

**The interpretative use of the Convention on the Rights of the  
Child in judicial decisions affecting children's socio-economic  
rights in South Africa**

*By Solange Rosa*

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## Abstract

*South Africa has extremely high rates of poverty amongst children. It is estimated that between 60 and 75% of South Africa's children live in poverty. In addition, children are negatively affected by high rates of HIV infection and related AIDS deaths of their caregivers. This context places millions of children in South Africa in highly vulnerable situations.*

*The UN Convention on the Rights of the Child (UNCRC) integrates both civil and political rights and social, economic and cultural rights. All the rights in the UNCRC are relevant to children living in poverty, but some of the rights are more directly relevant than others, such as article 27, which deals with the right to an adequate standard of living, and article 24 which addresses the right to health care.*

*South Africa ratified the UNCRC in June 1995. This means that the government is legally bound to implement the rights of children in the UNCRC. The UNCRC also influenced the design of the socio-economic rights and the related obligations to children in the South African Constitution. The interests of South Africa's children are thus protected by strong provisions both in our Constitution and via our obligations under the UNCRC.*

*This paper will explore and elaborate upon how international human rights law, particularly the UNCRC, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the comments of their Committees, can be used more effectively in order to realise the socio-economic rights of children living in poverty in South Africa. The paper will elaborate upon and compare the obligations to realize children's socio-economic rights placed on the South African government by the UNCRC, the ICESCR and the Constitution. These international law instruments are relevant because the South African Constitution states clearly that any interpretation of the Bill of Rights must consider international law.*

*Further, an analysis will be made of how the South African High Courts and Constitutional Court has used the UNCRC and the ICESCR (which has not been ratified) in its interpretation of children's socio-economic rights. I conclude that the Constitutional Court has thus far in its jurisprudence not made maximum use of the UNCRC in its interpretation of children's socio-economic rights. Recommendations will thus be made as to how the Constitutional Court could use the provisions in the CRC to improve the lives of children living in poverty, and how the Committee on the Rights of the Child could further strengthen their general comments to give greater interpretive guidance to States in implementing their obligations under the UNCRC.*

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## Outline

1. INTRODUCTION
2. THE INTERNATIONAL HUMAN RIGHTS SYSTEM
  - 2.1 International treaty enforcement mechanisms
  - 2.2 Enforcing socio-economic rights in international human rights law
3. SOCIO-ECONOMIC RIGHTS OF CHILDREN IN THE CONVENTION ON THE RIGHTS OF THE CHILD
  - 3.1 Overview of the CRC
  - 3.2 The protection of socio-economic rights – rights of ‘provision’
  - 3.3 Obligations of States
4. SOUTH AFRICA: MEETING ITS OBLIGATIONS TO REALISE CHILDREN’S SOCIO-ECONOMIC RIGHTS
  - 4.1 Through legislative reform
  - 4.2 Interpreting national legislation
  - 4.3 Incorporating children’s rights in the Constitution
  - 4.4 Interpreting the Bill of Rights
5. AN ANALYSIS OF THE COURTS’ USE OF THE CRC IN CASES INVOLVING CHILDREN’S SOCIO-ECONOMIC RIGHTS
  - 4.1. High Court: *Centre for Child Law & Another v Minister of Home Affairs and Others*
  - 4.2. High Court: *Bhe & Others v Magistrate, Khayelitsha & Others*
  - 4.3. Constitutional Court: *Grootboom*
  - 4.4. Constitutional Court: *TAC*
  - 4.5. Constitutional Court: *Bhe & Others v Magistrate, Khayelitsha & Others*
  - 4.6. Constitutional Court: *Khosa*
6. CONCLUSION

## BIBLIOGRAPHY

# The interpretative use of the Convention on the Rights of the Child in judicial decisions affecting children's socio-economic rights in South Africa

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## 1. INTRODUCTION

*Poverty is the "inability of individuals, households or communities to command sufficient resources to satisfy a socially acceptable minimum standard of living"*<sup>1</sup>

The situation of child poverty in South Africa is radical. As a wealthy developing nation, we have an astonishing 75% of children aged 0-17 living in poverty.<sup>2</sup> This amounts to more than 13 million children. This is both a result of inequitable policies under apartheid, as well as insufficient policies developed under our new democracy to counteract this dire situation.

Child poverty appears to be increasing.<sup>3</sup> The increasing rates are likely attributable to increasing unemployment and the impact of HIV/AIDS on breadwinners in the households. Both of these factors are continuing to increase, which also likely means future increases in the rates of child poverty in South Africa.

Poverty is more than just insufficient income. It also includes a lack of opportunities, lack of access to assets and credit, as well as social exclusion. Poverty is complex, multi-faceted and fluctuates in depth and duration.

The high level of child poverty can also be seen in the following harsh facts:<sup>4</sup>

- 21.6% of children between 0-9 years suffer from stunting, 10% are underweight and 4% are wasted<sup>5</sup>;
- The infant mortality rate is 49 per 1000 (average for SA)<sup>6</sup>;
- Most children use pit latrines for toilets<sup>7</sup>;
- 24% of schools have no water in walking distance, an average one toilet per 20 learners, and 11.7% do not have any sanitation at all.<sup>8</sup>

Children living in poverty are being denied their basic and fundamental Constitutionally guaranteed rights to "basic nutrition, shelter, basic health care services, and social services"

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<sup>1</sup> Committee of Inquiry into a Comprehensive Social Security System *"Transforming the present, Protecting the Future: Consolidated Report"*, (2002) 15.

<sup>2</sup> Using a poverty line of R430 a month, 74.9 % of children aged 0-17 in South Africa are poor. Using a R215 per month poverty line, 54.34% of children across South Africa are ultra-poor. This means that *9.7 million children from birth to age 17 are living in deep poverty*. In E Coetzee & J Streak 'Monitoring child socio-economic rights in South Africa: Achievements and challenges' in (2004) 17-18.

<sup>3</sup> The analysis of the October Household Survey data (1995 & 1999) by Ingrid Woodard for IDASA shows that child poverty rates have increased. Between 1995 and 1999 the rate of child poverty in South Africa (on a poverty line of R400.00 / month per capita) increased from 64.7% to 75.8%, and the rate of children in *dire* poverty (calculated on a poverty line of R200.00 / month per capita) increased by 19.2%, from 38.9% to 58.1%.

<sup>4</sup> Figures quoted in P Martin & S Rosa *Child Poverty Fact Sheet*, ACCESS, (2002)

<sup>5</sup> *National Food Consumption Survey*, 1999.

<sup>6</sup> Shung King M *et al.* 2002. *Child Health in the South African Health Review* (2002).

