

Constituting Children's Rights in South Africa

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Abstract

When the Republic of South Africa drafted its Constitution in 1994, it was a groundbreaking moment in the advancement of children's rights. It was the first time that children's rights were robustly and comprehensively recognized in the express language of a nation's constitution. Before then, children's rights were recognized primarily through statutes, case law, and international treaties, with only occasional recognition of specific rights such as the right to primary education and certain family rights found in the express language of constitutions.² Additionally, a variety of courts interpreted their constitutions to recognize children's rights (albeit usually limited ones both in number and scope relative to adults), but no country had promulgated a constitution that recognized children as a unique population of rights holders with numerous specific rights beyond those held by adults. This paper outlines the development of children's rights in South Africa within domestic, international, and historical contexts with a heightened focus on children's rights under the 1994 Constitution. It then identifies some of the most definitive decisions of the South African Constitutional Court interpreting children's rights under the 1994 Constitution, and questions whether recognition of children's rights in the 1994 Constitution is making a difference in the day-to-lives of children in South Africa.

I. South Africa and the Rise of Children's Rights

South Africa has inconsistently recognized children's rights over the past century. On the one hand, South Africa was an early and active leader in the recognition of children's rights in

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² In 2001, the U.N. Special Rapporteur on the right to education found explicit guarantees of the right to education in the constitutions of 142 out of 186 countries. Philip Alston & Nehal Bhuta, *Human Rights and Public Goods: Education as a Fundamental Right in India*, in *Human Rights and Development: Towards Mutual Reinforcement* 242, 249 (Phillip Alston & Mary Robinson eds., 2005). The right to education, at least at the minimal level of free and compulsory education for all children, is guaranteed in 142 countries. Special Rapporteur on the Right to Education, Annual Rep. of the Special Rapporteur on the Right to Education, paras. 66-67, U.N. Doc. E/CN.4/2001/52 (Jan. 11, 2001) (by Katarina Tomaševski). See, e.g., CONSTITUTION OF IRELAND Jul. 1, 1937, art. 42.4 (specifying state provision of free primary education and other educational facilities for the public good); SWITZERLAND CONSTITUTION Apr. 18, 1999, SR 101, art. 62.2 (cantons provide sufficient primary education and special needs education to all children); CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Dec. 1999, art. 78 (recognizing children and adolescents as full legal persons, protected by special courts); THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES Oct. 12, 1986, art. 15 (recognizes comprehensive rights of the Filipino family); THE CONSTITUTION OF THE REPUBLIC OF GHANA Apr. 28, 1992, Ch. 5, art. 28 (recognizes the right of the family to state protection in promoting the interest of children).

the international community. The Union of South Africa was a founding member of the League of Nations³ and voted to endorse the first major international instrument recognizing children's rights, the 1924 Declaration of the Rights of the Child ("1924 Geneva Declaration").⁴ The 1924 Geneva Declaration recognized children's fundamental political, civil, economic and social rights, presenting them all as "first-generation" rights.⁵

After the League of Nations was dissolved following World War I, the Union of South Africa became a founding member of the United Nations, and was one of 21 governments in March 1949 to send comments to the Secretary-General in support of adopting a United Nations Declaration of the Rights of the Child similar to the 1924 Geneva Declaration; moreover, the Union of South Africa was one of only five member states to send draft texts.⁶ The efforts of the Union of South Africa and others were successful. Ten years later, the 1959 Declaration of the Rights of the Child ("1959 Declaration") was adopted by the United Nations General Assembly; the vote was unanimous and there was not a single abstention.⁷

The 1959 Declaration went even further than the 1924 Geneva Declaration. It recalled the 1924 Geneva Declaration and incorporated both the United Nations Charter⁸ and the Universal Declaration of Human Rights,⁹ ensuring that everyone understood that the rights

³ 2 International Security and the United States: An Encyclopedia 717 (Karl R. DeRouen & Paul Bellamy eds., Praeger Security International, 2008) ("South Africa was a founding member of the League of Nations and of the United Nations...").

⁴ Geneva Declaration of the Rights of the Child, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 [hereinafter 1924 Geneva Declaration]. 1924 Geneva Declaration, available at <http://www.un-documents.net/gdrc1924.htm> (last visited Oct. 29, 2014). League of Nations Doc. Records of the Fifth Assembly, 177.

⁵ *Id.* at 8. The final text of the 1924 Geneva Declaration reads:

By the present Declaration of the Rights of the Child, commonly known as "Declaration of Geneva," men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

1. The child must be given the means requisite for its normal development, both materially and spiritually;
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;
3. The child must be the first to receive relief in times of distress;
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;
5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

⁶ UN Doc. E/CN.5/111. The other four countries were Belgium, Denmark, the Netherlands, and the Philippines.

⁷ Declaration of the Rights of the Child, Nov. 20, 1959, G.A. Res. 1386, U.N. Doc. A/4354 [hereinafter 1959 Declaration]; GA Res 1386 XIV. For greater understanding of the significance of the unanimous vote, see GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 32-66 (1998).

⁸ U.N. Charter, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945).

