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Implementing the U.N. Convention on the Rights of the Child

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Implementing the U.N. Convention on the Rights of the Child: Children's Rights Under the 1996 South African Constitution

ABSTRACT

The United Nations Convention on the Rights of the Child, adopted by the General Assembly on November 20, 1989, articulates a comprehensive scheme of rights specifically tailored to children. International recognition of children's rights is only the first step, however. The effectiveness of the Convention on the Rights of the Child depends on the signatories' efforts to comply with its provisions and to incorporate children's rights into existing schemes of established rights. The 1996 Constitution of the Republic of South Africa includes specific rights for children resembling those articulated in the Convention on the Rights of the Child. Although South Africa has incorporated children's rights into its Constitution, there are still substantial numbers of children in South Africa who do not enjoy the protection that the Convention on the Rights of the Child demands. In this Note, the Author examines the experience of South Africa to illustrate that the constitutionalization of children's rights does not alone ensure that the rights of the Convention are accessible to children. The Author addresses the barriers to South Africa's compliance with the Convention on the Rights of the Child and offers possible solutions to them. The Author's conclusion is that implementation of the Convention on the Rights of the Child requires legislative reform and increased participation of community-based organizations, as well as constitutionalization of children's rights.

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I. INTRODUCTION

On November 20, 1989, the United Nations General Assembly adopted, without a vote, the Convention on the Rights of the Child (hereinafter, Children's Convention).¹ The Children's Convention articulates a scheme of rights specifically tailored to children and is considered "the most rapidly and universally accepted human rights document in the history of international law."² By its tenth anniversary every nation had adopted the Children's Convention with the exception of the United States and Somalia.³ The true

1. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) [hereinafter Children's Convention].

2. Barbara Bennett Woodhouse, *Recognizing Children's Rights: Lessons from South Africa*, 26-SPG HUM. RTS. 15, 15 (1999) [hereinafter Woodhouse, *Recognizing Children's Rights*].

3. Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 1 (1999) [hereinafter Woodhouse, *Constitutionalization*]. As of November 14, 2003, 192 nations had ratified the Convention on the Rights of the Child. Office of the High Commissioner for Human Rights, Status of Ratification of the Convention on

effectiveness of the Children's Convention, however, ultimately depends on the signatories' willingness to comply with its provisions and to incorporate children's rights into their constitutions and laws.⁴

Part II of this Note offers a brief historical background on the development of the international movement for children's rights and the protection children's rights enjoyed before the adoption of the Children's Convention. Part III explores the origins of the Children's Convention, describing the drafting process, the substantive rights it protects, and its mechanism for implementation. Part IV of this Note examines South Africa's incorporation of children's rights into its Constitution and national laws, and offers reasons why South Africa's constitutionalization of children's rights fails to satisfy the requirements of the Children's Convention. Finally, Part V evaluates the barriers to South Africa's compliance with the Children's Convention, but acknowledges the positive steps taken by South Africa to protect children's rights.

II. THE DEVELOPMENT OF CHILDREN'S RIGHTS: THE ROOTS OF THE CHILDREN'S CONVENTION

The concept that a child is a subject of fundamental rights and liberties is relatively new.⁵ Until the mid-nineteenth century, children were regarded as chattels and were commonly sold into slavery, shipped off to sea, or apprenticed at an early age by their parents or guardians.⁶ The treatment of children improved as the status of children evolved from being considered as chattels to being valued as persons.⁷ In the nineteenth century, as part of a general humanitarian reform movement, there were appreciable changes in the treatment of children, including the expansion of compulsory public school education, the establishment of orphanages and schools for the handicapped, and the removal of children from adult prisons.⁸ The first international document recognizing the special status of

the Rights of the Child, available at <http://www.ohchr.org/english/law/crc-ratify.htm> (last visited Feb. 7, 2005).

4. Susan O'Rourke Von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 590 (1995).

5. See, e.g., Cynthia P. Cohen, *The Human Rights of Children*, 12 CAP. U. L. REV. 369, 370 (1983) [hereinafter Cohen, *Human Rights*]; Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 251, 256-57 (1996).

6. Cynthia P. Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 9 (1993) [hereinafter Cohen, *Developing Jurisprudence*].

7. Von Struensee, *supra* note 4, at 589.

8. Cohen, *Human Rights*, *supra* note 5, at 370.

children was the Geneva Declaration of the Rights of the Child (hereinafter, Declaration of Geneva),⁹ adopted by the Fifth Assembly of the League of Nations in 1924. The Declaration of Geneva was drafted and approved by Save the Children International Union (S.C.I.U.), a nongovernmental organization established by Eglantyne Jebb to provide relief to children following World War I.¹⁰ The Declaration of Geneva laid the foundation for the international movement for children's rights, and the roots of the Children's Convention can be traced to the Declaration of Geneva.¹¹

A. Declaration of Geneva

Although there were a few early treaties designed to prohibit child labor and trafficking, the Declaration of Geneva was the first document that directed international attention to children's rights.¹² Adopted in 1924 by the Fifth Assembly of the League of Nations, the Declaration of Geneva was premised on the belief that "mankind owes to the child the best it has to give."¹³ Accordingly, the Declaration of Geneva recognized five mandates for the care and protection of all children "beyond and above all considerations of race, nationality, or creed."¹⁴ These mandates protected children's most basic material needs and recognized the essential conditions for

9. Declaration of the Rights of the Child, LEAGUE OF NATIONS O.J. Spec. Supp. 23 (1924) [hereinafter Declaration of Geneva].

10. Cohen, *Human Rights*, *supra* note 5, at 371; see also Timothy J. Fitzgibbon, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation*, 20 LOY. L.A. INT'L & COMP. L. J. 325, 328 (1998).

11. See Cynthia P. Cohen, *Introductory Note: United Nations Convention on the Rights of the Child*, 28 I.L.M. 1448, 1448 (1989) [hereinafter, Cohen, *Introductory Note*].

12. *Id.*

13. Declaration of Geneva, *supra* note 9, at 177.

14. *Id.* The Declaration of Geneva provides:

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

Id.

fostering normal child development.¹⁵ In addition, the Declaration of Geneva recognized affirmative children's rights, including the child's right to be "put in a position to earn a livelihood" and to be "brought up so that it will devote its talents to the service of its fellow men."¹⁶

Although it represented an important step in the international movement for children's rights, the Declaration of Geneva had several major limitations. First, the Declaration of Geneva was concerned principally with children's "care and protection" rights and failed to address civil and political rights.¹⁷ Second, the term "right" did not appear in the text.¹⁸ It focused upon "acts which must be done to or for the child," providing that the child "must be 'fed,' 'nursed,' 'reclaimed,' 'sheltered,' and 'succored.'"¹⁹ The Declaration of Geneva was "silent as to what the child is allowed to do."²⁰ Finally, the Declaration of Geneva failed to provide an implementation mechanism²¹ because it was a document of a "moral and political nature" and was not considered legally binding.²²

B. 1959 Declaration of the Rights of the Child

After World War II, the United Nations asked the International Union for Child Welfare to assist in the drafting of a newly revised Declaration of the Rights of the Child.²³ On November 20, 1959, the United Nations gave official recognition to children's rights by adopting the ten article Declaration of the Rights of the Child (hereinafter, 1959 Declaration).²⁴ The 1959 Declaration was inspired by the Declaration of Geneva and expanded on the mandates contained therein.²⁵ Like the Declaration of Geneva, the 1959 Declaration provided that the child should be the first to receive relief and protection;²⁶ the child should be protected from exploitation;²⁷ and the child must be given the means to develop in a healthy and

15. Fitzgibbon, *supra* note 10, at 329.

16. Declaration of Geneva, *supra* note 9, at 177; see also Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 210 (1994).

17. Cohen, *Developing Jurisprudence*, *supra* note 6, at 9.

18. *Id.* at 10; see also Fitzgibbon, *supra* note 10, at 329.

19. Cohen, *Developing Jurisprudence*, *supra* note 6, at 9-10.

20. *Id.* at 9.

21. Fitzgibbon, *supra* note 10, at 329.

22. Lopatka, *supra* note 5, at 257.

23. Cohen, *Human Rights*, *supra* note 5, at 372.

24. Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959) [hereinafter 1959 Declaration].

25. Cohen, *Human Rights*, *supra* note 5, at 372.

26. 1959 Declaration, *supra* note 24, at princ. 8.

