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## Relief for Mandela's Children: Street Children and the Law in the New South Africa

### Cover Page Footnote

I wish to express my gratitude to MCI International for providing funding to support this research. I also wish to thank Professor Dennis Davis and the staff of the Centre for Applied Legal Studies at the University of the Witwatersrand School of Law in Johannesburg for allowing me to use their facilities. Finally, I am grateful to Professor Martin Flaherty of Fordham University School of Law for his guidance during the preparation of this Note.

**RELIEF FOR MANDELA'S CHILDREN:  
STREET CHILDREN AND THE LAW  
IN THE NEW SOUTH AFRICA**

TIMOTHY J. TREANOR\*

INTRODUCTION

*As the morning sun forced its way above the horizon, peering through breaches in Johannesburg's concrete forest, several small heads peered from beneath a heap of dirty blankets laying at the mouth of an alley. The eyes were glassy, bloodshot, and tired from another night of glue sniffing and sleepless vigilance. During the dark hours, these children remained awake, careful to evade older boys who often robbed and beat them, police officers who periodically arrested them, and lonely men who cruised the streets looking for "chip-chop."<sup>1</sup> Shoemaker's glue provided a quick escape from the reality of their miserable lives, a panacea both for the persistent hunger and for the cold that comes to the Transvaal during the winter.*

*The smallest child breathed a sigh of relief and rolled on to his side. His black skin was filthy, and his clothes were ragged. The callouses on his bare feet revealed that he had not owned shoes in a long time. It was difficult to guess his age. Although he had the body of a young child, the hard look in his eyes and the creases in his face betrayed his advanced years. He was relieved, however, because finally he could go to sleep.*

*On the streets, merchants opened shop, and the first business men and women appeared, briskly walking to work. Along with the day's light and the morning crowds came safety for these children who would sleep through the morning without fear. In the early afternoon, they would arise and set to work begging, parking cars, shining shoes, and sometimes stealing—anything to earn enough money for food and another night's supply of glue. After the nightclubs and restaurants closed, the children would reconvene in the alley, huddling under their foul blankets, and they would return to their wretched world of drug abuse and fear.<sup>2</sup>*

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1. "Chip-chop" is a slang term used by street children in South Africa to denote acts of prostitution. Willem Schurink et al., Human Sciences Research Council, *Street Children* 207 (1993).

2. This scene is derived from my personal observations and experiences working for Twilight Children as Director of the Senior Bridging Programme during 1991-92. Twilight Children is a private, non-governmental organization providing services to street children in Johannesburg.

Although shocking, this scene is not uncommon. In fact, it is a scene played out hundreds of times every night on the city streets of South Africa.<sup>3</sup> Since the late 1970s, when homeless street children first became conspicuous in Cape Town, Johannesburg, Durban and Pretoria,<sup>4</sup> they have become a serious problem throughout the country.<sup>5</sup> Today, street children constitute the most vulnerable and impoverished segment of South African society, and they endure as the most shameful legacy of apartheid.<sup>6</sup>

In the past, the apartheid government of South Africa did little to assist street children, refusing to correct the policies responsible for their existence and failing to care for them.<sup>7</sup> At times when public complaints compelled a response,<sup>8</sup> the government reacted by forcibly removing the children from the streets and containing them in prisons

3. See, e.g., Christopher S. Wren, *Johannesburg Journal: Mean Streets Swallow the Orphans of Apartheid*, N.Y. Times, Dec. 10, 1991, at A4 (describing the street children of Hillbrow in Johannesburg); Rick Lyman, *Living in the Streets, Apartheid's Children*, Phila. Inquirer, Oct. 5, 1991, at A1 (same).

4. See, e.g., Paul E. Gebers, *Health of Street Children in Cape Town*, Child Care Worker (S. Afr.), Sept. 1990, at 11 (reporting that street children did not become a conspicuous problem in Cape Town until 1978). Although South Africans consider street children to be a relatively new problem, their presence in Cape Town was actually noted as early as 1917. *Id.*

5. During the 1980s, the number of street children increased steadily throughout South Africa. Nicci Stein, Children's Found., National Status of Street Children Organisations 2 (Aug. 1990) (unpublished manuscript, on file with author). Today, they are visible in all of South Africa's cities and in some rural areas. Schurink, *supra* note 1, at 19. For information on street children in rural areas, see Thobeka Mangwana, *Rural Initiatives on the Phenomenon of Street Children*, Child Care Worker (S. Afr.), July 1991, at 13 (discussing street children in the rural communities of Cradock and Queenstown); Peter Slingsby, *Coping with Country Strollers*, Child Care Worker (S. Afr.), Jan. 1988, at 5 (recounting personal experiences caring for homeless children in a rural area of South Africa). Recent estimates maintain that there are approximately 10,000 street children in South Africa. UNICEF & National Children's Rights Comm., *State of South Africa's Children: An Agenda for Action 20* (1993) [hereinafter UNICEF, *Agenda for Action*].

6. *Latter-Day Peter Pans: But Life is Tough for These Children of the Streets*, S. Afr. Outlook, Jan.-Feb. 1992, at 6 [hereinafter *Peter Pans*]. In South Africa, street children are referred to by a variety of names, including "Strollers" (Cape Town); "Amalalapyipe," or those who sleep in pipes (Johannesburg); "Amalunde," or those who live on the streets (Johannesburg); "Twilight Children" (commonly); and "Skadukinders," or children of the shadows (commonly). Gebers, *supra* note 4, at 11.

7. Catherine Ross, *The Street Children Survival Strategies*, Indicator S. Afr., Spring 1991, at 69, 70-71; see also Fr. Bill MacCurtain, S.J., *Education: The Lost Property of Our People*, Child Care Worker (S. Afr.), Apr. 1988, at 8, 9 ("[A] street child is totally without support or protection, even from the law of the country."). There was one notable exception. In 1986, the House of Representatives of the South African Parliament began registering and financially supporting shelters for street children in Cape Town. Stein, *supra* note 5, at 5. Services for street children were not subsidized in other parts of the country.

8. Schurink, *supra* note 1, at 20 (noting that government did not respond to the problem until taxpayers demanded that the police remove the children from the streets).

and other secure institutional facilities.<sup>9</sup> Such brutal treatment, though not expressly prescribed, was tolerated by law in South Africa.<sup>10</sup> Under international law, however, the treatment of street children under apartheid—including both the government's failure to care for them and the regular detention of street children—constituted a denial of their fundamental human rights.<sup>11</sup>

Recent events in South Africa, however, including the nation's first democratic elections<sup>12</sup> and the subsequent election of Nelson Mandela to the Presidency,<sup>13</sup> signal a new era of respect for fundamental human rights in South Africa.<sup>14</sup> In fact, the adoption of a sovereign and justiciable bill of rights<sup>15</sup> as a component of the new Constitution<sup>16</sup> commands the nation's transformation to a rights-based legal system.<sup>17</sup> Among its enumerated rights, the bill of rights requires the

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9. Ross, *supra* note 7, at 72 ("The authorities believe the problem is best dealt with by the round-the-clock arrest of street children."); see also Jane Keen, *Street Children, Bush Children, Dump Children*, Child Care Worker (S. Afr.), Jan. 1988, at 12 (noting the illegitimate arrest and imprisonment of street children); *Peter Pans*, *supra* note 6, at 6 (noting that street children face "arbitrary arrest and imprisonment (in some cases in adult jails)"); Jill Swart, "Street Wise": *Opening the Way to Self-Actualization for the Street Child*, Africa Insight, no. 1, at 33, 35 (1988) ("In personal interviews with the children in Johannesburg, only five reported never having been in a police vehicle under arrest.").

10. See *infra* part IV.

11. See *infra* part II.

12. Paul Taylor, *Historic Election Begins in S. Africa: Some Snags Reported on First Day*, Wash. Post, Apr. 27, 1994, at A1.

13. Bill Keller, *Mandela is Named President Closing the Era of Apartheid*, N.Y. Times, May 10, 1994, at A1.

14. Bill Keller, *The South African Vote: Blacks; Mandate for Human Dignity*, N.Y. Times, Apr. 27, 1994, at A1; see also Randolph Scott-McLaughlin, *A New Day in South Africa*, N.Y. L.J., Aug. 23, 1994, at 2 (discussing the significance of the new bill of rights to South African society).

15. Constitution of the Republic of South Africa, No. 200 of 1993, ch. 3.

16. South Africa's Parliament adopted the new Constitution by a vote of 237 to 45 on December 22, 1993. Kenneth B. Noble, *South African Parliament Adopts New Constitution*, N.Y. Times, Dec. 23, 1993, at A3. The vote effectively ended years of negotiations, involving 26 political parties and government bodies, aimed at dismantling apartheid. *Id.* The new Constitution is meant only as an interim measure—to serve as the "supreme law of the Republic" for a period of five years while the Constitutional Assembly drafts a permanent version. Constitution of the Republic of South Africa, No. 200 of 1993, § 38. The Constitution went into effect on April 27, 1994. *Id.* § 251(1); see also Francis X. Clines, *The South African Vote: The Overview; After 300 Years Blacks Vote in South Africa*, N.Y. Times, Apr. 27, 1994, at A1 (discussing the accession of the new South African Constitution).

17. Bob Drogin, *New S. African Charter Endorses Rights for All*, L.A. Times, Nov. 18, 1993, at A1; see generally Steven Keeva, *Defending the Revolution*, ABA Journal, Apr. 1994, at 50 (discussing the changing role of lawyers under the new justiciable bill of rights in South Africa). Although the new interim Constitution is scheduled to be replaced in five years, the permanent Constitution will undoubtedly contain a sovereign and justiciable bill of rights much like the one included in the interim Constitution. This is because the interim Constitution requires the Constitutional Assembly to adhere to a list of 33 constitutional principles in drafting the permanent Constitution. Constitution of the Republic of South Africa, No. 200 of 1993, § 71(1)(a). These principles may not be amended. *Id.* § 74(1). Principle II provides that all persons shall

government to protect and care for needy children<sup>18</sup> and provides special protections for persons who are detained.<sup>19</sup> Furthermore, President Mandela has pledged that South Africa will play an active role in promoting human rights in compliance with the international norms specified by the United Nations.<sup>20</sup> These developments indicate that life will inevitably improve for street children.

For the time being, however, the same laws that governed the treatment of street children under apartheid—the Child Care Act<sup>21</sup> and the Criminal Procedure Act<sup>22</sup>—remain in effect.<sup>23</sup> To safeguard the fundamental human rights of street children and to ensure that these laws are administered in a manner consistent with the new bill of rights, this Note argues that the Child Care Act and the Criminal Procedure Act must be reformed.<sup>24</sup> Toward this end, this Note suggests specific legislative changes that will accomplish this goal by limiting the discretion conferred upon the police and the courts in dealing with children.<sup>25</sup>

Part I surveys general characteristics of the street children problem as it exists throughout the world and discusses some of the unique characteristics of the problem in South Africa. Part II turns to international human rights law and examines the obligations of the sovereign nations, including South Africa, to protect and care for street children. Part III analyzes the Child Care Act and the Criminal Procedure Act—the laws that govern the treatment of street children in South Africa, and Part IV argues that, under the administration of the apartheid government, these laws functioned to deny street children their fundamental human rights. Additionally, Part IV discusses the inability of street children to assert their rights under the apartheid system. Part V turns to the present day and examines favorable devel-

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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.* sched. 4, princ. II. Additionally, principle II provides that the bill of rights of the permanent Constitution shall be drafted only after due consideration is given to the rights contained in the interim Constitution. *Id.*

18. Constitution of the Republic of South Africa, No. 200 of 1993, § 30(1)(c).

19. *Id.* §§ 11(1), 25.

20. Nelson Mandela, *South Africa's Future Foreign Policy*, Foreign Affairs, Nov.-Dec. 1993, at 86, 89 ("South Africa's people look forward to our country's return as a full and active member of the United Nations family."). Furthermore, on June 1, 1994, International Children's Day, President Mandela declared that South Africa is committed to upholding the rights of children in line with the United Nations Declaration of the Rights of the Child. *South Africa Committed to Comprehensive Programs for Children*, Xinhua News Agency, June 1, 1994, available in LEXIS, Nexis Library, News File; see also *infra* notes 124-25 and accompanying text (discussing the Declaration of the Rights of the Child and street children).

21. Child Care Act, No. 74 of 1983 (S. Afr.).

22. Criminal Procedure Act, No. 71 of 1977 (S. Afr.).

23. See *infra* note 286 and accompanying text.

24. See *infra* part V.B.

25. See *infra* part V.B.1-2.

opments, including the adoption of a new bill of rights, that foreshadow improvements in the treatment of street children. Finally, Part V recommends legislative changes that will bring existing South African legislation into line with the new bill of rights and international human rights standards on the treatment of children.

## I. THE STREET CHILDREN PROBLEM

Street children are not unique to South Africa.<sup>26</sup> Rather, they constitute a widespread and critical problem in most of the world's developing countries.<sup>27</sup> In Latin America, Asia, Africa and more recently in Eastern Europe, street children have become a social epidemic.<sup>28</sup> Recent estimates maintain that there are approximately 100 million street children worldwide.<sup>29</sup>

In South Africa, it is estimated that there are approximately 10,000 street children.<sup>30</sup> Of this number, approximately ninety percent are

26. See generally Gary Barker & Felicia Knaul, *Childhope-USA, Exploited Entrepreneurs: Street and Working Children in Developing Countries 1* (1991) (presenting a general overview of street children in developing countries throughout the world).

27. Schurink, *supra* note 1, at 10-21. Street children also exist in industrialized countries where they are commonly known as "runaway" or "homeless" children. See generally Timothy J. Treanor & William W. Treanor, *North American Directory of Programs for Runaways, Homeless Youth and Missing Children* (1991) (discussing runaway and homeless youth in the United States and documenting programs caring for them); see also Linda Richter, *Street Children in Rich and Poor Countries*, *Child Care Worker* (S. Afr.), Sept. 1991, at 5 [hereinafter Richter, *Rich and Poor*] (comparing street children of South Africa and Brazil with "runaway" children of wealthy first world countries).

28. See generally Stefan Vanistendael, *International Catholic Child Bureau, Street Children: Problems or Persons?* (1992) (surveying common characteristics of the street children problem worldwide). Street children are conspicuous in cities throughout the developing world. See, e.g., Robert M. Press, *More African Kids Take to the Streets*, *Christian Sci. Monitor*, Feb. 7, 1994, at 11 (street children of Nairobi, Kenya and Bujumbura, Burundi); Larry C. Price, *What It Takes To Survive: Desperate for Food and Shelter, Romania's "Throwaway" Children Live by Their Own Rules*, *Features Inquirer Mag.* (Phila.), Feb. 13, 1994, at 14 (street children of Bucharest, Romania); Uli Schmetzer, *Street Urchins Form Army of Woe in China*, *Chi. Trib.*, May 12, 1994, at 10 (street children of Beijing, China); Corinne Schmidt-Lynch, *Drug Program Recoups Street Children in Lima*, *Wash. Post*, Jan. 9, 1993, at A14 (street children of Lima, Peru); Steve Small, *Russia's Abandoned Children*, *St. Petersburg Times* (Fla.), Mar. 6, 1994, at D1 (street children of St. Petersburg, Russia).

29. *Childhope, 1989-90 Annual Report* 5. Childhope is an international non-governmental organization advocating on behalf of street children.

