of the right to health care services needs to take into account that the supply of clean water and nutritious food is inextricably related to the right to access to health care.<sup>187</sup> The Court recognises that clean drinking water is necessary for the proper prevention of mother-to-child transmission<sup>188</sup> but doesn't link the duty to provide this service progressively with the right to health care as it is found in the ICESCR. The failure to link these provisions can be argued to stem from an incomplete analysis of international law.

In *Khosa*<sup>189</sup> the Court again failed to look at international law in any detail. This case does not even mention the relevant treaties. In the first place the Court could have sought guidance in relation to the claim of discrimination. In that regard it should have looked at

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<sup>178</sup> ICESCR article 12(1) and AfCHPR article 16. It was only following the *TAC* case that the CESCR adopted a General Comment on the right to the highest attainable standard of health (note 79 above).

<sup>179</sup> ICESCR article 12(2).

<sup>180</sup> ICESCR article 12(d). There is no corresponding provision in the regional agreements.

<sup>181</sup> ICESCR article 12 (2)(b).

<sup>182</sup> The other relevant rights are the child's right to life and maximum survival and development (article 6(2) UNCRC; article 5 of the AfCRWC); parents' joint responsibilities, assisted by the State (article 18 of the UNCRC; article 19 of the AfCRWC); the child's right to an adequate standard of living and the need for the State to provide assistance to parents where there is a need (article 27 of the UNCRC; article 20 of the AfCRWC).

<sup>183</sup> Incidentally this is also mentioned by the Human Rights Committee in relation to the right to life. See the Human Rights Committee General Comment 6, Article 6 (1982) para 5.

<sup>184</sup> UNCRC article 24 (2)(d)

<sup>185</sup> AfCRWC article 14(2)(e).

<sup>186</sup> UNCRC article 24(2)(c), AfCRWC article 14(2)(c).

<sup>187</sup> G van Bueren 'The right of the Child to Survival and Development' in G van Bueren (ed) *The International Law on the Rights of the Child* (1995) 293-327, 315.

<sup>188</sup> *TAC* (note 149 above) paras 15, 30, 64.

<sup>189</sup> *Khosa* (note 156 above)

the ICCPR. Article 2(1) states that special measures of protection are mandated for vulnerable groups. Read together with the ICESCR it is clear that children are in fact such a vulnerable group: article 10(3) of the ICESCR states that special measures of protection should be taken on behalf of all children and young persons. This provision is of immediate application.<sup>190</sup> This article would have assisted the Court because it states that such measures of protection should be taken without discrimination for reasons of parentage or other conditions. The AfCHPR would also have been directly relevant because it states that the aged shall have the right to special measures of protection.<sup>191</sup> Article 2(3) of the ICESCR states that developing countries may determine to what extent they guarantee the economic rights to non-nationals. The fact that the discrimination of children on the basis of the status of their parents is prohibited, and the fact that old persons are considered a vulnerable group, could lead to a conclusion that discrimination of older persons on the basis of their status, and discrimination of foreign children on the basis of their parents' status, is not allowed.

The interplay between the right to equality and socio-economic rights is interesting because the obligation to ensure rights without discrimination is an obligation of immediate application. The UNCRC and the AfCRWC oblige States parties to respect and ensure the rights *without* discrimination of any kind irrespective of the status of the child or his or her parent.<sup>192</sup> In addition, the guidelines for reporting for States parties to the UNCRC require information on measures they have taken to ensure that such discrimination is combated both in law and in practice.<sup>193</sup> Information on specific measures taken to prevent discrimination of disadvantaged groups of children, including children who are non-nationals or migrants, is also requested. The UNCRC therefore applies to all children in the country and the State may not discriminate against children purely on the basis that their parents are not South African nationals. This would have enriched the judgment without having to come to a different conclusion.