⁹ Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71.

enumerated in the 1959 Declaration supplemented children's core rights as human beings. Moreover, whereas the 1924 Geneva Declaration encouraged the "men and women of all nations" to accept as their duty the fulfillment and protection of children's rights, the 1959 Declaration also called upon parents, voluntary organizations, local authorities, and national governments to recognize children's rights and "strive for their observance by legislative and other measures."¹⁰ Under the 1959 Declaration, children were recognized as subjects, rather than objects, with rights to non-discrimination,¹¹ adequate nutrition,¹² housing,¹³ medical care,¹⁴ a name and nationality,¹⁵ social security,¹⁶ play and recreation,¹⁷ and education.¹⁸ Additionally, special care was owed to disabled children¹⁹ and those without a family.²⁰ Simultaneous with the adoption of the 1959 Declaration, the United Nations General Assembly unanimously adopted a resolution "calling upon Governments to recognise the rights, to strive for their observance and to publicise the Declaration 'as widely as possible.'"²¹

Although the Union of South Africa established itself as a leader in the international community with the recognition of children's rights through the 1924 Geneva Declaration and the 1959 Declaration, the rise of Apartheid policies after World War II led to a widespread failure to respect those same rights domestically. South Africa's widespread violation of human and children's rights alienated the country from the international community. For example, a resolution was presented to the United Nations Security Council in October 1974 that would have expelled South Africa from the United Nations due to its apartheid policies.²² The United States, the United Kingdom, and France vetoed adoption of the resolution, and so South Africa was not expelled, but the following month, the United Nations General Assembly suspended South Africa from the Assembly's work,²³ and South Africa was not able to participate fully in the United Nations until after the democratic elections in 1994 and the country's reformation as the Republic of South Africa.²⁴

¹⁰ *Supra* note 6, at Preamble.

¹¹ *Supra* note 6, at Princs. 1 and 10.

¹² *Id.* at Princ. 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at Princ. 3.

¹⁶ *Id.* at Princ. 4.

¹⁷ *Id.* at Princ. 7.

¹⁸ *Id.*

¹⁹ *Id.* at Princ. 5.

²⁰ *Id.* at Princ. 6.

²¹ GA Res 1387 XIV, 19.

²² *Matters Concerning South Africa's Apartheid Policies*, 1974 U.N.Y.B. 106, U.N. Sales No. E.76.I.1.

[<http://www.unmultimedia.org/searchers/yearbook/search.jsp?q=south+africa&searchType=advanced&volumeFacet=1974&sort=&display=page>].

²³ However, the suspension was not a formal one under Article 5. Draft Resolution on the Immediate Expulsion of South Africa from the United Nations, U.N. Doc. S/11543 (Oct. 24, 1974).

²⁴ G.A. Res. 48/258, U.N. Doc. A/RES/48/258 (Jul. 6, 1994).

During that time, important children's rights work was accomplished at the international level. The Year of the Child was in 1979,²⁵ five years after South Africa's suspension from the General Assembly and three years after the Soweto Uprising, a peaceful demonstration by black students in their school uniforms to assert their education rights, which became violent when the apartheid government opened fire on the children and led to the death and injury of hundreds.²⁶ In fact, the apartheid regime's brutality during the Soweto Uprising is cited by some as the death knell for apartheid, as even those countries that had tolerated the government's violations of the civil rights of adults, could not rationally defend the innocent killing of schoolchildren.²⁷

The Soweto Uprising was not the only example of the Union of South Africa's failure to respect at home the same children's rights that they had advocated for recognition of internationally. Indeed, of 22,000 people detained during a state of emergency in South Africa, forty percent were children.²⁸ International children's rights scholar, Geraldine Van Bueren, repeatedly cites to South Africa in her book, *The International Law on the Rights of the Child*, to provide examples of state violations of the rights of children. Examples include detaining children as young as 11 years of age for attending a funeral to express their grief,²⁹ passing the Internal Security Act, which allowed "authorities not to inform relatives of the detention of a family member" in violation of children's family rights,³⁰ and the impact that hunger and poor nutrition had on children's educational failure.³¹ Many other examples of South Africa's widespread violations of children's rights during the apartheid regime have been documented historically, but those in Van Bueren's book are noteworthy because of the legal context of her analysis.³²

While South Africa was violating the same children's rights the country had recognized and advocated for earlier in the twentieth century, the rest of the world was busy drafting the

²⁵ VAN BUEREN, *supra* note 7, at 13.

²⁶ The Soweto Uprising took place on June 16, 1976. Gary Baines, *The Master Narrative of South Africa's Liberation Struggle: Remembering and Forgetting June 16, 1976*, 40 INT'L J. AFR. HIST. STUD. 283, 283-302 (2007). The number of casualties estimated from the Soweto Uprising ranges from 20 to 700. MIKE MASON, DEVELOPMENT AND DISORDER: A HISTORY OF THE THIRD WORLD SINCE 1945 240 (1997) (citing an official count of 200, unofficial count between 600 and 700); DAVID HARRISON, THE WHITE TRIBE OF AFRICA 196 (1983) (cites 600 casualties); Gary Baines, *Coming to Terms with the Past: Soweto, June 16th 1976*, 56 HISTORY TODAY 18, 18-20 (2006) (cites 700 casualties). The most common number appears to be 176. DIANA GORDON, TRANSFORMATION AND TROUBLE: CRIME, JUSTICE AND PARTICIPATION IN DEMOCRATIC SOUTH AFRICA 141 (2006) (citing 176 dead within the first week of the Soweto uprising).