30. UNICEF, *Agenda for Action*, *supra* note 5, at 20. This number appears deceptively low when compared to the large worldwide estimate. The discrepancy results, at least in part, because the South African figure is derived from a more restrictive definition than that preferred by much of the international community. See *infra* notes 35-47 and accompanying text. Also, the problem in South Africa has largely focused on children living in towns and city centers. Wilfried Scharf, *Street Kids: Past Achievements and Future Challenges*, *Child Care Worker* (S. Afr.), Aug. 1988, at 13. Little attention has been paid to children living in the townships who may qualify as street children. *Id.*

"African" or "coloured" boys,<sup>31</sup> and ten percent are street girls.<sup>32</sup> The majority of South African street children range between the ages of seven and sixteen,<sup>33</sup> although it is not unusual to see children as young as five on the street.<sup>34</sup>

### A. Defining the Problem

Within the international community, a street child is commonly defined as "any girl or boy who has not reached adulthood, for whom the street (in the widest sense of the word, including unoccupied dwellings, wasteland, etc.) has become her or his habitual abode and/or sources of livelihood, and who is inadequately protected, super-

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31. UNICEF & National Children's Rights Comm., *Children and Women in South Africa: A Situation Analysis* 79 (1993) [hereinafter UNICEF, *Situation Analysis*]; see also Linda M. Richter, *Street Children: The Nature and Scope of the Problem in Southern Africa*, *Child Care Worker* (S. Afr.), July 1988, at 11, 11-12 [hereinafter Richter, *Nature and Scope*] (noting that the vast majority of street children in Johannesburg are African, while the population in Cape Town is split between coloured children (approximately 70%) and African children (approximately 30%)).

Under the Population Registration Act, all South African citizens were classified from birth into one of four racial groups: Whites, Coloureds, Indians or Africans. Population Registration Act, No. 30 of 1950, § 5(1) (S. Afr.). These racial categories determined the rights that individuals possessed and the privileges and handicaps they experienced under the apartheid system. The Population Registration Act was repealed on June 17, 1991. Population Registration Act Repeal Act, No. 114 of 1991 (S. Afr.); see also Christopher S. Wren, *South Africa Scraps Law Defining People by Race*, *N.Y. Times*, June 18, 1991, at A1 (reporting on the repeal of the Population Registration Act). This Note, however, will use the racial categories established by the Population Registration Act for the purposes of discussing apartheid laws and policies.

32. Richter, *Nature and Scope*, *supra* note 31, at 11. In developing countries, a low percentage of girls among the visible street population is common. Defence for Children Int'l, *International Investigation into the Rights of Abandoned Children* 7 (1989) (noting that street girls are less common worldwide). The disparity is attributed to a variety of factors. See, e.g., Barker & Knaul, *supra* note 26, at 5 (noting that girls are less conspicuous because they are often required to work at home and because many are employed as domestic workers or are drawn into prostitution where they are not visible on the street); Pam Jackson, *Ons Plek: A Shelter for Girls*, *Child Care Worker* (S. Afr.), Apr. 1993, at 7 (noting that girls in South Africa leave home at a later age because they are more vulnerable on the streets and may tolerate abuse at home longer than boys); Jane Keen, *Ons Plek: A New Home for Street Girls*, *Child Care Worker* (S. Afr.), Feb. 1989, at 8 (noting that girls in South Africa take to the streets at a later age than boys possibly because they are more valued in the home); Jabulile Mvula, National Children's Rights Comm., *Street/Homeless Children Workshop Report* 8 (1993) (proceedings from a workshop held in Broederstroom on January 29-31, 1993) (noting that street girls in South Africa have been known to disguise themselves as boys due to their greater vulnerability in outside society); Swart, *supra* note 9, at 34 (noting that girls may be abandoned less frequently and that relatives and neighbors may be more willing to take in girls because they can assist in household tasks).

33. Richter, *Nature and Scope*, *supra* note 31, at 11. In most countries, the age range is similar. Barker & Knaul, *supra* note 26, at 4 (noting that the most common range is eight to fifteen).

34. Mvula, *supra* note 32, at 4 ("Children as young as five are to be seen in tattered clothes ransacking garbage bins for food.").



vised or directed by responsible adults.”<sup>35</sup> This definition includes two subcategories of street children: children *of* the street are those who have severed family ties and live on the street;<sup>36</sup> and children *on* the street are those who work<sup>37</sup> on the street but return home on a regular basis to sleep and to see their families.<sup>38</sup>

In most developing countries, children *on* the street make up the vast majority of the street population.<sup>39</sup> Their situation is less critical than that of children *of* the street because they retain some support from their families and their communities.<sup>40</sup> Nonetheless, they are classified as street children because, at least for part of the day, they experience the same unhealthy conditions encountered by children *of* the street.<sup>41</sup>

In South Africa, however, local practitioners and academics define street children differently. They are “those who have abandoned (or have been abandoned by) their families, schools and immediate communities, before they are sixteen years of age, and [have] drifted into a nomadic street life.”<sup>42</sup> This definition includes only children *of* the street, excluding children *on* the street because they are relatively scarce in the cities of South Africa.<sup>43</sup>

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35. Ross, *supra* note 7, at 69 (quoting Inter-Non Governmental Organisations, Geneva, 1983); see also Jill Swart, *Street Children: Refugees, Drop-outs or Survivors?*, Child Care Worker (S. Afr.), Oct. 1987, at 6 (quoting the same definition); Vanistendael, *supra* note 28, at 8 (quoting a substantially similar definition).

36. Defence for Children Int'l, *supra* note 32, at 7.

37. “Work” for the purposes of this Note constitutes any income generating activity, legal or illegal, in either the formal or the informal sector.

38. Defence for Children Int'l, *supra* note 32, at 7.

39. Childhope, *supra* note 29, at 5 (noting that perhaps three-quarters of the world's street children live at home); Vanistendael, *supra* note 28, at 8 (noting that the population of children *of* the streets in most countries is smaller than the population of children *on* the streets).

40. Linda Richter, *Street Children in South Africa: General Theoretical Introduction: Society, Family and Childhood*, Child Care Worker (S. Afr.), Aug. 1991, at 7, 7-8 [hereinafter Richter, *Society, Family and Childhood*].

41. The inclusion of children *on* the street also makes the international definition very practical for research and treatment purposes because all street children can be identified by an observable characteristic—their unprotected presence on the street. Because many street children vacillate between home and the streets, there is really no clear divergence between the two categories. Brazil Network, *Children Without a Future 5* (1992). The consolidated definition eliminates the need to make artificial distinctions. For a discussion on the difficulty of accurately defining a street child, see Vanistendael, *supra* note 28, at 6-8.

42. Richter, *Nature and Scope*, *supra* note 31, at 11, 12 (adopting definition with minor changes from Annette Cockburn, *A Non-Formal Education Programme for Street Children*, Child Care Worker (S. Afr.), March 1988, at 8).

43. Richter, *Nature and Scope*, *supra* note 31, at 11. A relatively small population of children *on* the street does exist in South Africa. *Id.* at 12 (estimating that about one-third of the street children in South Africa may be children *on* the street). These children are generally referred to as “working children” and are considered a separate problem. *Id.* at 12-13.

The absence of children *on the street* in South Africa is due, in large part, to the legacy of apartheid planning, which situated non-white townships, including most poor urban neighborhoods, far away from white-designated central business districts and tourist areas where street children thrive.<sup>44</sup> As a result of the great distances between the townships and the cities, most poor children who set out to support themselves in the lucrative city centers are forced to sleep there, abandoning their families. In other countries, children who seek work in the city centers are not always compelled to leave their families. Poor neighborhoods, such as the *favelas* in Brazil, are frequently situated closer to the central business districts and tourist areas.<sup>45</sup> Consequently, many poor children who work on the city streets may still live at home.<sup>46</sup>

The low percentage of children *on the street* in South Africa, however, is likely to change in the near future due to the dismantling of apartheid. With legal barriers eliminated, non-white families are now free to seek accommodations closer to the city centers.<sup>47</sup> As poor communities spring up on the periphery of the major cities, the children of the most destitute families will find it easy and profitable to seek work in the cities. Consequently, the street children problem in South Africa will begin more closely to resemble the problem as it exists in other countries.

### B. *Causes of the Problem*

The causes of the street children problem vary among different countries and regions and include population growth, economic stagnation, the debt crisis, drought, famine, war and civil unrest, environmental degradation and the AIDS pandemic.<sup>48</sup> In many developing countries, however, including South Africa, there appears to be a fundamental progression—rooted in poverty, rapid urbanization and family breakdown—that leads to the proliferation of street children

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44. See, e.g., Simon Jenkins, *The Great Evasion: The Sentries on the Gate*, Economist Survey, June 21, 1980, at 12 (discussing the history and evolution of Soweto, which was originally a migrant labor camp deliberately located more than 10 miles outside of Johannesburg).

45. George de Lama, *Dreams Turn to Despair in Brazil's Slums*, Chi. Trib., July 2, 1989, at 1 (describing the *favelas* surrounding Brazilian cities and also mentioning the "pueblos juvenes" that ring Lima and the *ranchos* overlooking Caracas).

46. Barker & Knaul, *supra* note 26, at 4-5.

47. Twilight Children, 1992-93 Annual Report 29 (noting the effect of rapid urbanization on the street children population in Johannesburg).

48. Barker & Knaul, *supra* note 26, at 5; see also Ross, *supra* note 7, at 69 (listing factors in South Africa, including "poverty, unemployment, violence, homelessness, school disruptions, rapid urbanisation, and the resultant distortions of family and community life").

even in the absence of extraordinary circumstances, such as famine or war.<sup>49</sup>

The scenario often begins in the countryside where economic conditions among developing countries throughout the world have become increasingly depressed.<sup>50</sup> These deteriorating circumstances frequently cause families to abandon their villages in the hope of finding employment in the cities and ultimately building a better life.<sup>51</sup> The family members, however, are often disappointed because the number of jobs needed to satisfy the massive influx of workers never materializes.<sup>52</sup> Consequently, they end up like millions of others, living without steady incomes in the ever-growing, extra-urban shanty towns and squatter communities.<sup>53</sup>

The poverty and despair that characterize life in these communities place enormous pressure on the traditional family structure and force the family unit to adapt in order to survive.<sup>54</sup> Under such extreme conditions, families respond in a variety of different ways, often depending on each family's available resources and the resilience of individual family members.<sup>55</sup> In some instances, families are able to meet their needs by sending the children out to generate additional income.<sup>56</sup> This phenomenon produces children *on the street*.<sup>57</sup>

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49. Barker & Knaul, *supra* note 26, at 5-6. Although extremely simplified, this progression is a common feature of the developing world. Its commonality is an indication that the existence of street children is firmly tied to economic development patterns that distinguish the developing world from the industrialized nations. Consequently, an effective solution to the international street children problem ultimately depends upon the comprehensive improvement of the economic strength of developing countries and a concurrent improvement of the conditions of the poor throughout the world.

50. *Id.* at 6.

51. *Id.*

52. Timothy J. Treanor, *Street Children of the World*, in T. Treanor & W. Treanor, *supra* note 27, at 17.

53. *Id.* It is estimated that by the end of the 1990s, three out of five residents of developing cities will live in urban slums. Barker & Knaul, *supra* note 26, at 6. Estimates maintain that between 3.5 and 10 million South Africans out of a total population of 40 million live in squatter camps. Ben Johnson, *Millions in South Africa Endure Housing Plight New Government Must Face Challenge: Many Squatters, Few Homes*, San Diego Union-Trib., Nov. 14, 1993, at A1.

54. Richter, *Society, Family and Childhood*, *supra* note 40, at 7-8.

55. *Id.* (noting two types of family response to poverty and despair, adaptive and maladaptive). The adaptive response prevails when families are able to pull together to help each other while discovering new and creative ways of surviving. *See, e.g., id.* at 7 (noting that some families in South Africa have adapted to severe deprivation by finding new ways of making money, constructing dwellings out of available material, altering their usual diet, etc.).

56. *Id.* at 7.

57. Some commentators believe that children *on the street* are a sign of the strength of the family unit in the face of adversity. A. Bernstein & M. Gray, *Khaya Lethu—An Abortive Attempt at Dealing with Street Children*, 27 *Social Work (S. Afr.)* 50, 52 (1991) (noting that children *on the street* "remain an integral part of the family and their working is an indication of solidarity and unity rather than family breakdown. . . . They are part of the family's solution to surviving in circumstances of ex-

Among the most impoverished families, conditions may deteriorate so considerably that individual members become preoccupied by concerns of self-survival.<sup>58</sup> When this happens, family cohesiveness is completely destroyed because family members are no longer able to depend on one another.<sup>59</sup> In the absence of support from adult family members, the children in these families are forced to take to the streets to support themselves.<sup>60</sup> This phenomenon produces children *of the streets*.

In still other families, the pressures of poverty and despair contribute to the development of anti-social behavior and social pathology, evidenced by violent crimes, alcohol and drug abuse, physical abuse and neglect.<sup>61</sup> Among these families, children may be forced to leave home by violent parents or may be abandoned because their families are no longer capable of supporting them.<sup>62</sup> This phenomenon also produces children *of the streets*.

In addition to the more conventional causes, extraordinary circumstances aggravate the street children problem in many countries.<sup>63</sup> In South Africa, the problem has been profoundly affected by apartheid.<sup>64</sup> During the years of apartheid rule, government policies contributed substantially to the underlying causes of the street children problem both indirectly, by aggravating poverty among the non-

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treme poverty."); *see also* Richter, *Society, Family and Childhood*, *supra* note 40, at 7 (noting that some poor South African families could not survive without the income of working children); Richter, *Nature and Scope*, *supra* note 31, at 11 (quoting a Latin American commentator who noted the "valiant and admirable struggle" of poor families to improve their situations by having their children work or beg to supplement incomes (citation omitted)).

58. Richter, *Society, Family and Childhood*, *supra* note 40, at 7.

59. *Id.*

60. *Id.*

61. *Id.* at 8.

62. *Id.*; Swart, *supra* note 35, at 6 ("[S]treet children are children who have been abandoned by their parents, have run from destitute or brutal homes, [and] have been driven from home . . . by their parents."); *see, e.g., Peter Pans*, *supra* note 6, at 7 (noting that 80% of all children seen at one informal street shelter "have a history of family abuse, physical, sexual or emotional").

63. Jo Boyden & Pat Holden, *Children of the Cities* 61 (1991); *see, e.g., Challenge in the Sudan*, *Fin. Times*, Aug. 16, 1988, at 12 (attributing homelessness in the Sudan to drought, famine and war); Bob Drogin, *High-Rise Hell in City Laid Low by War*, *Guardian*, Nov. 25, 1993, at 14 (attributing homelessness in Angola to war); Donatella Lorch, *Uganda, Scarred by AIDS, Turns to Its Youth*, *N.Y. Times*, Feb. 23, 1993, at A1 (attributing homelessness in Uganda to AIDS); Bill Schiller, *The Ravages of War on Children*, *Toronto Star*, Dec. 17, 1990, at C1 (attributing homelessness in Mozambique to war).

