

Children's rights to health

Paula Proudlock and Prinslean Mahery (Children's Institute)

Children's rights to health are protected in international and national law. These laws place an obligation on the State to realise children's rights by delivering a range of services.

It is important for policy-makers, planners, administrators and health professionals who design, plan and deliver these services to understand their international and constitutional obligations. In order to advocate for improved service delivery, it is also important for health professionals, caregivers, children and civil society to have a clear understanding of children's rights, and the State's obligations in realising these rights.

This essay assesses South Africa's progress in realising children's rights to health by examining the following questions:

- What is the meaning of children's rights to health in international law?
- What is South Africa's progress in realising children's rights to health?
- What are the recommendations and conclusions?

What is the meaning of children's rights to health in international law?

The main human rights treaties in relation to children's rights to health are the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹ the United Nations Convention on the Rights of the Child (CRC),² and the African Charter on the Rights and Welfare of the Child (ACRWC)³. As the relevant articles of the ACRWC are almost identical to the CRC, they are not referred to separately in this essay.

Article 12 of the ICESCR provides that "everyone has the right to the highest attainable standard of physical and mental health". The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the right to health broadly as:

... an inclusive right extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and

*environmental conditions, and access to health related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health related decision-making at the community, national and international levels.*⁴

The CRC provides more detail on children's rights to health. Article 24(1) recognises "the right of the child to the enjoyment of the highest attainable standard of health, and to facilities for the treatment of illness and rehabilitation of health" and obliges the State to "strive to ensure that no child is deprived of his or her right of access to such health care services". Article 24(2) elaborates on the content of the State's obligation (see box 1).

Box 1: Article 24(2) of the Convention on the Rights of the Child

Article 24(2) obliges the State to "pursue full implementation" of children's right to the highest attainable standard of health. It in particular obliges the State to take appropriate measures to:

1. diminish infant and child mortality rates;
2. ensure the provision of necessary medical assistance and health care to all children, with an emphasis on primary health care;
3. combat disease and malnutrition through the provision of primary health care, the use of technology, and the provision of adequate nutritious foods, clean drinking water and basic sanitation;
4. ensure appropriate pre- and postnatal health care for mothers;
5. ensure that parents and children have a basic knowledge of child health and nutrition; the advantages of breastfeeding, hygiene and environmental sanitation; and the prevention of accidents; and
6. develop preventative health care, guidance for parents, and family planning education and services.

Source: Office of the High Commissioner of Human Rights (1989) *Convention on the Rights of the Child*, UN General Assembly resolution 44/25. Geneva: UN.

Similar to article 12 of the ICESCR, article 24 of the CRC emphasises a comprehensive primary health care approach by recognising the importance of the provision of water, food and sanitation, and by stressing health promotion education. It also makes the essential link between mothers' and children's health by requiring the State to provide appropriate pre- and postnatal care to mothers.

The United Nations Committee on the Rights of the Child (UN committee) has written two general comments on the topics of Adolescent Health and Development⁵ and HIV/AIDS⁶. States are obliged to provide health services which are sensitive to the particular needs and rights of adolescents and to ensure that they have access to information on tobacco, alcohol and drugs, sexual and reproductive health, family planning, contraceptives, the dangers of early pregnancy, and the prevention and treatment of sexually transmitted diseases (including HIV/AIDS). Adolescents must also be given the opportunity and skills to participate fully in decisions affecting them, and their rights to privacy and confidentiality must be respected.

The general comment on HIV/AIDS requires the State to put children at the centre of all its responses to the pandemic and to ensure that HIV-related services are provided to the maximum extent possible to all children without discrimination.

Article 6 obliges the State to ensure the survival and development of children. This is one of the CRC's four General Principles and was included in the convention to highlight the importance of realising children's socio-economic rights – especially the rights to health, water and sanitation, nutrition, housing, an adequate standard of living, and social security.