²⁷ Kimberlee Ann Scalia, *A Delicate Balance: The Effectiveness of Apartheid Reforms in the Struggle for the Future of South Africa*, 6 Fla. J. Int'l L. 177, 190, n.19 (1990) ("After the Soweto uprising in 1976, the United Nations General Assembly called the South African government an 'illegitimate, minority, racist regime,'" citing Winston Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and the Anti-Apartheid Act of 1986*, 4 FLA. INT'L L.J. 85, 134 (1988).)

²⁸ VAN BUEREN, *supra* note 7, at 207.

²⁹ *Id.* at 145.

³⁰ *Id.* at 192.

³¹ *Id.* at 238.

³² Roger J.R. Levesque, Review, *Geraldine Van Bueren, The International Law on the Rights of the Child*, 19 FORDHAM INT'L L.J. 832, 834 (1995) (noting that Professor Van Bueren's legal analysis, which directly examines the complex issues involved in understanding children's rights, is invaluable and would stand on its own).

United Nations Convention on the Rights of the Child (“U.N. Convention on the Rights of the Child”).³³ Drafting began in 1979 during the International Year of the Child, and lasted for nearly ten years.³⁴ In its final form, the U.N. Convention on the Rights of the Child recognized children’s rights in four core categories: protection, provision, participation, and prevention of harm.³⁵ The treaty eventually became the most widely ratified human rights treaty in the history of the world.³⁶ In fact, every recognized country in the world has ratified it except Somalia, South Sudan, and the United States.³⁷

South Africa did not participate in the drafting process.³⁸ Other African countries were involved in drafting the Convention on the Rights of the Child, but were not proportionally and consistently represented.³⁹ However, the continent was strongly represented among the first

³³ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). Somalia has plans to ratify the treaty and South Sudan’s parliament has passed a law to ratify the Convention that is waiting for the President’s signature. Jo Becker, *Dispatches: Will US be Last to Endorse Child Rights Convention?*, HUMAN RIGHTS WATCH (Nov. 26, 2013), <http://www.hrw.org/news/2013/11/26/dispatches-will-us-be-last-endorse-child-rights-convention>; *Somalia to Ratify UN Child Rights Treaty*, SABAHI (Nov. 20, 2013), http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/11/20/newsbrief-01; *Parliament Passes Bill to Ratify Child Rights Convention*, UNITED NATIONS MISSION IN SOUTH SUDAN (Nov. 20, 2013), <http://unmiss.unmissions.org/Default.aspx?ctl=Details&tabid=3465&mid=6047&ItemID=2338858>.

³⁴ Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of a Child, Vol. 1* (2007), <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf>.

³⁵ See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

³⁶ OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 3 (June 16, 2006), *available at* <http://www2.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (last visited Nov. 6, 2014).

³⁷ Somalia has plans to ratify the treaty and South Sudan’s parliament has passed a law to ratify the Convention that is waiting for the President’s signature. Jo Becker, *Dispatches: Will US be Last to Endorse Child Rights Convention?*, HUMAN RIGHTS WATCH (Nov. 26, 2013), <http://www.hrw.org/news/2013/11/26/dispatches-will-us-be-last-endorse-child-rights-convention>; *Somalia to Ratify UN Child Rights Treaty*, SABAHI (Nov. 20, 2013), http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/11/20/newsbrief-01; *Parliament Passes Bill to Ratify Child Rights Convention*, UNITED NATIONS MISSION IN SOUTH SUDAN (Nov. 20, 2013), <http://unmiss.unmissions.org/Default.aspx?ctl=Details&tabid=3465&mid=6047&ItemID=2338858>. While the United States has not yet ratified the Convention on the Rights of the Child, it signed the Convention on February 16, 1995, and again, was an active participant in the drafting process. *Convention on the Rights of the Child Ratification Status*, *supra* note 32

³⁸ Office of the U.N. High Comm’r for Human Rights, *Legislative History of the Convention on the Rights of the Child Vol. 2, Annex III*, U.N. Doc. HR/PUB/07/1 (2007) (listing participants in drafting process (South Africa is not listed)).

³⁹ See President of the Third Committee, *Adoption of a Convention on the Rights of the Child: Report of the Third Committee, delivered to the General Assembly*, U.N. Doc. A/44/736 (Nov. 17, 1989). Some histories of the drafting process attribute the underrepresentation of African countries in the drafting process to North-South racism, while others blame it on a lack of resources in Post-Colonial Africa. STEPHEN NMEREGINI ACHILIHU, *DO AFRICAN CHILDREN HAVE RIGHTS?: A COMPARATIVE AND LEGAL ANALYSIS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 28 (2010) (stating that “[t]he low participation by States in Africa, like other third world countries, was accounted for partly by the lack of trained personnel who can represent the countries in these capacities, and partly by low financial resources to commit the time and energy that are necessary to participate effectively in standard-setting activities.”); JEFFREY HERBST, *INTERNATIONAL LAW AND REBELLION IN AFRICA*, IN *INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP* 193 (Edward C. Luck & Michael W. Doyle eds., 2004) (attributing failure of African countries to engage during the drafting process to disproportionate number of diplomatic representatives and resources between the West and African delegations); Cynthia Price

nations that went on to sign and ratify the treaty quickly nonetheless.⁴⁰ In fact, of the fifty-seven countries who signed the Convention in the first month, over one-quarter of them were African countries.⁴¹ The Union of South Africa never ratified the Convention on the Rights of the Child. It was not until the transition to a constitutional democracy that the treaty was finally signed in 1993.⁴² The Republic of South Africa ratified the Convention on the Rights of the Child on June 30, 1995, without reservations.⁴³