64. Kedibone Letlaka-Rennert, *African Stud. Inst., Soweto Street Children: Implications of Family Disintegration for South African Psychologists* 2 (1988) (unpublished manuscript, on file with the author) ("Street children are one of the many identifiable groups of victims of the structural violence of Apartheid. . . . [T]hey are one of the societal by-products of Apartheid."); *see also* Bernstein & Gray, *supra* note 57, at 52 (attributing the problem of street children, in part, to discrimination resulting from apartheid).

white communities,<sup>65</sup> and directly, by forcibly disrupting extended families and communities.<sup>66</sup>

As the official ideology of the South African government, apartheid contributed to the degree of poverty suffered by non-whites because it mandated racial discrimination against them.<sup>67</sup> Under apartheid law, non-whites were barred from playing any significant role in the economic, social or political life of the nation.<sup>68</sup> Based solely on skin color, non-white South Africans were forced to settle for limited employment opportunities, lower pay, inferior education, low-grade medical care and restricted property rights.<sup>69</sup> As a result, by the final days of apartheid rule, white South Africans, comprising thirteen percent of the total population, owned eighty-six percent of the land and ninety percent of the wealth of the nation.<sup>70</sup> In contrast, one-half of the thirty million Africans in South Africa lived below the poverty line, an equal number were unemployed and an equal number were illiterate or semi-literate.<sup>71</sup> The resulting poverty inevitably contributed to the creation of street children.

Furthermore, specific apartheid policies, such as the Group Areas Act<sup>72</sup> and the "influx control" laws,<sup>73</sup> directly aggravated the street children problem by contributing to community destruction and the breakup of extended and nuclear families. The Group Areas Act demarcated the residential areas of the country along racial lines, designating urban centers and the surrounding areas as well as most of the productive land in South Africa for whites only.<sup>74</sup> It served as the

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65. *The Poverty of Apartheid*, Economist, June 2, 1984, at 73 (describing how apartheid exacerbated poverty among the African population).

66. Letlaka-Rennert, *supra* note 64, at 7-8.

67. Justice Malala, *Goldstone on Children and Violence*, Star (Johannesburg), Aug. 11, 1994, at 3 (reporting conclusion of the Goldstone Commission of Inquiry into the Effects of Public Violence on Children that the effects of apartheid on African children "were uniformly and profoundly destructive"); see generally Francis Wilson & Mamphela Ramphele, Carnegie Corporation, *Uprooting Poverty: The South African Challenge* (1989) (documenting the role of apartheid in causing and entrenching poverty among the non-white population of South Africa).

68. *The Anti-Apartheid Act of 1985: Hearings on S. 635 Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 1st Sess. 8 (1985) (statement of Sen. Edward M. Kennedy).

69. *Id.* at 9.

70. Paul Taylor, *Now the Hard Part Begins for South Africa*, Wash. Post, Apr. 24, 1994, at A1, A23.

71. *Id.*

72. Group Areas Act, No. 41 of 1950 (S. Afr.); Group Areas Act, No. 36 of 1966 (S. Afr.).

73. The crux of the "Influx Control" policy was the Black (Urban Areas) Consolidation Act, No. 25 of 1945 (S. Afr.). Other relevant laws included the Admission of Persons to Republic Regulation Act, No. 59 of 1972 (S. Afr.) and the Prevention of Illegal Squatting Act, No. 52 of 1951 (S. Afr.).

74. Group Areas Act, No. 36 of 1966, § 23 (S. Afr.). The Group Areas Act was repealed in June 1991. Abolition of Racially Based Land Measures Act, No. 108 of

justification for eliminating many of the unfortunate non-white townships and squatter communities that either stood in the way of expanding white neighborhoods or simply annoyed white residents.<sup>75</sup> Often, the inhabitants of these communities had little advance notice and were subject to brutal forced removals while their homes were razed to the ground.<sup>76</sup> These actions resulted in the complete destruction of entire communities and the breakdown of extended family ties.<sup>77</sup>

The "influx control" laws also contributed to the street children problem by causing the breakup of many non-white families.<sup>78</sup> Under these laws, Africans were permitted to live in white designated areas only if they had been born there, if they had lived there for over fifteen years, or if they were dependant on someone in either of the former categories.<sup>79</sup> All other Africans were permitted to be employed in the white-designated areas only on a contract basis and were permitted to reside in these areas only during the time of their employment.<sup>80</sup> They were not permitted, however, to bring their families with them.<sup>81</sup> This effectively divided thousands of families, and forced many children to grow up in single-parent households or without parents altogether.<sup>82</sup>

Paradoxically, apartheid laws also played a role in regulating the number of street children existing in the cities by restraining natural patterns of urbanization and containing poor populations in rural ar-

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1991, § 48 (S. Afr.); see also *South Africa: For Sale or Rent*, Time, June 17, 1991, at 47 (reporting the repeal of the Group Areas Act).

75. Group Areas Act, No. 36 of 1966, §§ 24-26 (S. Afr.).

76. See, e.g., Lawyers Comm. for Human Rights, *Crisis in Crossroads* (1988) (documenting the destruction of four squatter camps in the Crossroads area by security forces in May and June of 1986, rendering a total of 70,000 people homeless); see also Anthony Robinson, *Forced Removals Spark New Violence; Unrest in South Africa*, Fin. Times, Feb. 19, 1985, at 4 (same).

77. Fiona McLachlan, *Children in Prison in South Africa* 9 (1984); see, e.g., Scharf, *supra* note 30, at 13 (noting that Group Areas Act removals contributed to the breakdown of extended family and community structures in Elsies River, producing 300 street children in 1984).

78. UNICEF, *Situation Analysis*, *supra* note 31, at 73; see also Swart, *supra* note 9, at 34 (noting that "influx control" contributed to the street children problem by destroying traditional African values and leading to illegitimacy). The influx control laws were repealed in 1986. *Abolition of Influx Control Act*, No. 68 of 1986 (S. Afr.); see also Anthony Robinson, *South Africa Acts to End Pass Laws*, Fin. Times, Apr. 24, 1986, at 4 (discussing the South African government's decision to scrap the 34 laws that constituted the influx control policy).

79. *Black (Urban Areas) Consolidation Act*, No. 25 of 1945, § 10 (S. Afr.).

80. *Id.*

81. Swart, *supra* note 9, at 33-34; see also MacCurtain, *supra* note 7, at 8 (noting that street children in South Africa were also caused by the eviction of employees' children by their employers).

82. Judith C. Howard & Gregory Katz, *South Africa After Apartheid: Warnings from America*, Dallas Morning News, Nov. 15, 1992, at 1P (describing deterioration of the nuclear African family caused by the influx control policy).

cas.<sup>83</sup> This apparent benefit, however, was superficial because apartheid laws did nothing to alleviate the problems of poverty and family breakup. They merely precluded the problems from being manifest in the form of street children.<sup>84</sup> And, in the long run, apartheid laws aggravated the underlying causes of the street children problem.<sup>85</sup> As a consequence of the elimination of apartheid laws, however, South Africa is already experiencing a rapid increase in the urban street population, and will likely continue to experience such growth in the coming years.<sup>86</sup>

### C. *The Life of the Street Child*

Although the street children of the world emanate from a variety of different cultures, their daily experiences remain remarkably consistent.<sup>87</sup> In cities as distant and diverse as Johannesburg, Sao Paulo and Bombay, the lives of street children are similarly characterized by deprivation, drug abuse and danger.<sup>88</sup>

Virtually all street children, wherever they are found, lack the basic essentials of life. Typically, they are unable to afford regular meals or decent clothing.<sup>89</sup> As a result, many suffer from malnutrition, skin conditions, illnesses resulting from exposure and a wide range of other ailments for which they cannot obtain medical treatment.<sup>90</sup> Many street children lack adequate shelter and are forced to sleep wherever they can, including on the streets and sidewalks, down alleyways, in garbage dumpsters, sewers and drainpipes and in abandoned buildings.<sup>91</sup> Additionally, most street children are hopelessly fated to remain destitute for the balance of their lives because they are unable to obtain a satisfactory education.<sup>92</sup>

As a result of their interminable state of need, street children are constantly preoccupied by the quest for personal preservation. To sustain themselves, they perform a variety of income generating activi-

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83. See *supra* notes 44-46 and accompanying text.

84. *Twilight Children*, *supra* note 47, at 29.

85. See *supra* notes 64-82 and accompanying text.

86. *Twilight Children*, *supra* note 47, at 29.

87. Schurink, *supra* note 1, at 15.

88. See generally Barker & Knaul, *supra* note 26 (documenting common characteristics and experiences of street children worldwide).

89. *Images of Street Kids*, Child Care Worker (S. Afr.), Jan. 1990, at 7 (describing the diet of a dog in the Cape Town suburbs as preferable to that of a street child in the city); see also *Peter Pans*, *supra* note 6, at 7 (citing study that found that among the street children of Cape Town, 28% suffered chronic malnutrition and 37% acute malnutrition).

90. Defence for Children Int'l, *supra* note 32, at 22-23 (describing common health trends among street children worldwide); see also Gebers, *supra* note 4, at 11 (documenting the poor health of street children in Cape Town).

91. See, e.g., Gebers, *supra* note 4, at 14 (enumerating sleeping locations for street children, including in doorways, alleys, vacant lots, empty buildings, bus terminals, subways, parks, rubbish skips, culverts and under verandas and bridges).

92. Swart, *supra* note 9, at 33.

ties, including begging, washing or parking cars, shining shoes, carrying groceries and selling chewing gum or newspapers.<sup>93</sup> In some cases, street children resort to prostitution, drug dealing and other traditionally criminal acts.<sup>94</sup>

To cope with the hunger, the cold and the depression that intermittently linger among the children on the street, many street children abuse inhalants or other drugs.<sup>95</sup> In cities throughout the developing world, including South Africa, it is common to see street children breathing down their jacket sleeves or sitting with their shirts pulled up over their noses.<sup>96</sup> This rather conspicuous habit effectively encourages the common misperception that all street children are drug-abusing delinquents.<sup>97</sup>

Street children also live in a world of danger.<sup>98</sup> Due to their obvious vulnerability, street children are frequently targeted for sexual exploitation and physical abuse.<sup>99</sup> Consequently, it is common for street children to be coerced or enticed into providing sexual favors for devi-

93. Barker & Knaul, *supra* note 26, at 1; *see also* Ross, *supra* note 7, at 69 (noting that South African street children support themselves "through car washing and parking, begging, odd-jobbing, [and] scavenging").

94. *See, e.g.*, Barker & Knaul, *supra* note 26, at 5 (prostitution); Ross, *supra* note 7, at 69 (prostitution and petty crime). Street children are also exploited by criminal syndicates in burglary operations, drug dealing and organized prostitution. Jill Swart, *Community Perceptions of Street Children in Hillbrow*, Child Care Worker (S. Afr.), June 1988, at 11.

Street children are particularly active in prostitution in countries where sex tourism has become lucrative business. Marlise Simons, *The Sex Market: Scourge of the World's Children*, N.Y. Times, Apr. 9, 1993, at A3; *see generally* Hearings on Fiscal Year '95 Foreign Operations Appropriations Before the Subcomm. on Foreign Operations of the House Comm. on Appropriations, 103d Cong., 2d Sess. (Apr. 25, 1994) (testimony of Marilyn Rocky, Director of Childhope USA) (discussing involvement of street children in the sex trade). As a result of sexual exploitation, prostitution and drug abuse, street children are especially vulnerable and increasingly exposed to HIV/AIDS. *Id.*

95. Defence for Children Int'l, *supra* note 32, at 23-24 (discussing drug abuse as a common problem among street children worldwide); *see, e.g.*, P. Jansen et al., *Glue Sniffing: A Description of Social, Psychological and Neuropsychological Factors in a Group of South African "Street Children"*, 20 S. Afr. J. Psychol. 150, 151 (1990) (discussing glue sniffing among street children in South Africa).

96. Paul Shepard, "Glue Boys" Crave Warmth, *Refuge: Homeless, Hungry South African Youths Turn to Dangerous Drug*, Plain Dealer (Cleveland), May 8, 1994, at A1 (describing the abuse of inhalants by street children in Johannesburg).

97. Boyden & Holden, *supra* note 63, at 68. A negative public perception of street children is common in developing countries. *See, e.g.*, U.N. Centre for Human Rights & UNICEF, *Street Children 1-2* (1993) ("Street children are referred to as *gamines* (urchins) or *chinchas* (bed bugs) in Columbia; *marginais* (criminals/marginals) in Brazil; *pájaros fruteros* (fruit birds) in Peru; *bui doi* (dust children) in Viet Nam; *saligoman* (nasty kids) in Rawanda; and *moustiques* (mosquitoes) in Cameroon."); Schurink, *supra* note 1, at 15 ("The public often respond negatively to street children and call them all sorts of names including 'hopeless,' 'ruffians,' 'thieves,' 'parasites,' . . . 'hooligans' and 'bad influences.'").

98. Richter, *Nature and Scope*, *supra* note 31, at 13.

99. Swart, *supra* note 94, at 12-13.



ant adults,<sup>100</sup> and street children are often subject to beatings by other street boys,<sup>101</sup> the police,<sup>102</sup> local merchants<sup>103</sup> and other adults.<sup>104</sup>

For safety reasons, street children often live and travel together in small groups.<sup>105</sup> Thus, it is common in urban neighborhoods throughout the developing world to see clusters of street children huddled together at night for protection.<sup>106</sup> Safety, however, is not found in numbers for all street children. Because street groups are typically organized hierarchically, the youngest and smallest boys are frequently required to pay protection money and provide sex to the older boys who may subject them to periodic beatings to keep them in line.<sup>107</sup>

Increasingly, street children in many countries have become targets of death squads,<sup>108</sup> often organized by frustrated police officers or angry merchants who find street children a constant source of aggravation and a symbol of community decay.<sup>109</sup> Over the past few years, these death squads are believed to be responsible for literally hundreds of disappearances and several highly publicized massacres, in-

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100. Defence for Children Int'l, *supra* note 32, at 23.

101. Gebers, *supra* note 4, at 12 (noting the abuse of street children by older street boys in South Africa).

102. *Id.* at 12 (noting the abuse of street children by the police in South Africa); *see also* Shepard, *supra* note 96, at 1A (citing an Operation Hunger report that detailed abuse of street children by police in South Africa).

103. Schurink, *supra* note 1, at 191 (noting constant friction between street children and shopkeepers).

104. Swart, *supra* note 94, at 11, 12 (noting that "[o]therwise 'respectable' citizens kick and beat the children when they believe no one can see them; they throw cold water over them late at night in mid-winter, knowing that the children have no change of clothing" and that some citizens "set alight the cardboard boxes which the children flatten and use as blankets").

105. Barker & Knaul, *supra* note 26, at 7-8; *see also* Schurink, *supra* note 1, at 112 (noting that street children in South Africa typically form groups for safety reasons).

106. *See, e.g.*, Trish Beaver, *In the Twilight Zone*, Saturday Star (Johannesburg), Aug. 31, 1991, at 1 (describing the clusters of street children in the Hillbrow neighborhood of Johannesburg).