27. *Id.* at princ. 9.

normal manner.²⁸ The 1959 Declaration embraced the proposition of its predecessor, proclaiming in the preamble that "mankind owes to the child the best it has to give."²⁹ It further proceeded on the proposition that the child should "have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms . . . set forth."³⁰ With these propositions in mind, the 1959 Declaration commanded "parents, . . . men and women as individuals, and . . . voluntary organizations, local authorities and national Governments" to recognize the rights included therein and to strive for their observance.³¹ Whereas the child's welfare was historically considered the responsibility of the family, the 1959 Declaration thereby recognized that the welfare of the child was the concern of the community and the State.³²

The 1959 Declaration embodied one international response to the dislocation, economic instability, discrimination, and maltreatment suffered by children during and after World War II.³³ Accordingly, Principle 1 of the 1959 Declaration mandated that every child, "without distinction or discrimination" of any type, was entitled to enjoy the rights set forth therein.³⁴ Similarly, Principle 10 protected the child from "practices which may foster racial, religious, and any other form of discrimination."³⁵ The 1959 Declaration also reflected international concern with the problem of child refugees, and Principle 3 confronted this problem by mandating that every child "shall be entitled from his birth to a name and nationality."³⁶ The 1959 Declaration's prohibition against discrimination and recognition of the child's right to a name and nationality from birth were the first steps in the international children's rights movement toward recognizing individual personality rights.³⁷

The 1959 Declaration also encompassed the achievements of the general humanitarian reform movement of the nineteenth century. Included in the 1959 Declaration were "principles" providing for special education, treatment, and care for the handicapped;³⁸

28. *Id.* at princ. 2.

29. *Id.* at pmbl.

30. *Id.*

31. *Id.*

32. *See Lopatka, supra* note 5, at 256.

33. *Id.*

34. 1959 Declaration, *supra* note 24, at princ. 1.

35. *Id.* at princ. 10.

36. *Id.* at princ. 3.

37. Cohen, *Developing Jurisprudence, supra* note 6, at 10. Cohen defines "individual personality rights" as those rights that "support the child's right to human dignity." *Id.* at 5.

38. 1959 Declaration, *supra* note 24, at princ. 5.

compulsory public elementary education;³⁹ and restrictions on child labor.⁴⁰ Notably, it made no mention of the protection of delinquents by ensuring their separation from adult prisoners or of the criminal prosecution of juveniles,⁴¹ concerns that had been addressed by most Western legal systems by the beginning of the twentieth century.⁴²

Although the 1959 Declaration either directly or indirectly included virtually all of the rights set forth in the Declaration of Geneva,⁴³ there were important differences between the 1959 Declaration and its predecessor. First, the term "right" actually appeared twice in the text of the 1959 Declaration,⁴⁴ specifically in Principle 1 (prohibiting any type of discriminatory distinctions among children)⁴⁵ and in Principle 4 (giving the child the "right to adequate nutrition, housing, recreation, and medical services").⁴⁶ Moreover, the 1959 Declaration used the term "entitled," which is arguably analogous to the term "right," in Principles 3, 4, and 7, addressing issues of name and nationality, health, and education.⁴⁷ Second, the 1959 Declaration presumed that nations would enact laws that protect the child's welfare, by commanding "national governments" to protect the rights included therein "by legislative and other measures."⁴⁸ Third, unlike the Declaration of Geneva, the 1959 Declaration included "principles" devoted to the parent-child relationship that expressed a preference for parental care and emphasized that the responsibility for the child's education and guidance lies with the parents.⁴⁹ Finally, whereas the Declaration of Geneva used the language "[t]he child must be given,"⁵⁰ the 1959 Declaration stated that "[t]he child shall enjoy"⁵¹ the rights set forth therein. The language used by the 1959 Declaration reflects a change in the treatment of children from being viewed as objects of international law to being perceived as subjects of international law.⁵²

39. *Id.* at princ. 7.

40. *Id.* at princ. 9.

41. Cohen, *Human Rights*, *supra* note 5, at 372.

42. *Id.* at 370.

43. *Id.* at 372.

44. Cohen, *Developing Jurisprudence*, *supra* note 6, at 10; Levensque, *supra* note 16, at 211.

45. 1959 Declaration, *supra* note 24, at princ. 1.

46. *Id.* at princ. 4.

47. *See id.* at princs. 3-4, 7; *see also* Cohen, *Developing Jurisprudence*, *supra* note 6, at 10.

48. 1959 Declaration, *supra* note 24, at pmb1.

49. *Id.* at princs. 6-7.

50. Declaration of Geneva, *supra* note 9, at 177.

51. 1959 Declaration, *supra* note 24.

52. Fitzgibbon, *supra* note 10, at 332.

Despite its important additions to the international children's rights movement, the 1959 Declaration retained many of the limitations that plagued the Declaration of Geneva. First, like the Declaration of Geneva, the 1959 Declaration focuses almost entirely on children's "care and protection" rights.⁵³ Second, although the term "right" is used in the 1959 Declaration, its ten articles overwhelmingly refer to a "principle."⁵⁴ Finally, neither the Declaration of Geneva nor the 1959 Declaration was a legally binding international agreement protecting the rights of the child.⁵⁵

C. Other United Nations Human Rights Instruments

The first legally binding international agreements containing explicit protections of children's rights were adopted by the United Nations in 1966.⁵⁶ Two human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), incorporated most of the rights set forth in the Universal Declaration of Human Rights.⁵⁷ Before the adoption of the Children's Convention, children's rights advocates brought claims on behalf of juveniles under the ICCPR and the ICESCR.⁵⁸

The ICCPR, signed by more than 130 countries, protects individuals from slavery or other forced indentured servitude, torture, and inhumane punishment.⁵⁹ The ICCPR also encompasses the preservation and protection of life by providing that "[e]very human being has the inherent right to life. This right shall be protected by law."⁶⁰ Article 24 of the ICCPR adopts special measures designed to protect children's rights.⁶¹ The ICCPR provides that "[e]very child shall have, without any discrimination as to race,

53. Cohen, *Developing Jurisprudence*, *supra* note 6, at 10.

54. Fitzgibbon, *supra* note 10, at 332.

55. Lopatka, *supra* note 5, at 257.

56. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

57. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Supp. No. 127, at 71, U.N. Doc. A/810 (1948).

58. Christine Alice Corcos, *The Child in International Law: A Pathfinder and Selected Bibliography*, 23 CASE W. RES. J. INT'L L. 171, 172 (1991).

59. Rochelle D. Jackson, *The War Over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223, 241 (1999).

60. ICCPR, *supra* note 56, at art. 6.

61. Office of the High Commissioner for Human Rights, Rights of the Child (Art. 24): CCPR General Comment 17 (July 4, 1989), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument) (last visited Feb. 7, 2005) [hereinafter CCPR General Comment].

colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”⁶² The child also has the right to a name and a nationality.⁶³ The “General Comment” provided by the Office of the High Commissioner for Human Rights suggests that children also benefit from all of the other civil rights enunciated in the Covenant.⁶⁴ Article 2 of the ICCPR states that the rights recognized in the covenant apply “to all individuals . . . without distinction of any kind,” and children are among the “individuals” to whom the covenant applies.⁶⁵

Unlike the ICCPR, which is primarily concerned with preventing unreasonable governmental interference, the ICESCR places the burden on the state to ensure economic, social, and cultural rights to individual citizens.⁶⁶ Under the ICESCR, the state parties are obligated to provide benefits such as education and social security to its citizens.⁶⁷ The ICESCR situates children’s rights within the broad context of family rights.⁶⁸ Article 10 recognizes that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.”⁶⁹ It also mandates that children should be “protected from economic and social exploitation.”⁷⁰ To satisfy this mandate, the ICESCR directs national governments to enact legislation restricting child labor.⁷¹ The term “child” or “children” also appears in articles addressing issues of child health,⁷² the parents’ right to educate their children in accordance with their beliefs,⁷³ the family unit and dependent children,⁷⁴ and maternal care before and after childbirth.⁷⁵

The ICCPR and the ICESCR still serve as alternative mechanisms for the recognition and enforcement of children’s rights.⁷⁶ Critics of the Children’s Convention insist that it does not provide any rights that are not already guaranteed to children under

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62. ICCPR, *supra* note 56, at art. 24(1).
 63. *Id.* at art. 24(2)-(3).
 64. CCPR General Comment, *supra* note 61.
 65. ICCPR, *supra* note 56, at art. 2.
 66. Jackson, *supra* note 59, at 241.
 67. *Id.*
 68. Lopatka, *supra* note 5, at 257.
 69. ICESCR, *supra* note 56, at art. 10(3).
 70. *Id.*
 71. *Id.*
 72. *Id.* at art. 12(2)(a).
 73. *Id.* at art. 13(3).
 74. *Id.* at art. 10(1).
 75. *Id.* at art. 10(2).
 76. Corcos, *supra* note 58, at 172.

the ICCPR and the ICESCR.⁷⁷ Although these two human rights covenants are major landmarks in international law, they do not provide the comprehensive definition of children's rights contained in the Children's Convention.⁷⁸ The Children's Convention encompasses the principles expressed in the ICCPR and the ICESCR, but the rights recognized in the Children's Convention are incomparably more expansive.⁷⁹

III. CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations General Assembly unanimously adopted the Children's Convention on November 20, 1989,⁸⁰ thereby realizing a sixty-five year push for international recognition of the rights and liberties of the child.⁸¹ The Children's Convention, composed of a preamble and fifty-four articles, protects the child's civil, political, economic, social, and cultural rights.⁸² The Children's Convention does not place children's rights within a hierarchical framework, but rather recognizes the child as a person with his or her own individuality and dignity.⁸³ As such, the Children's Convention assumes that the child is a subject of fundamental rights and basic liberties.⁸⁴