South Africa also did not participate in the drafting or adoption of the Declaration on the Rights and Welfare of the African Child by the Assembly of Heads of State and Government of the Organisation of African Unity in 1979 (“African Children’s Declaration”).⁴⁴ Because the Organisation of African Unity was committed to removing colonialism and white minority rule from the African continent, South Africa did not become a member until June 6, 1994, less than six weeks after its first democratic election.⁴⁵ The African Children’s Declaration was a non-binding instrument that, *inter alia*, emphasized the African child’s special role in protecting African heritage, encouraged implementation and the updating of domestic legislation regarding children, and recognized the 1959 U.N. Declaration.⁴⁶

Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 84-85 (1993) (noting that as the drafting of the CRC neared completion, fear that rumors of a Northern-Western treaty, which would not reflect concerns of less developed countries, would prevent the Convention from being widely accepted). *See generally*, Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT’L L. 1 (2008) (referencing various charges of bias and cultural imperialism related to the CRC).

⁴⁰ *See Convention on the Rights of the Child Ratification Status*, United Nations Treaty Collection Database, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Nov. 12, 2013). The Convention on the Rights of the Child was adopted unanimously by the General Assembly and broke records for the greatest number of signatories to a treaty on the day it opened for signature. CITE.

⁴¹ The African countries which ratified the CRC in the first month: Algeria, Burkino Faso, Côte d’Ivoire, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Mali, Mauritania, Morocco, Namibia, Niger, Nigeria, Rwanda, Senegal, Togo and Tunisia. UNITED NATIONS TREATY COLLECTION, CHAPTER IV HUMAN RIGHTS, NO. 11 CONVENTION ON THE RIGHTS OF THE CHILD, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (Nov. 7, 2014). The CRC opened for signature on November 20, 1989, and the first signatures were entered in January 1990. *Convention on the Rights of the Child*, *supra* note33; *see also* Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 970 (2006).

⁴² *Convention on the Rights of the Child Ratification Status*, *supra* note32.

⁴³ UNITED NATIONS TREATY COLLECTION, CHAPTER IV HUMAN RIGHTS, NO. 11 CONVENTION ON THE RIGHTS OF THE CHILD, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (Nov. 7, 2014).

⁴⁴ Org. of African Unity [OAU], Declaration on the Rights and Welfare of the African Child, O.A.U. Doc. AHG/ST.4 (XVI) Rev. 1 (Jul. 20, 1979) [hereinafter African Children’s Declaration]. The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments. A further 21 states have joined gradually over the years, with South Africa becoming the 53rd member on 23 May 1994. <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm>.

⁴⁵ Joseph Mensa, *Organization of African Unity*, in 3 ENCYCLOPEDIA OF THE DEVELOPING WORLD 1203-1204 (Thomas M. Leonard ed., 2006).

⁴⁶ African Children’s Declaration, *supra* note 44.

South Africa also was unable to participate in the drafting of the regional treaty introduced in 1990 exclusively devoted to children's rights: the African Charter on the Rights and Welfare of the Child ("African Children's Charter").⁴⁷ The African Children's Charter was the world's first regional children's rights treaty, and went beyond the U.N. Convention on the Rights of the Child.⁴⁸ For example, whereas the U.N. Convention on the Rights of the Child identified the "best interests of the child" as *a* primary consideration in all decisions affecting the child, the African Children's Charter identified the "best interests of the child" as *the* primary consideration.⁴⁹ The African Children's Charter also took a bright line approach to defining a child as anyone under 18 years of age,⁵⁰ provided more express protections for girl children,⁵¹ and provided an enforcement mechanism for children whose rights had been violated.⁵²

The African Children's Charter not only addressed some of the shortcomings that had been identified in the U.N. Convention on the Rights of the Child, it adapted the construction of children's rights to Africa's unique historical and cultural context. For example, it recognized the heightened importance of family to the African child with relationships that were bilateral.⁵³ Under the African Children's Charter, children are viewed as having not only rights, but obligations to their families.⁵⁴ The African Children's Charter also recognized some of the unique challenges that were being faced on that continent and had provisions on child marriage,⁵⁵ child trafficking,⁵⁶ child labor,⁵⁷ children in armed conflict,⁵⁸ and harmful cultural practices.⁵⁹ With regard to South Africa, in light of its history, two provisions were especially key: (1) the principle of non-discrimination and to eliminate apartheid, and (2) the obligation of states parties to provide material assistance to children affected by such practices.⁶⁰ The African Children's Charter was signed by President Nelson Mandela in 1997 and finally ratified by South Africa in 2000.⁶¹

⁴⁷ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) [hereinafter African Children's Charter]. **CITE authority for South Africa's exclusion from the drafting process.**

⁴⁸ Van Bueren, *supra* note 7, at 10-11.