107. Schurink, *supra* note 1, at 183.

108. *See, e.g.*, Jeb Blount, *Gunmen Slay Children Asleep on Streets of Rio*, Wash. Post, July 24, 1993, at A1 (noting that 424 street children were murdered by death squads in Rio de Janeiro, Brazil in 1992); Rick Bragg, *Orphans of Haiti Disappear, Targets of Murderous Thugs*, N.Y. Times, Sept. 9, 1994, A1 (discussing hundreds of street children murdered since 1991 by gunmen loyal to the former military government of Haiti); *Reuters Africa Highlights*, Reuters World Service, Aug. 22, 1994, available in LEXIS, Nexis Library, News File (reporting the execution of six street children by plain-clothes police officers in Nairobi, Kenya); Charles Rusnell, *The Deadly Streets of Guatemala City*, Ottawa Citizen, Dec. 4, 1993, at B4 (documenting the extermination of street children by the police in Guatemala); Tracy Wilkinson, *Murderous "Social Cleansing" Does Not Even Spare Children in Colombia*, L.A. Times, March 8, 1994, at A3 (describing the murder of street children by vigilante death squads in Colombia).

109. *See, e.g.*, Don Podesta, *Police Commit Murders to Keep Order in Brazil: State Military Forces Eliminate Suspects*, Wash. Post, Sept. 5, 1993, at A39 (describing how police in Rio de Janeiro and throughout Brazil routinely murder street children in the name of law enforcement).

cluding the murder of eight street children across the street from the Canelaria Church in downtown Rio de Janeiro during the night of July 23, 1993.<sup>110</sup>

Although systematic violence against street children in South Africa has not reached the proportions existing in Brazil or Columbia, there have been isolated incidents. For example, in March 1992, eight street children were killed and fourteen injured when a Pretoria shelter for street children was burned to the ground.<sup>111</sup> Although the police claimed to find no evidence indicating wrongdoing, an independent forensic expert determined that the fire was caused by arson.<sup>112</sup> Subsequently, the South African police were widely accused of staging a cover-up<sup>113</sup> because the perpetrator of the crime was alleged to be a police officer who had a history of conflict with street children.<sup>114</sup> While the arson investigation was later reopened and the suspect was questioned, no one was ever formally charged in the incident.<sup>115</sup>

## II. STREET CHILDREN AND INTERNATIONAL HUMAN RIGHTS LAW

Due to the extreme vulnerability of street children in the face of severe deprivation and the constant threat of violence and arrest, protection of their fundamental human rights<sup>116</sup> is of critical importance to their well-being. Most vital to street children throughout the world are the right to an adequate standard of living<sup>117</sup> and the right to be free from arbitrary detention.<sup>118</sup> The United Nations recognizes these rights in several documents, including: the Universal Declaration of

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110. Blount, *supra* note 108, at A1.

111. Heike von der Lancken et al., *Night of Fiery Death: 8 Street Children Die as City Haven Gutted*, Pretoria News, March 12, 1992, at 1.

112. Fred deLange, *Street Children Die in Church Blaze*, Citizen (S. Afr.), March 13, 1992, at 1.

113. Ian Stiff, *Police Cover-Up Claimed in Elim Church Fire*, Pretoria News, March 21, 1992, at 1.

114. Mark Stansfiel, *Policeman May Have Harboured a Grudge*, Sunday Star (Johannesburg), March 22, 1992, at 2.

115. Alinah Dube, *Killer Blaze*, Sowetan (S. Afr.), March 13, 1992, at 1.

116. Human rights are "those benefits deemed essential for individual well-being, dignity, and fulfillment, and that reflect a common sense of justice, fairness, and decency." Louis Henkin, *The Age of Rights 2* (1990).

117. The right to an adequate standard of living is critical to street children because typically they are forced to provide for themselves. See *supra* notes 89-94 and accompanying text.

118. The right to be free from arbitrary detention is important to street children because in many countries they are commonly perceived to be criminally active and, therefore, are particularly susceptible to unwarranted arrest by overzealous police. Boyden & Holden, *supra* note 63, at 68.

Human Rights,<sup>119</sup> the Declaration of the Rights of the Child<sup>120</sup> and the Convention on the Rights of the Child.<sup>121</sup>

### A. *Right to an Adequate Standard of Living*

The United Nations expresses the right to an adequate standard of living in varying terms. The Universal Declaration of Human Rights recognizes that all persons, not only children, possess this right by proclaiming that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."<sup>122</sup> The Universal Declaration also acknowledges that children are entitled to extra consideration in the protection of this right by adding that "childhood [is] entitled to special care and assistance."<sup>123</sup>

The Declaration of the Rights of the Child proclaims that every child has the right "to enjoy the benefits of social security," including

119. G.A. Res. 217A(III), U.N. GAOR 3d Comm., 3d Sess., pt. 1, at 7, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. The Universal Declaration of Human Rights, by its terms, is an aspirational document. *Id.* pmbl. ("The General Assembly [p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . .").

120. G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, Agenda Item 64, at 19, U.N. Doc. A/4354 (1959) [hereinafter DRC]. The Declaration of the Rights of the Child, by its terms, is an aspirational document. *Id.* pmbl. ("The General Assembly . . . calls upon parents, upon men and women as individuals and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures . . .").

121. G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736, art. 3(2),(3) (1989) [hereinafter CRC]. The United Nations Convention on the Rights of the Child contains an extensive list of the fundamental human rights of children, including economic, social, cultural, civil, and political rights. *See generally* The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires" ix (Sharon Detrick ed., 1992) (documenting the history and development of the Convention on the Rights of the Child). The Convention was unanimously adopted by the United Nations General Assembly on November 20, 1989, and it entered into force on September 2, 1990. U.N. Centre for Human Rights & UNICEF, Status of the Convention on the Rights of the Child 1 (1993) [hereinafter UNICEF, Status of the Convention]. The Convention is binding on all ratifying nations. CRC, *supra*, art. 2 ("The States Parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction . . .").

122. Universal Declaration, *supra* note 119, art. 25(1).

123. *Id.* art. 25(2). The Declaration of the Rights of the Child affirms the Universal Declaration's assertion that children enjoy a special status under human rights law. In its preamble, the Declaration reasons that children need special safeguards and care because their lack of physical and mental maturity renders them particularly vulnerable. DRC, *supra* note 120, pmbl. Furthermore, the Convention on the Rights of the Child recognizes a discrete subcategory of children that warrants even more special consideration. CRC, *supra* note 121, pmbl. This subcategory is labelled "children living in exceptionally difficult conditions" and includes street children. *Id.*; *see also Africa's Lost Generation*, UNESCO Courier, Oct. 1991, at 22 (referring to this subcategory as "children in difficult circumstances").

"adequate nutrition, housing, recreation and medical services."<sup>124</sup> Furthermore, the Declaration recognizes the duty of sovereign states to safeguard this right by asserting that "[s]ociety and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support."<sup>125</sup>

Finally, the Convention on the Rights of the Child provides that a child has the right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."<sup>126</sup> The Convention imposes a duty upon states to uphold this right by maintaining that they must provide needy children with "material assistance and support programmes, particularly with regard to nutrition, clothing and housing."<sup>127</sup> The Convention also contemplates the availability of foster care, adoption and the creation of institutions for the care of needy children.<sup>128</sup>

### B. *Right to be Free from Arbitrary Detention*

The United Nations explicitly recognizes the right to be free from arbitrary detention in the Universal Declaration of Human Rights, which declares that "[n]o one shall be subjected to arbitrary arrest, detention or exile."<sup>129</sup> Furthermore, this right is recognized in the Convention on the Rights of the Child, which states that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily."<sup>130</sup>

Additionally, the United Nations recognizes other rights that implicate the right to be free from arbitrary detention. For example, the right to a fair trial protects criminal detainees from arbitrary detention by affording every defendant an opportunity to challenge the legitimacy of his arrest and detention in an unbiased court of law. Accordingly, the Universal Declaration states that "[e]veryone is entitled in full equality to a fair and public hearing, by an independent and impartial tribunal, in the determination of his rights and of any criminal charge against him."<sup>131</sup> With regard to children, the Convention on the Rights of the Child states that every child "has the right to challenge the legality of the deprivation of his or her liberty before a court."<sup>132</sup>

124. DRC, *supra* note 120, princ. 4.

125. *Id.* princ. 6.

126. CRC, *supra* note 121, art. 27(1). Among other rights relevant to street children, the Convention also recognizes children's rights to health care, including services to combat disease and malnutrition, *id.* art. 24(2)(c), to education, including free primary education, *id.* art. 28(1), and to recreation, including full participation in cultural life and the arts. *Id.* art. 31(1).

127. *Id.* art. 27(3).

128. *Id.* art. 20(3).

129. Universal Declaration, *supra* note 119, art. 9.

130. CRC, *supra* note 121, art. 37 (b).

131. Universal Declaration, *supra* note 119, art. 10.

132. CRC, *supra* note 121, art. 37; *see also id.* art. 40 (2)(b)(iii) (providing that children accused of crimes have the right "to have the matter determined without

Due to the particular vulnerabilities of the child, the United Nations also recognizes that children accused of crimes are entitled to additional protections. Thus, the Convention on the Rights of the Child declares that every child "accused of having infringed the penal law has . . . the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence."<sup>133</sup> Also, the Convention pronounces that a child defendant has the right "to have the matter determined . . . in the presence of . . . his or her parent or legal guardians."<sup>134</sup> Finally, the Convention directs that "[t]he arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time."<sup>135</sup> These rights reduce the risk that a child's lack of physical and mental maturity will render him susceptible to arbitrary detention.

### C. *South Africa's Obligations Under International Law*

The mere fact that the United Nations recognizes a right does not oblige all nations to respect that right. International law only requires sovereign states, including South Africa, to observe those rights that they submit to under treaties and covenants<sup>136</sup> and those rights that are embraced by customary international law.<sup>137</sup> Under both positive treaty law and customary international law, however, South Africa is obliged to protect the right of children to an adequate standard of living and their right to be free from arbitrary detention.

As a matter of positive law, the human rights clauses of the United Nations Charter require South Africa to observe these rights.<sup>138</sup> The human rights clauses charge all members of the United Nations, including South Africa, with a duty to promote "respect for, and obser-

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delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law").

133. *Id.* art. 40(2)(b)(ii); *see also id.* art. 37(d) (asserting that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance").

134. *Id.* art. 40(2)(b)(iii).

135. *Id.* art. 37(b).

136. Richard B. Lillich, *International Human Rights: Problems of Law, Policy, and Practice* 89 (2d ed. 1991) ("Treaties . . . bind only those states that choose to adhere to them.").

137. *Id.* ("[C]ustomary international law is binding upon all states, even though its content is uncodified and therefore often is more difficult to ascertain.").

138. U.N. Charter arts. 55, 56. South Africa has not explicitly consented under an international treaty or covenant to be bound by the right to an adequate standard of living or the right to be free from arbitrary detention. For instance, South Africa has not yet ratified the Convention on the Rights of the Child, which would bind the nation to observe these rights. CRC, *supra* note 121, arts. 2, 47. The Convention was signed, however, by South Africa's U.N. Ambassador, Jim Steward, on January 29, 1993. *South Africa Adheres to Six International Conventions*, Reuters Libr. Rep., Jan. 29, 1993, available in LEXIS, Nexis Library, News File.

vance of, human rights and fundamental freedoms."<sup>139</sup> Although the Charter does not define "human rights" or "fundamental freedoms," courts have held that the Universal Declaration of Human Rights is an authoritative interpretation of these terms.<sup>140</sup> Because the Universal Declaration recognizes both the right to an adequate standard of living<sup>141</sup> and the right to be free from arbitrary detention,<sup>142</sup> these rights make up part of South Africa's obligations under the human rights clauses of the United Nations Charter.

Moreover, customary international law also requires South Africa to uphold these rights.<sup>143</sup> To qualify as customary international law, a right must meet two requirements: it must arise from the general practices of states<sup>144</sup> and the practices must be followed out of a sense of legal obligation.<sup>145</sup> The widespread approval of the Convention on the Rights of the Child,<sup>146</sup> which recognizes the right of children to an adequate standard of living and their right to be free from arbitrary detention,<sup>147</sup> provides evidence that it is common practice for states to

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139. U.N. Charter art. 55(c). Specifically, Article 55 provides that "the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* Article 56 provides that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56.

140. *See, e.g.,* *Sei Fuji v. State*, 217 P.2d 481 (Cal. Dist. Ct. App. 1950) (holding that the Universal Declaration of Human Rights constitutes an authoritative interpretation of the human rights clauses of the U.N. Charter).

141. *See supra* note 122 and accompanying text.

142. *See supra* note 129 and accompanying text.

143. Further proof that the right to an adequate standard of living and the right to be free from arbitrary detention have risen to the level of customary international law is the fact that the Universal Declaration of Human Rights recognizes these rights. *See supra* notes 122-23, 129 and accompanying text. The Universal Declaration is considered by many to be a reflection of customary international law principles. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 42 (treating fundamental human rights principles as defined by the Universal Declaration as legal norms capable of application against a sovereign state); *see also* International Comm'n of Jurists, *South Africa: Human Rights and the Rule of Law* 149 (Geoffrey Bindman ed., 1988) (noting that the government of South Africa is bound by international law to observe the Universal Declaration of Human Rights).

144. Restatement (Third) of the Law of Foreign Relations of the United States § 102(2) (1987) (contending that customary international law must result "from a general and consistent practice of states").

145. Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 *Harv. Hum. Rts. J.* 87, 90 (1994) (referring to this requirement as *opinio juris*).

146. Within four years of its adoption by the United Nations General Assembly, 136 nations ratified the Convention. UNICEF, *Status of the Convention*, *supra* note 121, at 1-3. During the same period, another 23 nations signed the Convention, expressing their approval of its contents. *Id.* The United States remains among the few nations who have yet to sign or ratify the Convention. *See generally* Kerri Ann Law, Note, *Hope for the Future: Overcoming Jurisdictional Concerns to Achieve United States Ratification of the Convention on the Rights of the Child*, 62 *Fordham L. Rev.* 1851 (1994).

147. *See supra* notes 126-28, 130 and accompanying text.

endeavor to protect these rights.<sup>148</sup> Additionally, the fact that the international community made these rights the subject of an international treaty is confirmation that nations protect them out of a sense of legal obligation.

Although it is not clear what specific measures international law requires a sovereign nation to take to protect these rights, certain minimal requirements can be gleaned from the text of the various United Nations documents. Thus, it can be concluded that, at a minimum, international law requires South Africa to do its best to provide street children with adequate food, clothing, shelter and health care services.<sup>149</sup> And, to protect them from arbitrary detention, it can be concluded that, at a minimum, international law requires South Africa to afford all children who are arrested and accused of a crime a fair opportunity to challenge the legitimacy of their detentions in a court of law.<sup>150</sup>

### III. STREET CHILDREN AND THE LAW IN SOUTH AFRICA

In South Africa, as in most other nations, the government undertakes its duty to protect children through two separate systems—a child welfare system and a juvenile justice system.<sup>151</sup> The child welfare system, established under the Child Care Act,<sup>152</sup> addresses the right to an adequate standard of living by providing residential services to children in need of care.<sup>153</sup> The juvenile justice system, established under the Criminal Procedure Act,<sup>154</sup> addresses the right to be free from arbitrary detention by providing safeguards to those chil-

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148. Although the Convention is an international treaty, states that do not ratify or accede to it are bound to observe its terms if it embodies rules of customary international law. Lillich, *supra* note 137, at 89; *see also* Gary B. Melton, *Children, Families and the Courts in the 21st Century*, 66 S. Cal. L. Rev. 1993, 2040 (1993) (“[R]atification of the Convention is so nearly universal that its strictures are likely to be recognized as customary international law.”).

149. *See supra* part II.A.

150. *See supra* part II.B.