The concept of 'progressive realisation' that applies to everyone's rights to health in article 12 of the ICESCR also applies to children's socio-economic rights in the CRC, including the right to health.⁷ 'Progressive realisation' has been interpreted to mean that the State must move "as expeditiously and effectively as possible" towards the goal of full realisation of the right⁸ and that the State must satisfy the following immediate obligations:

- It must report regularly on its progress to the treaty monitoring committees. This accountability mechanism is aimed at keeping the State focused on meeting its obligations.
- The State must have a well-designed plan that describes the steps it will take to progressively realise the right. This plan must contain goals and timeframes and must specify which spheres and government departments are responsible for implementation.
- The plan must prioritise the delivery of the minimum core of the right to health (see box 2).

Box 2: Minimum core of the right to health

Minimum core obligations that the State must realise are to:

1. ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalised groups;
2. ensure access to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger for everyone;
3. ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
4. provide essential drugs, as defined by the World Health Organisation Action Programme on Essential Drugs;
5. ensure equitable distribution of all health facilities, goods and services;
6. ensure reproductive, maternal and child health care;
7. provide immunisation against major infectious diseases;
8. take measures to prevent, treat and control epidemic and endemic diseases;
9. provide education and access to information on the main health problems, including how to prevent and control them; and
10. provide appropriate training for health personnel, including education on health and human rights.

Source: United Nations Committee on Economic, Social and Cultural Rights (2000) *The right to the highest attainable standard of health. General comment 14 E/C.12/2000/4*. Geneva: UN.

- The plan must pay special attention to children, especially the most disadvantaged groups.⁹ Article 24(2) of the CRC provides express instructions to the State to prioritise child health within the health plan for the general population (box 1).
- The State must be able to show that it is making progress in implementing the plan. The treaty monitoring bodies assess progress by comparing quantitative and qualitative data to standards that they have set based on evaluating various country reports over a number of years. For assessing progress on children's rights to survival, development and health, the under-five mortality rate is the most important indicator.¹⁰

The United Nations Millennium Declaration¹¹ is the most recent global commitment to revive efforts to improve child health. States that have signed the declaration have agreed to work towards achieving the Millennium Development Goals (MDGs) by 2015. Many of the goals have a direct impact on child health (see pp. 30 – 31).

What is South Africa's progress in realising children's rights to health?

South Africa's progress can be assessed by answering the following questions.

Has South Africa ratified the key international laws?

South Africa's ratification of both the CRCⁱ and the ACRWCⁱⁱ demonstrates the State's commitment to realising children's rights at the highest political level.

However, South Africa has not yet ratified the ICESCRⁱⁱⁱ – the leading international treaty on socio-economic rights, including everyone's right to health. The failure to ratify this treaty has negative implications for child health and well-being, as children's health is dependent on that of their caregivers. Civil society organisations who are leading a campaign to ratify the covenant attribute the failure to a lack of political will.¹²

Another barrier has been the lack of clarity over which government department is responsible for overseeing the implementation of the ICESCR.¹³ The Department of International Relations and Co-operation has indicated that the intention is for South Africa to ratify the covenant by September 2010, and that the new Ministry in The Presidency: Monitoring, Evaluation and Administration shall be responsible for ensuring the ICESCR's implementation.¹⁴

Is South Africa complying with its reporting obligations?

South Africa submitted its first report on the CRC in 1997,¹⁵ but has failed to submit second and third reports that were due in 2002 and 2007 respectively.¹⁶ It has not submitted any reports on the ACRWC since ratification in 2000.¹⁷ The lack of reporting prevents the treaty monitoring committees from evaluating South Africa's progress, and from providing recommendations for improvements. South Africa has therefore lost out on valuable guidance from international child rights experts. It has also lost the political momentum that could have been provided through this accountability mechanism.

The Office on the Rights of the Child in the Presidency indicated that a combined second and third report on the CRC has been finalised and is awaiting Cabinet approval, and that the same report will also be used as a basis for reporting on the ACRWC.¹⁸

South Africa submitted a report on the MDGs in 2005.¹⁹ The next report is due in 2010 and Statistics South Africa, who is co-ordinating the evaluation of the country's progress

towards the MDGs, is hosting provincial workshops in 2010 to assist the report's completion.