<sup>7</sup> Statistics South Africa (SSA) 1999, October Household Survey 1996, (Statistical Release P0317). Pretoria.

<sup>8</sup> School Register of Needs 1997 - quoted in *"State of the Nation's Children Report"*2002.

(S28(1)), and their “right to a standard of living adequate for his/her development”, as provided for in the UN Convention of the Rights of the Child (CRC) ratified by South Africa in 1995.

By ratifying the Convention on the Rights of the Child, South Africa is obliged to advance the social and economic rights of children found in the Convention, in addition to its constitutional obligations. By signing and ratifying the CRC, South Africa agrees to recognise and implement all the rights described in the Convention.

This paper is concerned with the manner in which the Convention on the Rights of the Child could be strengthened to provide greater assistance to the interpretive power of the South African courts in bringing about the realisation of the socio-economic rights of children.

## **2. THE INTERNATIONAL HUMAN RIGHTS SYSTEM**

Several human rights treaties have been adopted under the auspices of the United Nations (UN) since it was founded in 1945. The excitement about the elaboration of shared international human rights frameworks has been somewhat dampened by concern about the lack of effective implementation of these standards. Six major human rights treaties have since been elaborated:

- the International Convention on the elimination of All Forms of Racial Discrimination (1965) (CERD);
- the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR);
- the International Covenant on Civil and Political Rights (1966) (ICCPR);
- the Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT); and
- the Convention on the Rights of the Child (1989) (CRC).<sup>9</sup>

South Africa has signed and ratified the CERD, ICCPR, CEDAW, CAT and the CRC and it therefore a State Party to these, but it has only signed the ICESCR.

### **2.1 International Treaty Enforcement Mechanisms**

Treaties are legally binding agreements between States that create rights and duties under international law. Treaties are often also referred to as ‘conventions’, ‘covenants’, or ‘charters’. A State will first sign a treaty, indicating that the State intends to become a party to the treaty, and then will ratify it. Simply signing a treaty, does not legally bind the State to the treaty, but it means that the State must not act in a way that is contrary to the provisions in that treaty. On the other hand, 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 set out in that treaty.<sup>10</sup>

Each one of the six UN treaties has their own supervisory body. The supervisory body’s main function 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 systems utilised by the supervisory bodies:<sup>11</sup>

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<sup>9</sup> C Heyns & F Viljoen 'The impact of six major UN human rights treaties in South Africa' (2001) *SAPR/PL 28*

<sup>10</sup> S Liebenberg & K Pillay 'Socio-Economic Rights in South Africa' in (2000) at 82.

<sup>11</sup> *Ibid* at 85.

- Reporting systems: This is where States who are party to a treaty must submit regular reports to the supervisory body on their progress in implementing the treaty. These reports are analysed by the supervisory bodies, to establish to what extent the State has implemented the treaty. (CRC, ICESCR, CERD, CEDAW)
- Individual complaints systems: The individual complaints system allows individuals in a country to send written statements to the supervisory body, claiming to be victims of violation of their rights protected in the particular treaty. Generally, a State has to first say that it accepts the authority of the supervisory body to deal with individual complaints against it. (CERD, ICCPR, CEDAW and CAT have this additional form of supervision for those States that have accepted it.)
- Inter-State complaints systems: This system allows a State party to bring to the attention of the supervisory body the fact that another State party is not respecting the treaty. (ICCPR, CERD, CAT)
- Investigatory systems: Some treaties give the supervisory body special powers to investigate if a particular State is violating the human rights protected by the treaty.

## 2.2 Enforcing Socio-Economic Rights in International Human Rights Law

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>12</sup> In 1996, a draft Optional Protocol to the ICESCR was drafted, but it has not been finalised yet. Once it comes into force, the UN Committee on Economic, Social and Cultural Rights will be able to receive individual complaints against States that have ratified the Protocol, similar to the enforcement mechanisms used for civil and political rights in the ICCPR.

The key international treaties dealing with socio-economic rights, and their enforcement mechanisms are:

- *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*: This is the most important UN treaty dealing with socio-economic rights. The supervisory body is the Committee on Economic, Social and Cultural Rights (CESCR) and currently it has the power to receive State reports.
- *The International Convention on the elimination of All Forms of Racial Discrimination (CERD)*: CERD says that States that have adopted CERD should eliminate racial discrimination and guarantee the right to equality in the enjoyment of all rights – civil and political rights, as well as economic, social and cultural rights. The supervisory body is the Committee on the Elimination of Racial Discrimination and it has the power to receive State reports, inter-State complaints and individual complaints.
- *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*: A number of articles of CEDAW deal with women's equal access to socio-economic rights. The supervisory body is the Committee on the Elimination of All Forms of Discrimination Against Women and it has the power to receive State reports and receive individual complaints and make inquiries.
- *The Convention on the Rights of the Child*: This is the most important international treaty dealing with the rights of children. It includes civil and political and social, economic and cultural rights. The supervisory body is the Committee on the Rights of the Child and has the power to receive State reports.
- *The Convention Relating to the Status of Refugees*: A number of articles in this Convention deal with socio-economic rights of refugees. The Office of the High

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<sup>12</sup> Ibid at 88.

Commissioner for Refugees is the supervisory body and it can request information and statistics from States.

The key regional treaties dealing with socio-economic rights, pertinent to South Africa, and their enforcement mechanisms are:

- *The African Charter on Human and People's Rights (ACHPR)*: This treaty incorporates socio-economic rights. The supervisory body is the African Commission on Human and Peoples' Rights and it has the power to receive State reports, inter-State and individual complaints and undertake investigations.
- *The African Charter on the Rights and Welfare of the Child (ACRWC)*: The Charter includes the protection of children's socio-economic rights. The supervisory body is the African Committee of Experts on the Rights and Welfare of the Child and has the power to receive State reports, inter-State and individual complaints and undertake investigations.<sup>13</sup>

In addition to the above enforcement mechanisms, the supervisory bodies also have the power to adopt General Comments which interpret the various parts of a treaty. The UN CESCR has issued 14 General Comments on the ICESCR in order to help clarify the meaning of the rights and duties in the Covenant. These General Comments can be used as interpretive guides to the socio-economic rights included in the South African Bill of Rights – since the drafters of the Constitution were guided by these general comments when they deliberated on the inclusion of socio-economic rights in the Bill of Rights. The CRC has also issued General Comments on its provisions, and they are seen as complementary to those issued by the CESCR. This is especially so in terms of the implementation of socio-economic rights because the Committee on the Rights of the Child specifically cross-referenced with the General Comments of the Committee on Economic Social and Cultural rights.