A. *Origins and Background*

To commemorate the twentieth anniversary of the 1959 Declaration of the Rights of the Child, the United Nations proclaimed 1979 the Year of the International Child.⁸⁵ As part of this celebration, the Polish government proposed that a legally binding international treaty be drafted that would incorporate the declared rights of children.⁸⁶ In order to produce a completed convention for submission to the General Assembly during the Year of the International Child, Poland submitted a draft convention to the Commission on Human Rights in 1978.⁸⁷ With the exception of a few minor changes, the draft

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77. Cohen, *Human Rights*, *supra* note 5, at 376.
 78. *Id.* at 385.
 79. Lopatka, *supra* note 5, at 258.
 80. Children's Convention, *supra* note 1.
 81. Cohen, *Introductory Note*, *supra* note 11, at 1448.
 82. *Id.*; see Lopatka, *supra* note 5, at 252.
 83. Jackson, *supra* note 59, at 225.
 84. Lopatka, *supra* note 5, at 254.
 85. Cohen, *supra* note 11, at 1448.
 86. *Id.*
 87. Cohen, *Human Rights*, *supra* note 5, at 373.

convention was virtually identical to the 1959 Declaration.⁸⁸ Besides minor changes in the wording of the preamble, the only additions to the newly proposed convention were nine articles providing procedures for ratification and implementation.⁸⁹ The draft convention failed to outline the duties and responsibilities of the signatory nations and did not define the age group to be subsumed under the term "child."⁹⁰ Moreover, since the draft convention was essentially a replica of the 1959 Declaration, it focused almost entirely on the "care and protection" rights of the child.⁹¹ This first draft convention was rejected by the Commission on Human Rights in favor of drafting a treaty with more legally binding language.⁹²

Recognizing that the convention should give consideration to issues such as apartheid, illegitimacy, abortion, and family reunification, the Commission on Human Rights established a Working Group in 1979 to draft the Children's Convention.⁹³ The Working Group met each year from 1979 to 1987 for one week just prior to the annual session of the Commission.⁹⁴ The Working Group, in the hope that the Children's Convention might be completed in time for the thirtieth anniversary of the 1959 Declaration, held two meetings of two weeks each in 1988.⁹⁵ The first two-week meeting in 1988 was devoted to completing the first draft of the Children's Convention, known as the "first reading."⁹⁶ The Working Group then requested that the Secretary-General conduct a "technical review" of the Convention and provide comments and recommendations for textual alterations.⁹⁷ The second two-week meeting in 1988 was the reviewing process known as the "second reading," during which the Working Group made extensive alterations to the "first reading" text.⁹⁸ In 1989, after meeting only briefly, the Working Group adopted its final report and presented it to the Commission on Human Rights for consideration and transmission to the General Assembly.⁹⁹

88. *Id.*

89. *Id.*

90. *Id.*

91. Cohen, *Developing Jurisprudence*, *supra* note 6, at 11.

92. *Id.*

93. Cohen, *Human Rights*, *supra* note 5, at 373; *see* Cohen, *Introductory Note*, *supra* note 11, at 1448; Jackson, *supra* note 59, at 235.

94. Cohen, *Introductory Note*, *supra* note 11, at 1448.

95. Cohen, *Developing Jurisprudence*, *supra* note 6, at 12-13.

96. *Id.* at 13.

97. Cohen, *Introductory Note*, *supra* note 11, at 1449.

98. Cohen, *Developing Jurisprudence*, *supra* note 6, at 13.

99. *Id.*

B. *The Drafting Process*

The recognition of children's rights contained in the Children's Convention is the result of a lengthy drafting process that began with the establishment of the Working Group in 1979. The first Working Group met for five days during the Commission on Human Rights' 1979 Session, where it proposed several new paragraphs for the preamble and considered revisions of the wording and content of several articles in the first draft convention.¹⁰⁰ In the fall of 1979, Poland submitted a second draft convention, which the Working Group used as the framework for its deliberations from 1979 to 1988.¹⁰¹

The second Polish draft convention differed significantly from the draft convention submitted in 1978. The second draft convention was more extensive and included standards for parent-child relations, mass media, recreation, foster care and adoption, and juvenile justice, in addition to the usual guarantees of health, education, and protection against discrimination.¹⁰² Unlike the first draft convention, the second draft convention explicitly identified a definite age group to be covered by the word "child."¹⁰³ Article 1 of the second draft convention provided that a "child" is a human being until the age of eighteen years unless majority is attained earlier under the law applicable to the child.¹⁰⁴ The second draft convention also explicitly outlined the duties and responsibilities of the signatory nations to implement rights enumerated in the convention.¹⁰⁵ Importantly, Article 7 of the second draft convention recognized that the child has a right to have an opinion and a right to be heard in matters affecting the child.¹⁰⁶ This Article represented an important step toward recognizing the child's individual personality rights.¹⁰⁷

During its annual pre-session work week, the Working Group considered alterations and amendments to the second draft convention.¹⁰⁸ Four highly controversial issues emerged during the process of reinterpreting and expanding the second draft

100. Cohen, *Human Rights*, *supra* note 5, at 373.

101. Cohen, *Developing Jurisprudence*, *supra* note 6, at 13.

102. *Id.* at 11-12.

103. Cohen, *Human Rights*, *supra* note 5, at 374.

104. *Id.*

105. *Id.*

106. Cohen, *Developing Jurisprudence*, *supra* note 6, at 12.

107. *Id.*; see also Jackson, *supra* note 59, at 242 (arguing that the second Polish draft convention "played an important role in establishing some of the civil and political rights of children").

108. Cohen, *Human Rights*, *supra* note 5, at 374.

convention.¹⁰⁹ These "hot topics" included the rights of the unborn child, freedom of religion, the right to foster care and adoption, and the minimum age at which children may participate in armed combat.¹¹⁰ The controversy over the rights of the unborn child was resolved by the compromise language of Article 1,¹¹¹ which defines a child as a "human being" and leaves it to the state parties to give meaning to the words through national legislation.¹¹² The preamble of the Children's Convention also recognizes the need for "appropriate legal protection, before as well as after birth."¹¹³ Despite objections to freedom of religion and to the right to adoption and foster care by the Islamic delegations, the Working Group ultimately included articles guaranteeing freedom of religion and the right to adoption and foster care in the final text.¹¹⁴ Regarding the minimum age for participation in armed combat, the majority of the Working Group supported raising the minimum age from fifteen to eighteen years.¹¹⁵ But the United States prevented consensus from being attained in support of a higher minimum age,¹¹⁶ and therefore the final text defines the minimum age at which a child may participate in armed combat as fifteen years.¹¹⁷

Beginning in 1983, the second draft convention's text was subjected to the review of a group of about thirty concerned nongovernmental organizations, which formed the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child (hereinafter, NGO Group).¹¹⁸ The NGO Group met biannually to review the text of each of the articles that had been proposed or adopted by the Working Group and either to support the text or recommend modifications.¹¹⁹ In addition, the NGO Group members were free to attend and participate in the sessions of the Working Group.¹²⁰ The NGOs commented during the discussion of an article and supplied governmental delegations with information and constructive suggestions, but the NGOs were not permitted to vote.¹²¹ The NGOs could not propose new articles directly, and when the NGO

109. Cohen, *Introductory Note*, *supra* note 11, at 1450.

110. *Id.*

111. *Id.*

112. Children's Convention, *supra* note 1, at art. 1.

113. *Id.* at pmb1.

114. *Id.* at arts. 14, 20-21; Cohen, *Introductory Note*, *supra* note 11, at 1451.

115. Cohen, *Introductory Note*, *supra* note 11, at 1451.

116. *Id.*

117. Children's Convention, *supra* note 1, at art. 38(3).

118. Cohen, *Developing Jurisprudence*, *supra* note 6, at 16; Cohen, *Introductory Note*, *supra* note 11, at 1449.

119. Cohen, *Developing Jurisprudence*, *supra* note 6, at 16.

120. *Id.* at 17-18.

121. *Id.*

Group wanted to introduce an entirely new article, it was necessary to find a governmental sponsor.¹²² Because the NGO Group's proposed articles were both carefully drafted and politically neutral, they were often used by the delegations as a tool for defusing political tension between the East and the West.¹²³ Among the rights included in the Children's Convention that can be directly traced to the proposals of the NGO Group are protection against "traditional practices" (female circumcision),¹²⁴ protection against sexual exploitation,¹²⁵ protection of the rights of indigenous children,¹²⁶ standards for the administration of school discipline,¹²⁷ and rehabilitation for victims of abuse and exploitation.¹²⁸

C. Substantive Rights

In its final form, the Children's Convention is "the most detailed and comprehensive (in terms of rights recognized, as opposed to the categories of persons covered) of all the existing international human rights instruments."¹²⁹ The Children's Convention is the first binding international treaty to incorporate civil, political, economic, social, and cultural rights into one treaty, placing equal emphasis on all these rights.¹³⁰ Moreover, the Children's Convention includes new rights never before protected in an international human rights treaty.¹³¹ Of these, the most notable are those that protect the child's right to an identity, prohibit female circumcision, regulate the administration of juvenile justice, and establish a framework for foster care and adoption.¹³² These and other substantive rights are enumerated in Part I of the Children's Convention.¹³³

The Children's Convention was adopted by the General Assembly with the intent of protecting the civil-political rights and economic-social-cultural rights of all children.¹³⁴ The Children's

122. *Id.* at 17.