⁴⁹ CRC, *supra* note 33, at art. 3(1) and ACC, *supra* note 42, at art. 4(1).

⁵⁰ CRC, *supra* note 33, at art. 1 (identifies a child as being below 18 years of age unless majority is attained through another law), and ACC, *supra* note 42, at art. 2.

⁵¹ CRC, *supra* note 33 (containing no provision for the rights of pregnant children) and ACC, *supra* note 42, at art. 11(6) (recognizing the educational rights of pregnant girls).

⁵² *Id.* at art. 16(2). [Describe].

⁵³ *Id.* at pmb. and art. 18-20.

⁵⁴ *Id.* at art. 31.

⁵⁵ *Id.* at art. 21.

⁵⁶ *Id.* at art. 29.

⁵⁷ *Id.* at art.15.

⁵⁸ *Id.* at art. 22.

⁵⁹ *Id.* at art. 21.

⁶⁰ *Id.* at 26.

⁶¹ African Union, List of Countries Which Have Signed, Ratified/Accessed to the African Charter on the Rights and Welfare of the Child (Feb. 21, 2013), http://www.au.int/en/sites/default/files/Welfare%20of%20the%20Child_0.pdf. The African Children's Charter entered into force after ___ countries had ratified it. Today, it has been ratified by 46 of the 53 recognized African countries. *Id.* The only countries that have not ratified the treaty are the Central African

It is not surprising Nelson Mandela oversaw the signing of the African Children's Charter and the ratification of the U.N. Convention on the Rights of the Child as the first president of the Republic of South Africa. History makes clear that he had a longstanding recognition of both children and family rights, and in fact, both were outlined in the Freedom Charter he co-authored in 1955 for the African National Congress.⁶² The Freedom Charter called for the elimination of child labor and laws that separate family members. It called for free and compulsory universal education and recognized children's rights to equal status in schools, in addition to free medical care (with special care provided for mothers and young children), and government care for orphans. Family rights included parents' rights (1) to educate their children, (2) maternity leave with full pay for all working mothers, and (3) to bring up their families "in comfort and security."⁶³

In short, South Africa had a history of leadership internationally in the advancement of children's rights, until the nation became sidelined from the international stage due to its human rights abuses under apartheid. It also had a history of domestic recognition of children's rights among the political leaders opposed to apartheid who would come to lead the government of the Republic of South Africa, which would oversee the drafting of a new constitution. It also was part of a continent that itself was emerging as an international leader in children's rights. But there was more. It also had a history of strong, proud, and vocal children who demanded that their rights be recognized both under apartheid with examples such as the Soweto Uprising and during the transition to democracy.

Over 200 South African children met in the Western Cape in 1992 at the International Summit on the Rights of Children to address the violation of their rights and discuss the problems they continued to face following apartheid.⁶⁴ Their discussion led to the drafting of the Children's Charter of South Africa, which asserted that children were not being included in the nation's transition to a constitutional democracy.⁶⁵ According to the Charter, children were not included on the agendas of either the government or any of the political parties. Children also were also not invited to participate in the negotiations of the Convention for a Democratic South

Republic, the Democratic Republic of the Congo, Sahrawi Arab Democratic Republic, the Federal Republic of Somalia, *São Tomé and Príncipe*, the Republic of South Sudan, and the Tunisian Republic. *Id.*

⁶² THE FREEDOM CHARTER, adopted at the Congress of the People, Kliptown, June 26, 1955, <http://www.anc.org.za/show.php?id=72>. In his autobiography, Mandela presented the Freedom Charter as a group effort. NELSON MANDELA, *LONG WALK TO FREEDOM* 151-53 (1994). See also Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 114 n. 43 (1997) ("The Freedom Charter was drafted by the ANC and adopted by a mass meeting of some three thousand delegates, named the Congress of the People, in Kliptown, several miles from Johannesburg, on June 25-26, 1955.").

⁶³ THE FREEDOM CHARTER, adopted at the Congress of the People, Kliptown, June 26, 1955, <http://www.anc.org.za/show.php?id=72>.

⁶⁴ International Summit on the Rights of Children in South Africa was held on May 27 - June 1, 1992 (Cape Town, South Africa); see also Barbara Bennett Woodhouse, *Recognizing Children's Rights: Lessons from South Africa*, HUM. RTS., Spring 1999, at 15. Children frequently shouted at the Summit, "Where is the new South Africa you all talk about? Show us because we do not see it...!" The Natural Child Project, *The Children's Charter of South Africa*, http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html (last visited Nov. 7, 2014).

⁶⁵ THE CHILDREN'S CHARTER OF 1992 (S. Afr.).

Africa (CODESA), which was leading the transition to a new democratic nation. When one considers the pivotal role that South Africa's children fulfilled and the price they paid in resisting the injustices of apartheid, in addition to the recognition of children's rights by both the leaders of the Union of South Africa and the emerging democracy, it is easy to appreciate why children believed they deserved a seat at the table.