Treaties with an individual complaints system also provide information on how the supervisory body interprets the right in the treaty in the decisions it makes on individual complaints.<sup>14</sup> Decisions taken by the Human Rights Committee (the supervisory body for the ICCPR) have even aided judicial decision-making in the South African Constitutional Court.<sup>15</sup> However, unfortunately neither the CESCR nor the CRC have a complaints system, making it difficult to hold States accountable under these treaties.

The way that the reporting system works, is that 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.<sup>16</sup>

Literature on the effectiveness of the reporting mechanisms under the various treaties - the CRC in particular - indicates that this type of enforcement mechanism is possibly the weakest of them all. This appears to be so because States, even though they adhere to the reporting requirements, do not appear to pay much attention to the observations or recommendations of the supervisory bodies, which arise from their reports. According to an article by Lisa Woll, a six country study showed that the reporting process for the CRC was generally not used as a

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<sup>13</sup> Came into force in November 1999 and was ratified by South Africa on 07/01/2000. See <http://www.africaninstitute.org/eng/afSystem/child/child.php> for background on the Charter and comparison with the CRC.

<sup>14</sup> Liebenberg & Pillay in (op cit n10) 91.

<sup>15</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 63-67.

<sup>16</sup> Liebenberg & Pillay in (op cit n10) 92.

catalyst for domestic review, debate or policy change.<sup>17</sup> The study was conducted on Ghana, Peru, Yemen, Nicaragua, Sweden and the Philippines as part of an impact study on the CRC. The study found that none of the countries used the preparation of the government report, viewpoints within the summary record and concluding observations as part of an overall strategy to advance children's rights. This lack of impact was attributed on the State's side to lack of clarity within governments as to who is responsible for following up the Committee's recommendations, and countries just seeing the report as another thing to tick off their 'to do' list. On the Committee's side, the failings were attributed to the Committee taking anywhere from one to three years to respond to state party reports and thereby becoming largely irrelevant.

### **3. SOCIO-ECONOMIC RIGHTS OF CHILDREN IN THE CONVENTION ON THE RIGHTS OF THE CHILD**

#### **3.1 Overview of the CRC**

The UN Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly on November 20, 1989 and entered into force on September 2, 1990.<sup>18</sup> The essential theme underlying the Convention is that children need special protection and priority care. 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.<sup>19</sup> The CRC thus highlights the special vulnerability of children by particularising certain of their rights. The Convention is remarkable in that it has been ratified by all States, except the United States of America.

The CRC is also stands out as the most comprehensive single treaty in the human rights field.<sup>20</sup> It covers all the traditionally-defined areas of human rights – civil, political, economic, social and cultural. In doing so, however, it does not distinguish between these rights but underscores the indivisibility, mutual reinforcement and equal importance of all rights.<sup>21</sup> In order precisely to avoid that traditional categorisation, with its negative historical connotations, many commentators have preferred to describe and analyse the scope of the Convention in terms of rights relating to 'provision' (of services and material benefits), 'protection' and 'participation' (in society and in decisions affecting the child him- or herself).<sup>22</sup>

Based on Thomas Hammarberg's interpretation of the substantive rights of children in the Convention, the rights of provision refer to the rights of children to be provided with their basic economic and social needs. For example, children have the right to survival and development (art.6), health care (art.24), basic economic security (art.27) and education (art.28). The rights of protection refer to children's rights to be protected from harmful acts or practices. In this category, children have the right to be protected from abuse and neglect (art.19), economic exploitation (art.32) and sexual exploitation (art.34). Finally, the rights of participation refer to the rights of children to express an opinion in matters affecting them and

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<sup>17</sup> L Woll 'Reporting to the UN Committee on the Rights of the Child' (2000) *International Journal of Children's Rights* 71-81

<sup>18</sup> H Steiner & P Alston 'International Human Rights in Context: Law, Politics, Morals' in (2000) at 511.

<sup>19</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

<sup>20</sup> Steiner & Alston in 511.

<sup>21</sup> The only exception to this is the explicit mention of 'economic, social and cultural rights' in Article 4. See Scott & Alston (op cit n20) 206.

<sup>22</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) at 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* 99

to have that opinion heard in an age-appropriate way (art.12). Also, children have the right to freedom of expression and information (art.13), to freedom of thought and conscience (art.14) and the right to freedom of association and peaceful assembly (art.15). Although it is obvious that poverty affects the first P – provision – it also is the case that the other two Ps – protection and participation – are affected as well.<sup>23</sup>

Furthermore, the Convention contains three important guiding principles to assist with interpretation and application. 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” (art.3(1)). Decision-makers thus must give serious consideration to the best interests of the child in all actions concerning children, including actions concerning their economic welfare. Secondly, the principle of non-discrimination requires that State parties “take all appropriate measures to ensure that the child is protected against all forms of discrimination” (art.2) 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” (art.12(1)).<sup>24</sup>

### **3.2 The protection 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 economic rights. Article 6 directs state signatories to “ensure to the maximum extent possible the survival and development of the child”. More specifically, Article 27 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.”

The Convention recognises that parents and guardians have primary economic responsibility for the child. However, in the case of need, the Conventions also directs states to provide material assistance to children either indirectly through their parents or directly to children themselves. 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.”

The Convention also recognises that different states have different financial capabilities. Thus under Article 27, while states parties have obligations, they do so “in accordance with national conditions and within their means.” However, this clause is not to be used as an excuse for inaction. Article 4 requires states parties to undertake economic measures “to the maximum extent of their available resources.”<sup>25</sup>

The Committee on the Rights of the Child has also issued General Comments in relation to specific rights or aspects of specific rights. It is interesting to note that these comments are primarily clarifying duties of States in relation to what is traditionally referred to as socio-economic rights in the CRC. It is submitted that these are complementary to the General Comments issued by the CESCR, therefore they do not cover aspects which have been covered in the CESCR General comments. The comments produced thus far by the CRC are as follows:

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<sup>23</sup> R Howe & K Covell 'Child Poverty in Canada and the Rights of the Child' (2003) 25 *Human Rights Quarterly* 1067

<sup>24</sup> *Ibid* at 1070.

<sup>25</sup> *Ibid* at 1072.

- General Comment No.1 (2001): The Aims of Education – on the quality and content of education that should be provided.
- General Comment No. 2 (2002): The role of independent national human rights institutions in the promotion and protection of the rights of the child.
- General Comment No. 3 (2003): HIV/AIDS and the rights of the child.
- General Comment No. 4(2003): Adolescent health and development in the context of the Convention on the Rights of the Child.