123. *Id.*; Cohen, *Introductory Note*, *supra* note 11, at 1449.

124. Children's Convention, *supra* note 1, at art. 24(3).

125. *Id.* at arts. 34-36.

126. *Id.* at arts. 17(d), 29(d), 30.

127. *Id.* at art. 28(2).

128. *Id.* at art. 29.

129. Jackson, *supra* note 59, at 237.

130. *Id.* at 236; Cohen, *Developing Jurisprudence*, *supra* note 6, at 18.

131. Cohen, *Introductory Note*, *supra* note 11, at 1451.

132. Cohen, *Developing Jurisprudence*, *supra* note 6, at n.95; see Children's Convention, *supra* note 1, at arts. 8, 24(3), 40, 28(2), 20, 21.

133. See Children's Convention, *supra* note 1, at arts. 1-41. The Children's Convention includes a Preamble and three Parts: Part I defines the Convention's substantive scope; Part II is devoted to implementation and monitoring procedures; and Part III covers final clauses. Jackson, *supra* note 59, at 237.

134. Lopatka, *supra* note 5, at 254.

Convention, however, recognizes that there are children living in exceptionally difficult conditions in all states in the world and stipulates additional rights for these children.¹³⁵ As such, it ensures additional rights for orphans, refugee children, disabled children, and children of minority and indigenous groups.¹³⁶ The Children's Convention also includes provisions to protect children living within territories of armed conflict.¹³⁷

Articles 2 and 3 of the Children's Convention establish the overarching principles that guide the interpretation of all the other substantive provisions.¹³⁸ Article 3 introduces the principle of the "best interests of the child as a primary consideration" in all actions concerning the child.¹³⁹ The Convention reiterates this principle numerous times, and implies that it reflects the standard with which compliance with the requirements of the Convention will be measured.¹⁴⁰ This principle, however, does not guarantee that a child's best interests will always prevail.¹⁴¹ It only guarantees that the child's interests will be given due weight in every circumstance and decision affecting the child.¹⁴² A second general principle, enumerated in Article 2, obligates the Convention's signatories to "respect and ensure" the rights of each child without discrimination, including discrimination based on gender.¹⁴³ This principle requires the State both to refrain from any action that would have a discriminatory effect on children and to protect children from all forms of discrimination.¹⁴⁴ This means that the State is obligated to take necessary measures to provide all children with their substantive rights under the Children's Convention.¹⁴⁵

The Children's Convention recognizes four categories of substantive rights: survival, development, protection, and participation rights of children.¹⁴⁶ First, the Children's Convention ensures the child's right to survival and to the highest attainable standard of living.¹⁴⁷ To this end, the Convention recognizes "the right of every child to a standard of living adequate for the child's

135. *Id.*

136. Von Struensee, *supra* note 4, at 594-95.

137. Lopatka, *supra* note 5, at 254.

138. Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 143 (1998).

139. Children's Convention, *supra* note 1, at art. 3.

140. Cohen, *Developing Jurisprudence*, *supra* note 6, at 19.

141. Rios-Kohn, *supra* note 138, at 144.

142. *Id.*

143. Children's Convention, *supra* note 1, at art. 2.

144. Rios-Kohn, *supra* note 138, at 146.

145. *Id.* at 145-46.

146. Von Struensee, *supra* note 4, at 594.

147. *Id.* at 597.

physical, mental, spiritual, moral, and social development.”¹⁴⁸ The Convention places primary emphasis on access to primary and preventative health care and provision of adequate nutritious foods and clean drinking water.¹⁴⁹ Second, Article 6, in addition to recognizing the child’s right to survival, ensures the child’s right to development.¹⁵⁰ To ensure the development of the child, the Children’s Convention recognizes the child’s right to education;¹⁵¹ to rest and leisure;¹⁵² and to enjoy his or her own culture, religion, and language.¹⁵³ Third, the protection rights included in the Children’s Convention guard children against sexual and economic exploitation,¹⁵⁴ cruelty,¹⁵⁵ abduction and trafficking,¹⁵⁶ recruitment into the armed forces,¹⁵⁷ and abuses in the criminal justice system.¹⁵⁸ Finally, the participation rights recognized by the Children’s Convention proceed on the premise that children have a right to be heard in matters affecting their welfare.¹⁵⁹ The Children’s Convention acknowledges that when a child is capable of forming opinions, those opinions should be given due weight, especially in judicial and administrative proceedings affecting the child.¹⁶⁰ To ensure the child’s right to be heard, the Children’s Convention grants the child the right to freedom of expression;¹⁶¹ freedom of thought, conscience, and religion;¹⁶² and freedom of association and peaceable assembly.¹⁶³

D. *The Implementation Mechanism*

Like all other United Nations human rights treaties, the Children’s Convention has no direct method of enforcement and no sanctions for noncompliance with the treaty’s standards.¹⁶⁴ Nations

148. Children’s Convention, *supra* note 1, at art. 27.

149. *Id.* at art. 24.

150. *Id.* at art. 6.

151. *Id.* at art. 28.

152. *Id.* at art. 31.

153. *Id.* at art. 30.

154. Children’s Convention, *supra* note 1, at arts. 32, 34.

155. *Id.* at art. 37.

156. *Id.* at art. 35.

157. *Id.* at art. 38.

158. *Id.* at art. 40.

159. Von Struensee, *supra* note 4, at 601.

160. Children’s Convention, *supra* note 1, at art. 12.

161. *Id.* at art. 13.

162. *Id.* at art. 14.

163. *Id.* at art. 15.

164. Cynthia P. Cohen, *The Jurisprudence of the Committee on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 201, 202 (1998) [hereinafter Cohen, *Jurisprudence of the Committee*].

that ratify the Children's Convention are presumed to have done so in good faith, with the intention of implementing it fully.¹⁶⁵ State parties¹⁶⁶ demonstrate this good faith by submission of regular reports to a ten member committee of experts detailing the measures they have taken to implement the Convention.¹⁶⁷

Articles 43, 44, and 45 outline the requirements of the Children's Convention's implementation mechanism.¹⁶⁸ Article 43 establishes a committee of experts, known as the Committee on the Rights of the Child, to be elected by states parties; the experts, however, serve in their personal capacities.¹⁶⁹ This article also provides the procedure for electing Committee members, places of meeting, and the salaries of Committee members.¹⁷⁰ Article 44 outlines the reporting obligations of the states parties, including the frequency and content of the reports.¹⁷¹ Article 45 lists initiatives that may be undertaken by the Committee on the Rights of the Child to cultivate effective implementation of the Convention.¹⁷²

The implementation mechanism of the Children's Convention largely follows the standard human rights treaty monitoring process. Like all other United Nations human rights treaties, the implementation mechanism requires the states parties to "submit to the Committee . . . reports on the measures they have adopted which give effect to the rights recognized herein, and on the progress made on the enjoyment of those rights."¹⁷³ The first of these reports is due two years after the Children's Convention enters into force for that nation and every five years thereafter.¹⁷⁴ The monitoring body for the treaty then examines each state party's report and conducts an oral hearing during which it asks questions of a delegation from the state party.¹⁷⁵ Thus, the role of the Committee on the Rights of the Child, as the Children's Convention's monitoring body, is to gain as much

165. *Id.*; Marilia Sardenberg, *Committee on the Rights of the Child: Basic Processes*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 263, 285 (1996).

166. "A country becomes a State Party either by ratifying or acceding to the treaty." Cohen, *Developing Jurisprudence*, *supra* note 6, at 20.

167. Cynthia P. Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 *WHITTIER L. REV.* 95, 95 (1999) [hereinafter Cohen, *Implementing the U.N. Convention*]; Cohen, *Jurisprudence of the Committee*, *supra* note 164, at 202.

168. *See* Children's Convention, *supra* note 1, at arts. 43-45 (establishing the Committee on the Rights of the Child, identifying reporting obligations of states parties, and listing initiatives that may be undertaken by the Committee on the Rights of the Child).

169. *Id.* at art. 43.

170. *Id.*

171. *Id.* at art. 44.

172. *Id.* at art. 45.

173. *Id.* at art. 44.