151. International Comm’n of Jurists, *supra* note 143, at 101.

152. Child Care Act, No. 74 of 1983 (S. Afr.). Although the Child Care Act was ratified by the apartheid government, it remains effective under the new South African Constitution. *See infra* note 286 and accompanying text.

153. *See infra* notes 168-72 and accompanying text. The term child “in need of care” was a term of art used in the Children’s Act, No. 33 of 1960, § 1(x) (S. Afr.). The term was abandoned when the Children’s Act was replaced by the Child Care Act. *See Interview: The New Child Care Act*, Child Care Worker (S. Afr.), Feb. 1987, at 15, 16 (interview with Helen Starke, Director of the Cape Town Child Welfare Society). It will be used in this Note, however, to signify any child who qualifies for services under the Child Care Act.

154. Criminal Procedure Act, No. 51 of 1977 (S. Afr.). Although the Criminal Procedure Act was ratified by the apartheid government, it remains effective under the new South African Constitution. *See infra* note 286 and accompanying text.

dren who are charged with committing offenses.<sup>155</sup> Street children are frequently dealt with under both of these systems.

### A. *The Child Care Act*

The Child Care Act empowers the child welfare system by establishing the children's court<sup>156</sup>—the official judicial forum for adjudicating issues of child welfare—and by authorizing the government to found and maintain residential facilities for needy children.<sup>157</sup> The Child Care Act establishes the children's court merely by designating that every magistrate's court is a children's court for the area of its jurisdiction<sup>158</sup> and that every magistrate is a commissioner of child welfare for the purposes of presiding over the children's court.<sup>159</sup>

Children in need of care may gain access to the children's court in several different ways, including when any person having custody of a child (i.e., a parent or guardian) voluntarily brings the child before a magistrate's court.<sup>160</sup> In the case of a street child, access to the court is typically obtained through the initiative of a police officer or a licensed social worker, who are authorized by the Child Care Act to take custody of any child who appears to be in need of care.<sup>161</sup> This may be done either with or without a warrant, provided that the officer or social worker has reason to believe that the child is in need of care and that the delay caused by obtaining a warrant would be detrimental to the safety and welfare of the child.<sup>162</sup>

When a child is brought before the children's court, the court is authorized to hold an inquiry to determine whether the child is in need of the State's care.<sup>163</sup> The ultimate determination of the child's status is made by examining the competence of the child's parents or guardian, although inferences may be drawn from the condition of the child.<sup>164</sup> Thus, a child is in need of care if the court finds either that

155. See *infra* notes 180-86 and accompanying text.

156. Child Care Act § 5.

157. *Id.* §§ 28-29.

158. *Id.* § 5.

159. *Id.* § 6. Children's courts are not specialized judicial institutions, and the magistrates who preside as commissioners of child welfare are not specially trained in family or juvenile law. UNICEF, Situation Analysis, *supra* note 31, at 91.

160. Child Care Act § 13(2).

161. *Id.* §§ 11(2), 12(1), 13(2).

162. *Id.* §§ 11(2), 12(1). A warrant may be issued by a commissioner of child welfare if it appears to the commissioner upon sworn information given by any person that there is reasonable grounds for believing that a child is in need of care. *Id.* § 11(2). The officer or social worker who removes the child is responsible for making certain that the child is brought before the children's court as soon as possible. *Id.* § 12(2)(c).

163. *Id.* § 13(3).

164. *Id.* §§ 13-14. Commentators have criticized the inquiry's focus on the parent. See, e.g., Di Levine et al., *One Year Later: A Critical Look at the Child Care Act*, Child Care Worker (S. Afr.), Apr. 1988, at 11, 12 (noting that the nature of the inquiry is "to 'criminalise' the parent, rather than regard the child as in need of help").



the child has no parent or guardian, that a parent or guardian cannot be traced or that the child is in the custody of a person who is unfit to care for the child.<sup>165</sup> The Child Care Act requires that the inquiry be held *in camera* and outside of the courtroom to shield the child from an intimidating atmosphere.<sup>166</sup> And, to protect the child's privacy, the Child Care Act makes it a criminal offense to publish information related to the proceedings without permission from the presiding commissioner.<sup>167</sup>

When the children's court determines that a child is in need of care, the Act offers several residential placement options depending on the needs of the particular child.<sup>168</sup> These options include foster care,<sup>169</sup> a children's home<sup>170</sup> or a school of industries.<sup>171</sup> If space is not available in the placement option appropriate for a particular child, the children's court is authorized to assign the child to a "place of safety" until a proper placement is available.<sup>172</sup> To ensure that adequate facilities are available for needy children, the Child Care Act authorizes the government to establish additional facilities as needed.<sup>173</sup>

### B. *The Criminal Procedure Act*

The Criminal Procedure Act empowers South Africa's juvenile justice system by establishing the juvenile court, the official judicial forum for adjudicating issues of juvenile delinquency. Like the Child

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165. Child Care Act §§ 13(3), 14(4). Specifically, the Child Care Act provides that a parent or guardian is unfit to have custody of the child if the parent or guardian:

(1) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child; (2) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated; (3) has caused or condoned to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts; (4) displays habits and behavior which may seriously injure the physical, mental or social well-being of the child; (5) fails to maintain the child adequately; (6) maintains the child in contravention of [adoption regulations]; (7) neglects the child or allows him to be neglected; (8) cannot control the child properly so as to assure proper behavior such as regular school attendance; (9) has abandoned the child; or (10) has no visible means of support.

*Id.* § 14(4)(b).

166. *Id.* § 8.

167. *Id.* §§ 8(3), (9).

168. *Id.* § 15(1).

169. *Id.* § 15(1)(b).

170. *Id.* § 15(1)(c). A "children's home" is defined as "any residence or home maintained for the reception, protection, care and bringing-up of more than six children apart from their parents, but does not include any school of industries or reform school." *Id.* § 1.

171. *Id.* § 15(1)(d). A "school of industries" is defined as "a school maintained for the reception, care, education and training of children sent or transferred thereto under this Act." *Id.* § 1.

172. *Id.* § 15(3). A "place of safety" is defined as "any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child." *Id.* § 1.

173. *Id.* §§ 28-29.

Care Act, the Criminal Procedure Act does this by designating that every magistrate's court is a juvenile court for the area of its jurisdiction.

Any child who is arrested and detained by the police for committing a crime must be brought before the juvenile court within forty-eight hours or must be released.<sup>174</sup> During the first forty-eight hours, the police are authorized to set bail<sup>175</sup> or, on minor charges, to release the child into the custody of either a parent or guardian,<sup>176</sup> or a probation or correctional officer,<sup>177</sup> with a warning and instructions to appear before the court at a specific time. Otherwise, the police are authorized to place the accused in a "place of safety," as defined by the Child Care Act, to await trial.<sup>178</sup>

Although the criminal court treats child suspects much the same as adults,<sup>179</sup> there are certain procedures that the court must follow when dealing with juveniles. For instance, when a child is charged with an offense, the Criminal Procedure Act requires the police to notify the child's parent or guardian to attend the court proceedings.<sup>180</sup> The parent or guardian is then authorized to assist the child in defending against the criminal charges.<sup>181</sup> Like children's court proceedings, the Criminal Procedure Act requires that juvenile proceedings be held *in camera*.<sup>182</sup>

Additionally, the Criminal Procedure Act grants a magistrate the discretion to convert a juvenile prosecution into a children's court inquiry.<sup>183</sup> This may be done at any time if it appears that the child is in need of care and the magistrate believes it would be preferable to deal with the child under the terms of the Child Care Act.<sup>184</sup> A conversion is particularly valuable to a child because it causes the State to waive any criminal charges against the child.<sup>185</sup> Even if a guilty verdict has already been handed down, the verdict is vacated by the conversion.<sup>186</sup>

The law in South Africa also recognizes substantive differences between children and adults. For instance, children under seven years of

174. Criminal Procedure Act §§ 39-40, 50(1).

175. *Id.* §§ 59-60.

176. *Id.* § 72(1)(b).

177. Criminal Procedure Amendment Act, No. 122 of 1991, § 39 (S. Afr.).

178. Criminal Procedure Act § 71. For the definition of a "place of safety," see *supra* note 172.

179. Ann Skelton, *Lawyers for Human Rights, Children in Trouble with the Law: A Practical Guide* 32-33 (1993) ("For the most part children are treated as miniature versions of adult offenders.").

180. Criminal Procedure Act §§ 50(4), 74.

181. *Id.* § 73(3).

182. *Id.* § 153(4).

183. *Id.* § 254.

184. *Id.* § 254(1).

185. *Id.* § 254(2).

186. *Id.*

age are irrebuttably presumed to be *doli incapax*, or incapable of forming criminal intent, and cannot be prosecuted for committing a crime.<sup>187</sup> Children between seven and fourteen are presumed to be *doli incapax*, but the presumption may be rebutted by the State.<sup>188</sup> Children fourteen and over, however, are presumed to be fully capable of forming criminal intent.<sup>189</sup>

Once a child is convicted of a criminal offense, virtually all of the punitive measures available to the court in dealing with adults are available for use against children.<sup>190</sup> They may be required to pay restitution or perform community service,<sup>191</sup> they may be ordered to submit to treatment<sup>192</sup> or supervision<sup>193</sup> and they may be imprisoned.<sup>194</sup> Unlike adults, however, children under eighteen may not be sentenced to death,<sup>195</sup> but they may be sent to reform schools.<sup>196</sup> Additionally, male children may be whipped.<sup>197</sup>

#### IV. TREATMENT OF STREET CHILDREN UNDER APARTHEID

Despite the operation of a child welfare system and a juvenile justice system, the apartheid government of South Africa failed to uphold its obligation to protect the human rights of street children. From the time street children first emerged in the major South African cities until the final days of apartheid in early 1994, the government regularly denied them the right to an adequate standard of living and the right to be free from arbitrary detention. Instead of caring for street children, the government categorically excluded them from the child welfare system,<sup>198</sup> and instead of guarding their liberty, the government arbitrarily arrested many street children and placed them in detention.<sup>199</sup>

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187. Skelton, *supra* note 179, at 4-5.

188. *Id.* at 5.

189. *Id.*

190. Criminal Procedure Act § 276; *see also* Skelton, *supra* note 179, at 30-33 (discussing the punitive measures that the juvenile court may impose upon a convicted child).

191. Criminal Procedure Act § 297(1).

192. *Id.* § 296.

193. *Id.* §§ 290(a), 297(1)(h).

194. *Id.* § 276(1)(b).

195. *Id.* § 277(3).

196. *Id.* § 290(3). A "reform school" is defined as "a school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act . . . or transferred thereto under [the Child Care Act]." Child Care Act § 1.

197. Criminal Procedure Act §§ 276(1)(b), 294.

198. Ross, *supra* note 7, at 70-71; *see, e.g.*, Jane Keen, *Dealing with Street Children*, Child Care Worker (S. Afr.), Nov. 1990, at 8 (noting that the primary strategy of the apartheid government was to ignore street children); MacCurtain, *supra* note 7, at 9 ("[A] street child is totally without support or protection, even from the law of the country.").

199. Schurink, *supra* note 1, at 92; *see also* Keen, *supra* note 9, at 12 (noting the illegitimate arrest and imprisonment of street children); Scott Kraft, *Jail Torment for*

Street children were singled out and treated with such cruel insensitivity because urban community members commonly believed them to be delinquent children who posed a threat to law and order and hastened neighborhood decline.<sup>200</sup> As such, the police and other government agents charged with executing the laws deemed street children unworthy of valuable social services and preferred instead to arrest them and deal with them through the juvenile justice system.<sup>201</sup> This was considered the most effective means of keeping street children out of the cities because children dealt with through the juvenile justice system were often detained in secure facilities from which they could not abscond.<sup>202</sup>

Although sometimes street children were legitimately arrested for committing conventional crimes,<sup>203</sup> the police frequently charged them with crimes they did not commit in order to justify their detention.<sup>204</sup> Additionally, the police often arrested street children under

*Children in S. Africa*, L.A. Times, Dec. 18, 1992, at A1 (noting that as many as 12,000 children were held in adult prisons during 1992, most were street children and only five percent were arrested for serious crimes); Ross, *supra* note 7, at 72 ("The authorities believe the problem is best dealt with by the round-the-clock arrest of street children . . ."); *Peter Pans*, *supra* note 6, at 6 (reporting that street children face "arbitrary arrest and imprisonment (in some cases in adult jails)."); *see, e.g.*, Swart, *supra* note 9, at 35 ("In personal interviews with the children in Johannesburg, only five reported never having been in a police vehicle under arrest.").

200. Schurink, *supra* note 1, at 92, 272; *see also id.* at 92 ("[I]t is clear that public perception is to a lesser or greater degree shaping policy regarding street children.").

201. Richter, *Nature and Scope*, *supra* note 31, at 13 (noting that the high visibility of criminal activity amongst a small group of street children provided authorities with the rationale for adopting punitive attitudes towards street children in general).

202. Annette Cockburn, *Street Children and the Law*, Child Care Worker (S. Afr.), Aug. 1992, at 7 (noting that police officers prefer facilities such as prisons from which children cannot escape); *see also* Kraft, *supra* note 199, at A8 ("[B]ecause escapes are common, many judges prefer that arrested children await their court dates in adult prisons."). On the other hand, children dealt with through the child welfare system were often sent to institutional "places of safety" from where many escaped and returned to the streets. *See, e.g.*, Schurink, *supra* note 1, at 126 (noting that children abscond from the Bayhead Place of Safety near Durban at a rate of 50% per month).

203. *See, e.g.*, Swart, *supra* note 94, at 11 (noting that sometimes street children are arrested for conventional crimes such as burglary, drug dealing and prostitution). Also, some street children were arrested because they were illegal immigrants or refugee children from border states. J. Mills, *The Role of Action Research in Addressing Welfare Policies Affecting Children Working in the Streets of Pretoria 3* (1989) (unpublished paper, on file with author).

204. Schurink, *supra* note 1, at 92; *see, e.g.*, Di Levine, *Street Children: Past, Present and Future*, Child Care Worker (S. Afr.), Apr. 1991, at 8 (interview with Jill Swart, anthropologist) (noting that the police often pick up law-abiding street children); Swart, *supra* note 35, at 7 (referring to a street child who had been arrested on several occasions, but only once for a crime he committed).

More recently, however, the police have used municipal ordinances prohibiting loitering, begging, molesting, obstructing or even washing or parking cars in public to warrant the arrest and detention of street children. Cockburn, *supra* note 202, at 7 (reporting that the police "arrest without warning, and it seems that the loitering laws are being used 'to clear the streets' . . . . Fifty eight children charged with loitering were seen in the cells in Cape Town Central . . . over a two month period . . ."); *see*

the "influx control" laws<sup>205</sup> or detained them under the terms of the security legislation.<sup>206</sup>

After arrest, street children were frequently detained for extended periods of time in jail cells or adult prisons.<sup>207</sup> The conditions for street children in detention were deplorable.<sup>208</sup> For example, in Poll-smoor Prison, up to fifty-two children were detained in a single cell with no beds.<sup>209</sup> They had no access to fresh changes of clothing and

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also Jules Levin, *Street Worker, Child Care Worker* (S. Afr.), March 1992, at 3 (discussing Cape Town loitering ordinance used against street children); Ross, *supra* note 7, at 69 (discussing Durban ordinances prohibiting loitering, molesting, obstructing and washing vehicles in public places used against street children). These ordinances effectively criminalize the status of being a street child by prohibiting many of the activities that street children commonly perform. See *supra* note 93 and accompanying text. Although these ordinances may have resulted, in part, from legitimate concerns of maintaining order within the cities, detention is excessive as a punitive measure for such violations. Cockburn, *supra* note 202, at 7. In fact, detention for such minor offenses may be contrary to international law. See, e.g., CRC, *supra* note 121, art. 37(b) ("The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time."). Furthermore, detention for such minor offenses may be unconstitutional under the new South African bill of rights. See, e.g., Constitution of the Republic of South Africa, No. 200 of 1993, § 11(2) ("No person shall be subject to . . . cruel . . . treatment or punishment."). A further discussion of the legality of such detentions is beyond the scope of this Note.