Besides the non-discrimination aspect, article 9 of the ICESCR is directly relevant. It states that '[t]he State parties to the present Covenant recognize the right of everyone to social security, including social insurance'. Article 11 is also relevant as it states that State parties shall recognise 'the right of everyone to an adequate standard of living for himself and his family [...]'. Article 26 of the UNCRC recognises the right of 'every child to benefit from social security including social insurance [...] [*emphasis added*]. The AfCHPR does not mention social security but does oblige the State to 'assist the family'.<sup>194</sup>

In all the cases, the Court should have outlined the scope and content of the relevant socio-economic rights by referring to the UNCRC, ICESCR, AfCRWC, and the AfCHPR before it embarked on a reasonableness analysis of the programme aimed at implementing the right.<sup>195</sup> This would have made it clear that, for example, the right of access to adequate health care as it appears in the Constitution, includes the elements listed in the ICESCR and the UNCRC and that the right is inextricably related to other socio-economic rights. The Courts cannot ignore the huge obstacles related to the implementation of all socio-economic rights that are faced by the government; however they should still outline the full extent of the rights using international law, even if they do not order immediate implementation. The

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<sup>190</sup> CESCR GC 3 (note 55 above) 5.

<sup>191</sup> Article 18(4).

<sup>192</sup> Article 2(1) of the UNCRC and article 3 of the AfCRWC.

<sup>193</sup> See Reporting Guidelines (note 24 above) paras 9-10.

<sup>194</sup> Article 18(2).

<sup>195</sup> Bilchitz (note 164 above) 8.

obligation is to strive towards the full realisation of the rights progressively and the Courts should thus define what the full extent of the right is. The government's plans in relation to this right can then be assessed in terms of the progressive movement towards the full content of the right. This would also assist the government in devising an appropriate plan because they would know what they are constitutionally obliged to do.

(bb) Failure to recognise the 'minimum core'

The South African Constitution does not expressly provide for a minimum core of socio-economic rights. In light of South Africa's international law commitments – set out earlier in this paper – it can be persuasively argued that everyone should have the right to a minimum core of basic entitlements.<sup>196</sup> Arguments for the incorporation of minimum core obligations for everyone are based on a number of international law provisions. Firstly, GC 3 of the CESCR, which first laid out the obligation, is highly persuasive despite the fact that South Africa has not ratified the ICESCR. Secondly, GC 5 of the CRC, where it is stated that the General Comments of the CESCR are complementary to the UNCRC, including the minimum core obligation, is also highly persuasive; and the UNCRC has been ratified by South Africa. Thirdly, the socio-economic rights in the Constitution are very similar to the rights in the ICESCR and the UNCRC, and the constitutional provisions were drafted with the international law in mind.

The minimum core could also be the key to understanding the relationship between the socio-economic rights of children in section 28 and the other socio-economic rights in sections 26 and 27 of the Constitution: the section 28 socio-economic rights constitute one facet – namely the minimum – of the more general, full-blown socio-economic rights. In relation to children, section 28 could be used to put the minimum core rights of children beyond doubt. The minimum core rights of children therefore are constitutionally protected whereas the minimum core rights of everyone have to be imported from international law.<sup>197</sup>

This argument makes sense considering the child's right to family care, parental care or appropriate alternative care,<sup>198</sup> as the argument respects the rights of children not to be

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<sup>196</sup> K Creamer *The impact of South Africa's evolving jurisprudence on children's socio-economic rights on budget analysis* (2002) 27. K Creamer 'The implication of socio-economic rights jurisprudence for government planning and budgeting: The case of children's socio-economic rights' (2004) 8 *Law Democracy and Development* 208-221, 218. *Comments on the Social and Economic Rights in the Working Draft of the New Constitution* (22 November 1995) 4. M Olivier 'Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences' (2002) 33 *VUWLR* 117-151, 140. L Jansen van Rensburg *The Extent of Justiciability of Socio-economic Rights of Children and the Courts Application of these Rights*, North West University (2004) [unpublished, unnumbered manuscript on file with the authors].

