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In the Spirit of Ubuntu: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa

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In the Spirit of *Ubuntu*: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa

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Africans believe in something that is difficult to render in English. We call it *ubuntu, botho.* It means the essence of being human. You know it when it is there and when it is absent. It speaks about humaneness, gentleness, hospitality, putting yourself out on behalf of others, being vulnerable. It embraces compassion and toughness. It recognizes that my humanity is bound up in yours, for we can only be human together.

– Archbishop Desmond Tutu**

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** DESMOND TUTU, THE WORDS OF DESMOND TUTU 71 (1989) (compiled by Naomi Tutu). As part of a panel entitled "Advancing the Health of the World's Children," Desmond Tutu described South Africa's HIV/AIDS epidemic in human terms:

> You hear that in my country perhaps one of nine [people] are infected with HIV. Imagine if you [in this auditorium] represented the South African population, and we counted out, one, two, three, four, five, six, seven, eight, nine – you have AIDS. One, two, three, four, five, six, seven, eight, nine – AIDS. We are in fact speaking about the daughter of, the wife of, the sister of, the husband of, the father of, the brother of someone. Perhaps my call to you would be to put the face of one of your loved ones to represent the statistics. Maybe that would help to bring those numbers to life.

Desmond Mpilo Tutu, "We Can Be Human Only Together," 1 SEATTLE J. SOC. JUST. 253, 253 (2002).

> Children have really been the forgotten face of AIDS. It is important that we focus attention on the needs of children.
>
> – UNICEF Executive Director Ann Veneman[***]

I. Introduction

The human immunodeficiency virus ("HIV") and acquired immune deficiency syndrome ("AIDS") have plagued the African continent. In sub-Saharan Africa, the hardest hit region, 22.5 million people were HIV infected as of 2007.[1] The Joint United Nations Program on HIV/AIDS ("UNAIDS") estimates that 1.7 million adults and children were newly infected with HIV in that region during 2007 and that another 1.7 million AIDS-related deaths occurred in sub-Saharan Africa in that year alone.[2] In South Africa – in what has been described as a "calamity"[3] and "the world's deadliest

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[***] *UNICEF to Launch Global Campaign on Children and AIDS*, available at <http://www.unicef.org/aids/index_29309.html> (visited July 15, 2007).

1. *See* Joint United Nations Program on HIV/AIDS (UNAIDS) & World Health Organization (WHO), "AIDS Epidemic Update" UNAIDS/07.27E (Dec. 2007), p. 15, available at <http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate.en.pdf>. More than two-thirds of people with HIV worldwide live in sub-Saharan Africa, and approximately 76 percent of all deaths due to AIDS in 2007 occurred in sub-Saharan Africa. *Id.* at 3, 6. The impact of HIV/AIDS on children has been particularly profound. More than 1.9 million African children under age 14 were HIV infected as of the end of 2003. *See* Raymond W. Copson, AIDS IN AFRICA, CRS ISSUE BRIEF FOR CONGRESS (Cong. Research Service/Library of Cong.) at 2 (May 12, 2005). Every day throughout the world more than 6,000 young people aged 15-24 become HIV infected; there are nearly 1,800 new HIV infections in children under age 15; and 1,400 children under age 15 die of AIDS-related illnesses. *See* Joint United Nations Program on HIV/AIDS (UNAIDS), "Securing the Future – Advocating for Children" (Apr. 12, 2007 media release), available at <http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/2007/20070412_advocating_for_children.asp> (visited Dec. 17, 2007).

2. *See* Joint United Nations Program on HIV/AIDS (UNAIDS) & World Health Organization (WHO), *supra* note 1, at 40-41. For the latest estimates pertaining to HIV/AIDS in South Africa, *see* UNAIDS Country Situation Analysis: South Africa, available at <http//:www.unaids.org/en/Regions_Countries/Countries/south_africa.asp> (visited Dec. 13, 2007).

3. South African Dept. of Health, HIV/AIDS/STD Strategic Plan for South Africa 2000-2005, at 5 (2000), available at <http://www.doh.gov.za/aids/docs/aids-plan00-05.pdf> (visited Oct. 15, 2007). A study done to determine the causes of death in South Africa from 1997 to 2001 found that "HIV is the leading cause of death among African females" and that the proportion of children dying from HIV, influenza, and pneumonia had risen in the country. *See* Statistics South Africa,

AIDS epidemic" – five and a half million of the country's forty-eight million people are HIV-positive, and nearly a thousand people die of AIDS every day there.[4] Despite ongoing efforts to combat the epidemic,[5] the human rights of African children affected by HIV/AIDS have frequently been ignored,[6] and, overall, as many as 100 million Africans could lose their lives to AIDS by 2025.[7] Many of

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Cause of Death in South Africa 1997-2001, at vi-vii (2002).

4. Michael Specter, *The Denialists*, THE NEW YORKER, Mar. 12, 2007, at 33 (describing the AIDS epidemic in South Africa); *cf.* South African Human Rights Commission, The Right to Health Care, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004 at 12, nn.24-25 (describing South Africa's overburdened health-care system and estimating that there are approximately 600 AIDS-related deaths every day in the country). The 5.5 million figure is an estimate from UNAIDS. *See* Joint United Nations Program on HIV/AIDS (UNAIDS) & World Health Organization (WHO), "AIDS Epidemic Update" UNAIDS/06.29E (Dec. 2006), p. 11 available at <http://www.unaids.org/en/HIV_data/epi2006>. For a more comprehensive look at HIV/AIDS and its impact on the people of South Africa, see HIV/AIDS IN SOUTH AFRICA (SALIM KARIM & QUARRAISHA KARIM, EDS., 2005); KYLE DEAN KAUFFMAN, DAVID L. LINDAUER & DESMOND TUTU, AIDS AND SOUTH AFRICA: THE SOCIAL EXPRESSION OF A PANDEMIC (2004); JEFF GOW & CHRIS DESMOND, IMPACTS AND INTERVENTIONS: THE HIV/AIDS EPIDEMIC AND THE CHILDREN OF SOUTH AFRICA (2002); ZIA JAFFREY, THE NEW APARTHEID: AIDS IN SOUTH AFRICA (2002); NICOLI NATTRASS, THE MORAL ECONOMY OF AIDS IN SOUTH AFRICA (2003); LORENZO S. TOGNI, AIDS IN SOUTH AFRICA AND ON THE AFRICAN CONTINENT (1997).

5. UNAIDS, the World Health Organization ("WHO"), African governments, public-private partnerships (such as the Global Fund to Fight AIDS, Tuberculosis, and Malaria), and a plethora of non-governmental organizations ("NGOs") are actively working to combat the disease. International aid is also being brought to bear on Africa's AIDS epidemic. In 2003, for example, the U.S. launched a $15 billion initiative called the Emergency Plan for AIDS Relief. *See* David Fidler, *Fighting the Axis of Illness: HIV/AIDS, Human Rights, and U.S. Foreign Policy*, 17 HARV. HUM. RTS. J. 99, 100, 116 (2004). Likewise, in 2005, Gordon Brown, then Great Britain's Chancellor of the Exchequer, proposed a $10 billion per year initiative to fight AIDS. *See* Copson, *supra* note 1, at 8. More recently, in May 2007, the Bush Administration announced a five-year, $30 billion HIV/AIDS plan. *See* President Bush Announces Five Year, $30 Billion HIV/AIDS Plan, available at <www.whitehouse.gov/news/releases/2007/05/20070530-6.html> (visited June 14, 2007).

6. *See* Joint United Nations Program on HIV/AIDS (UNAIDS), *supra* note 1 (noting that "[d]espite the beginnings of progress, children still remain largely absent from national and international political responses to the AIDS pandemic").

7. Statistics pertaining to HIV/AIDS vary by source and are continuously updated by U.N. and governmental agencies. See Terry Leonard, *AIDS Toll May Reach 100 Million in Africa*, WASH. POST, June 4, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/03/AR2006060300229.html> (visited Apr. 11, 2007); Craig Timberg, *U.N. to Cut Estimate of AIDS Epidemic*, WASH. POST, Nov. 20, 2007, available at <http://www.washingtonpost.com/wp-

those deaths will be in South Africa[8] – and many will be children like Nkosi Johnson, an orphan who died of AIDS at age twelve.[9]

The HIV/AIDS pandemic has taken or shattered scores of children's lives, particularly in southern Africa.[10] A study conducted by UNAIDS, the U.S. Agency for International Development ("USAID"), and the United Nation's Children's Fund ("UNICEF"), found that, at the end of 2003, 15 million children under the age of 18 had lost one or both parents to AIDS.[11] Approximately 12.3 million

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dyn/content/article/2007/11/19/AR2007111900978.html> (visited Dec. 13, 2007).

8. In 2001, *The Lancet*, reporting on a study by the South African Medical Research Council, noted that AIDS already accounted for about a quarter of all deaths in South Africa in 2000, and had become the country's "single biggest cause of death." It was further reported that the number of AIDS deaths was "expected to rise within the next decade 'to more than double the number of deaths due to all other causes, resulting in 5 to 7 million cumulative AIDS deaths in South Africa by 2010.'" *See* Sarah Ramsay, *"Shocking" AIDS Data Released in South Africa*, 358 THE LANCET 1345 (2001).

9. Further information about Nkosi Johnson is available online. *See* Nkosi Johnson, About Nkosi, available at <http://www.nkosi.iafrica.com/content Page.asp?pageID=5> (visited July 1, 2007). Nkosi Johnson, who was born HIV positive, electrified the audience at his speech at the 13th Annual International AIDS Conference in Durban. *Id.* Then age eleven and being raised by a foster mother, Gail Johnson, Nkosi spoke to the delegates about his own personal experiences. *Id.* Nkosi pleaded with spectators: "Care for us and accept us – we are all human beings. We are normal. We have hands. We have feet. We can walk, we can talk, we have needs just like everyone else. Don't be afraid of us – we are all the same." *Id.* Nkosi Johnson first attracted media attention when, over strong opposition, he won a fight (in spite of his HIV status) to attend a public school in South Africa. His fight eventually led to national policy reform, with South African law now providing that no infected child or teacher may be prevented from attending school or teaching. *See* <http://www.nkosi.iafrica.com/contentPage.asp?pageID=29> (visited July 1, 2007); Edwin Cameron, *Legal and Human Rights Responses to the HIV/AIDS Epidemic*, 17 STELLENBOSCH L. REV. 47, 60 (2006). In spite of that new policy, an unreported High Court case, *Karen Perreira v. Sr Helga's Nursery School*, WLD 2003-10-21, Case No. 437702 (Oct. 2003), shows that disparate treatment based on HIV status is still occurring in South Africa. In that case, a private nursery school in South Africa recently refused to admit a three-year-old child when her foster mother disclosed the child's HIV-positive status, and the High Court found no unfair discrimination. *Id.* at 80, n.211.

10. Adolescents become infected with HIV primarily through unprotected sexual activity, and infants get infected during their mothers' pregnancies, during labor or delivery, or while breastfeeding. *See* Joint United Nations Programme on HIV/AIDS, UNICEF & United States Agency for International Development ("USAID"), CHILDREN ON THE BRINK 2004: A JOINT REPORT OF NEW ORPHAN ESTIMATES AND A FRAMEWORK FOR ACTION 14 (2004) [hereinafter Children on the Brink 2004].

11. Children on the Brink 2004, *supra* note 10, at 3. The term "AIDS orphan" is

of those children were in sub-Saharan Africa,[12] where less than two percent of children carrying the HIV virus are receiving anti-retroviral ("ARV") treatment drugs.[13] Of the 2.2 million children under the age of 15 currently living with HIV/AIDS, the vast majority – 1.9 million – reside in sub-Saharan Africa, including 240,000 in South Africa.[14] Even the youngest of children have not been immune. In May 2004, it was reported that 6.7 percent of South Africa's children between ages 2 and 9 were HIV positive.[15] The prevalence of HIV among boys and girls aged 2-14 has been estimated to be 5.2 percent and 5.9 percent, respectively, with the figure increasing to 9.3

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sometimes used to describe children aged 17 and under who have lost one or both parents to AIDS. *See* Copson, *supra* note 1, at 2. To avoid stigmatizing children, those who work with children affected by HIV/AIDS prefer the use of the terms "orphans and vulnerable children," "children affected by AIDS," or "AIDS-affected children." *See* Tiaji Salaam, AIDS ORPHANS AND VULNERABLE CHILDREN (OVC): PROBLEMS, RESPONSES, AND ISSUES FOR CONGRESS 2 (Washington, D.C.), Cong. Research Service, Library of Cong. 2004 (updated Feb. 11, 2005). The term "vulnerable children" is used to refer to children whose survival, well-being, or development is threatened by HIV/AIDS. *See* Children on the Brink 2004, *supra* note 10, at 6.

12. Children on the Brink 2004, *supra* note 10, at 8.

13. *U.N. Drive Targets Childhood AIDS*, ST. PAUL PIONEER PRESS, Oct. 25, 2005, at 6A. The number of South Africans who are receiving antiretroviral drug treatment is just a fraction of those infected with HIV. *See* Craig Timberg, *Spread of AIDS in Africa Is Outpacing Treatment*, WASH. POST, June 20, 2007, at A01. According to projections by the Actuarial Society of South Africa, by the year 2015, less than one-fourth of those infected with the virus will be on ARVs. *Id.* ARVs are costly, though a settlement reached in 2003 between South Africa's Competition Commission, the Treatment Action Campaign, and the pharmaceutical companies GlaxoSmithKline and Boehringer Ingelheim helped to make ARVs more affordable and available. *See* Christa van Wyk, *Access to Affordable HIV Medicines in South Africa: Patents, Parallel Importation, Generics and Medical Schemes*, 1 DE JURE 9, 20 (2006).

14. *See* Joint United Nations Program on HIV/AIDS (UNAIDS) & World Health Organization (WHO), *supra* note 4, at 11; UNAIDS/WHO, *AIDS Epidemic Update: December 2004*, at 1 (2004). A Johannesburg-based NGO, the AIDS Law Project, estimated that 50,000 South African children needed antiretroviral drugs at the beginning of 2006, but that only 10,000 were receiving them. *See* HIV & AIDS in South Africa, available at <http://www.avert.org/aidssouthafrica.htm> (visited Apr. 13, 2007) (citing Moyiga Nduru, *ARV Programme Less Than the Sum of Its (Monetary) Parts*, MAIL & GUARDIAN ONLINE, Mar. 15, 2006). A recent UNICEF and WHO report found that only 18 percent of South African children under 15 who need antiretroviral treatment are receiving it. UNAIDS, UNICEF, WHO, CHILDREN AND AIDS: A STOCKTAKING REPORT (Jan. 2007), available at <http://www.sarpn.org.za/documents/d0002296/Children_AIDS_Jan2007.pdf> (visited July 3, 2007).

15. *See* Copson, *supra* note 1, at 2.

percent for those aged 15-24.[16]

In South Africa, the AIDS epidemic has been exacerbated by AIDS denialists, the stigma and discrimination associated with HIV/AIDS,[17] and the South African government's painfully slow, often bewildering and counterproductive response to the disease. In April 2000, South Africa's president, Thabo Mbeki, wrote American president Bill Clinton and other world leaders to defend fringe views that AIDS is not caused by the HIV virus.[18] For years, Mbeki and his Health Minister, Manto Tshabalala-Msimang, used words like "damaging," "poison," or "toxic" to describe ARV drugs, with Tshabalala-Msimang, at a 2006 international AIDS conference in Toronto, instead advocating the use of homespun remedies such as beetroot, garlic, olive oil, lemons and potatoes.[19] The South African government inexplicably denounced scientific evidence concerning HIV/AIDS at the 13th International AIDS Conference in Durban in 2000, and Mbeki went so far as to reject appeals in March 2001 to declare the AIDS pandemic a national emergency, causing even further delay in the battle against the disease.[20] Only under mounting

16. South African Human Rights Commission, *The Right to Education*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004, at 14-15.

17. *See* C.J. Davel & U. Mungar, *AIDS Orphans and Children's Rights*, 70 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 65, 66-67 (2007).

18. *See* Copson, *supra* note 1, at 4.

19. Specter, *supra* note 4, at 33. AIDS activists have begun referring to Manto Tshabalala-Msimang as "Dr. Beetroot" or "Dr. Olive Oil." "I have seen people take their last bit of money to go and buy a bottle of olive oil. And then drink it, and then get worse diarrhea," laments Zackie Achmat, a well-known South African AIDS activist and the co-founder of the Treatment Action Campaign. Tshabalala-Msimang was briefly sidelined by a liver transplant in 2007, leaving her deputy, Nozizwe Madlala-Routledge, in charge. However, Madlala-Routledge was quickly fired after she put AIDS at the top of the ministry's agenda. *See AIDS Crisis Politicized in South Africa as Graves Fill*, National Public Radio (Morning Edition), Sept. 19, 2007, available at <www.npr.org/templates/story/story.php?storyId=14370270> (visited Sept. 23, 2007).

20. *See* Copson, *supra* note 1, at 4; Specter, *supra* note 4, at 38. In a recent news report on National Public Radio, Mbeki's lack of leadership in combating the HIV/AIDS epidemic was called a "moral failure" by Xolela Mangcu, a Johannesburg newspaper columnist and a research fellow at Witwatersrand University. "It's the most glaring challenge of our time, and whoever comes after him has to put this thing on the agenda." "People are dying completely, completely unnecessarily," added Kerry Cullinan, who manages a South African news agency that covers the government's AIDS policy. "We've got the drugs now. They are cheap. But people are dying and dying and dying, and children are being forced to have lives that are

pressure from South Africa's Treatment Action Campaign[21] – an organization that fights for HIV treatment and prevention, including through litigation – did the South African cabinet instruct the health ministry in August 2003 to develop a plan to provide ARV therapy on a nationwide basis.[22]

The dire circumstances faced by so many HIV/AIDS-affected children in South Africa raises a host of questions and significant human rights issues. What legal rights do orphans and other vulnerable children have in South African society? How can those rights be exercised? By whom? And what more can be done, particularly within the confines of South Africa's legal system, to push for reform, to better the lives of these children?[23] In considering these questions, one must necessarily grapple with how South African courts should handle claims dealing with children's socio-economic rights – rights enshrined in South Africa's constitution. Socio-economic rights have been a controversial subject among lawyers and jurists, but socio-economic rights have undeniably become a rapidly emerging focus of scholarly debate and international human rights litigation.[24]

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more miserable than they were under apartheid." *See AIDS Crisis Politicized in South Africa as Graves Fill*, *supra* note 19.

21. *See* <www.tac.org.za> (visited Apr. 11, 2007).

22. *See* Copson, *supra* note 1, at 4. For many years President Mbeki, who rarely speaks about AIDS, has denied or downplayed the country's problem with HIV/AIDS—even suggesting that AZT, a drug commonly used in treatment, may present "a danger to health." *See* Edwin Cameron, *AIDS Denial and Holocaust Denial – AIDS, Justice and the Courts in South Africa*, 120 S. AFR. L.J. 525, 532-33, 536 & n.50 (2003). This has had devastating consequences given that public education and behavioral changes are so critical to combating the transmission of the disease. *Id.* at 532. AIDS activist Zackie Achmat has called the government's policies "a Holocaust against the poor." *Id.* at 538. The slow, often bungled response to AIDS has prompted the U.N. Special Envoy on AIDS in Africa to call the HIV/AIDS pandemic "the grotesque obscenity of the modern world." Glenn Kessler & Rob Stein, *Powell Says U.S. Leading Effort on AIDS; United Nations Address Disputes Criticisms of White House Spending Priorities*, WASH. POST, Sept. 23, 2003, at A24.

23. The international community obviously has a major role to play in combating HIV/AIDS in Africa. *See* BILL CLINTON, GIVING: HOW EACH OF US CAN CHANGE THE WORLD 13-15 (2007). This Article, however, focuses on South Africa's legal system, including the rights of children guaranteed by that country's constitution.

24. *See, e.g.*, Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L.J. 177 (2002); Theunis Roux, *Understanding Grootboom – A Response to Cass R. Sunstein*, 12 CONST. FORUM 41 (2002); Cass R. Sunstein, *Social and*

This Article – which focuses on South Africa's legal system and the constitutional framework in place in that country – seeks to answer some fundamental, if thorny, questions. Has South Africa lived up to its constitutional promises to its people, to its children? Have South Africans – and the current South African government – heeded or ignored the call for *ubuntu*, what Archbishop Desmond Tutu describes as "the very essence of being human."[25] And, most important, can more yet be done to realize the rights of children as guaranteed by South Africa's constitution? This Article specifically focuses on what more can be done to improve the lives of South African children affected by HIV/AIDS. More, no doubt, can be done, not only by international aid agencies and NGOs but through South Africa's own governmental institutions and the framework of the country's Bill of Rights.

Part II of this Article discusses the concept of *ubuntu* as understood in South Africa and as articulated by South African judges. The term *ubuntu* actually appeared in South Africa's interim

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Economic Rights? Lessons from South Africa, 11 CONST. FORUM 123 (2000-2001); J. Oloka-Onyango, *Beyond the Rhetoric; Reinvigorating the Struggle for Economic and Cultural Rights in Africa*, 26 CAL. W. INT'L L.J. 1 (1995); David Beetham, *What Future for Economic and Social Rights?*, 43 POLITICAL STUDIES 41 (1995). Internationally, in fact, there is a growing body of socio-economic rights jurisprudence. *See* Working Paper No. 1, ESC Rights Litigation Programme, Centre on Housing Rights and Evictions, *50 Leading Cases on Economic, Social and Cultural Rights: Summaries* (June 2003).

25. DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 34-35 (1999). *Ubuntu* comes from the root of the word meaning "person," explains Archbishop Tutu, so *ubuntu* "is the essence of being a person." *Id.* "[I]n our experience, in our understanding" he says, "a person is a person through other persons. You can't be a solitary human being. It's all linked. We have this communal sense, and because of this deep sense of community, the harmony of the group is a prime attribute." *Id.* When the Truth and Reconciliation Commission handed over its final report in March 2003, President Thabo Mbeki himself noted that the Commission's work had been informed by "the spirit of ubuntu." *See* Statement at the Handing over of the Final Report of the TRC (dated Mar. 21, 2003), available at <www.anc.org.za/ancdocs/history/mbeki/2003/tm0321.html> (visited June 18, 2007). As Tutu puts it: "We say, 'a person is a person through other people.' It is not 'I think therefore I am'. It says rather: 'I am human because I belong. I participate, I share.'" TUTU, *supra*, at 35. According to Tutu: "A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are." *Id.* People with *ubuntu*, Tutu preaches, "share what they have" and "are generous, hospitable, friendly, caring and compassionate." *Id.* at 34.

constitution and was frequently invoked in connection with the country's much-heralded Truth and Reconciliation Commission. Part III then sets forth children's constitutional rights, the constitutional significance of international law, and South Africa's existing socio-economic rights jurisprudence. An understanding of these rights – and the case law and treaty provisions bearing upon them – is critical to delineating the rights of HIV/AIDS-affected children. Parts IV and V then focus on the violation of those constitutional rights, and address what can legally be done to help these children. The Article concludes that existing law requires that more be done – a result compelled by constitutional language and buttressed by the traditional African principle of *ubuntu*, both as envisioned by South Africa's civil society and as adopted by that country's highest court as a legal construct.[26]

II. The Concept of *Ubuntu*

The history of South Africa – like the international fight against HIV/AIDS itself – is marked by struggle.[27] Led by Nelson Mandela

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26. Whereas many Western views of personhood focus on the individual alone, African culture emphasizes the concept of community as central to the individual's being. MICHAEL BATTLE, RECONCILIATION: THE UBUNTU THEOLOGY OF DESMOND TUTU 37 (1997). As Nobel Peace Prize winner Desmond Tutu has explained: "A person is human precisely in being enveloped in the community of other human beings, in being caught up in the bundle of life. To be is to participate. The summum bonum here is not independence but sharing, interdependence." *Id.* at 39. No human being, Tutu adds, is totally self-sufficient. "We do need other people and they help to form us in a profound way," he notes. *Id.* at 42. The concept of *ubuntu* is thus central to South African culture. Christopher Roederer, *The Transformation of South African Private Law After Ten Years of Democracy: The Rule of Torts (Delict) in the Consolidation of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447, 499 (2006) (*ubuntu* "traced to small scale communities in pre-colonial Africa"); Joan Church, *The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience,* AUSTL & N. Z. L. & HIST. ELEC. J. 94, 99 n.32 (2005), <http://www.anzlhsejournal.auckland.ac.nz/Church.pdf> (in discussing "indigenous law" in South Africa, Church says "[t]he concept of *ubuntu* 'I am because you are' is a concept central to the system").