174. Children's Convention, *supra* note 1, at art. 44.

175. Cohen, *Developing Jurisprudence*, *supra* note 6, at 20-21.

information as possible about the truthfulness of the state party's report, to draft and transmit "issue questions" soliciting written responses from the state party, and to conduct an oral examination of each state party's report.¹⁷⁶ The final step in the standard human rights treaty monitoring process is the submission of a report to the U.N. General Assembly.¹⁷⁷ The so-called "Concluding Observations of the Committee" includes comments on the positive factors of a state party's overall presentation and recommendations for improvements.¹⁷⁸ The monitoring body makes its conclusions public, and accordingly the "Concluding Observations" are recorded in U.N. documents and available on the website of the U.N. High Commissioner for Human Rights.¹⁷⁹

Although the implementation mechanism of the Children's Convention follows the standard human rights treaty monitoring process, Article 45 adds some innovations to human rights treaty monitoring.¹⁸⁰ First, the primary emphasis of the reporting procedure is on assisting states parties with their treaty compliance, rather than condemning states parties that fail to comply.¹⁸¹ This assistance is generally in the form of recommendations about how to improve on the identified "areas of concern,"¹⁸² and the state party is expected to address the recommendations before the next periodic report is due.¹⁸³ When a state party is struggling to meet the treaty's standards, the Committee on the Rights of the Child can act to provide technical assistance.¹⁸⁴ Accordingly, Article 45 instructs the Committee on the Rights of the Child to transmit states parties' requests for technical advice or assistance "to the specialized agencies, the U.N. Children's Fund, and other competent bodies."¹⁸⁵ The article includes a specific supporting role for UNICEF and nongovernmental organizations, which are intended to be included within the meaning of the words "other competent bodies."¹⁸⁶

Second, Article 45 enables the Committee on the Rights of the Child to derive information from a wide range of sources.¹⁸⁷ United Nations human rights treaties typically provide for their monitoring

176. Cohen, *Implementing the U.N. Convention*, *supra* note 167, at 101-02.

177. Children's Convention, *supra* note 1, at art. 44.

178. Cohen, *Implementing the U.N. Convention*, *supra* note 167, at 102.

179. *Id.*; Office of the United Nations High Commissioner for Human Rights, at <http://www.ohchr.org/english/> (last visited Feb. 7, 2005).

180. Cohen, *Developing Jurisprudence*, *supra* note 6, at 21.

181. *Id.*

182. Cohen, *Implementing the U.N. Convention*, *supra* note 167, at 102.

183. Sardenberg, *supra* note 165, at 285.

184. *Id.*

185. Children's Convention, *supra* note 1, at art. 45.

186. Cohen, *Implementing the U.N. Convention*, *supra* note 167, at 100.

187. *Id.*

bodies to receive information solely from the states parties.¹⁸⁸ In contrast, Article 45 provides that the Committee on the Rights of the Child may also invite advice and information from the "specialized agencies, the United Nations Children's Fund and other competent bodies," and it may recommend that the General Assembly undertake studies "on specific issues relating to the rights of the child."¹⁸⁹ The Committee on the Rights of the Child has expanded interaction with U.N. agencies and nongovernmental organizations even further by annually holding discussion days devoted to exploring general topics of interest to all states parties, including children and war, economic exploitation, the girl child, the disabled child, the child and the family, and children living with HIV/AIDS.¹⁹⁰ Enabling the Committee on the Rights of the Child to consult a variety of sources for information effectively assists it in determining the truthfulness of the states parties' reports.¹⁹¹

Finally, the implementation mechanism of the Children's Convention emphasizes public awareness about the Convention's standards.¹⁹² Article 42 obligates states parties to "make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."¹⁹³ Similarly, Article 44 requires states parties to "make their reports widely available to the public in their own countries."¹⁹⁴ By including these provisions, the Children's Convention aims "to improve the status of children by adequate dissemination of information about children's rights."¹⁹⁵

The Committee on the Rights of the Child began its public formal examination of states parties' reports in January 1993.¹⁹⁶ At this session, the Committee reviewed the reports of Bolivia, Egypt, the Russian Federation, Sudan, Sweden, and Vietnam. Approximately six reports have been evaluated during each subsequent session.¹⁹⁷ By the end of its session in January 1999, the Committee had completed the examination of seventy initial reports and six periodic reports.¹⁹⁸ The Committee's review process has proceeded slowly because there are United Nations budgetary constraints that limit the services that can be provided to the Committee in processing the reports and the

188. Sardenberg, *supra* note 165, at 286.

189. Children's Convention, *supra* note 1, at art. 45.

190. Cohen, *Implementing the U.N. Convention*, *supra* note 167, at 103.

191. *Id.* at 101.

192. Cohen, *Developing Jurisprudence*, *supra* note 6, at 23.

193. Children's Convention, *supra* note 1, at art. 42.

194. *Id.* at art. 44.

195. Cohen, *Developing Jurisprudence*, *supra* note 6, at 23.

196. Cohen, *Jurisprudence of the Committee*, *supra* note 164, at 204.

197. Cohen, *Implementing the U.N. Convention*, *supra* note 167, at 99.

198. *Id.* at 97.

number of days that the Committee is able to meet in any given year.¹⁹⁹ Because of these constraints and the vast amount of information available to the Committee, it has been “virtually impossible to review all of the states parties’ reports in a timely fashion.”²⁰⁰

IV. CONSTITUTIONALIZATION OF CHILDREN’S RIGHTS: 1996 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Article 4 of the Children’s Convention requires its signatories to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”²⁰¹ Consequently, the legislative, administrative, and judicial institutions of each state party are primarily responsible for implementation of the Children’s Convention.²⁰² The rights enumerated in the Children’s Convention are accessible to children only through incorporation into the constitutions and laws of the states parties.²⁰³ The states parties are just beginning the process of incorporating rights for children into existing schemes of established rights.²⁰⁴

On June 16, 1995, the Republic of South Africa ratified the Children’s Convention,²⁰⁵ thereby agreeing to “respect and ensure” the children’s rights set forth therein.²⁰⁶ By ratifying the Children’s Convention, South Africa committed itself to conform its legislation, administrative practice, and international relations to the requirements contained in the Convention.²⁰⁷ In addition, South Africa obliged itself to report periodically to the Committee on the Rights of the Child on the measures that it has adopted to give effect to the rights recognized in the Children’s Convention.²⁰⁸ Accordingly, South Africa’s initial report, submitted to the Committee on

199. Cohen, *Developing Jurisprudence*, *supra* note 6, at 28-29.

200. *Id.* at 29.

201. Children’s Convention, *supra* note 1, at art. 4.

202. Fitzgibbon, *supra* note 10, at 342.

203. Woodhouse, *Constitutionalization*, *supra* note 3, at 2; Woodhouse, *Recognizing Children’s Rights*, *supra* note 2, at 15.

204. Woodhouse, *Recognizing Children’s Rights*, *supra* note 2, at 15.

205. Office of the High Commissioner of Human Rights, Status of Ratification of the Convention on the Rights of the Child, available at <http://www.ohchr.org/english/law/crc-ratify.htm> (last visited Feb. 7, 2005).

206. Children’s Convention, *supra* note 1, at art. 2.

207. Tshepo L. Mosikatsana, *Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341, 345 (1998).

208. Children’s Convention, *supra* note 1, at art. 44.

December 4, 1997, asserts that it "sought to bring legislation, policy and practice in line with the requirements of the Convention."²⁰⁹

In accordance with the requirements of the Children's Convention, Section 28 of the 1996 Constitution of the Republic of South Africa (hereinafter, South African Constitution)²¹⁰ grants specifically defined rights to children in addition to, not in place of, the rights given to all citizens.²¹¹ In fact, South Africa may be "the only country to include specific rights for children in its

209. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, U.N. Convention on the Rights of the Child at ¶ 1, U.N. Doc. CRC/C/51/Add.2 (1997).

210. S. AFR. CONST. (1996), ch. 2, § 28. Section 28 of the South African Constitution provides:

Children

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

Id.

211. See, e.g., Woodhouse, *Constitutionalization*, *supra* note 3, at 45; Woodhouse, *Recognizing Children's Rights*, *supra* note 2, at 15.

Constitution.”²¹² Titled simply “Children,” Section 28 draws upon several comparative and international law sources, principally the Children’s Convention and the Africa Charter on the Rights and Welfare of the Child.²¹³ Like the Children’s Convention, it enumerates the child’s right to a name and nationality, to parental care, to social rights, to representation of counsel, and to legislative and judicial decisions based on the child’s best interests.²¹⁴ Although the rights enumerated in Section 28 closely resemble the principles of the Children’s Convention, this part of the Note demonstrates that the constitutionalization of children’s rights does not ensure that the rights enumerated in the Children’s Convention are accessible to children.

A. Constitution Building

On February 2, 1990, South African President F.W. de Klerk announced the repeal of the ban on the African National Congress (ANC), the Communist Party, and a multitude of other antiapartheid organizations.²¹⁵ In addition, de Klerk announced the impending unconditional release of ANC leader Nelson Mandela and others imprisoned for membership in the formerly banned organizations.²¹⁶ Finally, de Klerk promised a multitude of legal reforms aimed at abolishing apartheid-era segregation.²¹⁷ This speech invited the country’s leadership to the negotiation table and set the stage for the difficult and lengthy negotiations conducted between the major political parties between 1990 and 1994.²¹⁸

It took almost two years before sufficient consensus was reached between the major parties to commence formal negotiations concerning the future of South Africa.²¹⁹ In December 1991, the Convention for a Democratic South Africa (CODESA) was formed to carry out these negotiations and begin preparations for a fully democratic election and the creation of a new Constitution.²²⁰ The first plenary session (CODESA I) established working groups to consider and give advice on the issues that needed to be resolved,

212. Walter H. White, Jr., *A Report from the Chair*, 26-SPG HUM. RTS. I (1999).

213. See, e.g., Woodhouse, *Constitutionalization*, *supra* note 3, at 41; Woodhouse, *Recognizing Children’s Rights*, *supra* note 2, at 15.