### 3.3 Obligations of States

Article 2 sets out the basic ICCPR-style duty to ‘respect and ensure’ all the rights in the treaty. Then, duties with respect to economic, social and cultural rights are specifically mentioned in article 4:

States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. *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.* [own emphasis added]

The distinctions made between between civil and political rights and social, economic and cultural rights, have always been on shaky ground and are constantly called into question by human rights treaty bodies. Therefore, it is suggested by Scott and Alston, that Article 4 “is best viewed not in terms of implying lesser protection for some rights (ie, some rights in the CRC are not to be as ‘respect[ed] and ensure[ed]’ as others), but simply as stating – out of an excess of caution, as it were – the minimum degree of protection owed.”<sup>26</sup> It should be noted that the drafters chose not to include express reference to progressive realisation. As such, nothing in article 4 speaks to how immediately and with what priority certain obligations must be met, thus leaving the door wide open for jurisprudential interpretation.<sup>27</sup>

Thankfully, as stated above, the Committee on the Rights of the Child has sought to further clarify the general measures to be taken by States parties when implementing the CRC by providing General Comments on various provisions, including one specifically on ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6)’,<sup>28</sup>

General Comment 5 firstly states the principle of international law, that when a State ratifies the CRC, it takes on obligations under international law to implement it. This is the process whereby States parties take specific action in order to realise all the rights in the Convention for all the children in their jurisdiction. The Convention calls on States Parties not only to recognise but also to actualise the rights of the child. Accordingly, states parties “shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention” (art.4). The General Comment further clarifies that this project requires the engagement of ‘all sectors of society’, including children, and that domestic legislation must be fully compatible with the CRC and appropriately enforced.

In addition, the CRC has identified a range of measures that are needed from effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels.<sup>29</sup>

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<sup>26</sup> Scott & Alston (op cit n20).

<sup>27</sup> Ibid.

<sup>28</sup> CRC *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child CRC/GC/2003/5*, (2003)

<sup>29</sup> Ibid. para 1.

The General Comment further states that the General Comments of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights on articles similar to article 4 of the CRC on the overall implementation obligations of States parties, ‘should be seen as complementary to the present general comment’.<sup>30</sup> It is submitted that this statement could be taken further to refer to the complementarity of all general comments of the HRC and the ESCR, to the CRC, where there are similar provisions in the treaties, making the general comments of those Committees also binding on States parties to the CRC.

In relation to the distinct provision in article 4 relating to economic, social and cultural rights, the CRC states that ‘there is no simple or authoritative division of human rights in general or of Convention rights into the two categories’.<sup>31</sup> It reasserts the interdependence and indivisibility of all human rights and that the enjoyment is inextricably linked to the enjoyment of civil and political rights. However, the Committee also says that 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. When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation (see paragraph 60 below).”<sup>32</sup>

The Committee also concurs entirely with the CESCR in relation to the similar wording of articles of the ISECR when the CESCR states 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>33</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>34</sup>

With respect to the judiciary’s role, the CRC states 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>35</sup>

Again, in relation to positive obligations on State parties, the Committee describes in detail which measures State parties may find appropriate to ensure effective implementation, and includes the development of a comprehensive national strategy rooted in the Convention. This in turn ‘must go 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>36</sup>

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<sup>30</sup> Ibid para 5.

<sup>31</sup> Ibid para 6.

<sup>32</sup> Ibid para 7. Para 60 states, 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>33</sup> CESCR *General comment No.3, HRI/GEN/1Rev.6*, para 11, p.16.

<sup>34</sup> CRC para 8.

<sup>35</sup> Ibid para 12.

<sup>36</sup> Ibid para 32.

Lastly, implementation is to be monitored through a reporting system in which States parties are required to send periodic reports of its progress to an expert committee, the UN Committee on the Rights of the Child (art.44).<sup>37</sup>

#### **4. SOUTH AFRICA: MEETING ITS OBLIGATIONS TO REALISE CHILDREN'S SOCIO-ECONOMIC RIGHTS**

Per the South African Constitution, an international treaty is binding on South Africa once it is approved by resolution of both Houses of Parliament.<sup>38</sup> As explained in section 2 above, treaties are legally binding agreements between States that create rights and duties under international law. 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. When a State merely signs a treaty, it does not legally bind the State to the treaty, but it means that the State must not act in a way that is contrary to the provisions in that treaty.<sup>39</sup> The supervisory bodies of the six UN treaties monitor and ensure that States meet their obligations under the treaties.

A ratified treaty usually only becomes part of South African law when it is incorporated in our law by national legislation. The exception to this general rule is when a treaty has a provision that can be implemented by the courts without the need for legislation (called 'self-executing provisions'). Provisions like this form part of South African law unless they go against the Constitution or an Act of Parliament.<sup>40</sup>

None of the human rights treaties ratified by South Africa have been fully incorporated into South African law. These treaties are therefore not in themselves binding in South African courts. However, one of the important aims of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 is to make CERD and CEDAW effective in South African law. The Hague Convention on the Civil Aspects of International Child Abduction was also included in our national law by the Hague Convention on the Civil Aspects of International Child Abduction Act.

When a treaty is not made part of South African law, it is still binding under international law, and South Africa can be held accountable through international mechanisms. Furthermore, the courts and other bodies like the South African Human Rights Commission can also use a treaty to interpret the meaning of the rights in the Bill of Rights.<sup>41</sup> Finally, international treaties have also had an impact on the development of South Africa's Constitution and laws.

These various mechanisms assist states to realise the rights laid out in international treaties. Below, I will outline briefly the ways in which international human rights law influences South African law, with particular emphasis on the ways in which it assists in the realisation of the socio-economic rights of children.

##### **4.1 Through legislative reform**

The CRC has played a significant role in legislative reform in South Africa since its ratification in 1995. Although only two statutes make explicit reference to the CRC (the Maintenance Act<sup>42</sup> and the Domestic Violence Act<sup>43</sup>), the contents of the statutes show how the priorities of the CRC have been reflected in legislation.<sup>44</sup>

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<sup>37</sup> Howe & Covell (op cit n24) 1071.

<sup>38</sup> Section 231(2) of the Constitution of the Republic of South Africa Act 108 of 1996

<sup>39</sup> Liebenberg & Pillay in (op cit n10) 82.

<sup>40</sup> Section 231(4) of the Constitution of the Republic of South Africa Act 108

<sup>41</sup> Liebenberg & Pillay in at 94.

<sup>42</sup> Maintenance Act of 1998

These statutes include the following:

- The Films and Publications Act<sup>45</sup>
- The Natural Fathers of Children Born out of Wedlock Act<sup>46</sup>
- The Adoption Matters Amendment Act<sup>47</sup>
- The Recognition of Customary Marriages Act<sup>48</sup>
- The Domestic Violence Act
- The South African Schools Act<sup>49</sup>
- The Maintenance Act

Current legislation in the making, the Children's Bill and the Child Justice Bill are also guided by the CRC. The draft of the Children's Bill recommended by the South African Law Reform Commission even included a chapter on Children's Rights that was based on the CRC and the African Charter.