27. *See* Christof Heyns, *A 'Struggle Approach' to Human Rights*, in LAW AND PLURALISM 171-90 (Arend Soeteman, ed., 2001). South African President F.W. de Klerk repealed the ban on the African National Congress ("ANC"), the Communist Party, and other anti-apartheid organizations in 1990. He also announced the release of ANC leader Nelson Mandela and others imprisoned for their membership in previously banned organizations. These actions set the stage for the adoption of South Africa's interim constitution in 1993 and the country's final constitution a few years later. *See* Lauren M. Spitz, *Implementing the U.N. Convention on the Rights*

and others, South Africa finally put an end to apartheid and embarked on a bold, new course to jettison the racist, oppressive legacy of the past. It did so by creating new democratic institutions designed to further the causes of human dignity and non-discrimination, and South Africa ultimately became one of the world's first countries to adopt a constitution that included justiciable socio-economic and children's rights – all in an effort to lift people out of poverty and to protect its most vulnerable citizens.[28] The postamble to South Africa's interim 1993 Constitution, which began the country's post-apartheid journey to greater freedom and tolerance, called for "understanding," "not vengeance," "reparation" but not "retaliation," and said there was "a need for *ubuntu* but not victimization."[29] The country's final Constitution, adopted in 1996, was true to that calling, putting emphasis, as it does, on equality, human dignity, and respect *for* all people through the establishment of rights – and *by* all people, through the imposition of societal duties.[30]

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of the Child: Children's Rights under the 1996 South African Constitution, 38 VAND. J. TRANSN'L L. 853, 874-75 (2005).

28. Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 S. AFR. J. ON HUM. RTS. 448, 449 (2004). It has been written that "[t]he new South African Constitution provides arguably the most sophisticated and comprehensive system for protection of socio-economic rights of all the constitutions in the world today." Christof Heyns & Danie Brand, *Introduction to Socio-Economic Rights in the South African Constitution*, *in* A COMPILATION OF ESSENTIAL DOCUMENTS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1 (Gina Bekker, ed., 1999); *compare* Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights*, 6 CHAP. L. REV. 137, 138 (2003) (noting that South Africa's Constitution "contains a lengthy list of socio-economic rights").

29. S v Makwanyane and Another 1995 (6) BCLR 665 (CC) at ¶ 237, 262, 307 (S. Afr.) [hereinafter Makwanyane]. *Ubuntu* is the plural form of *bantu*, an African word coined by linguist Wilhelm Bleek to identify a linguistic bond among African speakers. BATTLE, *supra* note 26, at 39. *Ubuntu* has been variously described as "the ancient African philosophy of humanness," "the quality of being human," and as "the value base of the Constitution of the Republic of South Africa"; the word itself is closely associated with the concept of human dignity and the values of tolerance and forgiveness, kindness and respect, love and compassion, and caring and sharing. *See* JOHANN BROODRYK, UBUNTU: LIFE LESSONS FROM AFRICA 8, 15-16, 21, 25-26, 32-37, 44 (2002); *see also id.* at 26 ("It is a communal way of life which deems that society must be run for the sake of all, requiring cooperation as well as sharing and charity. There should be no widows or orphans left alone—they all belong to someone.").

30. This imposition of duties is consistent with the African Charter on Human and Peoples' Rights, which places duties on the individual towards others, one's family, the community, and to Africa itself. *See* 1 CHRISTOF HEYNS, ED., INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 394 (2004). For further discussion

As the interim constitution made clear, central to South Africa's struggle and democratic movement has been the African concept of *ubuntu* (or *botho*),[31] which – it has been said – translates roughly as "*humaneness*" or as "*personhood* and *morality*."[32] "Metaphorically,"

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of the concept of *ubuntu* as a constitutional interpretive aid, see Sivhaga Netshitomboni, Ubuntu: Fundamental Constitutional Value and Interpretive Aid (1998) (unpublished L.L.M. dissertation, University of South Africa) (on file with university).

31. *Ubuntu* is a Zulu word and *botho* is its Sesotho equivalent. *See, e.g.*, <http://www.freeafrica.org/african_philosophy.html> (visited Apr. 13, 2007). *Botho* and *ubuntu* are, in fact, often used interchangeably by South Africans. *See, e.g.*, <http://www.info.gov.za/vukuzenzele/number8/art_10.htm> (visited Apr. 13, 2007); *see also infra* nn.35, 40 (quoting South African cases that use the phrase "*ubuntu – botho*"). Archbishop Desmond Tutu has explained that the goal of South Africa's Truth and Reconciliation Commission was *ubuntu*, and that word actually appears in South Africa's Promotion of National Unity and Reconciliation Act of 1995. *See* Zia Jaffrey, *Desmond Tutu*, THE PROGRESSIVE, Vol. 62:2 (Feb. 1998); Ann Marie Skelton, The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice, chap. 9 (Nov. 2005) (unpublished dissertation, University of Pretoria, Faculty of Law) (on file with author) (discussing the role of *ubuntu* in the context of the Truth and Reconciliation Commission). As Tutu put it: "The Act says that the thing you're striving after should be *ubuntu* rather than revenge." *Id.*; *see also* TUTU, *supra* note 25, at 54-55 ("In the spirit of ubuntu, the central concern is the healing of branches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator . . . .").

32. Makwanyane, *supra* note 29, at ¶ 308 (emphasis in original); *see also id.* at 237 (Madala, J.) ("The concept of *ubuntu* appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally, and more particularly chap[ter] 3, which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness."). The Witwatersrand Local Division of the High Court of South Africa has described South Africa's culture of *ubuntu* this way:

> In South Africa the culture of *ubuntu* is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. *Ubuntu* speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection. This in turn must be interpreted to mean that in the establishment of our constitutional values we must not allow urbanisation and the accumulation of wealth and material possessions to rob us of our warmth, hospitality and genuine interests in each other as human beings. *Ubuntu* is a culture which places some emphasis on the commonality and on the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be a part of. In South Africa, *ubuntu* must become a notion with particular resonance in the building of our constitutional democracy.

City of Johannesburg v Rand Properties (Pty) Ltd and Others 2006 (6) BCLR 728

Justice Yvonne Mokgoro of South Africa's Constitutional Court has explained, "it expresses itself in *umuntu ngumuntu ngabantu*,[33] describing the significance of group solidarity on survival issues so central to the survival of communities."[34] "Its spirit," Mokgoro notes, emphasizes "respect for human dignity, marking a shift from confrontation to conciliation."[35] "In South Africa," she explains, "*ubuntu* has become a notion with particular resonance in the building of a democracy."[36] The term *ubuntu* is so widely used that it has appeared on billboards and been used to name a foundation that seeks to educate kids and build healthy communities in South Africa.[37]

(W) at ¶ 63 (S. Afr.).

33. A common expression in Xhosa (Zulu), *umuntu ngumuntu ngabantu* means "a person is only a person through their relationship to others." *See* Sean Coughlan, *All You Need Is Ubuntu*, BBC NEWS MAG., Sept. 28, 2006, available at <http://news.bbc.uk/2/hi/uk_news/magazine/5388182.stm> (visited Dec. 8, 2007). *Ubuntu* – a term that has been used repeatedly in South African jurisprudence – thus embodies "the concept that a person is a person through persons." City of Johannesburg v Rand Properties (Pty) Ltd and Others 2006 (6) BCLR 728 (W) at ¶ 64 (S. Afr.).

34. Makwanyane, *supra* note 29, at ¶ 308.

35. *Id.* While *ubuntu* "envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality." (Mokgoro, J., concurring). In another case, Justice Mokgoro discussed the concept of *ubuntu – botho* as follows: "In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms." Dikoko v Mokhatla 2007 (1) BCLR 1 (CC) at ¶ 68 (S. Afr.).

36. Makwanyane, *supra* note 29, at ¶ 308 (Mokgoro, J., concurring). Justice Mokgoro equates *ubuntu* with the "inherent dignity of all members of the human family," a notion reflected in the preamble of the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), pmbl., U.N. Doc. A/6316 (Dec. 16, 1966); *see* Makwanyane, *supra* note 29, at ¶¶ 308, 313. The concept of dignity is thus also crucial to South Africa's new democratic order. As one judge has explained: "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished." Makwanyane, *supra* note 29, at ¶ 329 (O'Regan, J., concurring).

37. *See* Ubuntu Education Fund, <www.ubuntufund.org> (visited June 14, 2007). For further background on the concept of *ubuntu*, *see* MOGOBE RAMOSE, AFRICAN PHILOSOPHY THROUGH UBUNTU (1999); *see also* AUGUSTINE SHUTTE, UBUNTU: AN ETHIC FOR THE NEW SOUTH AFRICA (2001); *see also* Drucilla Cornell, *A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation,* 19 S.

In the new South Africa, *ubuntu* thus captures the spirit of this fledgling democracy – a democracy that faces a host of social problems, including poverty, high unemployment, and the devastating impact of HIV/AIDS.[38] Justice Albie Sachs – writing for South Africa's Constitutional Court in a 2004 decision—put it succinctly: "The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy."[39] "It

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AFR. PUB. L. 661, 661-70 (2004); Rosalind English, *Ubuntu: The Quest for an Indigenous Jurisprudence*, 12 S. AFR. J. HUM. RTS. 641 (1996); PD De Kock & JMT Labuschagne, *Ubuntu as a Conceptual Directive in Realising a Culture of Effective Human Rights*, 62 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 114 (1999).

38. Approximately 48 percent of South Africans live in poverty, *see* G.E. Devenish, *The Nature, Evolution and Operation of Socio-Economic Rights in the South African Constitution*, 70 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 65, 84, 101 n.105 (2007) (citing statistics as of 2002), more than 23 million South Africans have no source of income, *id.* at 102 n.108, and South Africa has a 25 percent unemployment rate. *See* <http://www.statssa.gov.za/publications/statskeyfindings.asp?PPN=P0210&SCH=3890> (visited June 20, 2007). South Africa has one of the highest income inequalities in the world, with millions of "ultra-poor" households—in the terminology used by the World Bank—who often lack access to basic services such as education, safe water, and health care. *See* Sandra Liebenberg, *The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa*, 17 S. AFR. J. HUM. RTS. 232, 234-35 & nn.13-14, 18 (2001); *see also* <http://www.usaid.gov/policy/budget/cbj2005/afr/za.html> (visited June 20, 2007) ("South Africa also has one of the largest income disparities in the world, with over 50% of the total population, mostly black South Africans, living below the poverty line. Two-thirds of total income is concentrated in 20% of the population, leaving the poorest 20% with only 2% of total income.").

39. Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) at ¶ 37 (S. Afr.); *see also* Makwanyane, *supra* note 29, at ¶ 373-74 (Sachs, J.) (referencing the need to consider "traditional African jurisprudence" and referring to "the constitutionally acknowledged principle of *ubuntu*" in "the search for core and enduring values consistent with the text and spirit of the Constitution"); Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673, 705 (2007) ("In South Africa, we use the concept of *ubuntu*, a very central notion from African philosophy. It means, *I am a person because you are a person. I can't separate my humanity from yours – from a mutual acknowledgment of humanity.*") (italics in original); *id.* ("we are using the concept of *ubuntu* quite frequently in our judgments now as a South African philosophical quality that has significant application in legal decision-making"). The concept of *ubuntu* has also shown up in decisions of South Africa's Supreme Court of Appeal. *See* Pharmaceutical Society of SA and Others v Minister of Health and Another (6) BCLR 576 (SCA) at ¶ 39 (S. Afr.) ("*Ubuntu* has many dimensions but its application to statutory interpretation is novel. It ought to apply to the relationship between courts and the respect required of organs of state and courts towards citizens and towards each other.") (footnote omitted).

is," he said, "a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."[40] If ever there was a need for greater *ubuntu* in South African society, it is surely in the way in which orphans and other vulnerable children are treated, for such children are heavily dependent on society for their very survival.[41]

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40. Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) at ¶ 37 (S. Afr.); *see also* Hugh Arnold Wormald and Others v Lungiswa Snowy Kambule, Case No. 524, Supreme Court of Appeal (Sept. 22, 2005) (S. Afr.), available at <http://www.law.wits.ac.za/sca/files/kambule/2004-524.pdf> (quoting the same language). In the context of another case, a defamation lawsuit, Justice Sachs also referred to the "constitutional values of *ubuntu – botho*." Dikoko v Mokhatla 2007 (1) BCLR 1 (CC) at ¶ 112 (S. Afr.). According to Sachs:

> *Ubuntu – botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatized society to overcome and transcend the divisions of the past. In present day terms it has an enduring and creative character, representing the human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values.

Id. at ¶ 113; *see also id.* at ¶ 118 (Sach refers to "the core constitutional values of *ubuntu – botho*"); *id.* at ¶ 86 (Moseneke DCJ) (referring to the "indigenous values of *ubuntu* or *botho*"). Justice Sachs added that "the philosophy of *ubuntu – botho* has usually been invoked in relation to criminal law, and especially with reference to child justice." *Id.* at ¶ 115 (Sachs J); *see also id.* at ¶ 114 ("*Ubuntu – botho* is highly consonant with rapidly evolving international notions of restorative justice.").

41. In his book, *Ubuntu: An Ethic for a New South Africa*, University of Cape Town philosopher Augustine Shutte describes *ubuntu* as meaning "humanity" and as "an ethical concept" that "expresses a vision of what is valuable and worthwhile in life" and that "embodies an understanding of what it is to be human and what is necessary for human beings to grow and find fulfillment." *See* AUGUSTINE SHUTTE, UBUNTU: AN ETHIC FOR A NEW SOUTH AFRICA vii, 2, 66 (2001). Shutte further describes *ubuntu* "as a spirit, a shared way of seeing the world and relating to people," though he cautions that the term "has become almost meaningless in South African ears through over-use" in pop songs and advertising campaigns. *Id.* at ¶¶ 8, 14. "Our deepest moral obligation," Shutte writes, "is to become more fully human. And this means entering more and more deeply into community with others." *Id.* at ¶ 30. Shutte emphasizes that "at the heart of UBUNTU" is "the call to find oneself in the other," "to see, in the very differences between people and cultures, the same humanity that we find so precious in what is our own," and that "[t]he fundamental criterion for the distribution of resources in a health-care system animated by UBUNTU is need." *Id.* at ¶ 151 (emphasis in original). A person with *ubuntu* has been described as "someone who cares about the deepest needs of others and faithfully observes all social obligations." BATTLE, *supra* note 26, at 39. "Such a person," it is said, "is conscious not only of personal rights but also of duties to her or his

III. Children's and Socio-Economic Rights in South Africa

A. Constitutional Rights

The Constitution of the Republic of South Africa, adopted in 1996, is "the supreme law of the Republic."[42] It proclaims that "South Africa belongs to all who live in it," and it was specifically promulgated to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."[43] The Constitution's very first section states that South Africa is founded upon the values of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" and the "[s]upremacy of the constitution and the rule of law."[44] All of South Africa's citizens are "equally entitled to the rights, privileges and benefits of citizenship" and "equally subject to the duties and responsibilities of citizenship."[45]

The Constitution's Bill of Rights is, consequently, "a cornerstone of democracy in South Africa" that "enshrines the rights" of all South Africans and "affirms the democratic values of human dignity, equality and freedom."[46] The state "must respect, protect, promote and fulfil" those rights, and they bind "the legislature, the executive, the judiciary and all organs of state."[47] The substantive rights in the

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neighbor." *Id.* A story about cows told around African fires helps illustrate its meaning: if a person has two cows, it is said, *ubuntu* expects that person to donate the milk of a second cow to the underprivileged if the milk of the first cow is sufficient for that person's own needs. BROODRYK, *supra* note 29, at 13; *see also* Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 11 n.44 (2005) ("In the South African context, the interdependence between individual and community is captured in the spirit of ubuntu.").

42. S. AFR. CONST. 1996 § 2; *see also id.* ("law or conduct inconsistent with it is invalid, and the obligations of it must be fulfilled").

43. S. AFR. CONST. 1996 pmbl.

44. S. AFR. CONST. 1996 § 1.

45. S. AFR. CONST. 1996 § 3.

46. S. AFR. CONST. 1996 § 7(1).

47. S. AFR. CONST. 1996 § 8(1). The rights set forth in the Bill of Rights are only subject to the "limitations contained or referred to in section 36, or elsewhere in the Bill." S. AFR. CONST. 1996 § 7(2)-(3). Section 36 provides that "[t]he 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." S. AFR. CONST. 1996 § 36(1). Those factors include "the nature of the

Bill of Rights include the right to "dignity,"[48] "equal protection and benefit of the law,"[49] "life,"[50] "freedom and security of the person,"[51] and "bodily and psychological integrity."[52]

In addition to a wide array of civil and political rights, such as the right to freedom of expression, association, conscience and religion,[53] various socio-economic rights are recognized. Section 26 of South Africa's Constitution states that "[e]veryone has the right to have access to adequate housing."[54] Section 27 states that "[e]veryone has the right 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 dependents, appropriate social assistance."[55] And section 29 states

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right," "the importance of the purpose of the limitation," "the nature and extent of the limitation," "the relation between the limitation and the purpose," and "less restrictive means to achieve the purpose." *Id.* The obligation to "respect, protect, promote and fulfill" rights is one that has garnered the attention of African scholars and jurists, including in the health care context. *See* Danwood Mzikenge Chirwa, *The Right to Health in International Law: Its Implications for the Obligations of State and Non-State Actors in Ensuring Access to Essential Medicine*, 19 S. AFR. J. HUM. RTS. 541, 558-61 (2003); Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria, Comm. No. 155/96, Afr. Comm'n H.P.R. 60, at ¶ 45-47, 57 (2001).

48. S. AFR. CONST. 1996 § 10. "Dignity" is "a founding value" of the Constitution. *See* De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2003 (12) BCLR 1333 (CC) at ¶¶ 34-35, n.69 (S. Afr.). Dignity is not only a *"value* fundamental" to the Constitution, but is "a justiciable and enforceable *right* that must be respected and protected." Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (8) BCLR 837 (CC) at ¶ 35 (S. Afr.) (emphasis in original).

49. S. AFR. CONST. 1996 § 9(1). Among other things, "[t]he state may not unfairly discriminate directly or indirectly against anyone" on the basis of race, gender, age or disability. S. AFR. CONST. 1996 § 9(3).

50. S. AFR. CONST. 1996 § 11.

51. S. AFR. CONST. 1996 § 12(1). This right includes the right not to be "treated" in "a cruel, inhuman or degrading way." S. AFR. CONST. 1996 § 12(1)(e).

52. S. AFR. CONST. 1996 § 12(2). This right includes the right "to security in and control over their body." S. AFR. CONST. 1996 § 12(2)(b).

53. *E.g.*, S. AFR. CONST. 1996 §§ 15-19.

54. S. AFR. CONST. 1996 § 26(1). This right is subject to the following internal limitation clause: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right." S. AFR. CONST. 1996 § 26(2).

55. S. AFR. CONST. 1996 § 27(1). These rights are also subject to a similar internal limitation clause: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each

that "[e]veryone 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."[56]

Children's rights are explicitly protected in section 28 of the Constitution, and unlike sections 26 and 27, section 28 contains no internal limitation clause restricting the application of those rights.[57] Section 28 says that "[e]very child has the right" . . . .to "family care or parental care, or to appropriate alternative care when removed from the family environment"; to "basic nutrition, shelter, basic health care services and social services"; to be "protected from maltreatment, neglect, abuse or degradation"; to be "protected from exploitative labour practices"; "not to be required or permitted to perform work or provide services" that "are inappropriate for a person of that child's age" or "place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development"; and "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."[58]

South Africa's Constitution makes children independent rights-bearers,[59] and the country's Constitutional Court has found that children "merit special protection by the state."[60] In matters where

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of these rights." S. AFR. CONST. 1996 § 27(2).

56. S. AFR. CONST. 1996 § 29(1).

57. This special constitutional protection for children is somewhat unique, though a growing number of countries are including children's rights – of one kind or another – in their constitutions. *See* Spitz, *supra* note 27, at 873-74; John Tobin, *Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights*, 21 S. AFR. J. HUM. RTS. 86, 94-116 (2005) (listing countries which now grant children constitutional rights). The specific rights for South Africa's children in section 28 of the Constitution are "supplementary" to the other rights furnished by the rest of the Constitution's Bill of Rights. *See* W.A. JOUBERT & J.A. FARIS, EDS., 5 THE LAW OF SOUTH AFRICA 141 (2nd ed. 2004).

58. S. AFR. CONST. 1996 § 28(1). Section 28(1)(h) thus guarantees legal representation for children at state expense at least where "substantial injustice" would otherwise result. *See* Jason Brickhill, *The Right to a Fair Civil Trial: The Duties of Lawyers and Law Students to Act Pro Bono*, 21 S. AFR. J. HUM. RTS. 293, 300 (2005). For purposes of section 28, a "child" is defined as "a person under the age of 18 years." *Id.* at § 28(3).

59. *See* Spitz, *supra* note 27, at 877 ("Section 28 recognizes children as independent rights-bearers whose rights are explicit and justiciable").