<sup>197</sup> Alston & Quinn (note 76 above) 260. This was also argued by the *amici* in *Grootboom* (note 78 above).

<sup>198</sup> These rights are set out in section 28(1)(b) of the South African Constitution and the following provisions in the UNCRC: the preamble states that the family is the natural environment for the growth and wellbeing of the child; article 5 states that the responsibilities of parents shall be respected; article 9 states that the child shall not be separated from his or her parents unless it is in the best interests of the child to do so; article 18 states that both parents have the responsibility for the upbringing of their children; and article 27 states that the parents or other persons responsible for the child have the responsibility to secure the conditions of living necessary for the child's development. The AfCRWC states in article 18 that the family is the natural unit and basis of society and shall enjoy protection and support of the State. Article 19 states that every child shall enjoy parental care and protection whenever possible. Children shall not be separated from their parents unless it is in the best interest of the child.

separated from and to be cared for by their parents. It would be futile to grant children a minimum core of socio-economic entitlements while leaving the adults to continue to suffer severe deprivation.<sup>199</sup> This approach also honours international law obligations in relation to socio-economic rights in general,<sup>200</sup> in that – unlike the reasoning of Davis J in *Grootboom* – it does not ignore the plight of other vulnerable members of poor communities, such as the elderly and the disabled, and it does not single out poor children and their caregivers as the only vulnerable group deserving of basic socio-economic rights free of the usual limitations. In accepting the minimum core approach to all socio-economic rights, other vulnerable groups of people would also be granted a minimum measure of protection. This would also be in line with the Court's reasonableness test which does not permit 'those in desperate need and living in intolerable conditions'<sup>201</sup> to be excluded from the reach of programmes.

In *Grootboom*, the Constitutional Court considered GC 3 of the CESCRC, which the *amici* used to argue for the minimum core of the right to have access to adequate housing.<sup>202</sup> The minimum core approach was however rejected by the Court in both *Grootboom* and *TAC*.<sup>203</sup> In *Grootboom*, the Court reasoned that there are practical difficulties with ascertaining the varying degree of needs in the country and that there is a lack of information on what these needs are.<sup>204</sup> The Court was also concerned that it would be impossible to give everyone access to even a 'core' service immediately because the Court assumed that the resources would not be sufficient.<sup>205</sup> Finally the Court also questioned its institutional competency to decide on such matters.<sup>206</sup> In *TAC*, the Court rejected the notion that section 27(1) conferred a separate positive right free from the limitations set out in section 27(2). In both cases, the Court did however say that failure to fulfil minimum core needs should be taken into account in determining the reasonableness of the government programme.<sup>207</sup> It also found that the rigid and restrictive policy on Nevirapine was unreasonable in light of section 28(1)(c) because it excluded a group of particularly vulnerable people.<sup>208</sup> The issue of a minimum core was not dealt with by the court in the *Khosa* case.

The net effect of the above cases is that the Court ordered that a reasonable government programme must cater for the urgent needs of vulnerable groups. The reasonableness test

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Article 20 sets out that the parents carry the primary responsibility for the upbringing and development of the child.

<sup>199</sup> This was essentially the reasoning of Davis J in the High Court judgment in *Grootboom*, 16. The High Court however did not base its conclusion on the right to a minimum core but on the socio-economic rights of children in section 28(1)(c) because they are not limited by 'progressive realisation' and 'the availability of resources'. However, its reasoning was flawed in ignoring the basic needs of other vulnerable members of society.

<sup>200</sup> *In re Certain Amicus Curiae Applications relating to Minister of Health and Others vs Treatment Action Campaign and Others* 17, <<http://www.constitutionalcourt.org.za>>.

<sup>201</sup> *Grootboom* (note 78 above) paras 43-44, 68.

<sup>202</sup> *Ibid* 29.