## 4.2 Interpreting national legislation

Section 233 is clear on the interpretive role of international law in statutory interpretation:

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

The above accords with the final two paragraphs of General Comment 9 to the ICESCR, in which the CESCR states that this interpretive presumption is required by international human rights law and by the law of the Covenant. However, Scott and Alston state that while this presumption applies “with full force to statutory interpretation, the case for its applicability as a presumption of constitutional interpretation needs further argument, given that the Constitution is, after all, the supreme and hard-to-amend law.”<sup>50</sup>

## 4.3 Incorporating children's rights in the Constitution

A number of states have literally incorporated provisions of the CRC into their Constitutions. The extent of the provisions varies greatly, as does the degree to which the provisions of the CRC are reflected. The South African Constitution is one of the strongest examples of a new constitution which has drawn obvious inspiration from the CRC.<sup>51</sup> In the interim Constitution, the formulation of the provision on children's rights was reworked on the basis of the CRC. This formulation was unanimously accepted by all the negotiators. Similarly, during the drafting of the final Constitution, the CRC again played a leading influential role.<sup>52</sup>

Section 28 of the Final Constitution provides that:

28. (1) Every child has the right
- a. to a name and a nationality from birth;

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<sup>43</sup> Domestic Violence Act of 1998.

<sup>44</sup> Heyns & Viljoen (op cit n9) 48.

<sup>45</sup> The Films and Publications Act of 1996.

<sup>46</sup> The Natural Father of Children Born out of Wedlock Act of 1997.

<sup>47</sup> The Adoption Matters Amendment Act of 1998.

<sup>48</sup> The Recognition of Customary Marriages Act of 1998.

<sup>49</sup> The South African Schools Act of 1996.

<sup>50</sup> Scott & Alston (op cit n20).

<sup>51</sup> Steiner & Alston in 523.

<sup>52</sup> Heyns & Viljoen (op cit n9).

- 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;
  - e. to be protected from exploitative labour practices;
  - f. not to be required or permitted to perform work or provide services that
    - i. are inappropriate for a person of that child's age; or
    - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
    - i. kept separately from detained persons over the age of 18 years; and
    - ii. treated in a manner, and kept in conditions, that take account of the child's age;
  - h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
    - i. not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

Section 29 deals with the right to education:

29. (1) Everyone has the right
- a. to a basic education, including adult basic education; and
  - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
- a. equity;
  - b. practicability; and
  - c. the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
- a. do not discriminate on the basis of race;
  - b. are registered with the state; and
  - c. maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

#### 4.4 Interpreting the Bill of Rights

Given that the international treaties, including the CRC, formed such an important part of the constitutional negotiating and drafting process, it is not surprising that the courts have used these treaties as tools to interpret the new Constitution. Section 39 of the Constitution also specifically requires that when a court or other body interprets a right in the Bill of Rights, it 'must consider international law'.<sup>53</sup>

In *Makwanyane*, the Constitutional Court said that both binding and non-binding international law can be used in the interpretation of the Bill of Rights.<sup>54</sup> Further, in para 35, Chaskalson P stated that international human rights law provides a 'framework within which chap 3 can be evaluated and understood' and practical acts of relevant international human rights bodies (decisions, reports and so on) 'may provide guidance as to the correct interpretation of

<sup>53</sup> Liebenberg & Pillay in (op cit n10) 93.

<sup>54</sup> *S v Makwanyane* paras 36-37.

particular provisions.<sup>55</sup> However, Scott and Alston argue that while there is a clear judicial duty, section 39 does not go on expressly to indicate what courts may, should or must do once they understand international law to contain certain (existing or evolving) rules and principles. They say that the Constitutional Court, while hinting at a duty to do more than simply look at international law, have still framed the duty ‘cautiously’. This will become more vivid in the analysis of the individual Constitutional Court cases below.

Scott and Alston propose an approach to the interpretive weight that should be given to international law under the South African Constitution, which combines the imperatives in section 39(1) for the court to consider international law and to promote specified values. They propose that “a court must (or, at least, should) adopt an interpretation of the Bill of Rights which promotes international law, firstly, where the international law in questions is substantively relevant (ie international human rights law) and, secondly, where that law reflects the constitutional values of ‘an open and democratic society based on human dignity, equality and freedom’.”<sup>56</sup> They argue that international law would thereby help to clarify and give content to those very values.

What is surprising however, is that in a systematic review of the decisions of the High Courts and the Constitutional Court decisions since 1995, Heyns and Viljoen found that the ICCPR, more than any of the other treaties, has been used as the basis of court decisions, or has been referred to in the process of interpretation, especially of the bill of rights.<sup>57</sup> Courts have also referred to CERD, CEDAW and the CRC, but to a much lesser extent in a number of limited cases. No reliance has so far been placed on CAT.<sup>58</sup> Even though it has not been ratified, the ICESCR has also served as interpretative guide to the South African courts.

The Constitutional Court more recently also pronounced on the role of international law in the *Grootboom* judgement - giving it a much stronger emphasis than in the *Makwanyane* judgement. Jacob J stated:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, (footnote omitted) it may be directly applicable.<sup>59</sup>

This is particularly pertinent to the use of the CRC in the Courts’ jurisprudence, since the CRC is ratified and therefore legally binding. The following section will examine more closely the cases of the High Court and Constitutional Court which deal with children’s socio-economic rights, and provide an analysis of where the CRC has been used to further the realisation of these rights of children, as well as where the CRC could have been used by the Courts, but was not.

## **5 AN ANALYSIS OF THE COURTS’ USE OF THE CRC IN CASES INVOLVING CHILDREN’S SOCIO-ECONOMIC RIGHTS**

The Constitutional Court has dealt with socio-economic rights provisions on five occasions in the past 10 years of our democracy.<sup>60</sup> In these various cases dealing with socio-economic

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<sup>55</sup> Scott & Alston (op cit n20).

<sup>56</sup> Ibid at 222.

<sup>57</sup> They explain the popularity of the ICCPR on the basis of the high level of similarity between the bill of rights and the ICCPR. In the important decision of *S v Makwanyane*, which outlawed the death penalty, the Constitutional Court relied on a decision of the HRC. See *Makwanyane* paras 63-67.

<sup>58</sup> Heyns & Viljoen (op cit n9) at 50.

<sup>59</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 26.