60. De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2003 (12) BCLR 1333 (CC) at ¶ 63 (S. Afr.).

children's interests are at stake, South African courts consequently have the authority to take action to protect those interests. Where even "a risk of injustice" exists, it has been noted, a court is obligated "to appoint a curator to represent the interests of children."[61] And the rights set forth in section 28(1) of the Constitution are not exclusive or exhaustive. Section 28(2) requires that "[a] child's best interests are of paramount importance in every matter concerning the child."[62] This is, of necessity, a "flexible" standard because "individual circumstances will determine which factors secure the best interests of a particular child."[63] If a law does not "give paramountcy to the best interest of children," it would be inconsistent with section 28(2) of the Constitution and hence invalid.[64] Section 28(2) thus creates rights separate and independent of those specified in section 28(1).[65]

B. Treaties and the Importance of International Law

South Africa's Constitution requires that courts consider international law. "When interpreting any legislation," the Constitution reads, "every court must prefer any reasonable interpretation of the legislation that is consistent with the international law over any alternative interpretation that is inconsistent with international law."[66] Moreover, when interpreting the Bill of Rights, a court, tribunal or forum must not only "promote the values that underlie an open and democratic society based on human dignity, equality and freedom," but "must consider

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61. Du Toit and Another v Minister for Welfare and Population Development and Others 2002 (10) BCLR 1006 (CC) at ¶ 3 (S. Afr.) (citing S. AFR. CONST. 1996 § 28(1)(h)).

62. S. AFR. CONST. 1996 § 28(2).

63. Minister for Welfare and Population Development v Fitzpatrick and Others 2000 (7) BCLR 713 (CC) at ¶ 18 (S. Afr.) (quoting Fletcher v Fletcher 1948 (1) SA 130 (A)).

64. *Id.* at ¶ 20 (S. Afr.). The wording of South Africa's Constitution as to the best interest of the child is even stronger than that of the United Nations Convention on the Rights of the Child ("CRC"). *See* Brigitte Clark, *A 'Golden Thread'? Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law*, 11 STELLENBOSCH L. REV. 3, 3 (2000).

65. Minister for Welfare and Population Development v Fitzpatrick and Others 2000 (7) BCLR 713 (CC) at ¶ 17 (S. Afr.).

66. S. AFR. CONST. 1996 § 233.

international law" and "may consider foreign law."[67] Thus, "[t]he Constitution affirms that international law is an important interpretive tool."[68]

The Republic of South Africa is a party to several international[69] and regional human rights treaties.[70] South Africa ratified the

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67. S. AFR. CONST. 1996 § 39(1).

68. Christian Education South Africa v Minister of Education 2000 (10) BCLR 1051 (CC) at ¶ 13 (S. Afr.); *see also* S v Williams and Others 1995 (7) BCLR 861 (CC) at ¶ 23 (S. Afr.) ("there is no disputing that valuable insights may be gained from ... public international law as well as in foreign case law").

69. An international agreement binds the Republic of South Africa "only after it has been approved by resolution in both the National Assembly and the National Council of Provinces," unless it is "[a]n international agreement of a technical, administrative or executive nature" or "an agreement which does not require either ratification or accession," in which case approval by the National Assembly and the National Council of Provinces is not required. S. AFR. CONST. 1996 § 231(2)-(3). "Any 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 unless it is inconsistent with the Constitution or an Act of Parliament." S. AFR. CONST. 1996 § 231(4). The Republic of South Africa is bound by international agreements that were binding on the Republic when the Constitution took effect. S. AFR. CONST. 1996 § 231(5). "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." S. AFR. CONST. 1996 § 232.

70. South Africa is a member of the United Nations, having joined in 1945. *See* <http://www.un.org/members/list.shtml> (visited Dec. 9, 2007). It is also a member of the African Union ("AU"), the successor to the Organization of African Unity ("OAU"), one of the objectives of which is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments." *See* Constitutive Act of the African Union, Art. 3(h), July 11, 2000, available at <http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm> (visited Oct. 14, 2007). The OAU itself worked early on to rid South Africa of apartheid. *See* 1 CHRISTOF HEYNS, ED., INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 387 (2004).
Africa's regional human rights system has, at times, helped bring attention to the HIV/AIDS pandemic and the plight of children. For example, the Grand Bay (Mauritius) Declaration and Plan of Action (1999), adopted by the First OAU Ministerial Conference on Human Rights, noted that "children's rights issues remain of concern to all" and that the rights of HIV/AIDS sufferers "are not always observed." Grand Bay (Mauritius) Declaration and Plan of Action, April 16, 1999 at 2, ¶ 6, available at <http://www.africanreview.org/docs/rights/grandbBay.pdf> (visited Oct. 14, 2007). Likewise, the Kigali Declaration (2003), adopted by the AU, called attention to "the alarming rate at which HIV-AIDS is spreading" and to the need "to promote and protect the rights of people living with HIV/AIDS." Kigali Declaration, May 8, 2003, at ¶ 21, available at <www.unhchr.ch/html/menu6/declaration_en.doc> (visited Oct. 14, 2007); *see also*, Resolution on the HIV/AIDS Pandemic – Threat Against Human Rights and Humanity, 2001, available at <http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr41.doc> (visited Oct. 14,

International Covenant on Civil and Political Rights ("ICCPR") in 1998, and acceded to the Optional Protocol to the ICCPR in 2002.[71] In addition, South Africa ratified the African Charter on Human and Peoples' Rights in 1996.[72] That treaty, also known as the Banjul Charter, recognizes individual and peoples' rights, as well as certain socio-economic rights,[73] among them the right to education, a

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2007) (issued by the African Commission on Human and Peoples' Rights).

71. *See, e.g.,* <http://www1.umn.edu/humanrts/research/ratification-southafrica.html> (visited Oct. 11, 2005). The ICCPR states that "[e]very human being has the inherent right to life." International Convention on Civil and Political Rights, Art. 6, Dec. 16, 1966, 999 U.N.T.S. 171. The ICCPR also provides that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State." *Id.* at Art. 24(1).

72. *See* African (Banjul) Charter on Human and Peoples' Rights, Art. 1, June 27, 1981, 21 I.L.M. 58 [hereinafter Banjul Charter] available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> (visited Apr. 13, 2007).

73. The Banjul Charter obligates member states to "recognise the rights, duties and freedoms" enshrined in it and to "adopt legislative or other measures to give effect to them." Banjul Charter, *supra* note 72, art. 1. That Charter protects the "life" of human beings and guards against arbitrary deprivations thereof; guarantees "dignity" to every individual; gives everyone the right to have a cause heard; affords "the right to education"; and requires States to protect the rights of children "as stipulated in international declarations and conventions" and to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." *Id.*, arts. 4-5, 7, 16(2), 17, 18(3). Since South Africa acceded to the Banjul Charter in 1996, South African courts have invoked it alongside provisions of South Africa's Constitution. *See* 1 CHRISTOF HEYNS, ED., INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 417 (2004). The supervisory mechanism created by the Banjul Charter is the African Commission on Human and Peoples' Rights ("African Commission"). Banjul Charter, *supra* note 72, art. 30. That Commission reviews periodic state reports, is charged with protecting human and peoples' rights, and has the power to review individual and inter-state complaints. *Id.,* arts. 45, 47-56, 62. In its work, the Commission must "draw inspiration from international law on human and peoples' rights," particularly from various African instruments, the U.N. Charter, the Universal Declaration of Human Rights, other U.N. instruments, and various instruments adopted within "the specialized agencies of the United Nations." *Id.*, art. 60. The African Commission has only recently started paying serious attention to socio-economic rights. *See* Sibonile Khoza, *Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria*, 4 AFR. HUM. RTS. L.J. 334 (2004); Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights*, 23 HUM. RTS. Q. 327, 359 (2001). The African Commission, however, has yet to receive a communication alleging violations of human rights in the HIV/AIDS context. *See* Sabelo Gumedze, *HIV/AIDS and*

satisfactory environment, and to enjoy "the best attainable state of physical and mental health."[74] In 2002, South Africa also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[75] South Africa signed the International Covenant on Economic, Social and Cultural Rights ("ICESCR") in 1994, but has yet to ratify that treaty.[76]

South Africa is also a party to treaties that specifically deal with children's rights. On June 16, 1995, South Africa ratified the Convention on the Rights of the Child ("CRC"),[77] thereby agreeing to

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Human Rights: The Role of the African Commission on Human and Peoples' Rights, 4 AFR. HUM. RTS. L.J. 181, 195 (2004). One of the most significant socio-economic rights cases decided by the Commission is the *SERAC* case. *See* Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria, Comm. No. 155/96, Afr. Comm'n H.P.R. 60 (2001). In that case, Nigeria's military government was involved in oil production with Shell Petroleum that caused environmental and health problems affecting the Ogoni people. *Id.* at ¶ 1-2, 8-9. The Commission found that the Nigerian government violated the right to life, the right to health, the right to economic, social and cultural development, and the right to food, which was found to be implicit in the Banjul Charter. *Id.* Another significant case is Free Legal Assistance Group and Others v. Zaire, Comm. No. 25/89, 47/90, 56/91, 100/93 African Commission on Human and Peoples' Rights, Comm. No. Afr. Comm'n H.P.R. 74 (1995), where the Commission held that a shortage of medicine constituted a violation of article 16 of the Banjul Charter.

74. Banjul Charter, *supra* note 72, arts. 15, 16(1) & 24; *see also id.*, art. 22 ("All peoples shall have the right to their economic, social and cultural development . . . ."); *id.*, art. 2 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind . . . or other status"). With respect to the right to health, parties to the Banjul Charter must take "the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." Banjul Charter, *supra* note 72, art. 16(2).

75. *See, e.g.*, <http://www1.umn.edu/humanrts/research/ratification-southafrica.html> (visited Oct. 11, 2005).

76. *Id.*; W.A. JOUBERT & J.A. FARIS, EDS., 2 THE LAW OF SOUTH AFRICA 82 (2d ed. 2003); *see also* Devenish, *supra* note 38, at 86 ("at the time of writing, the South African government has not as yet ratified the International Covenant on Economic, Social and Cultural Rights, and is therefore not a state party to it"). The Vienna Convention on the Law of Treaties obligates State parties to refrain from acts which would defeat the "object and purpose" of a treaty after it has been signed but prior to its ratification. Although South Africa is not a party to that treaty, *see* Harksen v President of the Republic of South Africa and Others 2000 (5) BCLR 478 (CC) at n.24 (S. Afr.), certain of that treaty's provisions may reflect customary international law. *Id.*, nn.23-24.

77. Davel & Mungar, *supra* note 17, at 69; Christian Education SA v Minister of Education of the Government of the RSA 1999 (9) BCLR 951 (SE) at ¶ 13 n.10 (S. Afr.). South Africa's Constitutional Court has found that the CRC imposes

"respect and ensure" to every child[78] on a non-discriminatory basis various rights set forth therein.[79] The CRC requires that States Parties "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."[80] The CRC also states that "[w]ith regard to

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"international obligations" upon South Africa. *Id.* at ¶ 13; *see also id.* at ¶ 40 ("by ratifying" the CRC, South Africa "undertook to take all appropriate measures to protect the child from violence, injury or abuse"). The enforcement mechanisms of the CRC itself, however, have been described as "incredibly weak." *See* Kathy Vandergrift, *Challenges in Implementing and Enforcing Children's Rights*, 37 CORNELL INT'L L.J. 547, 551 (2004). The CRC – as one commentator puts it – "has no direct method of enforcement and no sanctions for noncompliance with the treaty's standards." Spitz, *supra* note 27, at 868. The main mechanism for accountability is state reporting to the Committee on the Rights of the Child once every five years. *Id.*

78. Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. A "child" is defined for purposes of the CRC as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." *Id.*, art. 1.

79. In an employment discrimination case involving South African Airways, the Constitutional Court of South Africa held that it is illegal to discriminate against adults on the basis of their HIV status. Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC) (S. Afr.). In that case, South African Airways refused to employ a man living with HIV as a cabin attendant even though a medical examination found him to be clinically fit for employment. *Id.* at ¶¶ 1-2, 5. The Constitutional Court found that South African Airways' employment practices violated the constitutional rights of equality and human dignity. *Id.* at ¶¶ 21-22, 27-29, 34-37, 41. The Court, for example, held that "all human beings, regardless of their position in society, must be accorded equal dignity," "[t]hat dignity is impaired when a person is unfairly discriminated against," and that "[p]eople who are living with HIV must be treated with compassion and understanding." *Id.* at ¶¶ 27, 38. "We must show *ubuntu* towards them," the Court ruled, emphasizing that *ubuntu* is "the recognition of human worth and respect for the dignity of every person." *Id.* at ¶ 38, n.31.
This ruling is fully consistent with the determination of the Committee on the Rights of the Child, which has specifically stated that States Parties cannot discriminate against children, or the enjoyment of their CRC rights, on the basis of their HIV/AIDS status. *See* Committee on the Rights of the Child, 33rd Sess., May 19 - June 6, 2003, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child,* ¶ 6, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

80. CRC, *supra* note 78, art. 4. South Africa submitted its initial report to the Committee on the Rights of the Child – the CRC's monitoring body – in 1997. *See* The Office of the United Nations High Commissioner for Human Rights, *Core Document Forming Part of the Reports of State Parties: South Africa,* Dec. 4, 1997, U.N. Doc. HRI/CORE/1/Add.92 (Sept. 23, 1998); *see also* The Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, *Initial Reports of State Parties Due in 1997: South Africa,* Dec. 4, 1997, U.N. Doc. CRC/C/51/Add.2 (May 22, 1999). South Africa's initial report was considered

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."[81] On January 7, 2000, South Africa also ratified the African Charter on the Rights and Welfare of the Child, otherwise known as the African Children's Charter.[82] The African Children's Charter, which is monitored by a Committee of Experts on the Rights and Welfare of the Child,[83] also mandates the recognition of

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in Geneva in January 2000. *See* Committee on the Rights of the Child, 23rd Sess., Jan. 25, 2000, *Summary Record of the 609th Meeting: South Africa,* U.N. Doc. CRC/C/SR.609 (Feb. 1, 2000), Committee on the Rights of the Child, 23rd Sess., Jan. 25, 2000, *Summary Record of the 610th Meeting: South Africa,* U.N. Doc. CRC/C/SR.610 (Feb. 17, 2000), and Committee on the Rights of the Child, 23rd Sess., Jan. 26, 2000, *Summary Record of the 611th Meeting: South Africa,* U.N. Doc. CRC/C/SR.611 (Feb. 2, 2000). A South African delegation representative emphasized at that time that, by ratifying the CRC, "the South African Government had committed itself to promoting the rights of children and the principles enshrined in the Convention" and that, after ratifying the CRC, "South Africa had immediately sought to bring its laws and policies into line with the Convention's provisions." *See Summary Record of the 609th Meeting,* ¶¶ 7, 9. The representative noted that HIV/AIDS constituted "one of the biggest challenges facing the South African Government" and that "[t]he Government's multi-faceted approach to HIV/AIDS included mobilizing resources, educating the public on methods of prevention and care, providing alternative care for children left orphaned by AIDS, strengthening the health care system, preventing discrimination against HIV-positive students in schools, and working with NGOs and civil society to create support networks and care centres for victims." *Id.* at ¶ 18. Another delegation member added that a large-scale campaign had also been introduced to increase awareness of HIV/AIDS, particularly among young people. *See Summary Record of the 611th Meeting,* ¶ 19.

81. CRC, *supra* note 78, art. 4. A number of international aid agencies and organizations are currently assisting South Africa in fighting the HIV/AIDS epidemic or in addressing its consequences. *See infra* note 270 (listing various NGOs and relief organizations).

82. *See* African Charter on the Rights and Welfare of the Child, available at <http://www.africa-union.org> (follow "Documents" hyperlink; then follow "Treaties, Conventions & Protocols" hyperlink) (visited Apr. 13, 2007) [hereinafter African Children's Charter]; Davel & Mungar, *supra* note 17, at 69, 71-72 & n.33. The African Children's Charter was adopted by the OAU in 1990. *See* B. Rwezaura, *The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa*, 8 INT'L J. L. & FAM. 82, 83 (1994). On June 7, 2000, South Africa also ratified the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. <http://www1.umn.edu/humanrts/research/ratification-southafrica.html> (visited Oct. 11, 2005).

83. The African Committee of Experts on the Rights and Welfare of the Child <http://www.africa-union.org/child/home.htm>, which receives state reports, is charged with protecting children's rights, investigating matters affecting children, and overseeing an individual complaint procedure. *See* African Children's Charter, *supra*

children's rights.[84]

The CRC and the African Children's Charter recognize a variety of civil, political, and socio-economic rights. The CRC and the African Children's Charter, for example, recognize a child's right to life,[85] education,[86] rest and leisure,[87] and to be free from torture, inhuman or degrading treatment, child labor, neglect, maltreatment, or physical or sexual abuse.[88] The CRC recognizes a child's right "to

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note 82, arts. 42-45. The Committee, which can receive communications from the U.N., any member state, or any person, group, or NGO, held its first meeting in 2002. *See id.*, art. 44; COMPENDIUM OF KEY HUMAN RIGHTS DOCUMENTS OF THE AFRICAN UNION 53 (Christof Heyns, ed., 2005). The Committee "shall draw inspiration from international law on human rights" and "from African values and traditions." *See* African Children's Charter, *supra* note 82, art. 46. Regrettably, South Africa has not yet submitted a report to the Committee. *See* Davel & Mungar, *supra* note 17, at 72.

84. African Children's Charter, *supra* note 82, art. 1 ("Member states of the Organization of African Unity parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to take 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."). For purposes of the African Children's Charter, a "child" means every human being below the age of 18 years. *Id.*, art. 2.

85. CRC, *supra* note 78, art. 6(1); African Children's Charter, *supra* note 82, art. 5. Countries must "ensure" to the "maximum extent possible" the child's "survival" and "development." CRC, *supra* note 78, art. 6(2); African Children's Charter, *supra* note 82, art. 5(2).

86. CRC, *supra* note 78, art. 28(1); African Children's Charter, *supra* note 82, art. 11. Parties to the CRC, "with a view to achieving this right progressively and on the basis of equal opportunity," must "[m]ake primary education compulsory and available free to all" and "[e]ncourage the development of different forms of secondary education" and "make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need." CRC, *supra* note 78, art. 28(1). The African Children's Charter, on the other hand, requires parties to take "all appropriate measures with a view to achieving the full realisation of this right" and "shall . . . provide free and compulsory basic education" and "encourage the development of secondary education in its different forms and to progressively make it free and accessible to all." African Children's Charter, *supra* note 82, art. 11(3). The CRC states that "the education of the child shall be directed to . . . [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential." CRC, *supra* note 78, art. 29(1)(a).

87. CRC, *supra* note 78, art. 31(1); African Children's Charter, *supra* note 82, art. 12.

88. CRC, *supra* note 78, arts. 19, 32, 37; African Children's Charter, *supra* note 82, arts. 15, 16(1), 27. The CRC also recognizes the right of the child "to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." CRC, *supra* note

the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health"[89] and the right of children to access "information and materials" aimed "at the promotion of his or her social, spiritual and moral well-being and physical and mental health."[90] Likewise, the African Children's Charter provides that "[e]very child shall have the right to enjoy the best attainable state of physical, mental and spiritual health."[91] The CRC itself confers upon children the right "to benefit from social

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78, art. 32. Other kinds of exploitation are also prohibited by the CRC, *see* CRC, *supra* note 78, art. 36, and States Parties to the CRC are obligated to take "all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse." CRC, *supra* note 78, art. 39.

89. CRC, *supra* note 78, art. 24(1). The CRC provides that parties to it "shall pursue full implementation of this right" and, in particular, "shall take appropriate measures" to (a) "diminish infant and child mortality"; (b) provide "necessary medical assistance and health care to all children"; (c) "combat disease and malnutrition" through, among other things, "the provision of adequate nutritious foods and clean drinking-water"; (d) "ensure appropriate pre-natal and post-natal health care for mothers"; (e) inform members of society, including children, on issues of "child health and nutrition"; and (f) "develop preventative health care, guidance for parents and family planning education and services." CRC, *supra* note 78, art. 24(2). Parties to the CRC must also "undertake to ensure the child such protection and care as is necessary for his or her well-being . . . and, to this end, shall take all appropriate legislative and administrative measures." CRC, *supra* note 78, art. 3(2). Parties to the CRC must also "ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision." CRC, *supra* note 78, art. 3(3).

90. CRC, *supra* note 78, art. 17.

91. African Children's Charter, *supra* note 82, art. 14(1). The African Children's Charter provides that parties to it "shall undertake to pursue the full implementation of this right" and in particular "take measures" to (a) "reduce the infant and child mortality rate"; (b) provide "necessary medical assistance and health care to all children"; (c) "ensure the provision of adequate nutrition and safe drinking water"; (d) "combat disease and malnutrition"; (e) "ensure appropriate health care for expectant and nursing mothers"; (f) "develop preventative health care and family life education and provision of service"; (g) "integrate basic health services programmes in national development plans"; (h) inform members of society, including children, on issues of "child health and nutrition"; (i) "ensure the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of basic service programmes for children"; and (j) support "the mobilisation of local community resources in the development of primary health care for children." African Children's Charter, *supra* note 82, art. 14(2).

security, including social insurance,"[92] and the right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."[93]

In line with South Africa's Constitution,[94] the CRC and the African Children's Charter make the best interests of the child a paramount consideration. The CRC states in part that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[95] And the African Children's Charter states that "[i]n all actions concerning the child undertaken by any person or authority, the best interests of the child shall be *the* primary consideration."[96] The CRC and the African Children's Charter also confer upon children the opportunity to be heard in any judicial and administrative proceedings affecting the child.[97] Under both treaties, any child who is permanently or temporarily deprived of a family environment is entitled "to special protection and assistance."[98] In

92. CRC, *supra* note 78, art. 26. States Parties "shall take the necessary measures to achieve the full realization of this right in accordance with their national law." CRC, *supra* note 78, art. 26(1). "The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child." CRC, *supra* note 78, art. 26(2).

93. CRC, *supra* note 78, art. 27(1). "States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." CRC, *supra* note 78, art. 27(2).

94. *See* Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC) at ¶ 29 (S. Afr.) (holding that section 28(2) of South Africa's Constitution provides "an expansive guarantee that a child's best interests are paramount in every matter concerning the child").

95. CRC, *supra* note 78, art. 3(1).

96. African Children's Charter, *supra* note 82, art. 4(1) (emphasis added).

97. CRC, *supra* note 78, art. 12(2); African Children's Charter, *supra* note 82, art. 4(2).

98. CRC, *supra* note 78, art. 20(1); African Children's Charter, *supra* note 82, art. 25(1). In particular, parties to the CRC or the African Children's Charter must ensure that parentless children or those who cannot be allowed to remain in a family setting get "alternative" care, which could include, among others, "adoption," "foster placement" or "placement in suitable institutions for the care of children." CRC, *supra* note 78, arts. 20(1)-(2), 21; African Children's Charter, *supra* note 82, arts. 24, 25(2).

addition, the CRC expressly recognizes "the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of treatment provided to the child and all other circumstances relevant to his or her placement."[99]

C. Existing Jurisprudence

The Constitutional Court of South Africa has dealt with socio-economic rights on several prior occasions. Those decisions help delineate the meaning and justiciability of those rights under South African law, and serve to illuminate the rights of children affected by HIV/AIDS.

i. In re Certification of the Constitution of the Republic of South Africa, 1996

From 1993 to 1996, South Africa functioned under an interim constitution that prescribed how the country's final constitution was to come into being.[100] The steps of that constitution-making process included the Constitutional Assembly adopting the new constitutional text by a two-thirds majority; that text complying with a prescribed set of constitutional principles;[101] and a certification by South Africa's

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99. CRC, *supra* note 78, art. 25. Section 28 of South Africa's Constitution is one of the mechanisms that helps satisfy South Africa's obligations under the CRC. Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC) at ¶ 75 (S. Afr.) [hereinafter Grootboom] ("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.").