In addition to insisting that children's representative be placed on CODESA and within South Africa's existing and future governments, the Children's Charter of South Africa recognized many of the children's rights previously recognized by South Africa's former and future government leaders, including rights to name and nationality; freedom from discrimination; freedom of expression; free legal representation; freedom of religion; cultural integrity; freedom from violence; not to be wrongfully detained; to enjoy a healthy and loving family life; clean water, food security, economic well-being; free and universal, compulsory education; freedom from slavery and exploitative child labor; and housing, for example.⁶⁶ Many of the rights that had been previously recognized by both the Union of South Africa and Nelson Mandela and the African National Congress, and that were demanded by the children of South Africa were included in both the interim and the final Constitutions eventually adopted by the Republic.

II. Children's Constitutional Rights in South Africa.

The robust and comprehensive recognition of children's rights in post-apartheid South Africa arose from a history and culture that permeated numerous populations: previous government leaders, anti-apartheid activists, neighboring countries, and the nation's children themselves. Thus, it is not surprising that the Republic of South Africa quickly distinguished itself as the nation with the most robust and comprehensive express recognition of children's rights of any constitution in the world. This was true for both the Interim Constitution, which was adopted in 1994,⁶⁷ and even more so for the final Constitution, which was adopted in 1997.⁶⁸

In its Interim Constitution, South Africa included a section recognizing a variety of children's rights.⁶⁹ The rights largely tracked fundamental rights embodied in the United Nations Convention on the Rights of the Child. The country's current Constitution expanded on those initial rights,⁷⁰ and as a result, South Africa's Constitution provides greater recognition and protection to the unique rights of children than any constitution in the world.⁷¹ In every matter concerning the child, South Africa's Constitution holds the child's best interests in paramount importance.⁷² Every child has the right to a name and nationality from birth.⁷³ Their rights to

⁶⁶ *Id.*

⁶⁷ S. AFR. (INTERIM) CONST. (Act. No. 200, 1993) [hereinafter INTERIM CONSTITUTION].

⁶⁸ S. AFR. CONST. 1996 [hereinafter 1996 CONSTITUTION], sec. 28.

⁶⁹ INTERIM CONSTITUTION, *supra* note 67, sec. 30.

⁷⁰ 1996 CONSTITUTION, *supra* note 68, sec. 28.

⁷¹ Johan D. van der Vyver, *Special Spring 2006 Symposium: Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model*, 20 EMORY INT'L L. REV. 9, 11 (2006).

⁷² 1996 CONSTITUTION, *supra* note 68, at sec. 28(2).

family care or parental care are protected,⁷⁴ and when they are removed from the family environment, they have the right to appropriate alternative care.⁷⁵ Every child has rights to basic nutrition, shelter, basic health care services and social services.⁷⁶ South Africa's Constitution is worded in such a way that it affirmatively obligates the nation to protect children from "maltreatment, neglect, abuse or degradation"⁷⁷ as well as "exploitative labour practices."⁷⁸ The Constitution prohibits children from being required or permitted to perform work or 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."⁷⁹ The Constitution also recognizes the child's rights to be protected during times of armed conflict and not to be used directly in armed conflict.⁸⁰

The South Africa Constitution requires the state to provide a legal practitioner to the child (at state expense) when children become involved in the justice system either criminally or civilly, if substantial injustice would otherwise result.⁸¹ While children in South Africa hold all of the same rights as adults when it comes to criminal proceedings,⁸² they also enjoy several additional rights by virtue of their status as children. For example, children may not be detained in South Africa except as a measure of last resort.⁸³ When they are detained, it must be for "the shortest appropriate period of time" and in facilities separate from adult detainees.⁸⁴ A child who is detained must be "treated in a manner, and in conditions that take account of the child's age."⁸⁵ In addition to the rights that are unique to children under South Africa's Constitution,⁸⁶ they also possess the rights as the general population including rights to, *inter alia*, life,⁸⁷

⁷³ *Id.* at sec. 28(1)(a).

⁷⁴ It is important to note that the right to family life was intentionally excluded from the Bill of Rights of South Africa's Constitution. *See* discussion in Julia Sloth-Nielsen and Belinda Van Heerden, *The Constitutional Family: Developments in South African Family Law Jurisprudence under the 1996 Constitution*, 17 INTERNATIONAL JOURNAL OF LAW, POLICY, AND FAMILY 121 (2003). However, the child's right to family care was included in section 28. 1996 CONSTITUTION, *supra* note 68, at 28(1)(b).

⁷⁵ *Id.*

⁷⁶ *Id.* at sec. 28(1)(c). It is important to note that the child's rights to nutrition, shelter, basic health care services and social services are presented as rights that are immediately enforceable. This immediate enforceability is a contrast to the rights of "everyone" to health care services, sufficient food and water, and social security, which are contingent on "available resources." Johan D. van der Vyver, *Special Spring 2006 Symposium: Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model*, 20 EMORY INT'L L. REV. 9, 11 (2006).

⁷⁷ S. Afr. Const. 1996, sec. 28(1)(d).

⁷⁸ *Id.* at sec. 28(1)(e).

⁷⁹ *Id.* at sec. 28(1)(f).

⁸⁰ *Id.* at sec. 28(1)(i).

⁸¹ *Id.* at sec. 28(1)(h) and 35(2)(c).

⁸² *Id.* at sec. 28(1)(g).