<sup>203</sup> Submission of the Community Law Centre and Idasa: *Amicus Heads of Argument TAC case* (April 2003) paras 14 & 23, p 181,

<[http://www.communitylawcentre.org.za/ser/docs\\_2002/TAC\\_MTCT\\_Case\\_Heads\\_of\\_Arguments.doc](http://www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc)>

The *amici* argued that section 27(1) contains an unqualified core duty to fulfil those aspects of the right that can be realised immediately and that section 27(2) speaks to those positive dimensions which cannot be realised immediately. On this basis, they argued that the minimum core right of health services included the provision of Nevirapine to pregnant, HIV-positive mothers and their babies.

<sup>204</sup> Yacoob J para 32 & 33.

<sup>205</sup> Yacoob J para 35.

<sup>206</sup> Yacoob J para 38.

<sup>207</sup> Yacoob J para 33. *TAC* para (note 149 above) 34.

<sup>208</sup> *TAC* (note 149 above) 68.

ultimately achieves a similar effect to the sentiments behind the minimum core. There are however three important points of difference. Firstly the judgment under the reasonableness test does not confer a direct entitlement to a minimum core of the socio-economic right. The plight of individuals who have to live under conditions of poverty will therefore not be directly improved. They may only benefit much later once the programme has been adjusted to cater for their needs. In the meantime they have to wait while continuing to live under conditions of poverty.<sup>209</sup>

Secondly the Court did not require the conditions of the claimants to be addressed as a matter of priority. Under international law, the minimum core confers a higher standard of review for the non-fulfilment of minimum core rights. This higher standard does not automatically apply under the reasonableness test even if minimum core needs are not met – it is merely a factor that can be considered. The needs of people living under conditions of extreme poverty can therefore be given the same priority as non-core needs of advantaged social groups and still be considered reasonable. It is questionable whether a society based on human dignity, equality and freedom can justify the improvement of the social condition of advantaged groups even if the basic bare minimum needs of disadvantaged groups have not been met.<sup>210</sup>

The third problem relates to the burden of proof. In terms of the reasonableness review used by the Court, the claimant must prove that the government's programme is unreasonable. This requires potential litigants to review the government's policies, programmes and legislation within the national, provincial and local spheres of government. They will also have to review the whole panoply of social programmes adopted by the State, as socio-economic rights are all interconnected. They would also have to identify and quantify the resources available to the relevant socio-economic needs and then will have to argue that the State's failure to meet their needs is unreasonable.<sup>211</sup> This is a very difficult task in any respect but it seems close to impossible especially for someone who is living under deplorable conditions, such as the Grootboom community. In terms of the minimum core inquiry on the other hand, the individual would succeed in establishing a *prima facie* violation if (s)he can show that (s)he lacks access to basic subsistence. The burden would then rest with the State to show that every effort has been made to use all the resources at its disposal in an effort to satisfy as a matter of priority those minimum core obligations. The State is of course also given a chance to justify itself via the general limitations clause in section 36.<sup>212</sup>

Even if the Court chose not to decide what the minimum core consists of, it should have recognised the existence of a minimum core for socio-economic rights. Had the Court been willing to recognise such a minimum core, Courts in future cases would have been encouraged to look at the General Comments of the CESCR and the CRC to assist them in determining what the minimum core of socio-economic rights are.

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<sup>209</sup> S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?' (2002) *Law, Democracy and Development* 159-191, 176.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid* 177.

<sup>212</sup> *Ibid.*

(cc) Other measures of implementation arising from international law

The General Comments made by the various international supervisory bodies set out various creative strategies to promote the realisation of socio-economic rights, irrespective of the availability of resources. The CRC GC 5 on implementation, as discussed above, lays out a number of avenues for furthering children's socio-economic rights. The GC was not yet published when the cases were considered but will undoubtedly be relevant to future cases.