100. S. AFR. (INTERIM) CONST. 1993.

101. Section 71(1) of the interim constitution provided that the new constitutional text shall "comply with the Constitutional Principles contained in Schedule 4" and "be passed by the Constitutional Assembly in accordance with this Chapter." *Id.* Schedule 4 contained a set of 34 constitutional principles. Constitutional Principle II stated that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution." *Id.* Others, for example, dealt with the concept of separation of powers or the power of the judiciary. *See* Constitutional Principle VI ("There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.") & Constitutional Principle VII ("The judiciary shall be appropriately qualified, independent and impartial and shall have

Constitutional Court that the text adhered to those principles.[102] Following the Constitutional Assembly's adoption of the new constitutional text in May 1996, the Constitutional Court engaged in its certification process.[103] It was in that context that the Constitutional Court first commented on the justiciability of socio-economic rights.

In *In re Certification of the Constitution of the Republic of South Africa, 1996*,[104] the Constitutional Court noted that judicial "certification" of a constitution "is unprecedented" and that it was the Court's duty "to measure each and every provision of the new constitution" against the articulated "Constitutional Principles."[105] Although the Constitutional Court concluded that the new constitutional text could not be certified "as it stands" because of non-compliance in several respects with those principles, the Court determined that "in respect of the overwhelming majority of its provisions," the Constitutional Assembly had measured up to the "predetermined requirements" and that the new constitutional text represented "a monumental achievement."[106] South Africa's constitution is undeniably unique as to both the scope and scale of justiciable socio-economic rights found within it.[107]

In its certification judgment, the Constitutional Court noted that objectors to the constitutional text had argued against the inclusion of socio-economic rights in that text on two grounds. The first

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the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.").

102. *See* In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (1) BCLR 1 (CC) at ¶ 1 (S. Afr.).

103. *Id.* at ¶ 2.

104. *See* In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC) (S. Afr.).

105. *Id.* at ¶¶ 1-2.

106. *Id.* at ¶¶ 31, 484. Following some additional changes to the text, the final constitutional text was certified by the Constitutional Court later in 1996. *See* In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC) at ¶ 205 (S. Afr.) ("We certify that all the provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996, comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa, 1993.").

107. *See* CHRISTOF HEYNS & DANIE BRAND, INTRODUCTION TO SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTION, available at <www.chr.up.ac.za/centre_projects/socio/compilation1part1.html> (visited Apr. 13, 2007).

objection, the Court pointed out, was that these rights were not "universally accepted fundamental rights."[108] The second objection, it added, was that the inclusion of these rights was said to be "inconsistent with the separation of powers" required by the constitutional principles because "the judiciary would have to encroach upon the proper terrain of the legislature and executive."[109] The objectors argued, for example, that socio-economic rights would result in courts dictating to the government how the budget should be allocated. The objectors argued that socio-economic rights would not be justiciable because of the budgetary issues their enforcement would engender.[110]

The Constitutional Court rejected both arguments. The Court acknowledged socio-economic rights are not "universally accepted," but pointed out that Constitutional Principle II permitted the Constitutional Assembly "to supplement the universally accepted fundamental rights with other rights not universally accepted."[111] As to the justiciability issue, the Court ruled that socio-economic rights "are, at least to some extent, justiciable."[112] "At the very minimum," the Court held, "socio-economic rights can be negatively protected from improper invasion."[113] The Court emphasized that while the enforcement of socio-economic rights "may result in courts making orders which have direct implications for budgetary matters," that did not "bar" their justiciability, with the Court noting that the enforcement of civil and political rights, such as equality and the right to a fair trial, often have such implications as well.[114] In addressing the "separation of powers" issue, the Court held that "[n]o constitutional scheme can reflect a complete separation of powers" and that no separation is "absolute" in democratic systems of government "in which checks and balances result in the imposition of restraints by one branch of government upon another."[115]

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108. *See* In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC) ¶ 76 (S. Afr.).

109. *Id.* at ¶ 77.

110. *Id.* at ¶¶ 77-78.

111. *Id.* at ¶¶ 76, 78.

112. *Id.* at ¶ 78.

113. *Id.* at ¶ 77.

114. *Id.* at ¶¶ 77-78.

115. *Id.* at ¶¶ 108-09. South Africa's Constitution was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. *See*

ii. Soobramoney v. Minister of Health, KwaZulu-Natal

In 1997, South Africa's Constitutional Court decided the case of a 41-year-old, unemployed man who was in the final stages of chronic renal failure and who sought renal dialysis at a state hospital.[116] The diabetic man, who had heart disease, cerebro-vascular disease, and who had suffered a stroke, sought to prolong his life but the state hospital refused to provide him with dialysis because the hospital's renal unit – which lacked adequate resources – only had 20 dialysis machines available to it and other patients had a higher priority for treatment.[117] The litigant, Thiagraj Soobramoney, had received dialysis treatment at private hospitals, but after his money had run out, filed an application seeking an order directing the state hospital to provide him with continuing treatment.[118] Soobramoney invoked his "right to life" and his right not to be refused "emergency medical treatment" under the 1996 Constitution.[119]

In rejecting his claim, the Constitutional Court held that chronic renal failure – which would require dialysis treatment two to three times a week – did not qualify as an "emergency," and that access to health care services had to be determined within the state's available resources.[120] "If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment," the Court ruled, "the cost of doing so would make substantial inroads into the health budget."[121] The Court emphasized that the socio-economic rights enshrined in the 1996 Constitution were central to the new constitutional order,[122] but was unwilling to interfere with difficult decisions affecting the country's health budgeting. "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters," the Court noted.[123]

<http://www.info.gov.za/documents/constitution/index.htm> (visited July 2, 2007).

116. Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC) at ¶ 1 (S. Afr.).

117. *Id.* at ¶¶ 1-3, 24-25.

118. *Id.* at ¶ 5.

119. *Id.* at ¶ 7.

120. *Id.* at ¶¶ 22, 36.

121. *Id.* at ¶ 28.

122. *Id.* at ¶¶ 8-9.

123. *Id.* at ¶ 29. A concurring opinion, authored by Justice Albie Sachs, further emphasized that the Bill of Rights should not "be interpreted in a way which results

iii. Government of South Africa v. Grootboom

Government of South Africa v. Grootboom[124] represented a milestone in the Constitutional Court's treatment of socio-economic rights. In that case, Irene Grootboom and others were evicted from their makeshift homes on private land that was to be used for low-income housing.[125] Mrs. Grootboom and many others had previously lived in deplorable conditions in an informal squatter settlement known as Wallacedene. All the people lived in shacks, only five percent of which had electricity; there was no sewage or refuse services; and the area was partially waterlogged.[126] Some shacks were permanently flooded during winter rains, there was severe overcrowding, and other shacks were perilously close to busy roads.[127] Many of the Wallacedene households – two-thirds of which earned less than R500 per month – had applied for low-cost housing but had been on the waiting list for up to seven years. This led Mrs. Grootboom and many others to move out of Wallacedene in September 1998 and to put up their shacks on the vacant land government officials planned to use for the low-cost housing.[128] They did so, however, without the permission of the landowner.[129]

Mrs. Grootboom—on behalf of 510 children and 390 adults – applied to the Cape of Good Hope High Court for an order requiring governmental entities to provide the applicants with housing until they obtained permanent accommodations.[130] The key constitutional provisions at issue were section 26, which provides that "[e]veryone has the right to have access to adequate housing," and section 28(1)(c), which states that "[e]very child has the right . . . to basic

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in courts feeling themselves unduly pressurised . . . into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others." *Id.* at ¶ 58. "If resources were co-extensive with compassion," Justice Sachs wrote, "I have no doubt as to what my decision would have been." *Id.* at ¶ 59. "Unfortunately," he concluded, "the resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonizing choices that had to be made." *Id.*

124. Grootboom, *supra* note 99.

125. *Id.* at ¶ 4.

126. *Id.* at ¶ 7.

127. *Id.* at ¶ 59.

128. *Id.* at ¶¶ 7-8.

129. *Id.* at ¶ 9.

130. *Id.* at ¶ 4, n. 2.

nutrition, shelter, basic health care services and social services."[131] The High Court ordered the national, provincial and local authorities to provide shelter to the children, as well as the parents of those children, with the judgment ordering that "tents, portable latrines and a regular supply of water" be provided as "the bare minimum."[132] The High Court found that the governmental entities involved had taken "reasonable legislative and other measures" within their available resources to achieve the progressive realization of the right of access to adequate housing, but that section 28(1)(c) – especially considering the best interests of the children – imposed an obligation on the state to provide shelter for children if the parents were unable to provide it.[133] Stating that "a child's right to shelter should take account of the need of the child to be accompanied by his or her parent," the High Court ordered that any children (as well as their parents) be provided with shelter "until such time as the parents are able to shelter their own children."[134]

When that order was appealed, the Constitutional Court ruled that socio-economic rights "are expressly included in the Bill of Rights" and "cannot be said to exist on paper only."[135] "The question," the Court held, "is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case."[136] Noting that each dispute "must be carefully explored on a case-by-case basis,"[137] the Court proceeded to rule that section 26(1)'s guarantee that "[e]veryone has the right to have access to adequate housing" must be read together with section 26(2), which requires the state to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[138] Everyone, including any child, has rights under section 26(1), the Court ruled, saying that under that section "there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right

131. *Id.* at ¶ 19.
132. *Id.* at ¶¶ 4, 14-15.
133. *Id.* at ¶¶ 14-15.
134. *Id.* at ¶ 16.
135. *Id.* at ¶ 20.
136. *Id.*
137. *Id.*
138. *Id.* at ¶ 34.

of access to adequate housing."[139]

Adding that section 26(2) "speaks to the positive obligation imposed upon the state,"[140] the Constitutional Court found that "[a] reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available."[141] In considering whether the measures adopted are "reasonable," the Court stated that it "will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent."[142] Instead, the Court would consider whether the initiative "is sufficiently flexible to respond to those in desperate need" and caters appropriately not only to "medium and long term needs" but to "immediate and short-term requirements."[143] "A programme that excludes a significant segment of society," the Court ruled, "cannot be said to be reasonable."[144] Because it found that the national housing program made no provision for those in "desperate need," the Constitutional Court found the program to be unreasonable.[145]

In so ruling, the Constitutional Court held that socio-economic rights "must all be read together in the setting of the Constitution as a

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139. *Id.*

140. *Id.* at ¶ 38.

141. *Id.* at ¶ 39.

142. *Id.* at ¶ 41.

143. *Id.* at ¶¶ 43, 56.

144. *Id.* at ¶ 43.

145. *Id.* at ¶¶ 63-65. A "reasonable part of the national housing budget" must be devoted to those in desperate need, the Court ruled, though it was quick to point out that "the precise allocation is for national government to decide in the first instance." *Id.* at ¶ 66. The Constitutional Court in *Grootboom* thus made a declaratory order requiring the government "to meet the obligation imposed upon it by section 26(2) of the Constitution," including an obligation "to devise, fund, implement and supervise measures to provide relief to those in desperate need." *Id.* at ¶¶ 96, 99. The author of the *Grootboom* judgment, cognizant of the deplorable living conditions of so many South Africans, recognized the state's difficulties in living up to its constitutional obligations, but noted their importance. "I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution which expressly provides that the state is not obligated to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce." *Id.* at ¶ 94.

whole."[146] The Court emphasized that "[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality."[147] However, the Constitutional Court rejected the argument that socio-economic rights contain a legally enforceable "minimum core,"[148] noting the term "progressive realisation" shows that a given socio-economic right "could not be realised immediately."[149] The Court also noted that legislative measures, all by themselves, do not create constitutional compliance. "The state," the Court ruled, "is obligated to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies

146. *Id.* at ¶ 24.

147. *Id.* at ¶ 44. The Court in *Grootboom* emphasized: "Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right." *Id.* This determination is in keeping with the concept of *ubuntu*, which focuses on dignity, survival, sharing of resources, the sustained well-being of community, and treating a neighbor's sorrows as one's own sorrows. *See* MFUNISELWA JOHN BHENGU, UBUNTU: THE ESSENCE OF DEMOCRACY 5, 8-9 (1996). As a member of South Africa's Parliament put it: "*Ubuntu* is a philosophy of tolerance and compassion. It does not give up on people and it starts from the premise that everybody has a potential to realise the promise of being human." *Id.* at 12.

148. This argument relied upon General Comment 3 issued by United Nations Committee on Economic, Social and Cultural Rights. Grootboom, *supra* note 99, at ¶¶ 29-31. That eighteen-member Committee had stated that "[o]n the basis of extensive experience gained by the Committee," States Parties must "ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" set forth in the ICESCR. General Comment 3, ¶ 10. "In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate 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." *Id.* The Court in *Grootboom* also determined that it did not have "comparable information" to the Committee to establish what might constitute a "minimum core." Grootboom, *supra* note 99, at ¶ 32.

149. Grootboom, *supra* note 99, at ¶ 45. The term "progressive realisation" was taken from Article 2.1 of the ICESCR. *Id.* The Constitutional Court thus looked to the meaning ascribed to that concept by the Committee on Economic, Social and Cultural Rights, finding "no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived." *Id.* That Committee has interpreted the progressive realization concept as "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights." *See* General Comment 3, ¶ 9 (1990). It imposes an obligation on the State "to move as expeditiously and effectively as possible" towards the goal, though it must only do so "within available resources." *Id.*; Grootboom, *supra* note 99, at ¶ 46.

and programmes implemented by the executive."[150] Thus, a program must also "be reasonably implemented."[151]

As regards children, the Court in *Grootboom* rejected the approach taken by the High Court,[152] saying the High Court's reasoning produced "an anomalous result."[153] "The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand," the Constitutional Court ruled.[154] "Children," it feared, "could become stepping stones to housing for their parents instead of being valued for who they are."[155] Although Mrs. Grootboom and amici emphasized that the right of children to shelter is unqualified and that section 28(1)(c) did not contain the "reasonable measures" qualification of other constitutional provisions, the Constitutional Court stated that "it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents."[156] The rights of children under section 28(1)(c) was found to "overlap" with the rights of "everyone," a term that includes children, under other

150. Grootboom, *supra* note 99, at ¶ 42.

151. *Id.*

152. The High Court judge had ruled that it was in the children's best interests to remain with their parents; that section 28(1)(c) of the Constitution "is drafted as an unqualified constitutional right"; that in the event parents were unable to provide shelter for their children, the obligation fell to the state; and that the word "shelter" in section 28(1)(c) envisages only "temporary shelter," "an obligation . . . far short of adequate housing." *See* Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (CC) (S. Afr.). "[S]helter," Judge Davis opined, "is a significantly more rudimentary form of protection from the elements than is provided by a house." *Id.* at 289. "As the family must be maintained as a unit," he ruled, "parents of the children who are granted shelter should also be entitled to such shelter." *Id.* at 291.

153. Grootboom, *supra* note 99, at ¶¶ 71, 79. The Constitutional Court characterized the High Court ruling as amounting to a judgment (1) that children and their parents were entitled to rudimentary shelter "on demand" if parents were unable to shelter their children, (2) that this obligation was to be made "irrespective of the availability of resources," and (3) that the obligation existed "independently of and in addition to the obligation to take reasonable legislative measures in terms of section 26." *Id.* at ¶ 70. "Neither section 26 nor section 28," the Constitutional Court ruled, "entitles the respondents to claim shelter or housing immediately upon demand." *Id.* ¶ 95.

154. *Id.* at ¶ 71.

155. *Id.*

156. *Id.* at ¶¶ 72-73.

constitutional provisions.[157] "This overlap," the Court stated, "is not consistent with the notion that section 28(1)(c) creates separate and independent rights for children and their parents."[158]

The Constitutional Court's ruling in *Grootboom* has considerable legal significance for children orphaned by AIDS and no longer living in a family environment. In *Grootboom*, the Court specifically determined that children's rights under section 28(1)(b) and 28(1)(c) "must be read together."[159] Construed together, these provisions were found to "ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care."[160] Thus, subsection (1)(b) "contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking."[161] Although the Constitutional Court held that "section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents and families," the Court did rule that the state incurs "the obligation to provide shelter to those children, for example, who are removed from their families."[162]

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157. *Id.* at ¶ 74.

158. *Id.*

159. *Id.* at ¶ 76. Surprisingly, the Constitutional Court in *Grootboom* did not analyze the implications of another portion of section 28 dealing with the "child's best interests." S. AFR. CONST. § 28(2). The High Court judge in the case, by contrast, had relied extensively on that concept.

160. Grootboom, *supra* note 99, at ¶ 76. In Bannatyne v Bannatyne 2003 (2) BCLR 111 (CC) (S. Afr.), the Constitutional Court held that "[w]hile the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the state to create the necessary environment for parents to do so." *Id.* at ¶ 24. Thus, the Constitutional Court has held that the state "must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s[ection] 28." *Id.* (quoting Grootboom, *supra* note 99, at ¶ 78).

161. Grootboom, *supra* note 99, at ¶ 77.

162. *Id.* Because orphans affected by HIV/AIDS may have no parent or family members to take care of them, orphans undoubtedly have rights under section 28(1)(c) of South Africa's Constitution. *Id.* at ¶¶ 77-79.

iv. Minister of Health and Others v. Treatment Action Campaign and Others

In the landmark case of *Minister of Health and Others v. Treatment Action Campaign*,[163] the Constitutional Court of South Africa further delineated the scope of socio-economic rights. In that case, the High Court in Pretoria, in response to an application filed by associations concerned about the treatment of HIV/AIDS and its prevention, found that South Africa's government had acted unreasonably.[164] In particular, the government was found to have acted unreasonably in "(a) refusing to make an antiretroviral drug called nevirapine[165] available to the public health sector where the attending doctor considered it medically indicated and (b) not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV."[166] The government's program – developed by the national Minister of Health and members of the executive councils responsible for health in all provinces except the Western Cape – had imposed restrictions on the availability of nevirapine in the public health sector.[167] The applicants had contended those restrictions, which made nevirapine available at only a small number of test sites, and thus inaccessible to many women, were unreasonable under the Constitution, which commanded that the state and all organs of state "respect, promote and fulfil the rights in the Bill of Rights."[168]

The *TAC* case arose out of a protracted struggle. The Treatment Action Campaign had pressed for acceleration of mother-to-child HIV treatment in the late 1990s, but the South African government had raised concerns about the safety and efficacy of nevirapine. Even

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163. Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1075 (CC) [hereinafter TAC].

164. *Id.* at ¶¶ 2-3.

165. The Constitutional Court described nevirapine as "a fast-acting and potent antiretroviral drug long since used worldwide in the treatment of HIV/AIDS and registered in South Africa since 1998." *Id.* at ¶ 2, n. 3. "The drug," the Court noted, writing in 2002, "is currently available free to government and its administration is simple: a single tablet taken by the mother at the onset of labour and a few drops fed to the baby within 72 hours after birth." *Id.* at ¶ 4, n.5. In July 2000, the manufacturers of nevirapine had offered to make the drug available to the South African government free of charge for a period of five years. *Id.* at ¶ 19.

166. *Id.* at ¶ 2.

167. *Id.* at ¶¶ 3-4.

168. *Id.* at ¶ 4.

after the 13th International AIDS Conference in Durban in August 2000, South Africa's Minister of Health continued to take the position that nevirapine would not be made generally available. Instead, South African provinces would each select two sites for further research and the use of the drug would be limited to those sites.[169] Those favoring an accelerated prevention campaign were concerned about the mothers and babies who could not afford private health care and who had no access to the research sites.[170] The *TAC* case ended up before South Africa's Constitutional Court after the government appealed from the decision of the High Court in Pretoria that the State had to provide nevirapine to all pregnant women through a health plan.[171]

After noting that "[i]n our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention,"[172] the Constitutional Court of South Africa nevertheless managed to arrive at a unanimous decision.[173] The Constitutional Court, citing its prior opinions in *Soobramoney* and *Grootboom*, first reiterated that socio-economic rights are clearly justiciable, then framed the legal issue as follows: "The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution."[174] The Court ultimately determined that the governmental measures taken did not meet constitutional standards,[175] finding two material deficiencies in the

169. *Id.* at ¶ 10. Nevirapine was registered in 1998 by the Medicines Control Council, a body created by the Medicines and Related Substances Control Act 101 of 1965 to regulate drug safety, and in January 2001 the WHO recommended the administration of nevirapine to mother and infant at the time of birth as a way to combat HIV. The Medicines Control Council approved the use of the drug to prevent mother-to-child transmission of HIV in April 2001. *Id.* at ¶ 12.

170. *Id.* at ¶ 17.

171. Devenish, *supra* note 38, at 95.

172. TAC, *supra* note 163, at ¶ 20.

173. *Id.* at ¶ 21.

174. *Id.* at ¶¶ 23-25.

175. The *TAC* opinion pointed out that if a governmental policy is found to be inconsistent with the Constitution, the Court is "obliged in terms of section 172(1)(a) to make a declaration to that effect." *Id.* at ¶ 101. "But that is not all," the Court added, saying: "Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief.'" *Id.* "It has wide powers to do so," the Court ruled, noting that

government's program[176] as regards health-care services to HIV-positive pregnant women: (1) the measures adopted by the government prohibited the administration of nevirapine at public hospitals and clinics outside research and training sites, and (2) the measures failed to implement a comprehensive program to prevent mother-to-child transmission of HIV.[177]

In coming to that conclusion, the Court in *TAC* grappled with several issues, including concerns of efficacy and reasonableness. As to the efficacy concern, the Court held that "[i]t is clear from the evidence that the provision of nevirapine will save the lives of a significant number of infants even if it is administered without... support services that are available at the research and training sites."[178] On the reasonableness issue, the Court said it had a duty to determine the reasonableness of the governmental measures[179] and found that "[t]he policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites."[180] The Court in *TAC*

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a court may also "make any order that is just and equitable." *Id.* As the Court held: "Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted." *Id.* at ¶ 106; *accord* Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC) at ¶ 19 (S. Afr.) ("Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.").

176. The *TAC* opinion called the government's policy "an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single does of nevirapine at the time of the birth of the child." TAC, *supra* note 163, at ¶ 80. The *TAC* court went on to call the government's policy a "breach" of the state's constitutional obligations and not a "reasonable" one. *Id.* at ¶¶ 80-81.

177. *Id.* at ¶ 44.

178. *Id.* at ¶ 57.

179. *Id.* at ¶ 93. In carrying out this responsibility, the *TAC* court acknowledged that "the country health services are overextended" and that "HIV/AIDS is but one of many illnesses that require attention." *Id.* "We are also conscious," the opinion stated, "of the daunting problems confronting government as a result of the pandemic." *Id.* at ¶ 94; *see also id.* ("[T]he state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obligated to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task.").