⁸³ *Id.* at sec. 28(1)(g).

⁸⁴ *Id.* at sec. 28(1)(g)(i).

⁸⁵ *Id.* at sec. 28(1)(g)(ii).

⁸⁶ *Id.* at sec. 28(g).

⁸⁷ *Id.* at sec. 11.

housing,⁸⁸ education,⁸⁹ free expression,⁹⁰ religion,⁹¹ culture and language,⁹² equality,⁹³ and a healthy environment.⁹⁴

Finally, the South Africa Constitution includes a section that expressly requires courts to consider international law when making decisions,⁹⁵ and to favor interpretations of statutory law consistent with international law whenever reasonable.⁹⁶ Thus, the children of South Africa enjoy protection of their rights enumerated not only in the nation's Constitution, but in the U.N. Convention on the Rights of the Child, the African Children's Charter, as well as other treaties such as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,⁹⁷ the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁹⁸ as well as other human rights treaties—at least on paper. The question is: do the decisions of South Africa's courts protect, respect, and embody these rights in post-apartheid South Africa?

III. Decisions of the South Africa Constitutional Court re Children's Rights 1994-2014

Initial judicial decisions by South African courts held great promise for children and their advocates under the new Constitution. Corporal punishment was banned both within the juvenile justice system⁹⁹ and in schools, including private Christian ones based on children's rights.¹⁰⁰ The courts recognized the importance of considering the best interests of the child both when

⁸⁸ *Id.* at sec. 26.

⁸⁹ *Id.* at sec. 29.

⁹⁰ *Id.* at sec. 16.

⁹¹ *Id.* at sec. 15.

⁹² *Id.* at sec. 30.

⁹³ *Id.* at sec. 9.

⁹⁴ *Id.* at sec. 24.

⁹⁵ *Id.* at sec. 39(1)(b).

⁹⁶ *Id.* at sec. 233.

⁹⁷ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/623 U.N. Doc. A/RES/54/263 (March 16, 2001) [hereinafter Optional Protocol on Child Soldiers]. South Africa signed the Optional Protocol on Child Soldiers on February 8, 2002, and ratified the treaty on September 24, 2009. CITE https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

⁹⁸ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002; United States ratified Dec. 23, 2002) [hereinafter Optional Protocol on Sale of Children]. South Africa ratified the Optional Protocol on Sale of Children on June 30, 2003. CITE

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en. It is noteworthy that South Africa has not signed nor ratified the third optional protocol to the U.N. Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, which would allow South African children and their representatives to bring complaints to the United Nations Committee on the Rights of the Child when they believe that one of their rights under the Convention has been violated. CITE.

⁹⁹ *S v. Williams* 1995 (3) SA 632 (CC) (S. Afr.).

¹⁰⁰ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)(S. Afr.)

making family law decisions¹⁰¹ and even when considering situations not expressly considered by section 28 of the Constitution, such as the impact on children when their parents are sentenced to imprisonment for criminal conduct.¹⁰² Courts no longer framed custody and visiting time decision solely from the perspective of parental rights, but began to recognize that children held their own unique rights to parental care under section 28(1)(b) of the Constitution, and these rights had to be balanced with parental rights and the best interests of the child.¹⁰³ Court began to uphold the rights of juvenile defendants to be detained for the shortest time possible and then only as a last resort under international law.¹⁰⁴

However, the limitations of the courts, whether by will or lack of resources, quickly became evident. In *Government of the Republic of South Africa and Others v. Grootboom and Others*,¹⁰⁵ a number of individuals and families were evicted from land that they had illegally occupied. They had no access to state housing and some had been on a waitlist for housing for seven years. Their shacks and their belongings were destroyed and they were left without shelter, basic sanitation, and clean water during the rainy season. A lawsuit was brought against the local municipality to provide the residents with basic housing. The lower court held that children's right to shelter under section 28(1)(c) of the Constitution supported the claim, and ordered the municipality to provide the children and their families (since the children should not be separated from their parents) with tents, portable toilets, and access to clean water. The Constitutional Court reversed the Cape High Court's decision, and interpreted section 28(1)(c) differently than had been previously interpreted by academics.¹⁰⁶ Instead of the section obligating the state to provide children with "basic nutrition, shelter, basic health care services, and social services,"

¹⁰¹ *Fraser v. Children's Court, Pretoria North* 1997 (2) SA 218 (T) (S. Afr.); *Fraser v. Children's Case Pretoria North* 1997 (2) SA 261 (CC) (S. Afr.), *Naude and another v Fraser* 1998 (4) SA 539 (SCA) (S. Afr.); *Fraser v Naude and Another* 1999 (1) SA 1 (CC) (S. Afr.). The court later determined in another case that it was in the best interests of a child to be adopted by both partners of a same-sex couple, and on that basis (among others) struck down statutory prohibitions on the adoption of children by same-sex couples. *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T) (S. Afr.) confirmed by the Constitutional Court at 2002 (10) BCLR 1006 (CC) (S. Afr.).

¹⁰² *Howell v S* 1999 2 All SA 233 (although the court upheld the sentence of imprisonment for the mother, a detailed order was drafted that provided care for her children during her imprisonment). *See also S v M* 2007 (3) SA 232 (CC) (S. Afr.) (considering the best interests of the child when sentencing mother for criminal conduct). *See also Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 CC (allowing intercountry adoption to be considered when a child cannot be placed in the country of origin or with foster parents under the principle of subsidiarity).