Are children's international rights to health included in the Bill of Rights?

The ICESCR and the CRC had a key influence on the drafting of the Bill of Rights in the Constitution.²⁰ The Bill of Rights therefore recognises the broad meaning of health by incorporating a full range of socio-economic rights. It also includes additional protection for children, as illustrated in figure 1.

The rights for everyone include rights to have access to health care services; social security, including social assistance; sufficient food and water; adequate housing; and to live in an environment that is not harmful to health or well-being. Children have additional rights to basic nutrition, shelter, basic health care services, social services, protection from abuse and neglect and to have their best interests considered of paramount importance in every matter that affects them.

The one international right that is not included in the Bill of Rights is children's right to participate in matters that affect them – but this has now been included in the new Children's Act²¹ (see *Part one: Children and law reform*, pp. 12 – 17).

The State has an obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation"²² of each of the socio-economic rights that apply to everyone in sections 26 and 27 of the Bill of Rights. In contrast, children's socio-economic rights, defined in section 28 of the Bill of Rights, do not have this qualification. This textual difference, together with the best interests principle, and children's right to be protected from neglect and abuse, have been interpreted by constitutional experts to mean that children have a priority claim on state resources for the prompt delivery of a basic package of socio-economic goods and services.²³ However, this interpretation has not been given full effect by Constitutional Court judgments (discussed on p. 27).

Has South Africa adopted appropriate laws, policies and programmes to enable the realisation of the rights?

Since the advent of constitutional democracy in 1994, South Africa has put a comprehensive range of laws, policies and programmes in place to enable the realisation of children's socio-economic rights. These laws place statutory duties on government to provide and budget for socio-economic services, and to clarify the roles and responsibilities of government spheres, departments and officials.

i Ratified by South Africa in 1995.

ii Ratified by South Africa in 2000.

iii Signed in 1994 but not yet ratified.

Figure 1: How the Constitution and the Children's Act give effect to children's international rights to health