205. Until 1986, the police could arrest street children virtually at will because their presence in the cities constituted violations of the "influx control" laws, which required all non-white persons present in white areas of the country to carry valid passes indicating authorization to be there. To be caught without a valid pass was a crime. In 1983, more than 200,000 arrests were made under these laws, and scores of non-white South Africans were sentenced to jail terms. *The Anti-Apartheid Act of 1985: Hearings on S. 635 Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 1st Sess. 11 (1985) (statement of Sen. Edward M. Kennedy). The influx control laws were repealed in 1986. See *supra* note 78.

206. Internal Security Act, No. 74 of 1982 (S. Afr.). The Internal Security Act gave the police the power to detain persons without charge if the arresting officer believed such action was necessary to prevent the person from committing certain specified offenses against the state. *Id.* § 28. Under the Act, no court of law had jurisdiction to pronounce on the validity of such a detention. *Id.* § 28(7). Although the Act generally contemplated detention to prevent terrorism, subversion or sabotage, acts which usually did not implicate street children, it also allowed the police to arrest persons when necessary for the maintenance of law and order. *Id.* §§ 54-63. The Act made no distinction between children and adults and was often used to arrest children. McLachlan, *supra* note 77, at 32-33; see also Lawyers Comm. for Human Rights, *The War against Children: South Africa's Youngest Victims 78* (1986) (documenting the detention of children under the Internal Security Act). The provisions of the Internal Security Act that permitted indefinite detention without trial were scrapped by Parliament on June 21, 1991. Internal Security and Intimidation Amendment Act, No. 138 of 1991 (S. Afr.); see also Christopher S. Wren, *South Africa Overhauls Law Used As Muzzle on Dissenters*, N.Y. Times, June 22, 1991, at A2 (reporting the amendment of the Internal Security Act).

207. Cockburn, *supra* note 202, at 7.

208. *Id.*; see also International Comm'n of Jurists, *supra* note 143, at 105 (noting poor conditions for children in several South African prisons).

209. Cockburn, *supra* note 202, at 7.

were granted only limited exercise opportunities.<sup>210</sup> Furthermore, the prison warden provided no recreation or educational programs and no social workers for the children.<sup>211</sup> In another prison, a dietician found that the quantity of food provided to child inmates constituted "a strict weight-reduction diet."<sup>212</sup> Conditions for children detained in jail cells were equally as poor.<sup>213</sup> Most egregious was the fact that children were frequently detained with adults.<sup>214</sup> Although official policy was to keep children and adults separate, this policy was repeatedly violated and many children were beaten up, sodomized or had their food stolen by adults.<sup>215</sup>

The failure of the South African government to safeguard the right to an adequate standard of living and the right to be free from arbitrary detention for street children was due, at least in part, to deficiencies both in the substance and in the administration of the Child Care Act and the Criminal Procedure Act.

#### A. *Failure of the Child Care Act*

Under the administration of the apartheid government, the Child Care Act failed to ensure that street children enjoyed an adequate standard of living because it placed no absolute duty on the South African government to care for needy children.<sup>216</sup> Instead, the Act simply authorizes the police to remove indigent children from the streets and bring them before the children's court, but does not require them to do so.<sup>217</sup> Because the police retain the option of leaving children on the street, access to the child welfare system for street children depends almost entirely upon the charity of individual police

210. *Id.*

211. *Id.*

212. International Comm'n of Jurists, *supra* note 143, at 105.

213. Barbara Whitaker, *Harsh Penalty for S. African Youth*, *Newsday*, Nov. 13, 1992, at 15 ("[C]hildren—some as young as 8—are routinely held in communal cells with as many as 60 other youths. Sometimes . . . they are placed with adults. [They] have no extra clothing and usually sleep on a concrete floor with a blanket. They share a single toilet in the middle of the room. Medical assistance is virtually nonexistent; recreational opportunities are few.")

214. International Comm'n of Jurists, *supra* note 143, at 105.

215. *Id.*

216. Child Care Act, No. 74 of 1983 (S. Afr.); *see also* Schurink, *supra* note 1, at 55 (noting the irony "that the Child Care Act of 1983 which intended to protect the child more than ever . . . has failed to protect even the most vulnerable category, namely the street child").

217. Child Care Act § 12(1) ("Any policeman . . . may remove a child from any place . . . if that policeman . . . has reason to believe that the child is a child [in need of care] . . ."). The Child Care Act also authorizes removal by a registered government social worker or by an "authorized officer." *Id.* Police officers, however, offered the only access route to the child welfare system for street children because the government did not employ social workers or "authorized officers" to monitor the street population. Under the Child Care Act, "authorized officer" denotes "any person authorized in writing by a commissioner of child welfare, social worker or policeman to perform [any] act." *Id.* § 1.

officers. During the apartheid years, police officers were typically unsympathetic towards street children, believing them to be delinquent youths who had deserted their families in the townships to indulge in the vices of the inner cities.<sup>218</sup> As a result, the police almost always declined to introduce street children into the child welfare system, preferring instead to leave them on the streets or to deal with them through the juvenile justice system. Moreover, children who were left on the streets had no access to government social services because the Child Care Act does not contemplate dealing with needy children outside of the child welfare system.<sup>219</sup>

Additionally, the Child Care Act enabled the South African government to obstruct the efforts of private citizens to provide for the needs of street children. During the 1980s, a number of private voluntary organizations were founded to provide services to street children in the major South African cities.<sup>220</sup> These organizations began by serving street children through soup kitchens.<sup>221</sup> Gradually, they established residential shelters to provide more comprehensive services to the vast numbers of street children.<sup>222</sup> Although the Child Care Act required these organizations to register their residential facilities,<sup>223</sup> the government repeatedly denied registration applications for

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218. See, e.g., Richter, *Rich and Poor*, *supra* note 27, at 6 (noting that street children are commonly stereotyped as "delinquent children, ungrateful for the best efforts of their impoverished parents; sly, manipulative and deceitful troublemakers; children without any basic morality who will end up as drug addicts, murderers or chronic criminals"). *But see* Richter, *Nature and Scope*, *supra* note 31, at 13 (relating results of a survey of street children that found only "about 23 percent of the boys . . . exhibited attitudes and/or behaviors consonant with what is commonly called delinquency"); Swart, *supra* note 94, at 12-13 (noting that street children "are used in criminal operations and organized prostitution," but criticizing "the generally held viewpoint that street children are on the streets because they are trying to escape parental discipline").

219. Schurink, *supra* note 1, at 21 ("The Child Care Act 1983 makes no provision for the informal treatment of street children.")

220. Scharf, *supra* note 30, at 13 ("Since 1982, we have witnessed the proliferation of groups and organisations which have set up stroller shelters."); see, e.g., Cockburn, *supra* note 42, at 8 (noting that the Homestead, the first shelter for street children in Cape Town, was opened in July 1982).

221. See, e.g., Levine, *supra* note 204, at 7 (noting that services for street children in Johannesburg began with a once-a-week soup kitchen in 1983).

222. See, e.g., *Twilight Children*, *supra* note 47, at 4 (describing private residential shelter in Johannesburg housing between 80 and 100 street children). Although most of the private programs for street children were originally run by volunteers, today several employ a considerable number of professional staff. See, e.g., *id.* at 14 (listing 19 paid staff members). Today, most private shelters serve exclusively boys, but there are some shelters for street girls. See, e.g., Lyle V. Harris, *Johannesburg's "Twilight Children": Street Life Is A Hard Teacher—Their Only One*, *Atlanta Const.*, May 15, 1994, at C1 (referring to the House, a shelter for street girls in Johannesburg); Keen, *supra* note 32, at 8 (discussing *Ons Plek*, a shelter for street girls in Cape Town).

223. Child Care Act § 30. The Child Care Act makes it a criminal offense to house children in an unregistered shelter. *Id.* § 30(6).

street children shelters,<sup>224</sup> forcing them either to close<sup>225</sup> or to risk criminal prosecution by operating illegally.<sup>226</sup> As a result of the apartheid government's opposition, private voluntary organizations were only able to deal with a small portion of the street population.<sup>227</sup>

The Child Care Act also failed to ensure that street children were free from arbitrary detention because it allowed the government to divert many of the street children who managed to gain access to the child welfare system into detention. Because the apartheid government maintained too few placements for African children in foster care, children's homes and schools of industry, most African children deemed to be in need of care by the children's court could not be properly accommodated.<sup>228</sup> Typically, the limited space available in

224. Stein, *supra* note 5, at 5 (noting that registration of street children's shelters has been difficult because they do not meet the government's criteria for registration). In the late 1980s, however, the House of Representatives (the coloured legislature under the 1983 Constitution) agreed to register several shelters for street children in the Cape Province. *Id.*

225. See, e.g., *Nowhere to Go but Back on the Streets*, Natal Witness (S. Afr.), Apr. 13, 1989, at 1 (describing the termination of the Khaya Lethu shelter in Durban by the Minister of Home Affairs).

226. Heather Lewis, *Shelters: The Step Children of Child Care Services?*, Child Care Worker (S. Afr.), Feb. 1993, at 13 (discussing the operation of street children shelters in violation of the provisions of the Child Care Act).

The South African government also used apartheid laws to inhibit the efforts of private organizations working with street children. For example, the government used the Group Areas Act to prevent some organizations from housing African and coloured children in "white" areas. See, e.g., *Council Blow to Street Kids Home in "White" Area*, Weekly Mail (S. Afr.), Apr. 13, 1989, at 1 (describing the rejection by the Johannesburg City Council of a plan presented by Streetwise, a private voluntary organization, to house 80 street children in Berea, a "white" neighborhood).

Additionally, the government obstructed the fundraising efforts of street children organizations by declining to allow them to register for fundraising numbers as required by law. International Comm'n of Jurists, *supra* note 143, at 147; see also Disclosure of Foreign Funding Act, No. 26 of 1989 (S. Afr.) (making it a crime for certain organizations to receive foreign funds without reporting it to the government). In the case of the Twilight Children organization, the government repeatedly denied applications for a fundraising number, forcing them to raise money illegally. Twilight Children, *supra* note 47, at 4. Twilight Children was eventually able to circumvent the law by nominally joining the welfare branch of the Presbyterian Church of South Africa, enabling them to use the church's number to raise funds. *Id.*

227. Peter Pans, *supra* note 6, at 8 ("[T]he homes and shelters currently running can deal only with 'the tip of the iceberg.'"); see, e.g., Twilight Children, *supra* note 47, at 5 (acknowledging that the "Twilight Children Shelter just touches the tip of the iceberg, a myriad of children remain unattended to on the streets of Hillbrow and Johannesburg"). Most private voluntary organizations operated entirely on private donations, receiving no government subsidies. See, e.g., Twilight Children, *supra* note 47, at 10 (including income statement of largest shelter for street children in South Africa, which shows that annual income is almost entirely derived from private donations). A few shelters in the Cape Province that were permitted to register, however, were subsidized by the government at a low level. Stein, *supra* note 5, at 5.

228. Peter Pans, *supra* note 6, at 8; see also UNICEF, Situation Analysis, *supra* note 31, at 76 (revealing that between 1991 and 1993, over 14,000 white children were placed in proper institutions or foster care under the Child Care Act, while only 3,330 African children received such services); Scharf, *supra* note 30, at 14 (noting that in



proper facilities was allocated to more manageable children and withheld from street children because they were considered too far gone to rehabilitate.<sup>229</sup> As a result, many street children were held, pursuant to the Child Care Act, in "places of safety" to await available space in children's homes or other appropriate facilities.<sup>230</sup> Because the conditions, particularly for African children, were poor in many government-operated, institutional "places of safety," such accommodation was more akin to punitive detention than to residential care.<sup>231</sup>

Furthermore, because the government maintained too few institutional "places of safety" for African children, the police frequently detained street children in jail cells and in extreme cases, in adult prisons while awaiting placement in appropriate facilities.<sup>232</sup> Detention in jail cells and prisons was permitted by the courts under the Child Care Act because the definition of a "place of safety" is so vague that it does not preclude such an interpretation.<sup>233</sup> Furthermore, the Child Care Act does not permit these decisions to be appealed.<sup>234</sup>

The resulting irony was that many of the "lucky" street children who gained access to the child welfare system were ultimately treated the same as juvenile delinquents.<sup>235</sup> In effect, they were forced to trade one human right—the right to be free from arbitrary detention—for the satisfaction of another—the right to an adequate standard of living.

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1988 there were no children's homes, schools of industry or reformatories for African children in the Western Cape); Swart, *supra* note 35, at 7 ("[I]t is well-known that there is a tremendous shortage of institutional care in South Africa for black children . . . whereas the ratio of black to white in the country is about 5 to 1, institutions are in the proportion of about 9 to 200.").

229. Levine, *supra* note 204, at 7 (noting the common perception that street children are dropouts from society and that nothing can be done for them).

230. Child Care Act § 15(3). When space is not available, the Child Care Act provides that children are to be assigned to "places of safety" to await placement in children's homes or other appropriate facilities. *Id.*

231. See, e.g., Schurink, *supra* note 1, at 126 (noting that some of the institutional "places of safety" operated by the government were formerly prisons).

232. Joanna Weschler, Human Rights Watch, *Prison Conditions in South Africa* 74 (1994); see also Jackson, *supra* note 32, at 8 ("As a result of the lack of facilities strollers often end up in prison instead of care."); Wren, *supra* note 3, at A4 ("[C]hildren as young as 8 years old have spent up to a year in juvenile detention before their cases have been resolved.").

233. Cockburn, *supra* note 202, at 7. The Child Care Act defines a "place of safety" as "any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child." Child Care Act § 1.

234. Child Care Act, No. 74 of 1983 (S. Afr.); see also Di Levine, *The Child Care Act at a Glance*, *Child Care Worker* (S. Afr.), Aug. 1987, at 15 (noting that the only cases that are appealable under the Child Care Act are adoption cases).

235. Schurink, *supra* note 1, at 54 (noting that the law tends "to treat children in need of care and juvenile delinquents in the same manner").

### B. *Failure of the Criminal Procedure Act*

Under the administration of the apartheid government, the Criminal Procedure Act proved inadequate to protect street children from arbitrary detention because it failed to provide the procedural protections necessary to ensure that they received fair trials. Because street children generally lack maturity and education, they require assistance both to help them understand criminal charges against them and to help them articulate their defenses. During the apartheid years, street children were frequently forced to stand trial alone, facing trained prosecutors without the assistance of counsel<sup>236</sup> or any other adult.<sup>237</sup> Under such circumstances, criminal proceedings against street children were inevitably unfair, and the courts were unable to detect arbitrary detentions.