<sup>60</sup> *Case CCT 12/03 Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* Decided on 4 March 2004; *Ex Parte Chairperson of the*

rights relating to health, shelter and housing, and social security, the socio-economic rights of children have also been touched upon and at times, were central to the outcomes. Below I seek to analyse the cases in relation to how they dealt with the socio-economic rights of children, in the High Court cases as well as the Constitutional Court cases, and remark upon whether or not the CRC was referred to in the judgements or submissions by the parties, and lastly, suggest how the outcomes for children could have been improved had they referred to the international jurisprudence on the rights of the child. I will not deal with the case of *Soobramoney* as it did not deal with the rights of children at all.

I have also briefly touched upon the cases that have come before the High Court and the Constitutional Court which specifically deal with the children's rights, but not necessarily social and economic rights.

## **5.1 High Court: *Centre for Child Law & Another v Minister of Home Affairs and Others*<sup>61</sup>**

### *5.1.1 Facts of the case*

On 3 March 2004 the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela Repatriation Centre. At the time of the main application, the detained children were not given separate accommodation from the adults also being detained at Lindela. They were also facing imminent and unlawful deportation. The methods of deportation out of the country and the treatment of the children in the home country were crass and the court granted an interdict preventing the deportation of the children and appointed a *curator ad litem* for the children. The curator was to investigate the circumstances of the children in detention, to make recommendations to the court regarding their future treatment and to institute legal proceedings in the enforcement of their rights.

The curator compiled a report and filed it with the court on 31 March 2004. The recommendations included that the 92 children who were then at Lindela be immediately removed to a place of safety, pending finalisation of children's court inquiries in respect of each child. That no further children should be placed in Lindela without interception from officials of the Department of Social Development and that a solution must be sought pertaining to any future arrest of any illegal minor child.

The children were removed to Dyambo (a place of safety) on 2 April 2004. Unfortunately no children's court inquiries took place because the Commissioner in Krugersdorp was of the view that foreign children fall outside the ambit of the Child Care Act. The High Court then compelled the Commissioner to conduct children's court proceedings, however this was not done. The application before the High Court thus dealt with four issues:

- a. The Department of Social Development's failure to bring the group of unaccompanied foreign children presently detained at Dyambo before the Krugersdorp Children's Court in order for inquiries to be opened for them in terms of section 12(2)(c) the Child Care Act.
- b. The failure by the SAPS, the Departments of Social Development and Home Affairs and Busasa (Lindela) to give effect to section 12(2) of the Child Care Act and their

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*Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others, Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC)

<sup>61</sup> *Centre for Child Law & Another v Minister of Home Affairs & Others* 2004 Case No: 22866/04. Unreported. (High Court of South Africa (Transvaal Provincial Division)).

- own stated policies to bring unaccompanied foreign children to a children's court in the districts where they have been found.
- c. The respondents' failure to reply or comment on the curator's report and/or any other founding papers and correspondences filed by the applicants.

### *5.1.2 Reference to International Human Rights Law*

The CRC and other treaties are referred to in para 25 by De Vos J. They are merely mentioned though as having articles pertaining to the rights of every child to health, social security and education. They serve to reinforce the rights of the children in this case in terms of section 28 of the SA Constitution. The High Court (TPD), however, does not delve any further into the interpretation of the international obligations, as they relate to the constitutional obligations.

The applicants did refer in their submissions to the international obligations under the CRC to children. It is submitted that this is why they were included in the judgement.

## **5.2 High Court: *Bhe & Others v Magistrate, Khayelitsha & Others*<sup>62</sup>**

### *5.2.1 Facts of the case*

The applicants, two young girls and their mother brought the case against their grandfather who was the father of the deceased. The father of the girls (the deceased) had lived together with the mother as husband and wife for a period of twelve years. The deceased died on 9 October 2002. Two minor children were born out of the relationship, aged 9 and 2 at the time of the hearing. The applicants are African and of Xhosa descent. The deceased and the mother acquired immovable property in Khayelitsha, Cape Town during their life together. The deceased and the mother and children occupied the property until the deceased died. They continue to live on the property. Since the death of the deceased, the grandfather claims that he is the intestate heir of the deceased by virtue of African Customary Law and therefore he is entitled to inherit the property of the deceased. Secondly, he says that he is entitled to the guardianship of the two minor children. The issue of custody and guardianship of the first two applicants however fell away as the grandfather conceded their custody and guardianship to the mother. The grandfather wanted to sell the property of the deceased to cover funeral expenses of the deceased. As a result of this attitude, the mother and her children obtained an interdict pendent elite, restraining the grandfather from alienating or encumbering the property in whatever manner.

### *5.2.2 Reference to International Human Rights Law*

In the High Court decision, in the Cape of Good Hope Provincial Division, no mention was made in the judgement regarding the rights of children. Arguments were made based on the equality and unfair discrimination provisions in section 9 of the Constitution.

## **5.3 Constitutional Court: *Grootboom***

### *5.3.1 Facts of the case*

The facts of the Grootboom are by now very well-known in South Africa and around the world. Ms Grootboom and the other respondents lived in an informal settlement, in an area prone to flooding. Many had applied for low-cost housing but had been on the waiting list for many years and had not received any indication of when such housing might become

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<sup>62</sup> *High Court of South Africa, Cape of Good Hope Provincial Division, Case No: 9489/02, Bhe & Others v The Magistrate, Khayelitsha & Others*. 2003

available. In light of their circumstances and the fact that the winter rains were setting in, the respondents left the settlement and erected shacks on nearby vacant land that had better drainage. Unfortunately, the land was privately owned. The owner obtained an eviction order and, in due course, the respondents were evicted in a very hostile and destructive manner. Finding their former sites in the informal settlement had now been filled by others, the respondents sheltered on a nearby sports field under temporary structures that provided little protection against the elements. The respondent's attorney then launched an urgent application in the Cape High Court asking that they be provided with adequate basic shelter or housing until they obtained permanent accommodation.

In the Cape High Court, Davis J did not find a violation of the rights of access to housing in section 26(1) and (2), but did find a violation of section 28(1)(c) – children's right to shelter – and ordered that children and their parents be granted shelter through the unqualified right accorded to their children. The state then appealed against this decision to the Constitutional Court.

### 5.3.2 Reference to International Human Rights Law

Much reference was made in the judgement to international law, but mostly with respect to the ICESCR.<sup>63</sup> The *amici* had submitted that the ICESCR is of significance in understanding the positive obligations created by the socioeconomic rights in the Constitution, and also made much reference to the general comments of the CESCR. The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core. The Court did not accept the concept of a 'minimum core' but it also did not rule it out, it merely stated that it did not "have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right."<sup>64</sup>

The Court then specifically refers to the CRC, but does not go very deeply into it:

"The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes."<sup>65</sup>

The Court in *Grootboom* stated there was no obligation on the state "to provide shelter to those of the respondents who were children and, through them, their parents in terms of section 28(1)(c)." This interpretation of section 28 came about after much confusion had been created in the High Court about who out of children and parents and non-parents had rights to any form of shelter or housing under sections 26 and 28. The Constitutional Court said that

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<sup>63</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* paras 26-33.