214. Woodhouse, *Recognizing Children’s Rights*, *supra* note 2, at 15.

215. Peter N. Bouckaert, Note, *The Negotiated Revolution: South Africa’s Transition to a Multiracial Democracy*, 33 STAN. J. INT’L L. 375, 387 (1997).

216. *Id.*

217. *Id.*

218. *Id.*

219. Justice Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT’L L.J. 451, 452 (1997).

220. Woodhouse, *Constitutionalization*, *supra* note 3, at 30-31.

particularly the manner in which the transition to a multi-party democracy would be managed.²²¹ The second plenary session in May 1992 (CODESA II) dissolved because the major parties could not agree on the size of the majority required for any change to the interim Constitution.²²²

Formal negotiations resumed in May 1993 with the adoption of the Multi-Party Negotiating Process (MPNP).²²³ The MPNP suggested a two-step process for the transition to a multiparty democracy.²²⁴ First, it adopted an interim Constitution in November 1993, which would govern temporarily while the nation held democratic elections.²²⁵ This transitional Constitution was enacted into law by the then Parliament and came into force on April 27, 1994.²²⁶ Second, a Constitutional Assembly, consisting of the newly elected National Assembly and the Senate, would draft and approve a permanent Constitution by a two-thirds vote.²²⁷ The permanent Constitution had to be consistent with all thirty-four of the constitutional principles contained in Schedule 4 of the interim Constitution.²²⁸ The Constitutional Court, established by the interim Constitution, would then have to certify that the text of the permanent Constitution complied with these principles before it would come into force.²²⁹

In effect, the interim Constitution "supplied the blueprint for transition" to "a non-racial, non-sexist multi-party democracy with three tiers of government and a justiciable Bill of Rights."²³⁰ The interim Constitution included a bill of rights²³¹ because the MPNP recognized that the best way of ensuring the interests of all South Africans was through the protection of individual rights.²³² In order to protect individual rights, the interim Constitution emphasized three overarching principles. First, Section 33 of the interim Constitution protected the rights contained therein from limitation by

221. Goldstone, *supra* note 219, at 452-53.

222. *Id.*

223. *Id.*

224. Woodhouse, *Constitutionalization*, *supra* note 3, at 31.

225. S. AFR. CONST. (1993); Woodhouse, *Constitutionalization*, *supra* note 3, at 31.

226. Goldstone, *supra* note 219, at 454.

227. Woodhouse, *Constitutionalization*, *supra* note 3, at 31.

228. S. AFR. CONST. (1993), sched. 4. These Constitutional Principles were acknowledged by the preamble to the interim Constitution, which provided that the permanent Constitution would be adopted "in accordance with the solemn pact recorded as Constitutional Principles." *Id.* at pmb1.

229. Goldstone, *supra* note 219, at 454.

230. Woodhouse, *Constitutionalization*, *supra* note 3, at 31.

231. S. AFR. CONST. (1993), ch. 3, §§ 7-35.

232. Goldstone, *supra* note 219, at 455.

laws of general application.²³³ Limitation is only permissible to the extent "reasonable" and "justifiable in an open and democratic society based on freedom and equality" and only if the limitation did not "negate the essential content" of the right.²³⁴ Moreover, certain rights, including rights to dignity, freedom, and personal security; to religious freedom, political rights, and rights in detention; and children's rights to protection from abuse, exploitative labor, and to their rights in detention, could be limited only if "necessary."²³⁵ Second, Section 98(5) of the interim Constitution contained a "suspension provision," empowering the Constitutional Court to declare a law unconstitutional, but allowing it to remain in force until the competent authorities corrected the defect.²³⁶ This provision meant that new rights could be recognized while negotiating the terms of their realization.²³⁷ Finally, the interim Constitution assigned the government an active rather than a passive role in promoting human rights.²³⁸ To this end, the interim Constitution established various governmental bodies, such as the Human Rights Commission and the Commission on Gender Equality, charged with the task of furthering human rights.²³⁹

B. Inclusion of Rights for Children

In addition to ensuring most internationally recognized human rights, the bill of rights of both the interim and the 1996 South African Constitutions singled out children for special protection.²⁴⁰ When viewed in contrast to the South African state's historically antagonistic relationship with children, the recognition of children's rights in Section 30 of the interim Constitution and its successor Section 28 represents a significant accomplishment.²⁴¹ Under the apartheid regime, children, particularly black children, were the main victims of human rights violations.²⁴² Apartheid laws, such as the Group Areas Act and "influx control" laws, forced parents to abandon their children in order to find work, leaving many children to seek survival on the streets.²⁴³ These street children, who should have been served by a child welfare system, were instead detained

233. S. AFR. CONST. (1993) ch. 3, § 33.

234. *Id.*

235. *Id.*

236. S. AFR. CONST. (1993) ch. 7 § 98(5).

237. Woodhouse, *Constitutionalization*, *supra* note 3, at 33.

238. *Id.*

239. *Id.*

240. Woodhouse, *Recognizing Children's Rights*, *supra* note 2, at 16.

241. Mosikatsana, *supra* note 207, at 343.

242. *Id.*

243. Woodhouse, *Recognizing Children's Rights*, *supra* note 2, at 17.

indefinitely for petty offenses, often in the same facilities as adult offenders.²⁴⁴ In addition, the government detained large numbers of children who were engaged as active combatants in the struggle against apartheid for political activism.²⁴⁵ The neglect, exploitation, and abuse suffered by children under apartheid, along with children's status as freedom fighters, provided a powerful motivation for situating children's rights as part of South Africa's transformative agenda.²⁴⁶

South Africa's initial report to the Committee on the Rights of the Child describes Section 28 of the South African Constitution as "deal[ing] specifically with the rights of children, in addition to the rights they enjoy elsewhere in the Bill of Rights."²⁴⁷ By granting children specifically defined rights in addition to those enjoyed by "everyone," Section 28 recognizes children as independent rights-bearers whose rights are explicit and justiciable.²⁴⁸ The Constitutional Assembly recognized, by including Section 28 in the South African Constitution, that children's interests cannot be protected unless children are treated as independent legal subjects rather than as objects of adult concern.²⁴⁹ Further, the framers of the new Constitution recognized that children's entitlement to protection of their human rights is not weaker because they are not adults.²⁵⁰ They reasoned that the fact that children are dependent on adults to assist them in exercising their rights is no reason for denying them rights.²⁵¹ Rather, the fact that children cannot claim their rights for themselves provides justification for establishing institutions for the protection and enforcement of children's rights.²⁵²

The constitutionalization of children's rights in Section 28 provides both political justification for establishing social programs and institutions for the protection and enforcement of children's rights, while at the same time enabling children to make claims against the state.²⁵³ First, the incorporation of children's rights into the South African Constitution provides the government with political justification for providing social welfare benefits to children.²⁵⁴ Children compete for scarce resources with the homeless,

244. *Id.*

245. *Id.*

246. *Id.*

247. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 1.

248. *Id.* at 15.

249. Mosikatsana, *supra* note 207, at 348.

250. *Id.*

251. *Id.* at 349.

252. *Id.*

253. *Id.* at 354-55.

254. *Id.* at 355.

the aged, and the unemployed, but some South African scholars have interpreted Section 28(1)(c) as having established a priority in favor of children.²⁵⁵ Thus, when confronted with competing claims for social welfare benefits, the government can justify prioritizing social welfare expenditures for children.²⁵⁶ Second, the constitutionalization of children's rights creates justiciable rights that children may enforce against the state.²⁵⁷ The language of Section 28, providing that "[e]very child has the right," reinforces the notion that this provision enables the rights claimants, the children, to make substantial claims against the state.²⁵⁸ The use of the word "right" implies that the Constitutional Assembly, in drafting this provision, intended to create an enforceable claim.²⁵⁹

The inclusion of children's rights in the South African Constitution provides children with institutional means to influence the decisions affecting their own lives.²⁶⁰ In so doing, Section 28 seeks to achieve the mandate of Article 12 of the Children's Convention, providing that "in all matters affecting the child, the views of the child [will be] given due weight."²⁶¹ Moreover, Section 28 of the South African Constitution seeks to emulate the approach of the Children's Convention by emphasizing the best interests of the child.²⁶² In order to conform fully to the Children's Convention, Section 28 provides a constitutional framework for reform of the racially oppressive and patriarchal pre-constitutional laws that undermine the child's best interests.²⁶³

C. Compliance With the Convention on the Rights of the Child

This section of this Note compares South Africa's protection of the rights of children in police custody and the right not to be used in armed combat with the requirements of the Children's Convention. In so doing, this section identifies the two primary barriers to South Africa's full compliance with the Convention. Although Section 28 of the South African Constitution articulates a detailed list of children's rights, constitutionalization has proved insufficient to ensure children's rights because (1) national laws are less protective of children's rights than Section 28 and (2) there are significant

255. Woodhouse, *Constitutionalization*, *supra* note 3, at 40.

256. *Id.*; Mosikatsana, *supra* note 207, at 355.