Street children did not enjoy the assistance of counsel in criminal proceedings because the Criminal Procedure Act only affords defendants a right of access to legal assistance.<sup>238</sup> It does not provide counsel to defendants, such as street children, who cannot afford to retain private attorneys.<sup>239</sup> Although street children were eligible to apply to Legal Aid for free legal assistance, the resources provided to Legal Aid by the apartheid government permitted representation of only a small number of criminal defendants.<sup>240</sup> Additionally, during the apartheid years, magistrates often failed to advise children of the availability of Legal Aid.<sup>241</sup>

Furthermore, the Criminal Procedure Act permitted the government to try many street children on criminal charges without the assistance and moral support of their parents. Although the Criminal Procedure Act requires the police to notify a parent or guardian at the time of a child's arrest<sup>242</sup> and allows the parent or guardian to assist the child during a criminal trial,<sup>243</sup> notification is only required "if such a parent or guardian is known to be within the magisterial district in question and can be traced without undue delay."<sup>244</sup> Due to this qualification, police officers considered notification merely optional

236. Jackson, *supra* note 32, at 8.

237. *Id.*; see also McLachlan, *supra* note 77, at 24 (noting that in one court 85.2% of the juvenile court proceedings took place in the absence of the child's parents).

238. Criminal Procedure Act § 73.

239. Eugenia Boutis, *South African Criminal Justice*, Nassau Lawyer (N.Y.), Feb. 1991, at 12 ("In non-capital offense cases, there is no right to counsel."); see also Lewis, *supra* note 226, at 14 (noting that South African street children "appear in court on paltry charges without legal representation").

240. International Comm'n of Jurists, *supra* note 143, at 114-15 ("The provision of legal aid in South Africa is wholly inadequate and the money supplied by the government for this purpose falls far short of the sums provided in comparable legal systems.").

241. Skelton, *supra* note 179, at 22-23.

242. Criminal Procedure Act § 74.

243. *Id.* § 73(3).

244. *Id.* § 74(2).

where a child's parent or guardian was not in the magisterial district or could not be traced promptly.<sup>245</sup> Because many street children do not know the whereabouts of their parents and because some travel to the city from far away,<sup>246</sup> the police rarely attempted to notify parents when street children were arrested.<sup>247</sup>

Furthermore, many magistrates exacerbated the biased nature of juvenile court proceedings by failing to enforce procedural protections specifically provided to children by law.<sup>248</sup> In most cases, magistrates, who receive no special legal training to handle juvenile prosecutions,<sup>249</sup> treated unrepresented juveniles like adults without a heightened sensitivity for the defenselessness of the child.<sup>250</sup> For example, magistrates did not always require prosecutors to meet their burden of establishing the criminal capacity of children under age fourteen.<sup>251</sup> Additionally, although the Criminal Procedure Act requires that juvenile court proceedings be held *in camera*,<sup>252</sup> presumably to protect the child from the intimidation and embarrassment of facing a full courtroom, magistrates frequently failed to clear the court.<sup>253</sup>

Furthermore, magistrates often failed to consider converting criminal prosecutions of street children into children's court inquiries. In fact, one study found that the conversion option was used in only 2.6% of the juvenile court proceedings surveyed.<sup>254</sup> Had this procedural tool been employed, the courts could have rectified, at least in form, capricious police conduct toward street children by diverting innocent children at the trial stage from the juvenile justice system to the child welfare system.<sup>255</sup>

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245. Skelton, *supra* note 179, at 8.

246. *See, e.g.*, Christopher S. Wren, *South African Street Children—More Appearing in the Cities*, S.F. Chron., Dec. 11, 1991, at A14 (relating examples of street children who travelled great distances to the major cities).

247. Schurink, *supra* note 1, at 19.

248. Skelton, *supra* note 179, at 7-8.

249. McLachlan, *supra* note 77, at 28-29 (suggesting that because magistrates receive no special legal training, they are not qualified to decide the fate of children without the assistance of a social worker).

250. *Id.* at 3 (noting that child defendants in South Africa are treated as "miniature versions of adult offenders"); *see also* McLachlan, *supra* note 77, at 22 ("[M]inors who are alleged to have committed criminal offenses are treated in essentially the same way as adult criminal accused in terms of the Criminal Procedure Act.").

251. Skelton, *supra* note 179, at 5 ("Although the law requires proof of criminal capacity in the case of under 14 year olds, in practice this requirement is not always complied with, particularly in cases where the accused is undefended."). In contrast, however, courts commonly required nothing less than expert testimony to establish the mental capacity of an adult when it had been placed in question. *Id.* at 5-6.

252. Criminal Procedure Act § 153(4).

253. Skelton, *supra* note 179, at 11-12.

254. McLachlan, *supra* note 77, at 27; *see also* Cockburn, *supra* note 202, at 7 ("Research . . . indicates that [the conversion] option is invoked in only two percent of cases.").

255. Skelton, *supra* note 179, at 13-16. In substance, diversion from the juvenile justice system to the child welfare system would have been of questionable practical

In the absence of these procedural protections, street children rarely received fair trials, and many were convicted on specious charges and were sentenced to terms of imprisonment in adult prisons.<sup>256</sup> Additionally, the lack of judicial oversight by magistrates encouraged the police to persist in detaining street children arbitrarily because they knew unwarranted detentions would not be challenged.<sup>257</sup>

### C. *Inability of Street Children to Assert Their Rights*

In response to rampant violations of their human rights, street children were powerless, under the apartheid system, to challenge the legitimacy of the law. Under the doctrine of parliamentary supremacy, the courts were not permitted to question the validity of laws duly enacted by Parliament or of government actions authorized by those laws.<sup>258</sup> Also, human rights could not be asserted in court because South Africa had no sovereign bill of rights and fundamental rights were not recognized by substantive law.<sup>259</sup>

Furthermore, the interests of street children in South Africa were virtually unrepresented in the legislative process because they derived exclusively from the disempowered African and coloured communities.<sup>260</sup> During the entire span of apartheid, the right to vote was denied to Africans.<sup>261</sup> And, although the franchise was extended to coloured South Africans under the Constitution of 1983,<sup>262</sup> the force of their vote was impaired because the white-dominated President's Council retained veto power over decisions of the coloured chamber of Parliament.<sup>263</sup>

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value to street children because the police retained the ability under law to detain children in need of care in jail cells and adult prisons. *See supra* notes 228-35 and accompanying text.

256. Kraft, *supra* note 199, at A1; *see also supra* notes 207-15 and accompanying text (discussing conditions for children in adult prisons).

257. International Comm'n of Jurists, *supra* note 143, at 110 ("[A]lthough the courts seldom associate themselves with government policy directly, the decisions of the court substantially facilitated the implementation of government policy by failing to keep the Executive within the law.").

258. Republic of South Africa Constitution Act, No. 110 of 1983, § 30 ("[N]o Court of law shall be competent to enquire into or pronounce upon the validity of an Act of Parliament."); *see also* John Dugard, *Human Rights and the South African Legal Order* 28 (1978) ("[C]ivil liberty and the rule of law were sacrificed on the altar of parliamentary supremacy to the idol of apartheid.").

259. Lawyers Comm. for Human Rights, *supra* note 206, at 142 ("South Africa has no Bill of Rights, leaving the courts little opportunity to uphold individual rights and liberties against the power of the state.").

260. *See supra* note 31 and accompanying text.

261. International Comm'n of Jurists, *supra* note 143, at 129.

262. Republic of South Africa Constitution Act, No. 110 of 1983.

263. International Comm'n of Jurists, *supra* note 143, at 128-29 (discussing power of the white-dominated President's Council to override decisions of the coloured and Indian chambers of Parliament).

Finally, street children could not expect relief from the international community. By the late 1970s, when street children first became a significant problem in South Africa,<sup>264</sup> the United Nations and a multitude of states had already repeatedly censured the apartheid government<sup>265</sup> and imposed a broad range of punitive measures, including economic sanctions, upon the nation for widespread human rights violations<sup>266</sup> and other breaches of international law.<sup>267</sup> These measures had little effect upon the domestic policies of the South African government before the 1990s<sup>268</sup> and left the international community with few options in response to further transgressions. Thus, an appeal to the international community by or on behalf of street children, had one been considered, would have been futile.

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264. See *supra* notes 4-5 and accompanying text.

265. In 1973, the General Assembly of the United Nations declared apartheid an international crime. International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973). And, in 1974 the General Assembly rejected the credentials of the South African representative. Jan C. Heunis, *United Nations Versus South Africa 2* (1986).

266. *If the World Tries to Block South Africa's Trade*, U.S. News & World Rep., Nov. 7, 1977, at 38 (discussing potential effects of comprehensive economic sanctions against South Africa). During the 1970s and 80s, the United Nations was consumed by efforts to dismantle apartheid. For example, in 1980 the General Assembly adopted almost 60 resolutions condemning South Africa, many of which dealt directly with human rights issues. Heunis, *supra* note 265, at 2. This accounted for over 60% of all resolutions adopted in plenary session that year. *Id.*

267. South Africa was also subject to punitive measures for its failure to comply with United Nations resolutions on Namibia. *U.N. Rebukes S. Africa*, Wash. Post, Dec. 22, 1978, at A24 (reporting recommendation of U.N. General Assembly to the Security Council to impose economic sanctions on South Africa for failure to comply with resolutions on Namibia).

268. In fact, the international community's opposition to apartheid appeared to strengthen the resolve of the South African government throughout the 1980s. In opening the 1987 session of Parliament, P.W. Botha, the State President of the Republic of South Africa, reflected the government's attitude of defiance in response to pressure from the international community:

In 1986, our international position was characterised increasingly by intensified pressures and punitive actions against our country. Undisguised attempts at interference in our domestic affairs reached unprecedented proportions . . . No foreign nation, nor the United Nations or any other international organisation has the slightest right whatsoever to meddle in our domestic affairs. It is a principle of international law and conduct that no self-respecting, sovereign country should be subservient to any other. I am sure that all responsible South Africans are united in claiming this legitimate right for ourselves and in rejecting unwarranted foreign interference and prescription.

P.W. Botha, State President, Debates of the House of Assembly cols. 10-11 (Jan. 30, 1987) (joint sitting), in *South Africa's Foreign Policy and International Practice as Reflected in Speeches, Parliamentary Statements and Replies - 1987* (Marie E. Muller ed.), 13 S. Afr. Y.B. Int'l L. 202-03 (1987-88).

## V. STREET CHILDREN AND THE NEW SOUTH AFRICAN BILL OF RIGHTS

Recent events herald the arrival of a new era of respect for fundamental human rights and a new era of compassion for street children in South Africa.<sup>269</sup> In April 1994, South Africa held multi-racial democratic elections for the first time in its history.<sup>270</sup> And, shortly thereafter, a truly representative government commenced rule under a new Constitution embracing a sovereign and justiciable bill of rights.<sup>271</sup> Predictably, Nelson Mandela—freedom fighter and champion of human rights—was elected as the first President of the democratic Republic of South Africa.<sup>272</sup>

Since the inauguration of the new South African government, compassion for street children has been exhibited at the highest levels of leadership. In his first State of the Nation Address, President Mandela listed street children, and the underlying causes of the problem, among the most compelling concerns facing the new South Africa.<sup>273</sup> He proclaimed that the South African government "must combat such social pathologies as widespread poverty, the breakdown of family life, crime, alcohol and drug abuse, the abuse of children, women and the elderly and the painful reality of street children."<sup>274</sup>

Shortly thereafter, President Mandela demonstrated his personal commitment to the cause of street children by initiating a presidential trust fund to support programs assisting street children and children in prisons.<sup>275</sup> Moreover, he announced that he will donate \$45,000 per year of his Presidential salary to this fund.<sup>276</sup> Developments such as

269. See *supra* note 14 and accompanying text.

270. See *supra* note 12 and accompanying text.

271. See *supra* notes 15-17 and accompanying text.

272. See *supra* note 13 and accompanying text.

273. Nelson R. Mandela, State of the Nation Address (May 24, 1994), reprinted in *A Time to Build . . .* 7, 15 (South African Communication Serv. ed., 1994).

274. *Id.*

275. John Battersby, *A Day to Measure South Africa's Progress*, Christian Sci. Monitor, June 17, 1994, at 5. In his State of the Nation Address, President Mandela also expressed his concern for the plight of children detained in adult prisons. He stated that:

[T]he Government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders. I have therefore issued instructions to the departments concerned, as a matter of urgency, to work out the necessary guideline which will enable us to empty our prisons of children and to place them in suitable alternative care.

Mandela, *supra* note 273, at 15. On November 10, 1994, the Senate of the South African Parliament passed the Correctional Services Amendment Bill, which outlaws the detention of juveniles in prisons. *Prison Minister Calls for "Will" to House Children*, Citizen (S. Afr.), Nov. 11, 1994, at 1. The bill was previously passed by the National Assembly and now awaits the signature of the President. *Id.*

276. Battersby, *supra* note 275, at 5.

these evidence a new priority for street children on the national agenda and indicate that life will inevitably improve for street children in South Africa.

### A. *The Bill of Rights*

The content of the new South African bill of rights<sup>277</sup> is the strongest indication that the new South African government will assume its obligation under international law to respect fundamental human rights.<sup>278</sup> As such, it is also a favorable sign that life will improve for street children. In general, the bill of rights proclaims that all South Africans, regardless of race, enjoy a wide array of civil and political freedoms and makes these fundamental human rights "the supreme law of the Republic."<sup>279</sup> More specifically, the bill of rights recognizes that all children in South Africa enjoy the right to an adequate standard of living<sup>280</sup> and that all detainees, including children, enjoy the right to be free from arbitrary detention.<sup>281</sup>

To ensure respect for the enumerated fundamental rights, the Constitution grants individuals the right to apply to a competent court of law for relief whenever "an infringement of or threat to any right . . . is alleged."<sup>282</sup> Additionally, the Constitution maximizes access to justice for alleged rights violations by broadly defining persons with standing to seek relief.<sup>283</sup>

Under the new Constitution, provincial and local divisions of the Supreme Court of South Africa have subject matter jurisdiction over

277. Constitution of the Republic of South Africa, No. 200 of 1993, ch. 3.

278. *See supra* part II.

279. Constitution of the Republic of South Africa, No. 200 of 1993, § 4(1). Additionally, the Constitution asserts that the bill of rights "shall bind all legislative, executive and judicial organs of the state at all levels of government." *Id.* § 4(2).

280. *Id.* § 30. The bill of rights recognizes that all children possess the right to an adequate standard of living by asserting that "[e]very child shall have the right . . . to security, basic nutrition and basic health and social services." *Id.* § 30(1)(c).

281. *Id.* § 25. The bill of rights recognizes the right to be free from arbitrary detention by declaring that every person who is detained has the right to "challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful." *Id.* § 25(1)(e). Because the right to challenge a detention in court is meaningless if judicial proceedings are unfair, the bill of rights further asserts that any person accused of a crime has "the right to a fair trial." *Id.* § 25(3).

282. *Id.* § 7(4)(a).