<sup>64</sup> *Ibid* para 33.

<sup>65</sup> *Ibid* para 75.

the High Court had therefore erred in making the order that children and their parents should be provided with shelter.

This difficult aspect of interpretation of children's rights in light of the rights of others would be greatly assisted by clarity from the CRC as to how to apply children's rights in contrast or in complement with the rights of everyone. The CRC could provide a general comment more specifically on how the socio-economic rights of children in the CRC should interact with the rights of everyone in the ICESCR, without creating anomalous or perverse situations.

The Court or the counsel in the case could have referred to the relevant rights in the CRC, namely to the child's right to survival and development in (art. 6(2)); and the child's right to an adequate standard of living (art. 27). In addition, with respect to the obligations of the state and of parents the Court could have invoked the principles of the best interests of the child (art. 3(2)); parents' joint responsibilities, assisted by the State (art.18); and the child's right to an adequate standard of living on the need for the State to provide assistance to parents where there is a need (art.27).

## **5.4 Constitutional Court: TAC**

### *5.4.1 Facts of the case*

In this case, the government had restricted the availability of the drug Nevirapine, which reduces the incidence of mother to child transmission of HIV/AIDS, to two test sites in each province, despite the fact that it was available free of charge and had been approved by the Medicines Control Council and the World Health Organisation. This, however, had the effect of excluding a significant and vulnerable sector of society – HIV-positive pregnant women, and their children, falling outside those sites – from that service. The issue before the Court was therefore whether those women and children had been unjustifiably excluded.

### *5.4.2 Reference to International Human Rights Law*

The submission from the applicants referred to the international instruments which South Africa has signed and ratified and of which the government was in breach.

Similar to the case of *Grootboom*, the Judge referred to the concept of the minimum core as put forward in the general comments to the ICESCR. The Court was made to look at this concept again by the amici to the court.

In a case specifically dealing with the rights of children and mothers to health care, it is surprising that no mention is made of the CRC. The General Comment of the CRC on the issue of HIV/AIDS is comprehensive and welcomed, but came too late for use in the TAC case. It appears that the Committee was in part led by the outcome of the judgement in the TAC case in drafting the general comment. It is submitted that in order for the CRC to be relevant to the jurisprudence of the Constitutional Court, which is an exceptional fore-runner in the field of socio-economic rights, it needs to be developing pertinent general comments on the rights enshrined in the CRC so that our Constitutional Court may refer to it, rather than the other way around. At the same time, it is good to see that the South African Constitutional Court's jurisprudence has positive ripple effects throughout the field of international human rights law.

Similar to the case of *Grootboom*, the Court or the counsel in this case could have referred to the relevant rights in the CRC, namely to the child's right to life and maximum survival and development in (art. 6(2)); and the child's right to health and health services (art. 24). In addition, with respect to the obligations of the state and of parents the Court could have invoked the principles of the best interests of the child (art. 3(2)); parents' joint

responsibilities, assisted by the State (art.18); and the child's right to an adequate standard of living on the need for the State to provide assistance to parents where there is a need (art.27).

## **5.5 Constitutional Court: *Bhe & Others v Magistrate, Khayelitsha & Others*<sup>66</sup>**

### *5.5.1 Facts of the case*

There are two Acts which governed intestate succession in South Africa. One is the Intestate Succession Act 81 of 1987 and the other is the Black Administration Act 38 of 1927. Section 23 of the Black Administration Act together with the regulations, deals only with intestated deceased estates of Africans and gives effect to the customary law of succession. Central to the customary law of succession is the principle of male primogeniture. There were two main issues before the court, the first was the question of the constitutional validity of section 23 of the Black Administration Act, and secondly the principle of male primogeniture in the customary law of succession.

3 cases were before the court, and they were decided together as they covered similar issues.

The applicants, two young girls and their mother brought the case against their grandfather who was the father of the deceased. The father of the girls (the deceased) had lived together with the mother as husband and wife for a period of twelve years. The deceased died on 9 October 2002. Two minor children were born out of the relationship, aged 9 and 2 at the time of the hearing. The applicants are African and of Xhosa descent. The deceased and the mother acquired immovable property in Khayelitsha, Cape Town during their life together. The deceased and the mother and children occupied the property until the deceased died. They continue to live on the property. Since the death of the deceased, the grandfather claims that he is the intestate heir of the deceased by virtue of African Customary Law and therefore he is entitled to inherit the property of the deceased. Secondly, he says that he is entitled to the guardianship of the two minor children. The issue of custody and guardianship of the first two applicants however fell away as the grandfather conceded their custody and guardianship to the mother. The grandfather wanted to sell the property of the deceased to cover funeral expenses of the deceased. As a result of this attitude, the mother and her children obtained an interdict pendent lite, restraining the grandfather from alienating or encumbering the property in whatever manner.

### *5.5.2 Reference to International Human Rights Law*

In the High Court decision, in the Cape of Good Hope Provincial Division, no mention was made in the judgement regarding the rights of children. Arguments were reflected based on the equality and unfair discrimination provisions in section 9 of the Constitution.

In the applicants' submission to the Constitutional Court refer to the rights of the children to inherit, and the relevant children's socio-economic rights but they do not refer to international law in relation to the rights of the child. They merely state:

#### **“Children's rights**

68. We submit that the customary law rules also violate,
- the right of every child to parental care in terms of s 28(1)(b);
  - the right of every child to be protected from neglect in terms of s 28(1)(d) and

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<sup>66</sup> *Constitutional Court of South Africa, Judgement, Case CCT 49/03, Bhe and Others v Magistrate, Khayelitsha & Others; Case CCT 69/03, Shibi v Sithole & Others; Case CCT 50/03, South African Human Rights Commission & Another v President of the Republic of South Africa & Another, date of hearing 2-3 March 2004. Decided on 15 October 2004.*

- s 28(2) that provides that "*a child's best interests are of paramount importance in every matter concerning the child*".

69. The latter provision means that laws that fail to treat the child's best interests as of paramount importance, are unconstitutional and invalid. [footnote omitted]
70. The customary law rules fail to do so in all those circumstances where they provide for an intestate estate to devolve upon the deceased's adult relatives (such as his father or the latter's male descendants) where the deceased is survived by children who do not qualify for succession because they are female or illegitimate. In those circumstances the law clearly does not afford paramount importance to the best interests of the children and instead gives preference to the best interests of the adult heirs without justification."<sup>67</sup>

In this case, the Court, counsel and the amici could have also invoked the following articles from the CRC to strengthen their case: non-discrimination (art.2); the child's right to survival and development in (art. 6(2)); the child's right to an adequate standard of living (art. 27); and the principle of the best interests of the child (art. 3(2)).