The government has an obligation to monitor and analyse the progress it has made in relation to the realisation of socio-economic rights. The CDESCR GC on adequate housing sets out the duty to monitor the situation with respect to housing.<sup>213</sup> The Court in *Grootboom* stated that the minimum core could not be determined by the Court because it didn't have sufficient information on the diverse needs in the country.<sup>214</sup> Had the Court properly consulted and considered international law it could have ordered the State to provide the information needed to assess what the minimum core needs of housing in South Africa were and thereafter to monitor the progress of implementation. The UNCRC also recommends that States should monitor and assess the progress made towards the realisation of children's rights through data collection and the development of child-sensitive indicators.<sup>215</sup> The 'best interests of the child' principle – also contained in the South African Constitution – requires the State to undertake a continuous process of child-impact assessment and evaluation.<sup>216</sup> The supply of sufficient and reliable data on children is an essential part of implementation<sup>217</sup> for all rights and the Courts should be able to order the government to do so. This would not only satisfy South Africa's international law obligations but would also be in line with the best interests principle in the Constitution.<sup>218</sup> The GC on implementation by the CDESCR also states that, while legislation is very important, the Courts should also require the State to undertake a whole range of activities, including the collection of information and data.<sup>219</sup>

In relation to monitoring, the Court mentioned in *Grootboom* that the South African Human Rights Commission (SAHRC)<sup>220</sup> would monitor and report on the progress made in relation to the realisation of socio-economic rights.<sup>221</sup> The SAHRC however does not have a *specific* mandate to deal with the rights of children apart from their general socio-economic rights.<sup>222</sup> The SAHRC has in fact reported that most of the government reports that they request in order to monitor socio-economic rights, do not articulate the measures taken or the extent of their impact on the lives of any vulnerable groups, let alone on children

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<sup>213</sup> CDESCR GC 4 (note 80 above) paras 10 & 13.

<sup>214</sup> Yacoob J para 33.

<sup>215</sup> CRC GC 5 (note 23 above) paras 48-50.

<sup>216</sup> Ibid paras 45-47.

<sup>217</sup> Ibid para 48. See also Hodgkin & Newell (note 72 above) 66-67.

<sup>218</sup> See *Concluding Observations of the Committee on the Rights of the Child: South Africa of 23/02/2000*, <<http://www.law.wits.ac.za/humanrts/crc/southafrica2000.html>> para 14. The CRC indicated concern for South Africa's lack of mechanisms to collect comprehensive and disaggregated quantitative and qualitative data for all areas covered by the Convention in order to monitor and evaluate, in particular to identify vulnerable children.

<sup>219</sup> CDESCR GC 1 (note 24 above) para 7 and GC 3 (note 67 above) generally. These General Comments were available to the Court at the time of the cases set out above.

<sup>220</sup> Section 184(3) of the Constitution.

<sup>221</sup> Yacoob J para 88.

<sup>222</sup> See <<http://www.sahrc.org.za>> for more details. See also section 184(3) of the Constitution.

specifically.<sup>223</sup> In the concluding observations to South Africa, the CRC expressed concern that the SAHRC did not have sufficient resources to carry out the mandate of protecting the rights of children specifically. In line with the GC on the role of independent human rights commissions issued by the CRC,<sup>224</sup> any broad-based human rights institution should include a specific focus on children.<sup>225</sup>

In future cases the Courts should also consult the General Comments on implementation to see what other measures of implementation it can order immediately, irrespective of the available resources. For example, analysing the budget in terms of what proportion of national and other budgets are allocated to the social sector and within that to children, directly or indirectly.<sup>226</sup> For this to happen, training and capacity building amongst all people involved in implementing the rights of the child, including lawyers,<sup>227</sup> should take place. Court researchers should also receive training to ensure that the Court gets an up-to-date analysis of constitutional and international human rights law.<sup>228</sup>