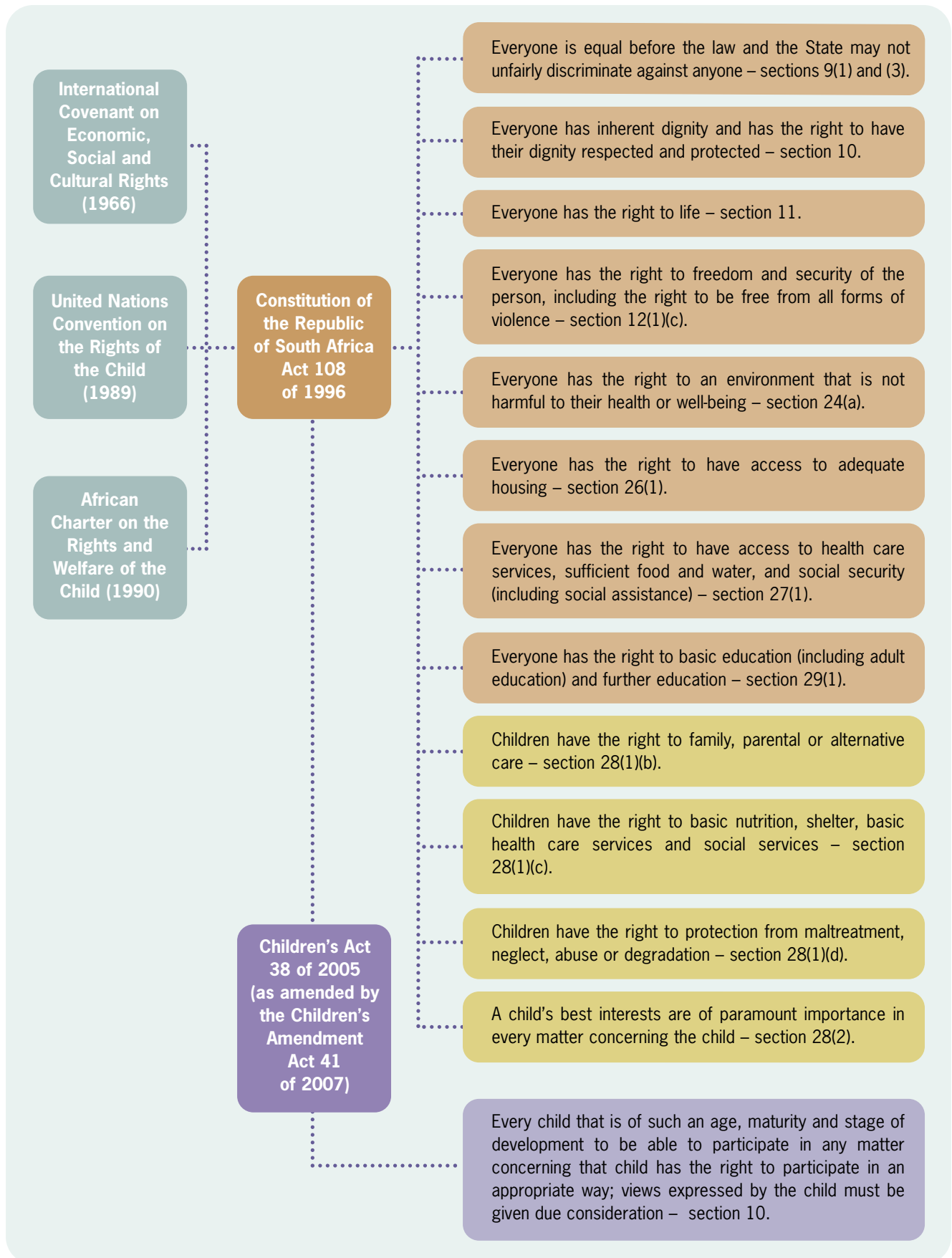


Table 1: Primary laws and key programmes for the realisation of children's socio-economic rights

Right	Law	Key programmes
Health care services	National Health Act 61 of 2003	<ul style="list-style-type: none"> • Free primary health care for everyone • Free health care for pregnant women and children under six years • Free health care for social grant recipients • Integrated Management of Childhood Illnesses • Prevention of mother-to-child transmission of HIV (PMTCT)
Water (including basic sanitation)	Water Services Act 108 of 1997 (and various local government laws and by-laws that regulate local government service delivery)	<ul style="list-style-type: none"> • Free basic water
Social assistance	Social Assistance Act 13 of 2004	<ul style="list-style-type: none"> • Child Support Grant • Foster Child Grant • Care Dependency Grant • Old Age Pension • Disability Grant • Social Relief of Distress
Housing	Housing Act 107 of 1997	<ul style="list-style-type: none"> • Housing subsidies
Social services and protection from abuse and neglect	Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007)	<ul style="list-style-type: none"> • Crèches • Early childhood development • Parenting skills training • Child and family counselling • Home- and community-based care • Protection services • Foster care • Child and youth care centres
Food and nutrition	These rights do not have their own express legislative framework.	<ul style="list-style-type: none"> • Social grants • National School Nutrition Programme • Vitamin A supplementation • Food fortification • Integrated Food Security and Nutrition Programme

Table 1 illustrates the primary laws and a selection of key programmes aimed at realising children's socio-economic rights.

The National Health Act²⁴ entrenches the entitlements to free health care services for pregnant women and children under six years, and free primary health care for everyone. However, it fails to give further substance to the State's obligation to prioritise children's rights to basic health care and basic nutrition.

In particular the Act fails to define the package of services that the State should provide to realise the rights to "basic health care services" and "basic nutrition" for children. Defining the package of services that children are entitled to under these rights by amending the law, regulations or through a policy process could help ensure that health managers and personnel always consider children's best interests in planning, budget allocation and service delivery decisions (see the list of proposed basic health care services for children on p. 60).

In keeping with the recommendations of the CESCR to

ensure public participation in health services,²⁵ the National Health Act promotes the participation of the public in health service delivery decision-making by legislating for the establishment of provincial and district health councils and clinic committees. However, the clinic committees section is not yet in operation, and some provinces have not yet passed or implemented the provincial legislation needed to give life to the provincial and district councils (see *Part one: Children and law reform*, pp. 12 – 17).