283. *Id.* § 7(4)(b). Specifically, the Constitution provides that relief may be sought by:

- (i) a person acting in his or her own interest; (ii) an association acting in the interest of its members; (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name; (iv) a person acting as a member of or in the interest of a group or class of persons; or (v) a person acting in the public interest.

cases involving alleged fundamental rights violations.<sup>284</sup> Furthermore, the Constitution establishes a Constitutional Court to serve as the ultimate authority on "all matters relating to the interpretation, protection and enforcement" of the provisions of the Constitution, including the bill of rights.<sup>285</sup> As a result of these provisions, street children, and their advocates, are now able to seek relief in the courts for fundamental rights violations, including violations of the right to an adequate standard of living and the right to be free from arbitrary detention.

### B. *Compliance with the Bill of Rights*

Despite the existence of the new bill of rights and the election of new leadership in South Africa, a substantial risk remains that the government will continue to violate the human rights of street children. Under the new Constitution, both the Child Care Act and the Criminal Procedure Act remain valid<sup>286</sup> and continue to direct gov-

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284. *Id.* § 101(3)(a), (4). The Appellate Division of the Supreme Court of South Africa, however, has no jurisdiction to adjudicate matters implicating the Constitution. *Id.* § 101(5).

285. *Id.* § 98. Under the new Constitution, the Constitutional Court is granted jurisdiction over "any alleged violation or threat of violation of any fundamental right." *Id.* § 98(2)(a). Decisions of the Constitutional Court are binding on "all persons and all legislative, executive and judicial organs of state." *Id.* § 98(4). The Constitutional Court is comprised of 10 judges and a President of the Constitutional Court. *Id.* § 98(1). On October 12, 1994, the final six members of the Constitutional Court were chosen. *Government Names Constitutional Court Judges*, Beeld (S. Afr.), Oct. 13, 1994, at 1.

In interpreting the enumerated rights, the Constitution contemplates the use of international human rights law and consents to the use of foreign case law. Constitution of the Republic of South Africa, No. 200 of 1993, § 35(1). Specifically, the Constitution provides that:

In interpreting the provisions of [the bill of rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in [the bill of rights], and may have regard to comparable foreign case law.

*Id.* § 35 (1). Furthermore, the Constitution recognizes that South Africa is bound by principles of customary international law. *Id.* § 231(4) ("The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.").

286. Constitution of the Republic of South Africa, No. 200 of 1993, § 229 ("[A]ll laws which immediately before the commencement of this Constitution were in force . . . shall continue in force . . . subject to any repeal or amendment of such laws by a competent authority."). Although a variety of laws were explicitly invalidated under the terms of the Constitution, see *id.* sched. 7, all other laws were held to remain in force unless incapable of reasonable interpretation consistent with the Constitution. *Id.* § 232(3). The Constitution states:

No law shall be constitutionally invalid solely by reason of the fact that the wording used is *prima facie* capable of an interpretation which is inconsistent with the provisions of this Constitution, provided such a law is reasonably capable of a more restricted interpretation which is not inconsistent with any such provision, in which event such law shall be construed as having a meaning in accordance with the said more restrictive interpretation.



ernment treatment of children in spite of their failure to protect the human rights of street children during the apartheid years.<sup>287</sup> Furthermore, many of the same government agents are administering these laws because members of the apartheid civil service, including police officers and magistrates, retained their jobs under the new Constitution.<sup>288</sup> Consequently, to protect the human rights of street children and to make certain that government conduct complies with the bill of rights, the Child Care Act and the Criminal Procedure Act must be amended.

### 1. Proposed Amendments to the Child Care Act

To ensure that street children enjoy the right to an adequate standard of living, the Child Care Act must be amended to ease access to basic social services<sup>289</sup> and to increase the government's capacity to care for children.<sup>290</sup> The Act can achieve these objectives within the formal child welfare system<sup>291</sup> by compelling the government to remove all needy children from the streets and by directing the government to establish additional child care institutions. Alternatively, the Act can achieve these objectives outside of the formal child welfare system by requiring the government to support and expand the efforts of private voluntary organizations ("PVOs") serving street children.<sup>292</sup> The Child Care Act should be amended to expand the efforts of PVOs because they have proven to be more responsive than has the child welfare system to the special needs of street children.

First, the services of PVOs are more accessible to street children because they are provided in the urban communities where street children gather through outreach programs<sup>293</sup> and open-door shelter facilities.<sup>294</sup> The services of the child welfare system, on the contrary, are not readily available to street children because children must wait to be removed from the streets by an authorized government agent before receiving even temporary assistance.<sup>295</sup>

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*Id.*

287. See *supra* part IV.A-B.

288. Constitution of the Republic of South Africa, No. 200 of 1993, § 236(2); see also Scott-McLaughlin, *supra* note 14, at 2 ("The same judges that enforced the apartheid laws are now being asked to overturn those same laws.").

289. See *supra* notes 216-19 and accompanying text.

290. See *supra* note 228 and accompanying text.

291. See *supra* part III.A.

292. Currently, there are several PVOs operating in South Africa that offer residential care and other services to street children outside of the formal child welfare system. See *supra* notes 220-27 and accompanying text.

293. See, e.g., Levin, *supra* note 204, at 3-4 (describing the role of a community outreach worker in Cape Town).

294. See, e.g., Twilight Children, *supra* note 47, at 19-20 (describing an open-door residential facility in Johannesburg).

295. Child Care Act, No. 74 of 1983, §§ 11(2), 12(1), 13(2). Furthermore, to be eligible for a more permanent residential placement, a child must obtain a judicial determination that he is in need of care. *Id.* § 15(1). Consequently, by expanding the

Second, PVOs are more effective at rehabilitating street children because they tailor their services to the distinct needs and characteristics of the street child.<sup>296</sup> Because most street children have supported themselves for extended periods of time, they are very independent and value their liberty immensely. Consequently, street children seldom thrive in contained, highly-structured environments,<sup>297</sup> and they typically abscond from institutional facilities and return to the streets.<sup>298</sup> PVOs overcome this problem by gradually introducing street children to a structured environment on a voluntary basis. Through incentives, street children are encouraged to trade their independence for a more healthy and highly-structured environment. Ultimately, the progression leads to the rehabilitation of street children and their return to the community as productive members.<sup>299</sup>

PVOs begin the treatment program through outreach programs where workers provide essential services to children living on the streets.<sup>300</sup> The outreach programs are primarily aimed at keeping the children healthy, but they also provide opportunities for workers to inform the children about available residential services and encourage them to leave the streets on their own volition.<sup>301</sup> Children who decide to leave the streets are admitted to basic residential shelter facilities where they receive more extensive services<sup>302</sup> but must submit to

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efforts of PVOs, the Child Care Act will also relieve the South African police and the magistrate's courts of the enormous and wasteful burden of dealing unnecessarily with street children.

296. Lewis, *supra* note 226, at 13 (noting that street children are non-conformists in society and therefore require unconventional treatment strategies).

297. Schurink, *supra* note 1, at 126.

298. *Id.*

299. Mike Baizerman, *Street Kids: Notes for Designing a Program for Youth of and on the Streets*, Child Care Worker (S. Afr.), Nov. 1988, at 15 (presenting a standard five-level model implemented by many PVOs working with street children).

300. Through formal outreach programs, several PVOs offer basic services, including regular meals, access to showers, clean clothes and essential health services to children still living on the streets. *See, e.g.*, Twilight Children, *supra* note 47, at 19-20 (describing outreach services to street children in Johannesburg, including meals, access to shower and laundry facilities).

301. The most sophisticated outreach programs employ street educators who monitor the population of children living on the street. *See, e.g.*, Levin, *supra* note 204, at 3-4 (giving a personal account of a street educator's role and responsibilities). They keep records on individual children by logging their movements, their involvement with the police and their health status. *Id.* Most importantly, they befriend the children, advise them of available services and encourage them to enter a residential program. *Id.*

302. *See, e.g.*, Peter Pans, *supra* note 6, at 9 (describing the Claremont Shelter in Cape Town). These basic residential shelters are commonly known as "first-phase shelters." *Id.* In addition to shelter, children in residence usually receive food, clean clothing, access to alternative educational services, counseling, and recreational services. Shelter programs with ample resources employ social workers who attempt, if possible, to reunify the children with their families. *See, e.g.*, Twilight Children, *supra* note 47, at 20.

a limited range of rules.<sup>303</sup> Children who display steady commitment<sup>304</sup> to the treatment program over several months are generally offered permanent positions in long-term residential facilities,<sup>305</sup> but they must submit to a more comprehensive range of rules.<sup>306</sup> Finally, some PVOs offer employment and job training services to children who have advanced through the treatment process and are mature enough to return to the community.<sup>307</sup> In contrast to the standard institutional services of the child welfare system, the voluntary and progressive services of PVOs have proven to be infinitely more effective at rehabilitating street children.<sup>308</sup>

To mandate government support for the efforts of PVOs, the Child Care Act must be amended in two ways. First, the Act must be amended to permit the registration and operation of shelters for street children.<sup>309</sup> Second, the Act must be amended to include a funding scheme that will direct the South African government to provide support for PVOs. The resulting collaboration between the government and PVOs will enable the most effective and efficient delivery of services to street children. This collaboration, however, will only ensure that street children enjoy their right to an adequate standard of living

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303. During the basic shelter stage, limited rules are imposed upon the children including a curfew, scheduled meal times, mandatory chores, behavioral norms, etc. Stein, *supra* note 5, at 3. Because the children can leave at any time, their continued presence is a constant affirmation of their willingness to give up the independence of street life and to commit to rehabilitation.

304. Commitment to treatment is demonstrated through regular attendance at the shelter, adherence to the rules and regular participation in shelter activities. Twilight Children, *supra* note 47, at 19-20.

305. See, e.g., *Peter Pans*, *supra* note 6, at 9 (describing Patrick's House in Cape Town). These long-term residential shelters are commonly known as "second-phase homes." *Id.* Children at this phase usually receive additional services including personal living space, individualized case planning, full educational services, recreational programming and privileges such as pocket money. Stein, *supra* note 5, at 3.

306. Once a child has reached this stage, there is a strong incentive to obey the rules because they risk losing their place and being returned to the basic shelter.

307. Stein, *supra* note 5, at 4. Programs that provide employment services and job skills training to older children with the purpose of reintegrating them into the community are sometimes called "bridging programs." Twilight Children, *supra* note 47, at 19-20. The purpose of the bridging program is to prepare children who are approaching adulthood for an independent life in the community. *Id.*

308. Annually, PVOs are more efficient at providing services to street children. Through years of serving an overabundance of street children with a limited quantity of funding, many PVOs in South Africa have learned to conserve their resources by trimming unnecessary expenditures. Annette Cockburn, *Services for Street Children*, Child Care Worker (S. Afr.), Jan. 13, 1993, at 8 (describing the relative efficiency of shelter services for street children in South Africa which limit expenditures on facilities, personnel and therapy). On the contrary, due to the inequities of apartheid, the child welfare system is accustomed to providing services at a standard that cannot be sustained if the government is to extend services to street children. Keen, *supra* note 198, at 8 (noting that the Child Care Act presents a "first world solution" to a third world problem).

309. The apartheid government actively opposed the registration of shelters for street children. See *supra* notes 220-27 and accompanying text.

if the government provides enough support to meet their needs for food, clothing, shelter and health care.<sup>310</sup> Adequate funding will put government conduct into compliance with the new bill of rights,<sup>311</sup> and it will ensure that South Africa meets its obligations under international human rights law.<sup>312</sup>

## 2. Proposed Amendment to the Criminal Procedure Act

To ensure that street children remain free from arbitrary detention, the Criminal Procedure Act must protect them from wrongful criminal convictions by guaranteeing that they receive fair trials. In light of the biased nature of juvenile criminal proceedings during the apartheid years,<sup>313</sup> fair trials can only be guaranteed if juvenile defendants receive legal assistance. Accordingly, the Criminal Procedure Act must be amended to require the South African government to provide free legal assistance to juvenile defendants who cannot afford private counsel.<sup>314</sup> This will place government treatment of children accused of crimes into compliance with the new bill of rights,<sup>315</sup> and it will ensure that South Africa meets its obligations under international human rights law.<sup>316</sup>

The right to legal assistance will offset many of the disadvantages that street children suffered as the subject of criminal prosecutions during the apartheid years. Legal assistance will compensate for their lack of education and maturity by helping them to formulate and articulate their defenses. Furthermore, legal assistance will ensure that magistrates provide children with the procedural protections that they are entitled to under the law.<sup>317</sup>

The right to legal assistance for children, however, will also create several problems. It will place an enormous burden on the current

310. PVOs will certainly receive some additional funding from the trust fund for children established by President Mandela. *See supra* notes 275-76 and accompanying text. It is not clear, however, how much support this fund can provide to PVOs serving street children. Accordingly, the South African government must establish a permanent funding scheme to ensure that PVOs can serve all of the children that seek services.

311. *See supra* note 280 and accompanying text.

312. *See supra* text accompanying note 149.

313. *See supra* part IV.B.

314. An amendment to the Criminal Procedure Act will not be necessary if the Constitutional Court recognizes that children accused of crimes possess a right to counsel. The bill of rights provides that "where substantial injustice would otherwise result" detainees and persons accused of crimes have the right "to be provided with the services of a legal practitioner provided by the state." Constitution of the Republic of South Africa, No. 200 of 1993, § 25(1)(c), (3)(e). Although "substantial injustice" is not defined by the Constitution, the Constitutional Court may conclude that "substantial injustice" is at risk when any child faces criminal charges without legal assistance.

315. *See supra* note 281 and accompanying text.

316. *See supra* text accompanying note 150.

317. *See supra* part III.B.

Legal Aid system in South Africa and will necessitate a vast increase in financial support from the South African government.<sup>318</sup> Furthermore, expansion of the Legal Aid system will require a dramatic increase in the number of attorneys that are qualified to practice in South Africa.<sup>319</sup>

#### CONCLUSION

At present, there are many reasons to be optimistic for the future of street children in South Africa. The adoption of a sovereign and justiciable bill of rights, in particular, signals a new era of respect for fundamental human rights in South Africa and indicates that conditions for street children will inevitably improve. Under the new Constitution, however, the same laws—the Child Care Act and the Criminal Procedure Act—still govern the treatment of street children. These laws must be amended to guarantee that their administration is consistent with the fundamental rights of street children. To ensure that street children enjoy the right to an adequate standard of living, the Child Care Act should be amended to mandate government support for private voluntary organizations. To ensure that street children enjoy the right to be free from arbitrary detention, the Criminal Procedure Act should be amended to provide legal assistance to all children accused of crimes.

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318. See *supra* note 240 and accompanying text.

319. Currently, there are fewer than 8,500 attorneys registered to practice in South Africa for a population of approximately 40 million people. Steven Keeva, *At the Bar: Opening Closed Doors*, ABA J., Apr. 1994, at 53. Fewer than 1,200 attorneys are non-white. *Id.* There are so few attorneys because the legal profession is highly regulated in South Africa. To qualify as an attorney, a student must earn an advanced legal degree, requiring, at a minimum, five-years of study at the university level. Attorneys Act, No. 53 of 1979, § 2(a) (S. Afr.). Then, the student must obtain and complete a two year clerkship supervised by an experienced practicing attorney. *Id.* §§ 2-3. The difficulties of acquiring clerkships have presented significant barriers to students seeking to enter the profession, particularly students who are not white. Keeva, *supra*, at 53. Recently, regulations have been relaxed to permit practicing attorneys in law clinics to supervise clerkships. Attorneys Act § 3(f). This, however, will only modestly increase the number of attorneys available to represent juvenile criminal defendants.