The Courts should also apply the general principles of the UNCRC in all cases related to children's rights.<sup>229</sup> This means that, in every matter having a direct or indirect effect on children, the best interests principle should be actively applied. In determining what is in the best interests of the child, the views of the child should be considered where this is possible when policies and programmes are designed.<sup>230</sup> The court should also always consider the inherent right to survival and development of the child.<sup>231</sup> Lastly, the court must always consider the right of the child to non-discrimination.<sup>232</sup> These principles were not considered in the *Grootboom* and *TAC* cases. In future a Court could order that the policy or programme should take into account the general principles – thereby applying a child rights perspective.<sup>233</sup>

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<sup>223</sup> IM Murray & L Jansen van Rensburg *The Utilisation of the right of Children to Shelter to Alleviate Poverty in South Africa*, University of the North (2004) 22 [unpublished document on file with the authors].

<sup>224</sup> CRC GC 7 (note 52 above).

<sup>225</sup> Ibid para 6.

<sup>226</sup> CRC GC 3 (note 52 above) paras 51 & 52.

<sup>227</sup> Especially if one considers that international law is not a compulsory subject at some universities, or was only introduced as a compulsory subject after 1999 at others. This means that some lawyers are not trained to use these instruments.

<sup>228</sup> CRC GC 5 (note 23 above) paras 53-55.

<sup>229</sup> Ibid para 12.

<sup>230</sup> See article 12 and *ibid*.

<sup>231</sup> *Ibid*. Again, this requires the State to identify groups of children that are vulnerable and that may need special measures of protection, and implies the need for data collection.

<sup>232</sup> *Ibid*.

<sup>233</sup> *Ibid*.

## V. CONCLUSION

The rights of children form part of a comprehensive system of human rights protection. The enforcement of socio-economic rights at an international law level however is especially weak. The Court as an institution that provides checks and balances to Government is suitably placed to ensure that the obligations in relation to children's socio-economic rights are actually enforced throughout its jurisprudence.

This paper shows that there is a wealth of material relating to the implementation of specific socio-economic rights in the international domain. This material can empower the Courts to ensure that the obligations that the State has accepted through the process of signing and ratifying international law treaties are in fact realised.

Courts are mandated by the Legislature and the Constitution to interpret socio-economic rights in line with the international law provisions. We therefore argue that there are cogent reasons for the Courts to place more emphasis on what the international treaties and their supervisory bodies say in relation to socio-economic rights obligations generally and specifically in relation to children.

The underlying assumption throughout this paper is that it is neither possible nor desirable to consider the rights of children in isolation from their communities.<sup>234</sup> We argue however that, due to children's vulnerability, Courts are required through international law to assess State action through a child rights perspective, which requires the active consideration of the general principles of the UNCRC in every decision that has a direct or indirect effect on children.

We have argued that the Courts do not place sufficient emphasis on international law when they define the content of the rights found in the Constitution. The obligation in section 39 on Courts to 'consider' international law when interpreting the rights in the BOR means that at the very least the relevant provisions of international law must be mentioned and, if they are not applied, the Court must give reasons for not doing so, thereby shaping future jurisprudence.

In the socio-economic rights cases that have come before the Courts thus far, too much emphasis has been placed on the reasonableness of the programme that is meant to address the right. Not enough emphasis has been placed on defining the full scope and content of the rights using international law and its related materials. It is critical to establish the scope and content of the rights in order to clarify for Government the full extent of its obligations in relation to socio-economic rights. Furthermore, in general, the Courts in these cases have failed to attach the appropriate weight to international law in relation to the rights of children and to utilise it in the cases before them.

For the Courts to enforce the socio-economic rights of children in the BOR successfully and in a fulsome manner, it is essential that they engage actively with the international human rights framework that has been set out.

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<sup>234</sup> See the dangers of this approach outlined by Yacoob J in *Grootboom* para 77. See also S Liebenberg 'Taking stock: The jurisprudence on children's socio-economic rights and its implications for government policy' (2004) 5 *ESR Review* 2.

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# PROJECT 28

THERE SHALL BE  
HOUSES  
SECURITY  
AND  
COMFORT  
FOR ALL



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