180. *Id.* at ¶ 67.

also reiterated what it had said in *Grootboom*: "[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavor to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."[181] The Court found that the government's policy failed to meet constitutional standards "because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV,"[182] pointing out that under the policy "it is the poor" – those who "cannot afford to pay for medical services"—who would suffer.[183]

The *TAC* opinion – which has great import to the plight of children affected by HIV/AIDS – also discussed and gave special consideration to children's rights under section 28 of the Constitution. The Court cited sections 28(1)(b) and (c) of the Constitution – giving "[e]very child" certain rights – and pointed out that the sections must be read together.[184] In response to the government's argument that section 28(1)(c) imposes an obligation not on the state, but on the *parents* of newborns, to provide children with required basic health care services,[185] the *TAC* court held that "[w]hile the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that '[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by

181. *Id.* at ¶ 68 (citing Grootboom, *supra* note 99, at ¶ 44, n.6). "A programme for the realisation of socio-economic rights," the *TAC* court continued, "must 'be balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable." *Id.* at ¶ 68.

182. *Id.* at ¶ 125; *compare id.* ("That does not mean that everyone can immediately claim access to such treatment, although the ideal . . . is to achieve that goal. Every effort must, however, be made to do so as soon as reasonably possible.").

183. *Id.* at ¶ 70.

184. *Id.* at ¶¶ 74-75.

185. For this argument, the government relied on passages from the *Grootboom* decision, which had held that sections 28(1)(b) and (c) of the Constitution had to be read together. *Id.*, ¶¶ 75-76. In *Grootboom*, the Court had noted: "Subsection 1(b) defines those responsible for giving care while ss 1(c) lists various aspects of the care entitlement." *Id.*, ¶¶ 76-77. The *Grootboom* court then stated: "It follows from ss 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking." *Id.*

their parents or families.'"[186] Indeed, the Court in *TAC* specifically observed: "The State is obligated to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking."[187]

In deciding the case, the judges in *TAC* saw the need for a concerted, coordinated effort to fight HIV/AIDS[188] and also discussed the concept of a "minimum core" of rights. Amici briefs had contended that section 27(1) of the Constitution had established an individual right vested in everyone, and that this right has a "minimum core" to which every person in need is entitled.[189] In its decision, the Constitutional Court pointed out that the "minimum core" concept was developed by the United Nations Committee on Economic, Social and Cultural Rights, which is charged with monitoring State obligations undertaken pursuant to the ICESCR.[190] That Committee stated:

> If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être.* By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligations must also take into account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate 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.[191]

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186. TAC, *supra* note 163, at ¶¶ 76-77.

187. *Id.* at ¶ 79. As the *TAC* court noted: "Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them." *Id.*

188. The Court's language seems a clarion call for more *ubuntu* in the country. *See id.* at ¶ 123 ("The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshaled, inspired and led.").

189. *Id.* at ¶ 26.

190. *Id.*

191. CESCR General Comment 3, *The Nature of States Parties Obligations (Art.*

The Constitutional Court in the *TAC* case emphasized that "[t]he minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity."[192] As the Court stated: "No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court." In so ruling, the Constitutional Court alluded to "a distinction between the self-standing rights in sections 26(1) and 27(1), to which everyone is entitled, and which in terms of section 7(2) of the Constitution '[t]he state must respect, protect, promote and fulfil', and the independent obligations imposed on the state by sections 26(2) and 27(2)."[193]

In *TAC*, the Constitutional Court held, however, that "the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them."[194] The Court in *TAC*, citing *Soobramoney* and noting that the constitutional provisions had to be construed together, emphasized that the obligations to take "progressive" action imposed on the State by sections 26(2) and 27(2) correspond to the rights referred to in sections 26(1) and 27(1), which rights themselves "are limited by reason of the lack of resources."[195] According to the Court in *TAC*: "It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."[196]

The Court noted the "many pressing demands on the public

2, par. 1), Dec. 14, 1990, ¶ 10.

192. TAC, *supra* note 163, at ¶ 28.

193. *Id.*

194. *Id.* at ¶ 34.

195. *Id.* at ¶¶ 29-31, 39 (citing Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC) at ¶ 11, n. 6 (S. Afr.)). The Court in *TAC* also cited *Grootboom*, noting that *Grootboom* "made clear that '[s]ection 26 does not expect more of the State than is achievable within its available resources' and does not confer an entitlement to 'claim shelter or housing immediately upon demand' and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependents are concerned, 'the State is not obliged to go beyond available resources or to realise these rights immediately.'" TAC, *supra* note 163, at ¶ 32.

196. *Id.* at ¶ 35.

purse"[197] and that "[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community."[198] The Court further stated that "in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards . . . should be, nor for deciding how public revenues should most effectively be spent."[199] "The Constitution," the Court held, "contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation."[200] "In this way," it noted, "the judicial, legislative and executive functions achieve appropriate constitutional balance."[201]

The Constitutional Court in the *TAC* case ordered both declaratory and other relief. The Court first declared that the Constitution required the government "to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV."[202] The Court also declared that "[t]he programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment

197. *Id.* at ¶ 37.

198. *Id.* at ¶ 38.

199. *Id.* at ¶ 37.

200. *Id.* at ¶ 38. Determinations of reasonableness, the Court noted, "may in fact have budgetary implications, but are not in themselves directed at rearranging budgets." *Id.* In making reasonableness determinations, conclusory assertions by the government about budgetary constraints will not suffice. *See* Devenish, *supra* note 38, at 98 (citing Van Biljon v Minister of Correctional Services 1997 (4) SA 441 (CC) (S. Afr.), a case in which HIV-infected prisoners applied for declaratory relief and sought medical and ARV medication; in granting relief, the court held that although the Constitution did not require "optimal treatment"—only "adequate treatment" was required—the State had failed to make out a reasoned case that it could not afford the requested treatment). In other words, a governmental body cannot rely on purely conclusory statements in defense of a policy or program.

201. TAC, *supra* note 163, at ¶ 38.

202. *Id.* at ¶ 135.

available to them for such purposes."[203] The government was also "ordered without delay" to, among other things, "[r]emove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites" and "[p]ermit and facilitate the use of nevirapine."[204]

v. Khosa v. Minister of Social Development

Khosa v. Minister of Social Development[205] dealt with a constitutional challenge to provisions of the Social Assistance Act reserving social grants for aged South African citizens and child-support grants and care-dependency grants for South African citizens only.[206] The applicants in *Khosa* were Mozambican citizens who had acquired permanent residence status in South Africa, and alleged that the failure of the Social Assistance Act to make provision for permanent residents ran afoul of South Africa's Constitution.[207] The Constitutional Court agreed, declaring that the failure to include the words "or permanent resident" after the word "citizen" in the relevant provisions of the Act was inconsistent with the Constitution.[208] In particular, the Court noted that the socio-economic rights in sections 26 and 27 of the Constitution are conferred on "everyone" and that section 7(1) of the Constitution provides that the Bill of Rights protects the rights of "all people in our country."[209] The Court concluded that "the most appropriate remedy" was to read the words "or permanent resident" into the Act after the words "citizen" so as to retain the right of access to social security for South African citizens while making it instantly available to permanent residents.[210]

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203. *Id.* In addition, the government was ordered to "pay the applicants' costs, including the costs of two counsel." *Id.*

204. *Id.* As to such orders, the Constitutional Court noted that "[t]he orders . . . do not preclude the government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV." *Id.*

205. Khosa v Minister of Social Development 2004 (6) BCLR 569 (CC) (S. Afr.).

206. *Id.* at ¶ 1 (citing Social Assistance Act 59 of 1992).

207. *Id.* at ¶ 2.

208. *Id.* at ¶ 98.

209. *Id.* at ¶¶ 46-47.

210. *Id.* at ¶ 89.

In so holding, the Constitutional Court emphasized that "[t]he socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom."[211] The Court further stated that section 27(1) and section 27(2) "cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another."[212] Instead, section 27(2) "exists as an internal limitation on the content of section 27(1)" and that "the ambit of the section 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1)."[213] "When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights," the Court ruled, "they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness."[214]

The Court's decision put special emphasis on the needs of the most vulnerable in South African society – and the need for people to look out for one another. "The right of access to social security, including social assistance, for those unable to support themselves and their dependants," the Court ruled, "is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs."[215] "Sharing responsibility for the problems and consequences of poverty equally as a community," the Court went on, "represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole."[216] Finding the exclusion of permanent residents from the social assistance scheme to be "discriminatory" and "unfair," the Court concluded that such unfairness "would not be justifiable under

211. *Id.* at ¶ 40. The Court noted that "[e]quality in respect of access to socio-economic rights is implicit in the reference to 'everyone' being entitled to have access to such rights in section 27." *Id.* at ¶ 42.

212. *Id.* at ¶ 43.

213. *Id.*

214. *Id.* at ¶ 44.

215. *Id.* at ¶ 52. "A society," the Court stated, "must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational." *Id.*

216. *Id.* at ¶ 74.

section 36 of the Constitution."[217] The Court further found that "the importance of providing access to social assistance to all who live permanently in South Africa... far outweighs the financial and immigration considerations on which the state relies."[218]

IV. Vindicating the Rights of HIV/AIDS-Affected Children

A. South Africa's Legal Framework

South Africa includes national, provincial and local units of government.[219] The country's Parliament controls the national sphere of government; provincial legislatures have legislative authority over the provinces; and municipal councils control localities.[220] The Republic of South Africa is made up of the following nine provinces: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North West, and Western Cape.[221] By law, a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and

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217. *Id.* at ¶ 80. The Court noted that "[t]here is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution." *Id.* at ¶ 83. Sections 26 and 27 contain internal limitations which qualify the rights, the Court noted, pointing out that the state's obligations in respect of these rights "goes no further than to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation' of the rights." *Id.* "If a legislative measure taken by the state to meet this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27," the Court noted, "section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different" than "what is 'reasonable' for the purposes of sections 26 and 27." *Id.* While reserving judgment on that issue, the author of the Court's opinion nevertheless concluded: "Even if it is assumed that a different threshold of reasonableness is called for in sections 26 and 27 than is the case in section 36, I am satisfied for the reasons already given that the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable within the meaning of section 36." *Id.* at ¶ 84.

218. *Id.* at ¶ 83.

219. S. AFR. CONST. 1996 § 40(1) ("In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."). "All spheres of government and all organs of state within each sphere must," among other things, "secure the well-being of the people of the Republic" and "be loyal to the Constitution, the Republic and its people." *Id.* § 41(1)(b), (d).

220. S. AFR. CONST. 1996 § 43.

221. S. AFR. CONST. 1996 § 103.

economic development of the community."[222]

The South African judicial system has many kinds of courts, including the Constitutional Court, the Supreme Court of Appeal, the High Courts, and the Magistrates' Courts.[223] The Constitutional Court is "the highest court in all constitutional matters" but "may decide only constitutional matters, and issues connected with decisions on constitutional matters."[224] The Supreme Court of Appeal "may decide appeals in any matter" and is "the highest court of appeal except in constitutional matters."[225] A High Court may decide "any constitutional matter except a matter that (i) only the Constitutional Court may decide; or (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court," as well as "any other matter not assigned to another court by an Act of Parliament."[226] Magistrates' Courts and all other courts may decide "any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President."[227]

South Africa also has children's courts, which are responsible for "overseeing the well-being of children, examining the qualifications of applicants for adoption and granting adoption orders."[228]

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222. S. AFR. CONST. 1996 § 153(a).

223. S. AFR. CONST. 1996 § 166.

224. S. AFR. CONST. 1996 § 167(3)(a)-(b). "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force." *Id.* § 167(5). In matters affecting children, South Africa's Constitutional Court has made clear that "the aid of the High Courts" can always be sought "in their capacity as upper guardian of all minor children." *See* Du Toit and Another v Minister for Welfare and Population Development and Others 2002 (10) BCLR 1006 (CC) at ¶ 36 (S. Afr.).

225. S. AFR. CONST. 1996 § 168(3).

226. S. AFR. CONST. 1996 § 169.

227. S. AFR. CONST. 1996 § 170.

228. Minister for Welfare and Population Development v Fitzpatrick and Others 2000 (7) BCLR 713 (CC) at ¶¶ 30-31 (S. Afr.); *see also* W.A. JOUBERT & J.A. FARIS, EDS., 2 THE LAW OF SOUTH AFRICA 70 (2nd ed. 2003) ("Children's courts are empowered to make or rescind adoption orders, orders transferring parental authority, and contribution orders against respondents who are liable to maintain a child and have failed to do so."); *id.* at 76 (noting that the court "may order that the child be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker, or that he or she be sent to a children's home . . . .").

Children's courts are specifically authorized to order foster care placements, with Section 15(b) of South Africa's Child Care Act giving such courts that right.[229] However, many children in alternative care arrangements – including those affected by HIV/AIDS – never go through a children's court proceeding but are simply informally incorporated into an extended family system, making the resulting caregivers ineligible for a R500 per month foster care grant.[230]

The power of South African courts to right wrongs and grant relief is extremely broad – as the *TAC* decision made clear. The Constitution gives individuals, those acting on another's behalf "who cannot act in their own name," associations and groups, and those acting in the "public interest," the ability to "approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened," and then gives courts the ability to "grant appropriate relief, including a declaration of rights."[231] When deciding a constitutional matter within its power, a court "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."[232] In addition, a court "may make any order that is just and equitable."[233] As the Constitutional Court of South Africa has emphasized: "The Constitution requires government

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229. Davel & Mungar, *supra* note 17, at 77. Children also have important statutory rights, including under the Child Care Act, *see* W.A. JOUBERT & J.A. FARIS, EDS., 2 THE LAW OF SOUTH AFRICA 111 (2nd ed. 2003), but this Article focuses on children's constitutional rights. An exploration of children's statutory rights is beyond the scope of this Article.

230. Davel & Mungar, *supra* note 17, at 77.

231. S. AFR. CONST. 1996 § 38. Appropriateness "imports the elements of justice and fairness." *See* Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC) at ¶ 42 (S. Afr.). The determination of appropriate relief "calls for the balancing of the various interests that might be affected by the remedy." *Id.* at ¶ 45. "The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief." *Id.*

232. S. AFR. CONST. 1996 § 172(1).

233. S. AFR. CONST. 1996 § 172(1)(b). The Supreme Court of Appeal, a High Court or a court of similar status "may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court." S. AFR. CONST. 1996 § 172(2)(a). An order may limit "the retrospective effect of the declaration of invalidity" or suspend the declaration of invalidity "for any period and on any conditions, to allow the competent authority to correct the defect." *Id.* § 172(1)(b)(i)-(ii).

to comply with the obligations imposed upon it. Should a court find the government to be in breach of these obligations, the court is required to provide effective relief to remedy that breach."[234]

B. The Violation of Children's Legal Rights

As HIV/AIDS has spread throughout Africa, often along trucking routes frequented by sex workers,[235] the number of children affected by the disease has skyrocketed. From 1990 to 2003, the number of children orphaned by AIDS in sub-Saharan Africa increased from less than one million to more than 12 million, with the figure projected to climb to 18 million by the year 2010.[236] South Africa – a microcosm eerily reflective of what is going on in many parts of Africa – currently has hundreds of thousands of children orphaned by AIDS, with the figure projected to climb even higher in the years to come.[237] Already, three percent of South African households (180,433 per a 2005 report) are now *headed* by children, though that figure may even be higher as it is difficult to track kids no longer enrolled in school.[238] The vast majority of orphans live with a

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234. TAC, *supra* note 163, interlocutory judgment of July 5, 2002, at ¶ 20, available at <http://www.law-lib.utoronto.ca/diana/TAC_case_study/Executionorder appeal.pdf> (visited Nov. 16, 2007).

235. *See, e.g.*, KARIM & KARIM, *supra* note 4, at 293-94.

236. Children on the Brink 2004, *supra* note 10, at 10. In 2003, sub-Saharan Africa had 7.7 million double orphans. *Id.* at 11. "Double orphans" are children under age 18 whose mothers and fathers have died. *Id.* at 6.

237. Dr. Bhadra Ranchod, HIV/AIDS and Its Impact on Children in South Africa, Address Before the 4th World Congress on Family Law and Children's Rights (Mar. 21, 2005), available at <www.childjustice.org/docs/ranchod2005.pdf> (visited Dec. 13, 2007). The growing number of children orphaned by AIDS in South Africa is well-documented. *See* Centre for Actuarial Research, *The Impact of AIDS on Orphanhood in South Africa: A Quantitative Analysis*, CARE Monograph No. 4 (2001), available at <www.queensu.ca/sarc/Projects/AIDS/Orphans.pdf> (visited Dec. 13, 2007). A 2005 study found that there were 2,531,810 orphans in South Africa, including 1,745,715 paternal orphans, 455,970 maternal orphans, and 330,125 children who have lost both parents. Davel & Mungar, *supra* note 17, at 66. It is projected that the number of orphans in South Africa is likely to peak around 2014, with approximately 5.7 million children having lost one or both parents. *See* Centre for Actuarial Research, *The Impact of AIDS on Orphanhood in South Africa: A Quantitative Analysis*, *supra*, at i-ii.

238. Davel & Mungar, *supra* note 17, at 67; Nancy L. Muirhead, South Africa Program Review, p. 18, available at <www.rbf.org/usr_doc/South_Africa-Review_ Paper.pdf> (visited Apr. 11, 2007). Newborns are particularly vulnerable to the HIV/AIDS epidemic. In September 2004, South Africa's Department of Health reported that approximately 27.9 percent of pregnant women in the country were

surviving parent or with their extended family, but many HIV/AIDS-affected children end up in foster care or orphanages,[239] dependent on government assistance and often heavily reliant on foreign aid, NGOs, or community goodwill or charity for food and housing.[240] Other children are simply abandoned, and face a life in the streets, struggling every day for sustenance and their very survival.[241]

As a result of neglect, sickness and parental lives lost to AIDS, South African children affected by HIV/AIDS have suffered immensely. Children with HIV, or whose parents either have the virus or have died of AIDS, are often stigmatized and discriminated against, with the death of parents leaving many orphans to fend for themselves on the streets – all in violation of their constitutional rights.[242] The exact number of street children is not known, but these

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HIV positive. *See* Copson, *supra* note 1, at 4. Most infants with HIV become infected through mother-to-child transmission. KARIM & KARIM, *supra* note 4, at 183.

239. Children on the Brink 2004, *supra* note 10, at 4, 10. A UNICEF study of 40 countries in sub-Saharan Africa found that extended families have assumed responsibility for more than 90 percent of orphaned children. *Id.* at 10. For further background information on HIV/AIDS-affected orphans, see GEOFF FOSTER, JOHN G. WILLIAMSON & CAROL LEVINE, EDS., A GENERATION AT RISK: THE GLOBAL IMPACT OF HIV/AIDS ON ORPHANS AND VULNERABLE CHILDREN (2005); BARRY LEONARD, ED., CHILDREN ORPHANED BY AIDS: FRONT-LINE RESPONSES FROM EASTERN AND SOUTHERN AFRICA (2004); ARVIND SINGHAL & W. STEPHEN HOWARD, EDS., THE CHILDREN OF AFRICA CONFRONT AIDS: FROM VULNERABILITY TO POSSIBILITY (2003); EMMA GUEST, CHILDREN OF AIDS: AFRICA'S ORPHAN CRISIS (2003); DIANE COURY, REACHING OUT TO AFRICA'S ORPHANS: A FRAMEWORK FOR PUBLIC ACTION (2004); STEVEN F. DANSKY, NOBODY'S CHILDREN: ORPHANS OF THE HIV EPIDEMIC (1997); BARBARA O. DANE & CAROL LEVINE, EDS., AIDS AND THE NEW ORPHANS: COPING WITH DEATH (1994).

240. *See* Centers for Disease Control and Prevention, *The Emergency Plan for South Africa*, available at <http://www.cdc.gov/nchstp/od/gap/countries/south_africa.htm> (visited Apr. 11, 2007). The government's reliance on charitable organizations to provide the basic necessities for South African children has been criticized by a High Court judge in Pretoria. Centre for Child Law and Others v. MEC for Education and Others, Case No. 19559/06 (Pretoria High Court, Transvaal Provincial Division), 30 June 2006 Judgment, at 8-9 (describing proposal that efforts be undertaken to raise funds from the Red Cross and the NGO sector as "way off the mark" and as reflecting a "fundamental misunderstanding" of the "constitutional duty"; "The duty to provide care and social services to children removed from the family environment rests upon the state. The government must provide appropriate facilities and meet the children's basic needs. The duty cannot be restricted to pleading on behalf of children with private interests to furnish it with resources.").

241. *See infra* note 243 (giving estimates of the number of "street children" in South Africa).

242. Ranchod, *supra* note 237, at 9. There is still a strong stigma associated with

children face especially dire circumstances, including a high risk of sexual or other abuse, with about 75 percent of these children testing HIV positive.[243] Children affected by HIV/AIDS have been barred from schools, and the loss of a parent, or both parents,[244] can force children into prostitution[245] and cause severe financial hardship, leaving little or no money for school fees, uniforms, transportation costs, or meals.[246] And, again and again, the country's health-care system has failed many of South Africa's most vulnerable children. According to Dr. Bhadra Ranchod of the University of Stellenbosch, the country's National Treatment Plan for HIV/AIDS has focused on adult sufferers, with only 4 of 113 treatment sites in South Africa having a pediatric unit.[247]

The threats to children's survival – from lack of food and water, from lack of adequate shelter, and from HIV/AIDS and other illnesses – must receive urgent attention. Hunger, malnutrition, scarcity of water, and a lack of affordable housing, are still facts of life

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HIV/AIDS in South Africa. According to Father Benedict Mahlangu, a Catholic priest in Diphloof, Soweto, family members of those who die won't even attribute the death to AIDS. "They won't tell you it's HIV. They won't just be open and say that. Mostly, they'll say its pneumonia or cancer. But you know . . . it is not the truth," he says. "Because it's unusual every week burying young people suffering from cancer or pneumonia." *See* "AIDS Crisis Politicized in South Africa as Graves Fill," National Public Radio (Morning Edition), Sept. 19, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=14370270> (visited Sept. 23, 2007).

243. Ranchod, *supra* note 237, at 4, 8. One estimate puts the number of street children in South Africa at 15,000, and the coordinator of the Durban Street Children Forum reports that approximately 100 children are abandoned on Durban's streets each month. *See* Davel & Mungar, *supra* note 17, at 68, 81; *compare* W.A. JOUBERT & J.A. FARIS EDS., 5 THE LAW OF SOUTH AFRICA 140 (2nd ed. 2004) ("In South Africa at the present time, there are in all the major cities thousands of destitute so-called 'street children'."). Homeless children first became conspicuous on the streets of Cape Town, Durban, Johannesburg and Pretoria in the late 1970s. *See* Timothy J. Treanor, *Relief for Mandela's Children: Street Children and the Law in the New South Africa*, 63 FORDHAM L. REV. 883, 884 (1994).

244. In a country where 12 percent of teachers are themselves HIV positive, *see* Copson, *supra* note 1, at 6, the loss of a parent or, worse still, both parents, can obviously reduce children's educational prospects and endanger a child's mental, physical and spiritual health.

245. Children that resort to prostitution are particularly vulnerable to contracting HIV/AIDS. *See* Salaam, *supra* note 11, at 5.