In the Constitutional Court case, Langa J referred to the constitutional rights of children in section 28 [paras 52 to]. Langa J in para 53 also refers to the African Charter on the Rights of the Child, in relation to their provision regarding harmful social and cultural practices (article 21(1)(b)). In para 55, Langa J states:

"In interpreting both section 28 and the other rights in the Constitution, the provisions of international law must be considered. [footnote omitted] South Africa is a party to a number of multilateral international agreements, designed to strengthen the protection of children. The Convention on the Rights of the Child asserts that children, by reason of their "physical and mental immaturity", need "special safeguards and care". Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed regardless of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status."

He then goes on to mention the ICCPR and the African Charter on the Rights and Welfare of the Child.

## 5.6 Constitutional Court: *Khosa*<sup>68</sup>

### 5.6.1 *Facts of the case*

The *Khosa* and *Mahlaule* cases concerned a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992. The applicants in both matters were permanent residents in South Africa. In the *Khosa* application, the applicants challenged the constitutionality of section 3(c) of the Act which reserves social grants for aged South African citizens. In the *Mahlaule* case, the constitutional challenge was to sections 4(b)(ii) and 4B(b)(ii) of the Act, which similarly reserved child-support grants and care-dependency grants respectively for South African citizens only.

### 5.6.2 *Reference to International Human Rights Law*

While this case is very important for the development of jurisprudence on socio-economic rights and in particular on the right to social security and social assistance (s 27), and the rights of children (s 28), it needs to be highlighted that the judgement, delivered by Justice

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<sup>67</sup> Applicants' Submissions to Case CCT49/03 in the Constitutional Court of South Africa. *Nonkululeko Letta BHE and Three Others/ The Magistrate Khayelitsha and Three Others*. Found at [www.wlce.co.za/litigation](http://www.wlce.co.za/litigation).

<sup>68</sup> *Case CCT 12/03 Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others*.

Mokgoro, does not refer to international law at all. Mokgoro J does, however, make impressive and precedent-setting statements about the state's responsibilities to people living in poverty and the impact poverty has on people's dignity and equality as follows:

"In other words, decisions about the allocation of public benefits represent the extent of which poor people are treated as equal members of society."<sup>69</sup>

"What is of particular importance in my view, however, and can be stressed again, is that the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus case in the role of supplicants."<sup>70</sup>

"The importance of the right in issue cannot be gainsaid. It is a right that goes to one of the core values of our Constitution – human dignity. The state has an obligation to ensure that its citizens have access to basic needs such as food, clean water and shelter. Social security is a vital component of the social system that is available for those who cannot provide these basic needs for themselves or their families."<sup>71</sup>

The Judgement is, however, quite confusing in as much as it vacillates between the use of the limitations clause in justifying limitations to socio-economic rights, and the internal limitations of section 27. The dissenting judgement argues that the outcome is nevertheless the same whether they use section 36 or section 27(2).

The Court or the counsel in the case again could have referred to the relevant rights in the CRC, namely to the child's right to survival and development in (art. 6(2)); the child's right to benefit from social security (art.26); and the child's right to an adequate standard of living (art. 27). In addition, with respect to the obligations of the state and of parents the Court could have invoked the principles of the best interests of the child (art. 3(2)); parents' joint responsibilities, assisted by the State (art.18); and the child's right to an adequate standard of living on the need for the State to provide assistance to parents where there is a need (art.27).

## 6 CONCLUSION

The treaties have indeed had an extensive impact on human rights in South Africa, in that the legal system has largely been transformed to reflect the norms expressed in the treaties. In particular, this is visible in the provisions for children in the bill of rights, and also in legislation and court decisions, as mentioned above. However, the legacy which apartheid left us with, the wide disparity in wealth and access to resources, has not yet been wiped away. International human rights law has not gone nearly far enough so as to impact to any significant extent on these problems.

It is submitted, that in the use of the CRC to further the realisation of children's rights through the judicial system, much is left to be desired. As seen above from an analysis of the cases affecting children's rights in the Constitutional and High Courts of South Africa, while the courts do often refer to the treaties themselves, the jurisprudence that has developed around the treaties, in the form of general comments, recommendations by the UN on SA's country report, expert legal opinion, etc, has not yet received significant judicial attention, largely, it is submitted, due to a lack of awareness.

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<sup>69</sup> Ibid para 74.

<sup>70</sup> Ibid para 80.

<sup>71</sup> Ibid para 114.

Despite the constitutional imperative to take international law into account in interpreting the Constitution, many judges (in the high courts) and magistrates (in the lower courts) do not make reference to international human rights law.<sup>72</sup>

The following recommendations are thus made in order to increase the usefulness of the Convention on the Rights of the Child in the courts:

- Judicial training (of both magistrates and judges) on the CRC and its jurisprudence should be undertaken.
- The role of lawyers referring to international human rights during argument is also important. Lawyers should as far as possible incorporate the relevant provisions of the CRC and its jurisprudence (and those of the CESCR) in their oral and written submissions to the courts.
- Judges should also take it upon themselves to investigate the international children's rights law relevant to a particular case before them, in order to make reference to the CRC a regular part of judgements related to children's rights.
- The role of amici (friends of the court) is also significant. It can be very powerful for relevant expert organisations in the field of children's rights make submissions to the courts and may help to bring about a greater awareness of the CRC and its jurisprudence amongst the legal fraternity.
- Law students should receive legal training on the CRC as part of their international human rights law modules, instead of presenting them separately or as an adjunct.
- The CRC and its jurisprudence should be more widely publicised and information disseminated to make it common parlance, by state and civil society organs.
- Courts should refer to the UN Committee's recommendation to SA on SA's country report.

In relation to the Committee on the Rights of the Child and improvements to the enforcement mechanisms of the CRC, it is recommended:

- Firstly, that the Committee regularly produce more general comments, on the provisions which require further elaboration so that states may have guidelines for implementation. In particular, the minimum core content of all social and economic rights should be clearly defined so that states may know which targets to meet at first instance.
- In addition, the reports and recommendations on specific countries should be distilled to formulate these general comments on various provisions as they prove to be much more useful than the reports themselves, for use in the jurisprudence of national courts.
- Secondly, it is advised that the setting up of an individual complaints mechanism for the CRC would not only provide another useful avenue for dealing with lack of enforcement of the CRC by States parties, but would also provide further useful and enlightening jurisprudence on the provisions in the CRC. For example, further clarity is sought on the intersection between the social and economic rights of children and other members of society, including parents and non-parents.

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<sup>72</sup> Ibid at 66-67.

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