257. Mosikatsana, *supra* note 207, at 354.

258. S. AFR. CONST. (1996), ch. 2, § 28(1).

259. Mosikatsana, *supra* note 207, at 354-55.

260. *Id.* at 350.

261. Children's Convention, *supra* note 1, at art. 12.

262. Children's Convention, *supra* note 1, at art. 3; S. AFR. CONST. (1996), ch. 2, § 28(2).

263. Mosikatsana, *supra* note 207, at 392.

inconsistencies between national laws and Section 28. The result is that "there are large numbers of children in South Africa who do not enjoy the protection" that Section 28 of the South African Constitution and the Children's Convention provide.²⁶⁴

1. The Rights of Children in Police Custody

During the struggle against apartheid, the state violently oppressed black children who were engaged as active combatants.²⁶⁵ In addition to those children detained without trial as punishment for political activism, large numbers of street children, who should have been served by a child welfare system, were detained indefinitely for petty offenses.²⁶⁶ These children were detained arbitrarily under conditions that were in violation of Article 37(c) and Article 40(1) of the Children's Convention.²⁶⁷ Accordingly, one of the primary goals of Section 28 of the South African Constitution and post-Constitution legislation was to bring South Africa into compliance with the Children's Convention.²⁶⁸

Section 28(1)(g) of the South African Constitution was enacted to protect the rights of children in police custody.²⁶⁹ Section 28(1)(g) provides that a child is "not to be detained except as a measure of last resort."²⁷⁰ When it is necessary to detain a child, Section 28(1)(g) states that the child "may be detained only for the shortest appropriate period of time," has the right to be kept separately from adult detainees, and has the right to be "treated in a manner, and kept in conditions, that take account of the child's age."²⁷¹ The language of this provision conforms with the requirements of Article 37 of the Children's Convention, which provides that detention of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time" and requires that every child in police custody be treated in a manner taking into account "the needs of persons of his or her age" and be separated from adults.²⁷²

South Africa's initial report to the Committee on the Rights of the Child, however, recognized that the constitutionalization of the rights of children in police custody did not ensure compliance with

264. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 50.

265. Woodhouse, *Recognizing Children's Rights*, *supra* note 2, at 17.

266. *Id.*

267. *See* Children's Convention, *supra* note 1, at arts. 37(c), 40(1).

268. Mosikatsana, *supra* note 207, at 361.

269. S. AFR. CONST. (1996), ch. 2, § 28(1)(g).

270. *Id.*

271. *Id.*

272. Children's Convention, *supra* note 1, at art. 37.

Article 37(c) and Article 40(1) of the Children's Convention.²⁷³ The initial report noted that Section 28(1)(g) of the South African Constitution was not consistently applied in South Africa, and children were being detained in prisons with persons over the age of eighteen years.²⁷⁴ Thus, the initial report recognized that legislation was necessary to ensure compliance with the mandate of the Children's Convention that children should be detained separately from adults.²⁷⁵

To this end, the Correctional Services Amendment Act, as amended in 1994, proscribed detention in a prison, police cell, or lock-up of an unconvicted child, unless his detention was necessary and no suitable place of safety was available.²⁷⁶ As a result, some 2,000 unconvicted children in police custody were released in May 1995.²⁷⁷ The courts released them on their own recognizance or in the care of a parent or guardian, and many of these children did not reappear for trial.²⁷⁸ When possible the children were sent to places of safety, which proved to be ill-equipped to hold potentially violent inmates, resulting in the commission of further serious offenses.²⁷⁹ As a result, the Act was again amended in 1996 to allow for the detention of children between the ages of fourteen and eighteen years who have committed serious offenses.²⁸⁰ Thus, the rights originally given to children in the Correctional Services Amendment Act of 1994 were severely scaled back.²⁸¹

The large numbers of children held in prison and the deplorable conditions under which these children are kept suggest that the Correctional Services Amendment Act falls short of ensuring the protection provided to children in police custody under the South African Constitution and the Children's Convention.²⁸² In May 2000, there were 4,253 children in South African prisons, less than half of

273. See *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 64.

274. *Id.*

275. *Id.* ¶ 65.

276. Correctional Services Amendment Act § 29, No. 17 (1994).

277. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 519.

278. Mosikatsana, *supra* note 207, at 362.

279. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 519.

280. Correctional Services Amendment Act § 29, No. 14 (1996).

281. Mosikatsana, *supra* note 207, at 362.

282. See generally *South Africa Government Perpetuating Child Abuse: McKay*, S. AFR. PRESS ASS'N, Sept. 4, 2000, available at 2000 WL 24057015 (arguing that the South African government "was perpetuating abuse against children through its justice system, which allowed for minors to be incarcerated under inhuman conditions").

whom had been convicted and sentenced.²⁸³ Although some of the unconvicted children detained in South African prisons were awaiting trial for serious offenses, such as murder and rape, the majority were charged with less serious offenses, usually crimes of poverty.²⁸⁴ In clear violation of the Correctional Services Amendment Act and the South African Constitution, unconvicted children less than fourteen years old were being detained in prisons, and adults were frequently incarcerated with the juvenile offenders.²⁸⁵ Recognizing that national law was insufficient to protect the rights of children in police custody, the Committee on the Rights of the Child expressed concern with "the use of detention as other than a last resort" and "the holding of minors in adult detention and prison facilities."²⁸⁶ Although the Committee acknowledged the South African Constitution's efforts to guarantee the rights of children in police custody, the Committee suggested that South Africa take further steps to conform to the Children's Convention.²⁸⁷

2. The Child's Right Not to Be Used in Armed Conflict and to Be Protected in Times of Armed Conflict

During the 1976 Soweto uprisings, a large number of black children engaged in the armed struggle against apartheid died as a result of conflicts with the military and the police.²⁸⁸ The experience of South African children during the 1976 uprisings and throughout the violent struggle against apartheid motivated the Constitutional Assembly, in drafting the new South African Constitution, to prohibit the direct or indirect involvement of children under a certain age in hostilities.²⁸⁹ The Constitutional Assembly was confronted with a developed body of international law concerning the participation of

283. *Task Teams to Deal with Children in Prisons: Skosana*, S. AFR. PRESS ASS'N, July 14, 2000, available at 2000 WL 24053439.

284. *South Africa Government Perpetuating Child Abuse: McKay*, *supra* note 282.

285. *Id.*

286. *Concluding Observations of the Committee on the Rights of the Child: South Africa*, U.N. Convention on the Rights of the Child at ¶ 42, U.N. Doc. CRC/C/15/Add.122 (2000) [hereinafter *Concluding Observations*].

287. *See id.* ¶¶ 3, 42.

288. Mosikatsana, *supra* note 207, at 358. On June 16, 1976, 20,000 Soweto schoolchildren marched in protest against a decree by the Department of Bantu Education that Afrikaans had to be used as one of the languages of instruction in secondary schools. The police, who raced to the scene, neither ordered the marchers to disperse nor fired warning shots. Rather, the police fired at the marchers, and the first child to be shot was a thirteen-year-old schoolchild named Hector Petersen. *Id.* at 344 n. 8.

289. *Id.* at 359.

children in armed conflict.²⁹⁰ Article 38 of the Children's Convention requires state parties to "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."²⁹¹ The African Charter on the Rights and Welfare of the Child prohibits children under the age of eighteen from "tak[ing] a direct part in hostilities."²⁹² Despite some disparities in the international human right instruments, the international limit for participation in hostilities is, effectively, fifteen years.²⁹³

Section 28(i) of the South African Constitution, which provides that children under the age of eighteen years are "not to be used directly in armed conflict" and are "to be protected in times of armed conflict," protects children against the harms suffered by children under apartheid.²⁹⁴ By extending the limit for participation in armed conflict to eighteen years, Section 28(i) is more protective of children's rights than the Children's Convention.²⁹⁵ Although the limit for participation in armed conflict may be suspended during a state of emergency, South African law states that a child less than fifteen years old can never be used directly in armed conflict.²⁹⁶ Thus, even in a state of emergency, Section 28 satisfies the Children's Convention's mandate that state parties "ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."²⁹⁷

National laws governing the minimum age for participation in armed conflict, however, do not uniformly comply with either Section 28(i) or the Children's Convention.²⁹⁸ Although conscription of white males at the age of sixteen has been abolished in favor of legislation establishing an all-volunteer force with a minimum recruitment age of seventeen years, such legislation is not consistent with the requirements of the Constitution.²⁹⁹ The Defence Act, for example, provides that the minimum age for cadet training and for membership in the South African Defense Force is twelve, and the minimum recruitment age for military service is seventeen.³⁰⁰ The

290. *Id.* at 358.

291. Children's Convention, *supra* note 1, at art. 38(2).

292. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

293. Mosikatsana, *supra* note 207, at 359.

294. S. AFR. CONST. (1996), ch. 2, § 28(i).

295. *Id.*

296. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 78.

297. Children's Convention, *supra* note 1, at art. 38(2).

298. See *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 51.

299. *Id.* ¶ 479.