246. Ranchod, *supra* note 237, at 4, 9.

247. *Id.* at 6.

in South Africa,[248] and HIV-infected children face greater health risks due to the vulnerability of their immune systems.[249] The South African Human Rights Commission itself has noted in recent reports that "there was no comprehensive housing response to people living with HIV/AIDS"[250]; and that "[i]t is reasonable to argue that many people, and children in particular, had their right to food violated" because of the lack of access to affordable food "due to high prices or unreasonable plans devised and supervised by the government."[251] Already, a few court cases – some successful and some not – have been brought to enforce the right to water[252] and to prevent

248. Sibonile Khoza, *Protecting the Right to Food in South Africa: The Role of Framework Legislation*, ESR REVIEW (Mar. 2004); South African Human Rights Commission, *The Right of Access to Adequate Housing*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004, at 11; South African Human Rights Commission, *The Right to Food*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004, at 7, 13, 59, 61, 66. Over 100,000 South African children were admitted to the hospital with severe malnutrition during the one-year period from April 2002 to March 2003. *Id.* at 62. Nutritional supplementation interventions for people living with HIV were not reported. *Id.* at 3. State provision of good nutrition to HIV/AIDS sufferers, whether through formula feed or food supplements, has not yet been the subject of a court action. *Id.* at 8.

249. *See, e.g.*, Chirwa, *supra* note 47, at 547 ("As the HIV/AIDS pandemic has shown, for example, access to adequate nutrition is critical to the success of antiretrovirals in reducing mother-to-child transmission of the virus.").

250. South African Human Rights Commission, *The Right of Access to Adequate Housing*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004, at 49, 57. That report notes that "[a]dditional space in homes of people who care for individuals either affected or infected by AIDS is vital in order to alleviate problems of overcrowding and sanitation, which may otherwise encourage the spread of opportunistic diseases." *Id.*, p. 50. The KwaZulu-Natal Department of Housing has instituted a policy of providing housing to assist HIV-affected people and children orphaned by AIDS. *Id.*, p. 22.

251. South African Human Rights Commission, *The Right to Food*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004, at 5.

252. South Africa has instituted a Free Basic Water Policy to help ensure that everyone has access to water. South African Human Rights Commission, *The Right to Water*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year (June 21, 2004), p. 3. Regulations made under the Water Service Act provide that every South African should be able to access a minimum of 25 litres of potable water per day or 6 kilolitres per household per month and that the source should be within 200 meters of a household. *Id.* at 51. Approximately 57 percent of South Africans had access to basic water services as of the end of March 2003. *Id.* at 3, 24. For further information on the right to water and litigation pertaining to that right, see Jackie Dugard, "CALS Supports Phiri Water Rights Case," Centre for Applied Legal Studies newsletter, available at <http://www.law.wits.ac.za/cals/NewsLetters/NewscNov06.pdf>. In *Manquele v. Durban Transitional Metropolitan Council*

evictions.[253]

South Africa's Constitutional Court, however, has thus far considered few cases addressing children's socio-economic rights. The lack of litigated claims seems particularly strange given the plight of so many impoverished, HIV/AIDS-affected children in South Africa, and given the country's long-standing public commitment to children – a commitment made in the Constitution and recently reaffirmed by the Constitutional Court itself.[254] Although the separation-of-powers doctrine requires that courts not unduly interfere in the affairs of the legislative and executive branches, children's rights advocates have been remiss is not filing more socio-economic rights cases on behalf of children. South Africa's Constitutional Court has the constitutional obligation to ensure that the legislative and executive branches fully comply with constitutional

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(2001) JOL 8956 (D), for example, a 35-year-old woman with seven children fell into arrears on her water account. Before her water supply was cut off, she was given written notice and thereafter sought an order from the Durban High Court declaring the disconnection illegal. The Durban High Court supported the decision of local authorities to discontinue services because of the failure to pay, finding that she had used more water than was allotted to her free of charge. *Id.* at 37. The High Court in *Residents of Bon Vista Mansion v. Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (S. Afr.), by contrast, granted a temporary interdict that water be restored to the applicants' apartment complex. Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S. AFR. J. HUM. RTS. 473, 494 (2006).

253. Section 26(3) of the Constitution states that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances." S. AFR. CONST. § 26(3). In Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) (S. Afr.), a municipality sought an eviction order against 68 people, including 23 children, who were occupying shacks erected on privately owned land for up to eight years. *Id.* at ¶ 1-2. In refusing to immediately evict the people, South Africa's Constitutional Court ruled that municipalities "must attend to their duties with insight and a sense of humanity" and that "[w]here the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required." *Id.* at ¶ 56. In finding that the municipality "acted precipitately to secure an eviction," the Constitutional Court emphasized the need for human dignity and a heightened sense of community obligations. *Id.* at ¶ 57. "It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads," the Court ruled. *Id.* at ¶ 18. "Our society as a whole," the Court emphasized, "is demeaned when state action intensifies rather than mitigates their marginalisation." *Id.*

254. Bannatyne v Bannatyne 2003 (2) BCLR 111 (CC) at ¶ 25 (S. Afr.) ("our country has committed itself to giving high priority to the constitutional rights of children").

guarantees, and while most socio-economic rights must only be implemented progressively and in accordance with available resources, orphans and other vulnerable children have much stronger grounds to seek relief under section 28 of the Constitution. Indeed, legislative and executive branch initiatives and policies can be challenged if they are not reasonable (both in formation and in implementation), as the *Grootboom* and *TAC* cases make clear.[255]

V. The Way Forward

A. The Call for Ubuntu *or* Botho

South Africa's Constitution has numerous provisions that may be of use to – and which should be invoked on behalf of – children affected by HIV/AIDS. The Bill of Rights guarantees the right to "dignity,"[256] "equal protection,"[257] "life,"[258] "freedom and security of the person,"[259] and "bodily and psychological integrity."[260] Also, section 26 recognizes a right of access to "adequate housing"[261]; section 27 provides access rights to health care services, food and water, and social security[262]; section 28 gives children a plethora of rights to "basic nutrition, shelter, basic health care services and social services" and to "appropriate alternative care" when family or parental care is absent[263]; and section 29 affords the right to education.[264] Children who have been orphaned or affected by HIV/AIDS are most likely in need of a variety of social services,[265] and advocates for orphans and other vulnerable children should not hesitate to invoke the many rights available to these children.

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255. Devenish, *supra* note 38, at 94-95 (citing Grootboom, *supra* note 99, at ¶ 42 n.16).

256. S. AFR. CONST. 1996 § 10.

257. S. AFR. CONST. 1996 § 9(1).

258. S. AFR. CONST. 1996 § 11.

259. S. AFR. CONST. 1996 § 12(1).

260. S. AFR. CONST. 1996 § 12(2).

261. S. AFR. CONST. 1996 § 26(1).

262. S. AFR. CONST. 1996 § 27(1).

263. S. AFR. CONST. 1996 § 28.

264. S. AFR. CONST. 1996 § 29(1).

265. *See* Davel & Mungar, *supra* note 17, at 76 ("It is obvious that children who have been orphaned by AIDS qualify as children in need of alternative care according to *Grootboom* and section 28(1)(b) of the Constitution.").

Legislative and executive actions (or governmental inactions, as the case may be) should also be challenged by children's advocates. South Africa's present social security system is non-comprehensive and limited in scope, and many children – including street children and children in child-headed households – often fall through the cracks.[266] For example, South Africa's care dependency grant of R700 per month currently only covers children between the ages of one and eighteen with severe mental or physical disabilities, leaving children infected by HIV precluded from participation unless they are in the final stages of the illness.[267] Furthermore, free access to health care services is currently available only to children under the age of six.[268] There are thus significant gaps in social services to HIV/AIDS-affected children, and South Africa's social welfare system has rightfully come under criticism,[269] including for its unusual degree of

266. Davel & Mungar, *supra* note 17, at 76 ("The current social security system is fragmented, limited in coverage and non-comprehensive. Many groups of children are not covered, or cannot access any assistance. These include children with AIDS, street children, children in child-headed households and children without adult supervision. There is thus no social grant intended specifically for the care of AIDS orphans or children who are HIV/AIDS infected."). Research conducted by the Henry J. Kaiser Foundation and the Health Systems Trust found that "in already poor households HIV/AIDS is the tipping point from poverty into destitution." *See* Marlise Richter, *The Right to Social Security of People Living with HIV/AIDS in the Context of Public-Sector Provision of Highly-Active Antiretroviral Therapy*, 22 S. AFR. J. HUM. RTS. 197, 198 (2006).

267. Davel & Mungar, *supra* note 17, at 77; *compare* W.A. JOUBERT & J.A. FARIS, EDS., 2 THE LAW OF SOUTH AFRICA 78 (2nd ed. 2003) ("As a rule, at common law the duty to maintain or support a child falls upon the parents. If both parents are unable to support the child the duty passes on to other relations. A stepfather or stepmother does not have a legal duty to support a stepchild. All grandparents must support their grandchildren where these children are born of a marriage, while only maternal grandparents have a legal duty to support a grandchild who is born out of wedlock."). South Africa did recently sign the United Nations Convention on the Rights of Persons with Disabilities, which requires States Parties to take "all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children." *See* <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (visited Dec. 14, 2007); Convention on the Rights of Persons with Disabilities, art. 7(1), Aug. 25, 2006, available at <http://www.un.org/esa/socdev/enable/rights/ahc8adart.htm> (visited Oct. 14, 2007).

268. Davel & Mungar, *supra* note 17, at 76.

269. *See* Devenish, *supra* note 38, at 105 ("In recent years, the Department of Social Development has rightly been subject to considerable criticism for substantially under-spending funds allocated for various welfare programmes, including poverty relief projects, the child support grant, and the improvement to the administration of grants.").

reliance on voluntary organizations for the delivery of basic services.[270]

When cases are brought before it, the Constitutional Court has the opportunity to enforce South Africa's Constitution – the Rule of Law – and changes are often brought about in South African society as a result. The Constitutional Court carries with it not only power but moral authority, and its pronouncements can affect not only the litigants before the court but the country's public discourse. For example, in *S. v. Williams*,[271] a 2003 case, the Constitutional Court held that judicially imposed corporal punishment violated a child's right not to be subjected to neglect, abuse or degradation. As a result of that judgment, South Africa's Parliament passed the Abolition of Corporal Punishment Act.[272] If children's rights advocates brought more child's rights cases and the Constitutional Court began weighing in on them, including by issuing decisions affecting the rights of HIV/AIDS-affected children, more changes would no doubt be brought about in South African society – and the traditional African notion of *ubuntu* would be better put into practice.

Justice Pius Langa on South Africa's Constitutional Court – in the milestone case that declared South Africa's death penalty unconstitutional[273] – recounted how *ubuntu* "recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such

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270. *See, e.g.*, J. Sloth-Nielsen, *The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom*, 17 S. AFR. J. HUM. RTS. 210, 212, 214-15 (2001). A number of international, non-profit and humanitarian organizations provide services to those affected by HIV/AIDS in South Africa. They include, among many others, Avert <www.avert.org>, the Bill and Melinda Gates Foundation <http://www.gatesfoundation.org>, loveLife <http://www.lovelife.org.za/>, the Nelson Mandela Foundation <http://www.nelsonmandela.org/>, UNAIDS <http://www.unaids.org/>, USAID <www.usaid.gov>, the William J. Clinton Foundation <http://www.clintonfoundation.org/>, the United Nations Children's Fund <www.unicef.org>, and the World Health Organization <www.who.int/en/>. Save the Children U.K. has also been involved in working with issues pertaining to orphans and other vulnerable children. *See* <http://www.savethechildren.org.uk/en/31_60.htm> (visited Dec. 14, 2007).

271. S v Williams and Others 1995 (7) BCLR 861 (CC) (S. Afr.).

272. *See* W.A. JOUBERT & J.A. FARIS, EDS., 5 THE LAW OF SOUTH AFRICA 143 (2nd ed. 2004).

273. Makwanyane, *supra* note 29.

person happens to be part of."[274] The concept of *ubuntu*, Justice Langa emphasized, "is of some relevance to the values we need to uphold" and is "a culture which places some emphasis on communality and on the interdependence of the members of a community."[275] It also, he added, imposes "a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community" and "regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."[276] Although the word "ubuntu" does not actually appear in South Africa's 1996 Constitution, that Constitution clearly embodies that traditional African concept by promoting social justice and by protecting life and health, human dignity, and the vulnerable.

Obviously, given their extreme vulnerability, children affected by HIV/AIDS are highly deserving of legal protection and are in great

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274. *Id.* at ¶¶ 223-224. In that case, Justice Langa also said this about the call for *ubuntu* in South Africa:

> It was against a background of the loss of respect for human life and the inherent dignity which attaches to every person that a spontaneous call has arisen among sections of the community for a return to *ubuntu*. A number of references to *ubuntu* have already been made in various texts, but largely without explanation of the concept. It has however always been mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for.

Id. at ¶ 227. The concept of *ubuntu*, in fact, was frequently invoked by Constitutional Court members in their decision declaring South Africa's death penalty unconstitutional. *See* Peter Norbert Bouchkaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287, 310 (1996) ("The Justices' focus on the concept of ubuntu and the 'spirit' of the Constitution represents an attempt by members of the Court to define a distinctive South African constitutional jurisprudence and to ensure the inclusion of all South Africans in this process.").

275. Makwanyane, *supra* note 29, at ¶ 224. Justice Langa further noted that "[t]reatment that is cruel, inhuman or degrading is bereft of *ubuntu*." *Id.* at ¶ 225.

276. *Id.* at ¶ 224. The concept of *ubuntu* thus "encapsulates communality and the inter-dependence of the members of a community." Bhe and Others v. Magistrate, Khayelitsha and Others, 2004 (2) SA 544 (C) at ¶ 163. A "dominant theme" of a culture of *ubuntu* is that "the life of another person is at least as valuable as one's own." Makwanyane, *supra* note 29, at ¶ 225 (Langa, J.). In the *Makwanyane* case, the "need for *ubuntu*" was said to express "the ethos of an instinctive capacity for and enjoyment of law towards our fellow men and women; the joy and the fulfillment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by." *Id.* at ¶ 263 (Mahomed, J.).

need of having their constitutional rights vindicated, including by courts, if necessary. South Africa's final Constitution does not contain "a right to *ubuntu*" – which, if it did, would be difficult and troublesome for judges to interpret and apply in individual cases given the term's many, multi-faceted meanings.[277] However, the spirit of *ubuntu* is infused throughout the country's Constitution and that landmark document, in plain, unambiguous language, does protect children's rights in explicit ways by requiring the government to provide basic, concrete things for children. It requires "appropriate alternative care" and "a basic education"; it requires "basic nutrition," "shelter," "basic health care services" and "social services." The enforcement of children's socio-economic rights, even if only on a rudimentary level, no doubt would entail an element of re-distribution of societal resources, but in South Africa, the Constitution clearly affords justiciable socio-economic rights, including children's rights, and the Constitutional Court is thus obligated by law to enforce them.

B. Protecting Children Affected by HIV/AIDS

In its initial CRC report to the Committee on the Rights of the Child, the South African government included a section called "The way forward."[278] Among other things, that 1999 report noted that ratification of the CRC "committed South Africa to implementing a 'first call for children' whereby the needs of children are considered paramount throughout the Government's development strategies, policies, programmes and services"; and that "[t]he National Programme of Action (NPA) is the instrument by which South

277. Albie Sachs, *War, Violence, Human Rights, and the Overlap Between National and International Law: Four Cases Before the South African Constitutional Court*, 28 FORDHAM INT'L L.J. 432, 436 n.15 (2005) ("Ubuntu is an African cultural value that is difficult to define precisely."); *see also id.* ("Ubuntu has been described as an African world-view and 'a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources.'") (quoting Justice Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 15 (1998)); *see also* Mokgoro, *supra*, at 15 ("The concept of ubuntu . . . is not easily defined.").

278. *Initial reports of States parties due in 1997: South Africa*, CRC/C/51/Add.2 (State Party Report) of 22 May 1999 at ¶¶ 40-43 (report submitted 4 December 1997).

Africa's commitments to children are being carried out."[279] The "way forward" identified in the report called for future activities to focus, among other things, on "[b]udgetary arrangements in favour of children" and "[s]trengthening of effective governmental structures for children."[280]

Although the Committee on the Rights of the Child welcomed South Africa's efforts to comply with CRC provisions,[281] the Committee expressed concern that insufficient mechanisms were in place to collect data about children, in particular vulnerable children, including those living in institutions and on the streets.[282] In addition, the Committee expressed concern about child-headed households[283]; that "professional groups, children, parents, and the public at large are generally not sufficiently aware of the Convention and the rights-based approach enshrined therein"[284]; and that "insufficient measures have been adopted to ensure that all children are guaranteed access to education, health and other social services."[285] The Committee also encouraged greater participation by youth to develop strategies to fight HIV/AIDS[286] and recommended that South Africa "establish clear child-friendly procedures to register and address complaints from children regarding violations of their rights and to guarantee adequate remedies for such violations."[287]

Thus far, the South African government has not done enough to help orphans and other vulnerable children affected by HIV/AIDS – and neither the South African Human Rights Commission nor the Constitutional Court has gone far enough to hold the government

279. *Id.* at ¶¶ 3-4.

280. *Id.* at ¶ 43.

281. *See Concluding observations of the Committee on the Rights of the Child: South Africa*, CRC/C/15/Add.122, Feb. 23, 2000, at ¶ 3 ("the Committee welcomes the new Constitution (1996), in particular article 28, which guarantees children a number of specific rights and freedoms also provided for under the Convention"), ¶ 4 ("[t]he Committee welcomes the implementation of a National Programme of Action (NPA) within the State party"), ¶ 5 ("[t]he Committee welcomes the establishment of the South African Human Rights Commission and the appointment of a director with responsibility for children's rights").

282. *Id.* at ¶ 14.

283. *Id.* at ¶ 22.

284. *Id.* at ¶ 16; *see also id.* at ¶ 31 (dealing with "Adolescent health").

285. *Id.* at ¶ 18.

286. *Id.* at ¶ 31.

287. *Id.* at ¶ 13.

accountable. There are so many children currently living on the streets that South African legislation now defines "street child," and in spite of state-backed constitutional guarantees – which promised to transform South African society – scores of children still rely mostly on charities and NGOs for their basic needs.[288] Although the Constitutional Court has recognized the justiciability of socio-economic rights, the remedies ordered in its socio-economic rights cases have, to date, often been insufficient to protect litigants' rights. The litigants in *Grootboom* continued to live in dire circumstances even after the judgment in that case; the Constitutional Court in *Grootboom* did not even analyze the implications of the principle that the "best interests" of children be considered; and in the *TAC* case, it was largely the Treatment Action Campaign's post-judgment persistency that ensured a measure of governmental accountability.[289] Obviously, South Africa's Constitutional Court can only hear those cases appealed to it, but no legal barriers exist to prevent children's rights cases from being litigated within the country.

The Constitutional Court, an unelected body, must walk a fine line in adjudicating socio-economic rights cases so as not to cross the line as regards its authority and the separation-of-powers doctrine. However, the Court should insist that the actions of the legislative and executive branches are at all times in the best interest of children and continuously prod those branches of government to safeguard children's constitutional rights. South African commentators disagree over whether the "reasonableness" standard articulated in *Grootboom* is sufficient to guarantee socio-economic rights, with some arguing for adoption of the "minimum core" approach that the

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288. *See* Irene-Marié Esser, *The Position of Street Children in South African Legislation*, 2 DE JURE 385, 386-87, 399 (2006). South Africa's Constitution "is widely described as a transformative Constitution." *See* Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 71 STELLENBOSCH L. REV. 5, 6 (2006).

289. *See* Mia Swart, *Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor*, 21 S. AFR. J. HUM. RTS. 215, 216 & n.6, 228 (2005); DM Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?*, 22 S. AFR. J. HUM. RTS. 301, 313-14 (2006). The Constitutional Court needs to issue orders with more teeth and consequences for a governmental failure to comply with children's constitutional rights. *See id.* at 318 (noting that the Constitutional Court's "consistent refusal to grant structural relief" has produced situations where "[l]itigants have won cases" yet "government has done little to produce the tangible benefits that these litigants were entitled to expect from their success").

Constitutional Court has thus far declined to embrace.[290] At the very least, consistent with the fundamental value of human dignity that plays such a central role in South Africa's constitutional order,[291] the Court should insist on the government establishing *a concrete, factual basis* for any asserted justification (based upon resource considerations or otherwise) for failing to provide a "minimum core" of services to orphans and vulnerable children affected by HIV/AIDS.[292]

The Constitutional Court may be ill-equipped to make national budgetary decisions that may have unintended consequences affecting a whole spectrum of groups and other public policy issues. However, the Court is clearly competent and authorized by law to

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290. *Compare* Carol Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence,* 123 S. AFR. L.J. 264, 272, 275 (2006) (arguing that "the minimum core approach under-accommodates the doctrine of the separation of powers," that "[j]udicial definition of the content of socio-economic rights would stifle the 'constitutional conversation,'" and that it is inappropriate for judges to define socio-economic rights) and Mark S. Kende, *The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT'L. L. 617 (2004) (defending the Constitutional Court's approach) *with* Pieterse, *supra* note 252, at 473-75 (noting that the Constitutional Court's "rejection of what can be called a 'minimum core approach' to the enforcement" of socio-economic rights in favor of a reasonableness approach has been "much lamented," with Pieterse stating, "I remain of the opinion that the notion of a minimum core is useful for understanding the nature of socio-economic obligations and that it provides a valuable blueprint for an entitlement-based approach to socio-economic rights").

291. *See* Liebenberg, *supra* note 41, at 3.

292. Such an approach would be fully consistent with an idea articulated in the Limburg Principles, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights *reprinted in* 9 HUM. RTS. Q. 122 (1987), which show particular concern for disadvantaged groups. *See* GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 296 (1998) ("The Limburg Principles, which per se are purely interpretive and non-binding, include the principle that regardless of the level of economic development, states are under a duty to ensure respect for minimum subsistence rights for all. According to the Limburg Principles, the significance for the progressive realisation of the rights in the Covenant is that particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups."). The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights further state that "minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties." The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *reprinted in* 20 HUM. RTS. Q. 691 (1998) (principle 9); *see also* Victor Dankwa, Cees Flinterman & Scott Leckie, *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 705 (1998).

define the nature and scope of constitutionally articulated socio-economic rights and to insist that such rights not be rendered meaningless through governmental inattention or neglect. If South Africa's government fails to provide the "minimum core" to HIV/AIDS-affected children and contends that it lacks the resources to do so, it should have to substantiate any such assertion with specific facts and testimony, with the Court rigorously scrutinizing whether the approach taken by the government is, in fact, reasonable under the circumstances.[293] The Court should not simply conclude it lacks sufficient information to define what the "minimum core" is, thus side-stepping an important issue, as it did in *Grootboom* and *TAC*.[294] This is especially so for vulnerable groups such as HIV/AIDS-affected children, when so much is known (e.g., as to food and nutrition, water, and health care) about what children need to survive and – ultimately – thrive. By better defining core services – and holding them up as benchmarks for the government to meet – the Constitutional Court will better protect the constitutional rights of HIV/AIDS-affected children.[295]

What is needed now in South Africa – in the wake of the ever-expanding HIV/AIDS epidemic – is a holistic, multi-faceted approach. There needs to be greater awareness of, and focus on,

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293. The United Nations Committee on Economic, Social and Cultural Rights, in interpreting States' obligations under international law, has opined that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant." U.N. Comm. Econ. Soc. & Cultural Rts., *CESCR General Comment 3: The Nature of States Parties Obligations (art 2(1) of the Covenant)*, ¶ 10, UN Doc. E/1991/23 (Dec. 14, 1990). "This places a burden on the state, should it seek to attribute its failures to meet its core obligation to a lack of available resources, to 'demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.'" *See* Liebenberg, *supra* note 41, at 17 (citing General Comment 3, at ¶ 10).