¹⁰³ *V v V* 1998 (4) SA 169 (C) (awarding joint custody to a father and a lesbian mother under a recognition of the child's right to parental care). But see *Jooste v Botha* 2000 (2) BCLR 187 (T) (finding that the child's right to parental care does not exist where the parent has never created a caring relationship with the child).

¹⁰⁴ *S v Kwalase* 2000(2) SACR 135 CPD (S. Afr.).

¹⁰⁵ 2001 (2) SA 46 (S. Afr.).

¹⁰⁶ Julia Sloth-Nielsen, *Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child*, 10 THE INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 137, 148 (2002).

the Constitutional Court interpreted that provision within the context of the child's right to parental care, which effectively means that it is the state's responsibility to ensure that parents or other caregivers are providing these basic provisions to children. Only when a child's parents are unable to provide for the child and the child comes into state care would the state have a direct obligation to provide for a child's basic necessities. In other words, children have no greater right to the allocation of state resources than adults. Indeed, the court expressly wrote that "the carefully constructed constitutional scheme for the progressive realization 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."¹⁰⁷

The year following *Grootboom*, the Constitutional Court issued another significant decision that would have widespread impact. *Minster of Health and Others v Treatment Action Campaign and Others*,¹⁰⁸ which involved the provision of anti-retrovirals to prevent mother-to-child transmission of HIV. The court compelled the South African government to reformulate a healthcare policy in order to make an antiretroviral drug, Nevirapine, more widely available to HIV-positive mothers and their newborn babies.¹⁰⁹ The court expressly relied on South Africa's constitutional obligations in issuing its decision and found that the government had "to take reasonable measures within its available resources for the progressive realization of the right of mother and child to basic health care."¹¹⁰

IV. Reflections and Reverberations.

Legislation

The Constitution of South Africa essentially mandated the Children's Act.¹¹¹ But that Act, too, has failings (*see, e.g.*, gender bias vis-à-vis circumcision)

Other African Constitutions

Now other countries in Africa, especially in Southern Africa, are modeling their constitutions and judicial opinions on South Africa's recognition and judicial interpretations of children's rights. In fact, over thirty African states have included children's rights in their constitutions since the Republic of South Africa adopted its Interim Constitution in 1993. These include rights to, e.g., non-discrimination, name and nationality, parental care, life, not to be detained except for shortest possible duration, education, basic nutrition, shelter, health care, &

¹⁰⁷ *Grootboom*, *supra* note 105 at para. 71.

¹⁰⁸ 2002 (5) SA 721 (S. Afr.).

¹⁰⁹ *Minister of Health v Treatment Action Campaign* (no. 2) 2002 (5) SA 721 (CC) (S. Afr.).

¹¹⁰ Johan D. van der Vyver, *Special Spring 2006 Symposium: Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model*, 20 EMORY INT'L L. REV. 9, 39-40 (2006).

¹¹¹ Thomas J. Walsh, *Advancing the Interests of South Africa's Children: A Look at the Best Interests of Children under South Africa's Children's Act*, 19 MICH. ST. J. INT'L L. 201, 249 (2011).

social services, special protections, and to have all matters decided per best interests of the child. Some African Constitutions also impose duties on children, especially to obey parents and respect authority.

Involvement with ACERWC

Improvement in children's lives

Compare state of ZA Children 1994-2014

- Poverty
- Nutrition
- HIV/AIDS

Cotlands Children's Hospice--where children infected with HIV/AIDS used to go to die. The hospice opened during Nelson Mandela's presidency, the same year that South Africa's final Constitution went into effect. The Constitution of 1997 recognized children's right to health care. Based on that right embodied in the Constitution of the Republic of South Africa, the Constitutional Court ruled that pregnant women and children were legally entitled to anti-retroviral drugs to avoid HIV infection. During our visit to the hospice, the beds were still full, but not with children preparing for death. Instead, they were filled with healthy children who were hoping to be adopted. It had been more than four years since a child had died, and it was time to refocus the organization's resources on helping children to live fully rather than die with mercy and dignity. How many children's lives had been saved because of the recognition of children's right to health care in South Africa's Constitution—a right that could be traced directly back to the Freedom Charter?

V. Conclusion

South Africa emerged as an international leader in the recognition of children's rights both at the beginning and at the close of the 20th Century. However, apartheid in the mid-20th century, and more recently, widespread inequalities in post-apartheid South Africa have prevented the nation from fulfilling its potential to serve as the most progressive country in the world vis-à-vis children's rights. South Africa's Constitution was the first in the world to include a comprehensive and detailed section on children's rights. Unfortunately, judicial decisions and socio-economic conditions in the past twenty years suggest South Africa is unable and unwilling to respect the rights of its children. Instead, the Constitutional Court has held that it is largely the responsibility of parents and others to fulfill those rights, not the state. This view is reminiscent of the 1924 Geneva Declaration, and causes one to wonder what progress has been made in the

past 100 hundred years if twenty years of judicial decision-making under the most progressive constitution in the world refuses to hold the state consistently accountable for the effective realization of children's rights.

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