300. Defence Act 44 of 1957, § 3(a), (b).

Defence Act, like many of the statutes that address the objectives of Section 28, predates the Constitution and South Africa's ratification of the Children's Convention.³⁰¹ Thus, the inconsistencies between the Constitution and national laws on the minimum age of participation in armed conflict result in large part from the failure to redraft existing laws to meet the requirements of the Constitution and the Children's Convention.³⁰²

The inconsistencies between Section 28 and national laws on the minimum age of participation in armed conflict can also be traced to the South African common law definition of a "child."³⁰³ Both Section 28 and the Children's Convention define a "child" as a person under the age of eighteen years.³⁰⁴ Under common law, however, "childhood" is divided into three age categories, and a child's legal status depends upon these categories.³⁰⁵ Under the age of seven years, a child is known as an *infans* and has no legal capacity to act independently.³⁰⁶ At the attainment of puberty, which is considered age twelve for girls and age fourteen for boys, a child achieves a different legal status.³⁰⁷ Under common law, a child achieves majority at age twenty-one years, at which point the child is no longer subject to parental control over decision-making.³⁰⁸ The continuing vitality of the common law conception of "childhood," as embodied in South African laws, demonstrates the "urgent need to continue reviewing and revising legislation and policies which affect children in order to align them with the Convention and the Constitution."³⁰⁹

V. EVALUATION AND RECOMMENDATION

South Africa's protection of children in police custody and in times of armed conflict illustrates that the substantive rights of the Children's Convention are not accessible to children solely by

301. See Mosikatsana, *supra* note 207, at 346 (discussing statutes existing at implementation of the Constitution).

302. See *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 44 (showing that in the initial report to the Committee on the Rights of the Child, South Africa impliedly recognized the necessity of redrafting laws to meet the requirements of the Convention and alleged that the process of redrafting has begun).

303. *Id.* ¶¶ 51, 52.

304. S. AFR. CONST. of 1996, ch. 2, § 28 (3); Children's Convention, *supra* note 1, at art. 1.

305. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 52.

306. *Id.*

307. *Id.*

308. *Id.* ¶¶ 52, 54.

309. *Id.* ¶ 2.

incorporation into the Constitution. Although incorporation of children's rights into the Constitution is a significant step toward compliance with the Convention, the effectiveness of constitutionalization is frustrated when there are inconsistencies between the Constitution and national law and when national law inadequately protects children's rights. South Africa will make children's rights real only through the reform of national laws and the enactment of new laws that meet the requirements of the South African Constitution and the Children's Convention. Only then will South Africa live up to its commitment to "undertake all appropriate legislative, administrative, and other measures for the implementation" of the substantive rights recognized by the Children's Convention.³¹⁰

First, South Africa will have little success with reform so long as customary law, the private-law legal system affecting the majority of South Africa's children, fails to conform to the principles and provisions of the Children's Convention.³¹¹ Although customary law has traditionally occupied a position of secondary importance, it must be acknowledged as a vital part of the legal system in South Africa.³¹² Customary law generally focuses on the community rather than on the individual; this approach is incompatible with the Children's Convention and Section 28's recognition of children as independent legal subjects.³¹³ Another conflict between the Children's Convention and customary law arises because customary law does not incorporate legal rules that apply according to chronological age; rather, differentiates legal status according to gender, physical and customary law, intellectual maturity, initiation, marriage, and the establishment of a separate household.³¹⁴ By making this differentiation, the customary law regulating the position of children conflicts with Article 2 of the Children's Convention, which prohibits "discrimination of any kind."³¹⁵ South Africa's efforts to comply with the Children's Convention, therefore, should focus on reforming customary law to ensure that it does not infringe on the nondiscrimination principle of Article 2 or deny children the rights to which they are entitled under the Children's Convention.

Second, the legacy of apartheid continues to have a negative effect on the situation of children in South Africa and adversely affects the full implementation of the Children's Convention.³¹⁶ South

310. Children's Convention, *supra* note 1, at art. 4.

311. See *Concluding Observations*, *supra* note 286, ¶ 10.

312. Mosikatsana, *supra* note 207, at 346.

313. See *id.*

314. *Id.* at 347.

315. Children's Convention, *supra* note 1, at art. 2(1).

316. *Concluding Observations*, *supra* note 286, ¶ 9.

Africa's initial report to the Committee on the Rights of the Child acknowledges that "[a]partheid has left South Africa with a culture of violence, particularly at [the] local community level."³¹⁷ Although political violence has decreased significantly since 1994, it has been replaced by an increase in crime in which many children, suffering the effects of poverty and unemployment, have become involved.³¹⁸ Thus, children continue to be caught in the "crossfire of violence," both as victims of appalling abuse and as actors.³¹⁹ The legacy of apartheid is also reflected in the national laws regulating the rights of children, which predate the Constitution and the ratification of the Children's Convention. These laws tend to confer rights to children along racial lines and offer less protection to female children.³²⁰ The constitutionalization of children's rights justifies reform of the racist and antifeminist aspects of these laws, but efforts to reform must take place in an existing legal structure established during apartheid and historically antagonistic toward children.³²¹ In order to combat the negative effect of apartheid, South Africa should introduce legal reforms concerning the inequities within the educational system, the prevention of family violence, the establishment of a new juvenile justice system, the protection of sexually abused children, and the expansion of the child-care system.³²²

Third, South Africa's failure to ensure that adequate programs for the protection and care of children are introduced at the community level denies many children access to the rights provided by Section 28 and the Children's Convention.³²³ South Africa's initial report to the Committee on the Rights of the Child acknowledges that future measures aimed at compliance with the Children's Convention should focus on "implementation of the Convention at a local level."³²⁴ To this end, South Africa established the National Programme of Action Steering Committee (NPASC) to coordinate the implementation of programs for the protection and care of children.³²⁵ To fulfill its task, the NPASC has received assistance from numerous governmental institutions, including the Departments of Correctional Services, Safety, and Security, Foreign Affairs, Labor, Provisional Affairs, and Constitutional Development, the Inter-Ministerial

317. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 477.

318. *Id.* ¶ 478.

319. *See id.* ¶¶ 477-83.

320. Mosikatsana, *supra* note 207, at 346.

321. *See id.* at 343, 346.

322. *Concluding Observations*, *supra* note 286, ¶¶ 8, 10.

323. *Id.* ¶ 12.

324. *Initial Reports of the States Parties Due in 1997, Addendum, South Africa*, *supra* note 209, ¶ 43.

325. *Id.* ¶ 25.

Committee on Young People at Risk, the Human Rights Commission, the Youth Commission and the Truth and Reconciliation Commission.³²⁶ There is, however, a continuing need to decentralize efforts to implement the Convention to the community level and to diversify the process to include more participants outside of government.³²⁷ The Committee on the Rights of the Child has expressed particular concern that children in rural areas are being denied access to the programs and rights established for their protection and care.³²⁸ Certainly, increased allocation of resources to children's care and education contributes to implementation of the economic, social, and cultural rights of children at the community level.³²⁹ In addition, South Africa will have greater success at ensuring children's rights provided by the Children's Convention by including community-based organizations in the coordination, promotion, and implementation of the Children's Convention.³³⁰ Increased participation of nongovernmental organizations, the public health system, educators, the broadcast media, and social workers working with children in the promotion and protection of children's rights would further the implementation of the Convention at the community level.³³¹

South Africa has nevertheless made a significant step toward protecting children's rights by enacting Section 28 of the South African Constitution. By granting children specifically defined rights in addition to those enjoyed by "everyone," Section 28 commits South Africa to protecting all children and creates justiciable rights that children may enforce against the State.³³² Although the constitutionalization of children's rights does not ensure that these rights are accessible to children, it provides a justification for reforming the existing racist and patriarchal laws in order to meet the requirements of the Children's Convention.³³³ In addition, Section 28 justifies the establishment and finance of social welfare programs to ensure implementation of the rights provided to children by the Children's Convention.³³⁴

326. *Id.* ¶ 26.

327. *Id.* ¶ 41(c).

328. *Concluding Observation*, *supra* note 286, ¶ 12.

329. *See id.* ¶ 15.

330. *Id.* ¶ 12.

331. *See id.* ¶ 16.

332. Woodhouse, *Recognizing Children's Rights*, *supra* note 2, at 15.

333. Mosikatsana, *supra* note 207, at 346.

334. *Id.* at 355.

VI. CONCLUSION

With the adoption of the Convention on the Rights of the Child on November 20, 1989, the United Nations committed the international community to the promotion and protection of the rights of all children. Unlike its predecessors, which spoke of "principles," the Children's Convention recognizes children as individuals and grants children specified "rights." The Children's Convention was also the first binding international instrument to encompass children's civil and political rights, as well as their economic, social, and cultural rights. The effectiveness of the Children's Convention in improving children's lives depends on implementation and compliance by the states parties. The constitutionalization of children's rights in Section 28 of the South African Constitution represents a meaningful attempt to implement and comply with the Children's Convention. The experience of South Africa illustrates, however, that the constitutionalization of children's rights does not alone ensure that the substantive rights of the Children's Convention are accessible to children. Implementation of the Children's Convention in South Africa requires greater efforts toward legislative reform and increased participation of community-based organizations. Only then will South Africa overcome the barriers erected by the legacy of apartheid and the continuing vitality of customary law.

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