294. Liebenberg, *supra* note 41 at 17, 25. As Sandra Liebenberg writes: "Whatever formulation is adopted, courts should scrutinize the state's evidence and arguments closely with a view to assessing whether they constitute a compelling justification in the context of current South African society for failing to provide basic needs." *Id.* at 25.

295. A Constitutional Court judgment that the socio-economic rights of HIV/AIDS-affected children are being violated would itself be a call to action – a call for more *ubuntu* within South African society. If the Court were to find that the government's budgetary priorities had short-changed orphans and other vulnerable children, societal inaction might soon be transformed into life-saving activities within the legislative and executive branches – and within South Africa's civil society.

children's rights even as the rights of South African adults – who must care for the country's children – are better publicized and respected and protected.[296] There needs to be more legal advocacy of children's rights, including by civil society groups and caregivers; strengthening the capacity of families and caregivers to care for orphans and vulnerable children; increased training of lawyers and child advocates to represent children and their interests; more resources allocated to the education of children, to alleviate child poverty, and to prevent and treat HIV/AIDS; better monitoring of children's rights; and judicial vindication of those rights. Several South African organizations already exist to promote one or more of these goals,[297] and the Constitutional Court – in cases such as *Grootboom* and *TAC* – has already laid out the jurisprudential framework that makes the assertion of constitutional claims and the vindication of children's rights possible.[298]

Africa is made up of societies whose laws guarantee rights but also impose certain duties. The Banjul Charter, to which all African

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296. South African surveys show that a large percentage of the populace – particularly in rural areas – are unaware of their constitutional rights. *See* JC Mubangizi, *Know Your Rights: Exploring the Connections Between Human Rights and Poverty Reduction with Specific Reference to South Africa*, 21 S. AFR. J. HUM. RTS. 32, 41-42 (2005).

297. These organizations include, among others, the Centre for Child Law <www.childlawsa.com>, the Centre for the Study of AIDS <www.csa.za.org>, the AIDS Law Project <www.alp.org.za>, the Legal Resources Centre <www.lrc.org.za>, the Children's Rights Centre <www.childrensrightscentre.co.za>, the Community Law Centre <www.communitylawcentre.org.za>, the Centre for Human Rights <http://www.chr.up.ac.za>, the Children's Institute <http://ci.org.za/>, the Nelson Mandela Foundation <http://www.nelsonmandela.org/>, The Nkosi Johnson AIDS Foundation <http://nkosi.iafrica.com>, the Socio-Economic Rights Project <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights>, and the Treatment Action Campaign <http://www.tac.org.za>.

298. In invoking socio-economic rights in South Africa's Constitution to protect orphans and other vulnerable children, the provisions of international law, including the CRC, should not be overlooked. One scholar has described the CRC as "an authoritative guideline in the interpretation of children's rights contained in section 28 of the South African Constitution." Marius Pieterse, *In Loco Parentis: Third Party Parenting Rights in South Africa*, 11 STELLENBOSCH L. REV. 324, 326 (2000). The CRC and other international treaties are of considerable importance because South Africa's Constitution requires that international law be considered, S.A. CONST. 1996 § 39(1), and South Africa's Constitutional Court has frequently cited regional and international treaties in making its decisions. *See, e.g.*, Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC) at ¶ 51 (S. Afr.) ("The need to eliminate unfair discrimination . . . also arises out of international obligation.") (citing the African Charter on Human and Peoples' Rights).

countries are parties, enshrines both rights and duties as part of Africa's regional human rights system. Not only are individual rights of great importance, but the Banjul Charter states that "[e]very individual shall have duties towards his family and society, the state and other legally recognised communities and the international community."[299] Under the Charter, every individual has the duty "to respect and consider" others, and to preserve and strengthen "social and national solidarity" and "positive African cultural values" in relation to others "in the spirit of tolerance, dialogue and consultation."[300] This must all be done "to contribute to the promotion of the moral well-being of society."[301] The recognition of socio-economic rights is thus a key mechanism in which rights and duties are both realized in Africa's cultural milieu.

South Africa's constitutional recognition of socio-economic rights, and the Constitutional Court's finding that such rights are justiciable, is fully consistent with the traditional African concept of *ubuntu* – and the intent of the Banjul Charter. To date, however, the socio-economic rights of South Africa's children, particularly those affected by HIV/AIDS, have often been blatantly violated – all with extreme consequences. Orphans and vulnerable children deserve better, and South Africa's civil society, including its legal community, should immediately take actions to make sure that children's rights are observed and honored. Children are among the most vulnerable in any society and they need the help of others to vindicate their rights. Acting with the guidance of *ubuntu* – a traditional African value – politicians and lawyers and judges can help to rectify the failings of the past and help to ensure that orphans and other vulnerable children do not go hungry, have adequate shelter, and do not fall prey to HIV or child prostitution or die from AIDS.

By virtue of its inclusion of justiciable socio-economic rights, South Africa's Constitution imposes a much different conception of the separation-of-powers doctrine than that prevailing in the United States. "An implication of placing social and economic rights in a constitution," explains Justice Albie Sachs, "is to say that decisions which, however well-intended, might have the consequence of producing intolerable hardship, cannot be left solely in the hands of

299. Banjul Charter, *supra* note 72.
300. *Id.*, arts. 28-29.
301. *Id.*, art. 29(7).

overburdened administrators and legislators."[302] Justice Sachs says South African courts are, in effect, in "dialogue" with the other branches of government.[303] "We view ourselves" as being "in a constitutional conversation with them," Sachs says of the Constitutional Court's role in relation to the other branches of government, explaining that the Court accords "respect" for what they do but not unfettered "deference."[304] South Africa's new constitutional order, which takes a rights-based approach to socio-economic issues, thus requires judges to hold the other branches of government accountable for their policies and their implementation.[305] As Justice Albie Sachs has written, "[t]he integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence."[306]

The justiciability of socio-economic rights is always a difficult task for any judicial system,[307] and many view such rights as merely *aspirational goals*, such as those set forth in the U.N. General Assembly's Millennium Declaration.[308] In the new South Africa, however, socio-economic rights plainly are *rights* – even if some of

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302. Albie Sachs, *The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case*, *in* DEMOCRATISING DEVELOPMENT: THE POLITICS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 137 (Peris Jones & Kristian Stokke, eds., 2005). The judiciary "comes into its own," Sachs explains, when it comes to "securing respect for human dignity." *Id.*

303. *Id.*

304. *Id.* In South Africa, members of the cabinet—in the executive branch—also serve in Parliament, a practice the Constitutional Court found not to violate the separation-of-powers doctrine. *See* Pius N. Langa, *Symposium: A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy*, 22 S. AFR. J. HUM. RTS. 2, 5, nn.8-9 (2006). South Africa's system of government is thus different from America's system of government in more ways than one.

305. *See* Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 385 (2004).

306. Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) at ¶ 18 (S. Afr.).

307. *See* Devenish, *supra* note 38, at 87 ("The enforceability of socio-economic rights, in any event, is always jurisprudentially and politically problematic.").

308. *See* Michael J. Dennis & David P. Steward, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 495 (2004) (noting that the Millennium Development Goals, which include halting the spread of HIV/AIDS, are envisioned to be achieved by 2015).

those rights must only be progressively implemented in accordance with available resources. South African courts certainly cannot – with a snap of their fingers – wipe out all at once the poverty and economic and social injustices that apartheid left behind. As Justice Albie Sachs has written: "The judiciary cannot of itself correct all the systemic unfairness to be found in our society."[309] "The inherited injustices at the macro level," he explains, "will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level."[310] But the courts do have a critical role to play in the transformation of South African society. The judiciary, Sachs concludes, "can at least soften and minimise the degree of injustice and inequity."[311] Indeed, if socio-economic rights are to be more than "paper rights" – as one commentator puts it –"the court must, in deference to the Constitution, enforce them."[312]

By law, the South African Human Rights Commission must "promote respect for human rights and a culture of human rights," "promote the protection, development and attainment of human rights," and "monitor and assess the observation of human rights."[313] The Commission has the power to "investigate" and "report" on the observance of human rights," "take steps to secure appropriate redress where human rights have been violated," "carry out research," and "educate."[314] Significantly, each year, "relevant organs of state" must provide the Commission with "information on the

309. Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) at ¶ 38 (S. Afr.).

310. *Id.*

311. *Id.*

312. Devenish, *supra* note 38, at 87.

313. S. AFR. CONST. 1996 § 184(1). The South African Human Rights Commission regularly publishes rights-related reports. Copies of those reports are available online at the Commission's website, <http://www.sahrc.org.za/sahrc_cms/publish/cat_index_28.shtml> (visited July 15, 2007). For further information about the work of the South African Human Rights Commission, see Christof Heyns, *Taking Socioeconomic Rights Seriously: The 'Domestic Reporting Procedure' and the Role of the South African Human Rights Commission in Terms of the New Constitution*, 32 DE JURE 195, 198 (1999) and Jonathan Klaaren, *A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights*, 27 HUM. RTS. Q. 539 (2005).

314. S. AFR. CONST. 1996 § 184(2). The Commission has the power to bring cases before a court in its own name or on behalf of others. *See* Anja Snellman, The development of a socio-economic rights jurisprudence in South Africa – a Minor Field Study 55 (Sept. 6, 2002) (unpublished thesis, Örebro University), available at <http://www.afrikagrupperna.se/usrd/agm488.pdf>.

measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."[315] The Commission should more effectively use those powers to draw attention to the violation of children's rights, and children's advocates should insist that the Commission strive to secure appropriate redress for such violations. Indeed, children's rights advocates should use the Commission's reports as evidence in connection with socio-economic rights cases.

Lawyers, law students and caregivers in South Africa should also play a bigger role in protecting orphans and other vulnerable children. Of particular importance to children is section 38 of the Constitution, which broadly allows "anyone" to seek relief from the courts – including for, or on behalf of, a whole class or group of persons, including children.[316] South Africa's legal community, as well as its civil society organizations, should use this constitutional provision to help vindicate children's rights, particularly the rights of orphans and other vulnerable children who cannot stand up for their

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315. S. AFR. CONST. 1996 § 184(3). The South African Constitution thus places a heavy emphasis not only on civil and political rights, but on economic and social rights. As Nelson Mandela once said of South Africa's new democracy:

> We must address the issues of poverty, want, deprivation and inequality in accordance with international standards which recognise the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom.

See Nelson Mandela, Address at His Investiture as Doctor of Laws at Soochow University (Aug. 1, 1993), available at <http://www.anc.org.za/ancdocs/history/mandela/1993/sp930801.html>. In a videotaped interview, Nelson Mandela explained that one aspect of *ubuntu* is illustrated by the fact that, when he was young, travelers in his country who stopped at a village did not have to ask for food or water; it was simply provided by villagers. *See* <http://www.youtube.com/watch?v=Dx0qGJCm-qU> (visited July 2, 2007).

316. South African law used to require that an applicant or plaintiff have some degree of personal or direct interest to have legal standing. *See* John C. Mubangizi, *The Role of Human Rights Law in Community Development: A South African Perspective*, 3 STELLENBOSCH L. REV. 522, 531 (2004). Section 38 of the 1996 Constitution, however, changed that, not only allowing class actions to be brought by a single representative, but allowing those acting in the "public interest" to sue for relief. *Id.* at 531-32. Section 38 has been called "one of the most extensive standing provisions of any national constitution." *See* Tobin, *supra* note 57, at 121; *see also id.* ("There is no specific reference to children in this provision but it is immediately apparent that it would offer a number of options for commencing an action on behalf of a child or children.").

own rights because of their youth and the dire circumstances in which they find themselves. At a conference at Wits University, in fact, NGOs in South Africa recently articulated the need for better, more affordable access to the courts in order for socio-economic rights cases to be considered.[317] South Africa's legal system allows children's claims to be heard, and those claims – whether brought by individuals, NGOs, legal aid or student-run legal clinics, or practicing lawyers – should be brought and carefully considered by the courts.[318]

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317. *See* Consensus Statement on Improving Access to Legal Services for People Living with HIV/AIDS, Wits University Conference on HIV and Access to Legal Services (Feb. 18, 2006), available at <http://alp.org.za.dedi20a.your-server.co.za/images/upload/Consensus.pdf> (visited Oct. 14, 2007). Chief Justice Pius Langa gave the opening address at this conference and endorsed a rights-based approach to HIV/AIDS. *Id.* In his speech, he noted the economic disparities in South Africa and called upon the legal profession to provide services to the poor, including through public interest litigation and on a *pro bono* basis, if necessary. "It is one thing to articulate the right, as we lawyers quite often do," he said. "It is quite another thing to take by the hand those who need to access the right, that is, the weak and the poor, the ill and those suffering from societal deprivation by reason of discrimination and stigmatisation. I accordingly plead for a collective effort by all branches of society." *See* Chief Justice Pius Langa, Keynote Address at Wits University Conference on HIV and Access to Legal Services, *available at* <http://alp.org.za.dedi20a.your-server.co.za/images/upload/Chief%20Justice%20Langa.pdf> (visited Oct. 14, 2007); *see also* Jackie Dugard, *Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court*, 22 S. AFR. J. HUM. RTS. 261, 266 (2006) ("The first hurdle a poor person must overcome in any justice system is accessing that system. In South Africa the usual difficulties of accessing justice are exacerbated by gross socio-economic inequalities and the remoteness of law from most peoples' lives. In the absence of legal aid for constitutional matters, poor people are largely unable to take cases through the normal judicial process, which is both lengthy and costly.").

318. University law clinics in South Africa, for example, have developed into mature institutions over the last three decades and would be well positioned to assert claims on children's behalf. *See* Willem de Klerk, *Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model*, 2 DE JURE 244 (2006); Willem de Klerk, *University Law Clinics in South Africa*, 122 S. AFR. L.J. 929 (2005). Organizations such as the Legal Resources Centre <www.lrc.org.za>, the Centre for Applied Legal Studies <www.law.wits.ac.za/cals>, Lawyers for Human Rights <www.lhr.org.za>, the Women's Legal Centre <www.wlce.co.za>, and Black Sash <www.blacksash.org.za>, have already used advocacy or litigation to advance various causes. *Id.* at 939; *see also* Brickhill, *supra* note 58, at 307.

Cases seeking to vindicate children's rights should also be brought in other regional and international forums, if only to increase awareness of the violation of children's rights. For a recent article discussing how international and regional instruments might be used in South African cases, see Solange Rosa & Mira Dutschke, *Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights*, 22 S. AFR. J. HUM. RTS. 224 (2006). Rosa and Dutschke, citing writings of the Committee on Economic, Social and Cultural Rights ("CESCR"), argue that "[t]he standard of a minimum core can be translated to mean

On the health care front and as regards the right to life, further steps must be taken to prevent mother-to-child transmission of AIDS by facilitating better access to the antiretroviral drug, nevirapine.[319] Approximately 70,000 infants in South Africa become HIV infected through their mothers annually, and it is estimated that 35,000 newborns a year become infected because of the failure to use nevirapine.[320] The *TAC* case established that poor children and their mothers have legal rights, but more vigilant enforcement efforts at the provincial and local levels is necessary because of the spotty implementation of that judicial decision.[321] Orphans affected by HIV/AIDS must also receive appropriate shelter and distributions of food and water in accordance with their rights[322] and be afforded better access to primary health care services, including life-saving ARV drugs.[323]

Children's constitutional right to education must also be a particular focus of socio-economic rights cases. The South African Schools Act[324] prohibits discrimination against HIV-positive children and the children of parents who do not pay school fees,[325] and other

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that a minimum level of subsistence is necessary for a dignified human existence." *Id.* at 238. They further point out that the CESCR has already, in General Comments, delineated those minimum levels in relation to food, water, housing, education, and health, arguing that "a society based on human dignity, equality and freedom" must pay attention to "the basic bare minimum needs of disadvantaged groups." *Id.* at 238, 256.

319. Nevirapine, which reduces the likelihood that HIV will be transmitted from mother to child at birth, is listed on the WHO's Model List of Essential Drugs. David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 2 (2003); Sibonile Khoza, *Reducing Mother-to-Child Transmission of HIV: The Nevirapine Case*, 3 ESR REVIEW No. 2 (Sept. 2002). "Ubuntu," it has been said, "is the idea that no one can be healthy with the community is sick." Margaret M. Russell, *Cleansing Movements and Retrospective Justice* 101 MICH. L. REV. 1225, 1267 (2003).

320. George J. Annas, *The Right to Health and the Nevirapine Case in South Africa*, 348 NEW ENG. J. MED. 750-51 (2003).

321. *See* Mark Heywood, *Contempt or Compliance? The TAC Case after the Constitutional Court Judgment*, 4 ESR REV. 7 (2003).

322. S. AFR. CONST. 1996 §§ 27 & 28(1)(c); CRC, *supra* note 78, art. 24(2)(c).

323. *See* Kathryn Bromley Chan, *From Legal Universalism to Legal Pluralism: Expanding and Enhancing the Human Rights Approach to HIV/AIDS*, 21 S. AFR. J. HUM. RTS. 191, 195-96 (2005).

324. South African Schools Act 84 of 1996.

325. *See* Stuart Wilson, *Taming the Constitution: Rights and Reform in the South African Education System*, 20 S. AFR. J. HUM. RTS. 418, 432 (2004). The Schools

measures have been taken – including exempting fees at schools in impoverished areas – to keep children in school.[326] While the school fees exemption is a laudable step forward, many schools fail to make parents aware of the exemption, turn poor kids away, or expel students for not paying fees.[327] Although organizations such as the AIDS Law Project publicize that the violation of children's educational rights can be challenged in court,[328] a great deal more must be done to vindicate children's educational rights, with there being a notable absence of litigation on issues pertaining to South Africa's school funding system.[329]

Actions must also be brought to ensure that children's rights to social services are protected. The South African Human Rights Commission has emphasized that street children in particular must be given "serious attention" by governmental agencies and civil society to ensure that these children attend school.[330] "Inasmuch as one does

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Act grants public schools the right to levy fees, subject to certain conditions. *Id.* at 431. A full exemption must be granted if a child's parents earn less than ten times the annual school fee. *Id.* at 432. A partial exemption from fees is granted where the parents earn between ten and thirty times the annual school fee. *Id.*

326. Before the interim constitution came into effect in 1994, South Africa conducted its educational system at racially segregated schools managed by different departments of education. *See* Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another 2002 (9) BCLR 891 (CC) at ¶ 8 (S. Afr). In June 2003, as part of a "Plan of Action for Improving Access to a Free and Quality Basic Education for All," South Africa's Minister for Education announced that the poorest 40 percent of South Africa's public schools would no longer be permitted to charge school fees unless explicitly given permission. *See* Wilson, *supra* note 325, at 418-19, 444.

327. *See* Wilson, *supra* note 325, at 425; South African Human Rights Commission, *The Right to Education*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year (21 June 2004), pp. 2-4, available at <http://www.sahrc.org.za/old_website/5th_esr_education.pdf> (visited Oct. 17, 2007).

328. *See* <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=40> (visited July 3, 2007).

329. *See* Wilson, *supra* note 325, at 423 n.12 & 435 (noting that "no policy-challenging litigation has been launched in the education funding sector" and that "the absence of litigation challenging policies in the education sector is an interesting issue in itself"). According to a research officer at the Centre for Applied Studies at the University of the Witwatersrand: "The fact that there has been no substantive legal challenge to the school funding regime speaks largely to the infancy of the education rights movement in South Africa, and to the absence of a grassroots organization with the capacity and political will to mount such a challenge." *Id.* at 423 n.12.

330. South African Human Rights Commission, *The Right to Education*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year, June 21, 2004,

not have the statistics for children living in the streets," the Commission has written, "there needs to be a concerted effort . . . to address the plight" of these vulnerable children.[331] Overall, South Africa's government needs to ensure that children and their caregivers receive adequate child support grants, foster care grants and care dependency grants[332] to adequately address children's needs.[333] And unlike the situation now, any child up to age eighteen should be eligible, at the very least, for means-tested social security benefits.[334]

General Comment No. 3 of the Committee on the Rights of the

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p. 5.

331. *Id.* at 32.

332. These are the three major grants that are available for the support of children, including orphans, HIV-positive children, and children living in families affected by HIV/AIDS. The foster care grant is paid to someone who, upon court appointment as a foster parent, takes care of a child that has been placed in his or her care; the child support grant is given to care-givers, and care dependency grants are given to help care for children who are ill or need special medical attention. *See* <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=78> (visited July 3, 2007).

333. For a lengthy working paper discussing children's right to social security, see M. Dutschke, *Defining children's constitutional right to social services.* A PROJECT 28 WORKING PAPER, July 2006. Cape Town: Children's Institute, University of Cape Town.

334. Currently, only children under the age of 14 qualify for the child support grant. The Alliance for Children's Entitlement to Social Security ("ACESS"), which consists of approximately 1,200 children's organizations, is pushing to make children up to age 18 eligible for the child support grant. In its advocacy, ACESS emphasizes the high level of child poverty, that children aged 14-18 are vulnerable to being exploited as child laborers, that many child-headed households exist in South Africa, and that access to social security is a constitutional right. *See* <http://www.acess.org.za/documents/csgfacts.pdf> (visited July 3, 2007); *see also* "Social Security for Children in the Context of AIDS: Questioning the State's Response," Medical Research Council of South Africa (June 2004) ("we argue that the most effective mechanism for addressing the needs of children in the context of HIV/AIDS—including children who have been orphaned by the death of their parent(s)—is through the full extension of the Child Support Grant to all children up to 18"), available at <http://www.mrc.ac.za/aids/june2004/security.htm> (visited Aug. 21, 2005). The obstacles faced by a large number of child-headed households in collecting social security is well-documented. *See, e.g.*, Linda Jansen van Rensburg, *The Denial of the South African Government to Provide Child Headed Households with Social Assistance Grants*, CHILDREN'S RTS. INT'L J., available at <http://www.childjustice.org/html/issue305_pr.htm> (visited Aug. 21, 2005); "Z Skweyiya to open conference on Orphans and Vulnerable Children" (referencing July 7, 2006 speech), available at <http://www.info.gov.za/speeches/2006/06071011451003.htm> (visited July 3, 2007) (citing statistics regarding child-headed households).

Child, issued in March 2003, deals specifically with HIV/AIDS and children's rights.[335] That General Comment notes how the HIV/AIDS epidemic "has drastically changed the world in which children live," lays out the myriad problems faced by HIV/AIDS-affected children, and highlights ways in which children's lives can be improved. Citing to various CRC provisions, General Comment No. 3 contains a roadmap that children's advocates can follow as regards children's rights under international law and contains a specific section devoted to "Children affected and orphaned by HIV/AIDS" that might be invoked, too. "The Committee," it reads in part, "wishes to underline the necessity of providing legal, economic and social protection to affected children to ensure their access to education, inheritance, shelter and health and social services, as well as to make them feel secure in disclosing their HIV status . . . ."[336] "In this respect," General Comment No. 3 continues, "States parties are reminded that these measures are critical to the realization of the rights of children and to giving them the skills and support necessary to reduce their vulnerability and risk of becoming infected."[337] The CRC itself, of course, only provides for State reporting and authorizes studies of issues affecting children,[338] but in the case of South Africa, the CRC

335. General Comment No. 3 ("HIV/AIDS and the rights of the child"), Committee on the Rights of the Child, CRC/GC/2003/3 (17 Mar. 2003), available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/309e8c3807aa8cb7c1256d2d0038caaa/$FILE/G0340816.pdf> (visited Oct. 17, 2007).

336. *Id.* at 10, ¶ 31.

337. *Id.* The comment further notes: "States parties must also support and strengthen the capacity of families and communities of children orphaned by AIDS to provide them with a standard of living adequate for their physical, mental, spiritual, moral, economic and social development, including access to psychosocial care, as needed." *Id.* at 10, ¶ 33. In addition, General Comment made several recommendations, including that States Parties "adopt and implement national and local HIV/AIDS-related policies, including effective plans of action, strategies, and programmes that are child-centred, rights-based and incorporate the rights of the child under the Convention"; "allocate financial, technical and human resources, to the maximum extent possible, to support national and community-based action"; and consider the establishment of a "review procedure" to specifically respond to "complaints of neglect or violation of the rights of the child in relation to HIV/AIDS." *Id.* at 12, ¶¶ 40-41. Because children often have difficulty vindicating their rights, the Committee on the Rights of the Child has further commented on the need for child-sensitive mechanisms for relief. *See* General Comment No. 5 ("General measures of implementation of the Convention on the Rights of the Child"), Committee on the Rights of the Child, CRC/GC/2003/5 (27 Nov. 2003), p. 5, ¶ 24, available at <http://www1.umn.edu/humanrts/crc/crc-generalcomment5.html>.

338. The CRC established the Committee on the Rights of the Child "[f]or the

has greater legal significance as the children's rights set forth in it often find expression in the country's Constitution, which itself requires that international law be considered.

It would be naïve to believe that constitutional litigation alone could ever alleviate all of the suffering faced by South Africa's children, and litigation is always a last resort. Such litigation, however, might well prompt the legislative and executive branches to better safeguard children's constitutional rights.[339] Different budgetary priorities might be put in place that would be beneficial to HIV/AIDS-affected children,[340] and further delineation of the rights of orphans and other vulnerable children might itself prompt greater

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purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken" in the convention. CRC, *supra* note 78, art. 43(1). That committee consists of "ten experts of high moral standing and recognized competence in the field covered by" the CRC. *Id.*, art. 43(2).

339. At a conference addressing socio-economic rights in late 1998, NGOs were urged by judges and academics to facilitate the bringing of resource-intensive socio-economic rights cases before South African courts. *See* "Economic, Social and Cultural Rights in South Africa," a study prepared for The Swedish NGO Foundation for Human Rights by The Human Rights Committee of South Africa (Jan. 2000), p. 129, available at <http://www.humanrights.se/upload/files/2/Rapporter%20och%20seminariedok/eng-ESC%20Rights%20in%20South%20Africa.pdf> (visited Dec. 14, 2007). To better facilitate claims, lawyers in South Africa should consider offering their services on a *pro bono* basis to children and children rights' organizations. Of course, section 28(1)(h) of the Constitution holds out the prospect that – at least in certain circumstances – counsel may be appointed and paid for by the State in children's cases.

340. *See* Devenish, *supra* note 38, at 104 ("constitutional litigation could provide a catalyst to effect a beneficial budgetary prioritisation"). At a speech at Oxford University in March 2005, Prince Mangosuthu Buthelezi, the President of the Inkatha Freedom Party, lamented that only one percent of South Africa's budget was being spent to fight HIV/AIDS. "I contend that if our nation was fighting a military campaign against invading forces," he said, invoking the African principle of *ubuntu* in his speech, "we would allocate more than one percent of our resources to fighting it." *See* "Fighting the HIV/AIDS Pandemic in South Africa," Speech to the Oxford University Lyceum International Affairs Society by Prince Mangosuthu Buthelezi (9 Mar. 2005). At a 1997 speech to the Johannesburg bar, the new Chief Justice of South Africa's Constitutional Court, Ismail Mahomed, said this about *ubuntu*: "To sustain a human rights culture it is no longer necessary to collide with the law. It is necessary only to harness it creatively. That remarkable humanitarian ethos of Africa, expressed through *ubuntu* is no longer a remote sociological construct; it is a constitutionally identifiable objective." *See* "Address by Chief Justice I Mahomed at a Dinner by the Johannesburg Bar on 25 June 1997 to Celebrate His Appointment as Chief Justice of South Africa," available at <http://www.law.wits.ac.za/sca/speeches/appoint.html> (visited July 4, 2007).

social action – and lead to greater social justice.[341] Indeed, insufficient emphasis has been put on children's rights – and the resources needed to uphold them – by South Africa's government. A study done in 2003 by the Institute for Democracy in South Africa specifically found that South Africa's government must enhance its strategy to realize children's socio-economic rights and that there is no systematic process for prioritizing child-specific rights in the government's budgeting or formulation or implementation of policies.[342]

For South African children without parental care, enforcement of their socio-economic rights is sometimes a life-or-death matter. In a recent case adjudicated before the High Court in Pretoria, the living conditions of pupils at the JW Luckhoff High School was at issue.[343] In that case, brought by the Centre for Child Law[344] and others, it was

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341. *See* Rosa & Dutschke, *supra* note 318, at 253 (arguing that South African courts should define the full extent of socio-economic rights even if immediate implementation is not ordered so that any governmental plan can be assessed against the full content of such rights and so as to "assist government in devising a plan because then they would know what they are constitutionally obliged to do").

342. *See* <http://www.eldis.org/static/DOC16178.htm> (visited Aug. 21, 2005); <http://www.childrenfirst.org.za/shownews?mode=content&id=22961&refto=4558> (visited Aug. 21, 2005). The Committee on the Rights of the Child pays considerable attention to child-focused resource allocations in considering compliance with the CRC. *See* Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, ¶ 51, CRC/GC/2003/5 (Nov. 27, 2003) ("In its reporting guidelines and in examination of States parties' reports, the Committee has paid much attention to the identification and analysis of resources for children in national and other budgets. No State can tell whether it is fulfilling children's economic, social and cultural rights 'to the maximum extent of . . . available resources' . . . unless it can identify the proportion of national and other budgets devoted to the social sector and, within that, to children, both directly and indirectly."); *see also* Geraldine Van Bueren, *Combating Child Poverty – Human Rights Approaches*, 21 HUM. RTS. Q. 680, 684 (1999) ("there is a growing body of research on children's rights indicators and there is nothing preventing national courts from utilizing similar criteria").

343. Centre for Child Law and Others v. MEC for Education and Others, Case No. 19559/06 (Pretoria High Court, Transvaal Provincial Division), 30 June 2006 Judgment, at 1.

344. The High Court specifically ruled that the Centre for Child Law had "*locus standi* to act on behalf of the pupils of the school of industry in terms of section 38(d) of the Constitution, by virtue of it acting in the public interest." *Id.* at 2 (italics in original). The Centre for Child Law is based at the University of Pretoria and it established a Children's Litigation Project in August 2003 with a grant from the Open Society Foundation and the International Commission of Jurists (Sweden) to do impact litigation in the realm of children's rights. *See* <www.childlawsa.com> (visited Sept. 23, 2007).

alleged that the constitutional rights of children – who were living in squalid conditions in hostels at a "school of industry"[345] in Gauteng – were being infringed. In particular, the Centre for Child Law alleged that the conditions violated section 28 of the Bill of Rights as well as the right to dignity in section 10 and the right not to be subjected to cruel, inhuman or degrading treatment in section 12.[346] The judge – issuing his decision orally in open court because of its "importance and urgency" – ordered that the children housed at the school's hostels be provided at once with sleeping bags to vindicate their constitutional rights and protect them from the cold.[347]

In the case, the High Court judge specifically noted that the children lacked parental care, and emphasized the dangerous and terrible conditions in which the children were being housed. The judge found all of the hostels "in a varying degree of physical deterioration"; that "broken windows and broken ceiling boards" exposed children to "inclement weather in their sleeping quarters," with "temperatures dropping after sunset to zero degrees and less" when Gauteng "experiences a windy season and a particularly cold snap"; and that "[t]here appears to be no heating in the dormitories at all, and in some instances there is no electricity." The judge described

345. The High Court noted that "[s]chools of industry have a long history in South Africa. Centre for Child Law and Others v. MEC for Education and Others, Case No. 19559/06 (Pretoria High Court, Transvaal Provincial Division), 30 June 2006 Judgment, at 4. Children are removed from their families and sent to such schools after a Child Care Act inquiry, with the idea that "the school will provide a higher standard of care than that which the child's parents, for one reason or other, are able to provide." *Id.* at 4-5.

346. *Id.* at 2.

347. *Id.* at 2, 12. In particular, the High Court judge ordered that sleeping bags "with a temperature rating of at least five degrees Celsius" be immediately provided to pupils at the JW Luckhoff High School. *Id.* at 12. The judge noted that "[t]he minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values." *Id.* at 8. In so holding, the High Court judge rejected the government's argument that other children at different institutions might be treated unequally. *Id.* at 7-8. According to the court: "The equality argument equally holds no water. It can never be a defence to a violation of constitutional rights to argue without qualification that the remedy should not be granted, lest others similarly denied their rights should seek the same remedy at significant cost to the state." *Id.* at 8. "As a society," the judge ruled, pointing to the centrality of the right to dignity, "we wish to be judged by the humane and caring manner in which we treat our children." *Id.* "Our Constitution," the judge continued, "imposed a duty upon us to aim for the highest standard, and not to shirk our responsibility." *Id.* Children are entitled to more than "equal graveyards," the High Court judge held. *Id.*

the children's bedding this way: "The children's beds consist of old, dirty foam mattresses on old bedstands. Some of the beds examined had sheets and one blanket, others had two blankets. The blankets are thin and grey, such as those used in prisons."[348]

Of course, in crafting solutions to the problems faced by HIV/AIDS-affected children, children's voices must be heard.[349] As South Africa's Constitutional Court emphasized in *Christian Education South Africa v. Minister of Education*,[350] children's experiences and opinions enrich "the dialogue" over children's rights issues.[351] In socio-economic rights cases in which children's rights are at stake, a *curator ad litem* should thus be appointed to assist in the presentation of children's views.[352] If the rights of South African children are ever to be fully realized, the experiences of children like Moali, a 13-year-old girl, must be taken into consideration. That girl, only a toddler when her mother died of AIDS, was raped by an uncle with whom she was sent to live and later ended up in a foster home. According to a recent news report, the bright young girl – wearing a threadbare school uniform and carrying a ragged schoolbag on her shoulder – was sent home from school for a lack of money to pay school fees. "I never had anyone to help me," she said quietly, after being told to pay up or go home.[353]

In South Africa, children are plainly entitled to access to critical information that affects their lives, including as to their constitutional rights.[354] To more effectively ensure that children's rights are

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348. *Id.* at 5.

349. *See* Committee on the Rights of the Child, *supra* note 79, at ¶ 8 ("States Parties need to ensure that adolescents are given a genuine chance to express their views freely on all matters affecting them . . . ").

350. Christian Education South Africa v Minister of Education 2000 (10) BCLR 1051 (CC) (S. Afr.).

351. *Id.* at ¶ 53.

352. *Id.* (noting that it was "unfortunate" that a *curator ad litem* was not appointed to represent the interests of children, and that the appointment of a *curator ad litem* would have enabled children's "voices to be heard").

353. *U.N. Drive Targets Childhood AIDS*, ST. PAUL PIONEER PRESS, Oct. 25, 2005, at 6A.

354. *See* Committee on the Rights of the Child, *supra* note 79, at ¶ 26 ("It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours."); *id.* at ¶ 28 ("States parties should provide adolescents with access to sexual and reproductive information, including on family planning and

protected, wider distribution of guides to children's rights must occur, including within South Africa's legal community.[355] Various websites already provide some of this information,[356] but children in poverty are unlikely to have Internet access. South African governmental bodies must also take a rights-based approach in crafting policies and in responding to the HIV/AIDS epidemic. As the UNAIDS International Guidelines on HIV/AIDS and Human Rights advise: "One essential lesson learned from the HIV epidemic is that universally recognized human rights standards should guide policymakers in formulating the direction and content of HIV-related policy and form an integral part of all aspects of the national and local response to HIV."[357] All of these actions are necessary to protect and restore the dignity of children affected by HIV/AIDS.[358]

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contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs)"); *id.* at ¶ 30 ("States should ensure that appropriate goods, services and information for the prevention and treatment of STDs, including HIV/AIDS, are available and accessible.").

355. *See, e.g.*, Julia Sloth-Nielsen, *Realising the rights of children growing up in child-headed households: A guide to laws, policies and social advocacy*, Comm. L. Centre, Univ. W. Cape (2004); SAVE THE CHILDREN UK, CHILDREN, HIV/AIDS AND THE LAW: A LEGAL RESOURCE (2001).

356. The AIDS Law Project <http://www.alp.org.za/> and the Children's Rights Centre <http://www.childrensrightscentre.co.za/> have websites dealing with children's rights. Notably, the Constitutional Court's website also contains a page delineating children's rights. Among other things, that page states: "Children need special protection because they are among the most vulnerable members of society. They are dependent on others – their parents and families, or the state when these fail – for care and protection." *See* <http://www.constitutionalcourt.org.za/site/yourrights/knowyourrights-childrensrights.htm> (visited July 9, 2007).

357. Office of the United Nations High Commissioner for Human Rights, *International Guidelines on HIV/AIDS and Human Rights* (2006 Consolidated Version), p. 79, ¶ 99, *available at* <http://www.ohchr.org/english/issues/hiv/docs/consolidated_guidelines.pdf> (visited July 12, 2007).

358. *See* Committee on the Rights of the Child, *supra* note 349, at ¶ 37 ("Adolescents who are sexually exploited, including in prostitution and pornography, are exposed to significant health risks, including STDs, HIV/AIDS, unwanted pregnancies, unsafe abortions, violence and psychological distress. They have the right to physical and psychological recovery and social reintegration in an environment that fosters health, self-respect and dignity (art. 39)."). The lack of *ubuntu* as regards South Africa's orphans has been lamented. *See, e.g.*, Karolin Johansson & Therese Palm, *Children in Trouble with the Law: Child Justice in Sweden and South Africa*, 17 INT'L J.L. POL'Y & FAM. 308, 327 (2003) ("The notion that 'it takes a whole village to raise a child' is based on Ubuntu – a spirit of humanity, which encompasses a principle of people caring for each other's well-being. It says that a person is a person because of or through others. Ubuntu is a

VI. Conclusion

South Africa's 1996 Constitution can be a powerful tool to combat injustice and to protect people's dignity, and South Africa's lawyers and judges should use it to improve the lives of the children affected by HIV/AIDS even as international aid arrives to assist these children. Unlike the "access" rights in sections 26 and 27 of the Constitution, which must be realized only on a progressive basis in accordance with available resources, section 28(1)(c) guarantees the rights of children to "basic nutrition, shelter, basic health care services and social services" without qualification, as does section 29(1)(a) pertaining to the right to basic education.[359] Section 28 also requires that a "child's best interests" be considered – and this, too, points towards a vindication of the socio-economic rights of South Africa's children.

In South Africa, more cases need to be brought to improve and save the lives of children, and governmental failures to develop comprehensive initiatives to provide basic services to orphans and other vulnerable children must not go unchecked.[360] Child-headed

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guide for social conduct as well as a philosophy of life. The concept of Ubuntu has promoted societal harmony in Africa for many years, and guided traditional conflict resolution. In pre-colonial and traditional societies South African children were raised in this spirit, and few children were homeless or abandoned. The impact of colonization, urbanization and apartheid have left their mark and a large number of homeless, abandoned or neglected children bear witness to the fact that Ubuntu is no longer strong enough to protect them.").

359. *See* Marius Pieterse, *Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa*, 14 STELLENBOSCH L. REV. 3, 10 (2003); Wilson, *supra* note 325, at 435, 439 & n.44; *accord* Davel & Mungar, *supra* note 17, at 72-73, nn.76 & 80 (noting that "[c]hildren's entitlements to basic nutrition, shelter, basic health care services and social services are not 'access' entitlements, but are direct entitlements to the provision of the goods in question" and that section 28 of the Constitution does not contain a provision on the "progressive" realization of children's rights subject to available resources).

All constitutional rights are subject to the general limitation provision in section 36 of the Constitution. However, just as section 36 was rejected as a basis for allowing the continued use of corporal punishment in schools, *see*, Christian Education South Africa v Minister of Education 2000 (10) BCLR 1051 at ¶ 30-31, 42 (S. Afr.), the Constitutional Court should not use section 36 as a basis to deny orphans and other vulnerable children their fundamental rights, including their socio-economic rights.

360. The South African Human Rights Commission recently noted, for example, that governmental authorities have given "too little consideration" to the impact of the HIV/AIDS epidemic on water resource management. South African Human Rights Commission, *The Right to Water*, 5th Economic and Social Rights Report

households deserve special attention, with one South African, Dr. Bhadra Ranchod, aptly calling them an "abomination" and a violation of section 28 of the Constitution.[361] As Dr. Ranchod writes: "Resources must be found immediately to end the violation of children's fundamental human rights. Community care centres or similar child friendly environments must be established and existing NGO facilities such as at Nkosi's Haven, Care Topsy Foundation and many more informal care arrangements in the townships must be funded by the government to absorb these children until they can be put up for adoption."[362] The presence of kids fending for themselves on the streets is an unmistakable sign that children's rights are not being protected.

The Constitutional Court itself should move toward minimum core entitlements for HIV/AIDS-affected children without familial support.[363] This would help ensure the protection of orphans and other vulnerable children – and would be consistent with children's constitutional rights as well as the overarching philosophy of *ubuntu*, what Justice Richard Goldstone of South Africa's Constitutional Court has called "an African custom of peoplehood; that people don't exist save through other people; that there has to be a relationship between people to make people whole."[364] Without educational opportunities and the basic necessities of life, orphans and other vulnerable children are doomed to a life of deprivation, destitute

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Series 2002/2003 Financial Year, June 21, 2004, p. 51 available at < http://www.sahrc.org.za/old_website/esr_report_2002_2003.htm>. Per the Commission: "In the wake of the HIV/AIDS epidemic the inability to pay increases and it becomes harder and harder for local government to collect rates from the services rendered." *Id.*

361. Ranchod, *supra* note 237, at 8.

362. *Id.* Institutional care, of course, is not the ideal approach. As two commentators have noted, "For their own well-being, as well as for the fabric of society as a whole, children ought not to grow up in institutions. Children belong in a home." Davel & Munger, *supra* note 17, at 76.

363. A critique of the Constitutional Court's views on the impropriety of the minimum core concept is found at Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?* 6 L. DEM. & DEVELOPMENT 159 (2002).

364. *See* <http://www.facinghistory.org/Campus/tj/TJ.nsf/0/10B9E07B473CE57085256FB6005A68C6> (visited July 1, 2007). For further information on the "minimum core" concept, see Geraldine Van Bueren, *Alleviating Poverty through the Constitutional Court*, 15 S. AFR. J. HUM. RTS. 52, 59 (1999) ("a minimum core approach . . . should be viewed as a springboard for further action").

poverty, suffering and death. One of the legacies of apartheid is extreme poverty and inequality – a legacy that the Constitution sought to transform through legal means. South Africa's 1996 Constitution offers hope to those who live in the newly democratic South Africa, though there remains a great divide between the aspirations of the Bill of Rights and the reality on the ground. Nowhere is this divide more apparent than in the realm of rights-deprived, HIV/AIDS-affected children.

"The spirit of *ubuntu*," Nelson Mandela has said, is "that profound African sense that we are human only through the humanity of other human beings."[365] That spirit enabled South Africa's first democratically elected president – a man who was imprisoned for over 25 years – to have mercy on his tormentors following the demise of the apartheid regime, and it was a moving force behind South Africa's much-publicized Truth and Reconciliation Commission hearings, which precipitated acts of forgiveness and societal healing nationwide.[366] Ironically, on January 6, 2005, South Africa's former president, Nelson Mandela, announced that his son, Makgatho, had died of AIDS,[367] and the spirit of *ubuntu*

365. Archbishop of Canterbury's Sermon in Odibo, Namibia (30 Jan. 2000), available at <http://www.archbishopofcanterbury.org/carey/speeches/000130.htm> (visited Oct. 25, 2005).

366. *See* Zia Jaffrey, *Desmond Tutu*, THE PROGRESSIVE, Vol. 62:2 (Feb. 1998). Shortly after the adoption of the 1996 Constitution, Justice Yvonne Mokgoro of South Africa's Constitutional Court wrote of "the potential that traditional African values of *ubuntu* have for influencing the development of a new South African law and jurisprudence." Yvonne Mokgoro, "*Ubuntu* and the Law in South Africa," paper delivered at Potchefstroom on 31 October 1997, at 1, available at <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/98v1mokg.pdf> (visited July 2, 2007). A revised version of Justice Mokgoro's paper was later published by the *Buffalo Human Rights Law Review*. *See* Mokgoro, *supra* note 277, at 15. Although Mokgoro emphasized that the concept of *ubuntu* is difficult to translate and define, *id.*, she noted that it is "one of those things that you know when you see it." *Id.* Mokgoro wrote that "the *ubuntu* values of collective unity and group solidarity are translated into the value of national unity demanded by the new South African society"; that "*ubuntu(-ism)* can be employed to create responsive legal institutions for the advancement of constitutionalism and a culture of rights in South Africa"; and that "[i]n the true spirit of *ubuntu*, no one, especially not lawyers, can afford to sit back and watch our new-found constitutionalism slide into disrepute." *Id.* at 19-20, 22. As Mokgoro concluded: "The values of *ubuntu*, I would like to believe, if consciously harnessed, can be central to a process of harmonizing indigenous law with the Constitution and can be integral to a new South African jurisprudence." *Id.* at 22-23.

367. *See* Copson, *supra* note 1, at 5.

is not yet fully present in the country's next great, post-apartheid challenge: the HIV/AIDS crisis and all of the South African people it has so profoundly affected. Until that day comes, the HIV/AIDS epidemic will not only go unchecked, but South Africa's children will continue to suffer and the country will have turned away from one of its core values, the humane treatment and collective survival of its citizens as embodied in the principle of *ubuntu* or *botho*.

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