Effective participatory structures will enable parents and children to influence health care services planning and delivery at a local level. This will not only give effect to democratic participation rights but will also help ensure that the services are accessible and responsive to a community's particular health needs. While the National Health Act and several provincial Health Acts do not specifically mention children's participation in these structures, section 10 of the Children's Act can be used to motivate for the participation of children, especially adolescents.

Is the State implementing its laws and programmes reasonably and is it prioritising children's health rights?

It is outside the scope of this essay to provide a definitive answer to this question. However, readers can consider the following questions while reading other essays to assess whether laws and programmes are being reasonably implemented:

1. Is the State allocating the necessary budget and human resources to enable the progressive realisation of everyone's socio-economic rights (including everyone's right to health care services)?
2. Is the State applying the best interests of the child principle when making decisions about budget and human resource allocations and other implementation strategies? This would require the State to consider children's needs proactively when making all budget and human resource allocation decisions and to ensure that children's best interests are considered of paramount importance in the final decision.^{iv}
3. Is South Africa making progress with regards to the key child health indicators, in particular the infant and under-five mortality rates? (See pp. 29 – 40.)

What is the courts' track record in enforcing children's health rights?

Socio-economic rights in the Bill of Rights are justiciable, which means that they can be enforced by a court of law. The courts have delivered a number of significant judgments on socio-economic rights. The most notable judgment in the area of child health is *Minister of Health and Others v Treatment Action Campaign and Others*²⁶ where the Constitutional Court considered the State's policy of restricting PMTCT to a few pilot sites. The court declared this to be a violation of mothers' and children's constitutional rights to life and health care services, and ordered the State to ensure that PMTCT was available at all health facilities. This judgment and the resultant roll-out of comprehensive PMTCT have saved thousands of babies' lives. This progress would not have happened without the activism of health professionals and civil society.

On the negative side, the Constitutional Court has been criticised for failing to give content to the meaning of socio-economic rights and for failing to hold the State to the delivery of a minimum core, despite the wealth of international law jurisprudence and expert evidence available.²⁷ The court has instead adopted a procedural approach ("the reasonableness test") that promotes a process of justification and accountability and that

leaves defining the content of socio-economic rights to the Executive and the legislature.

In its most recent judgment on the right to have access to sufficient water, *Mazibuko and Others v City of Johannesburg and Others*,²⁸ the Constitutional Court found against the Phiri community who were asking for an increased amount of free basic water per month, and ruled that the core content of the right to sufficient water should be defined by Parliament and the Executive, not the judiciary.

While the High Court judgment in this case made express reference to the State's obligation to children in article 24 of the CRC to "take appropriate measures to combat disease and malnutrition ... including the provision of clean drinking-water",²⁹ the Constitutional Court made no reference to children's international or constitutional rights in its judgment. This is despite section 39 of the Bill of Rights obliging the courts to consider international law when interpreting rights and despite the fact that diarrhoea is a leading cause of child mortality in South Africa, especially in communities, like Phiri, with poor access to clean water and sanitation and high levels of poverty and HIV.

What are the recommendations and conclusions?

South Africa's tardy reporting record for the two international child rights treaties, delay in ratifying the ICESCR, and high infant and under-five mortality rates indicate that there has been a lack of political leadership in the area of children's health rights.

The new Minister of Health, together with fellow national and provincial ministers, now face the challenge of leading the country in an approach that puts the best interests of children at the forefront of all decisions. The following steps are recommended to pave the way for this child-centred approach:

- Submit the long-outstanding country reports on the CRC and the ACRWC, and publicly debate and implement the recommendations of the treaty monitoring committees.
- Ratify the ICESCR in 2010 and publicly debate the implications of giving effect to this treaty.
- Promote public participation in health care services. This requires sections of the National Health Act to be put into effect, provincial health laws to be passed and put into effect, and participatory structures established and adequately funded. It is important to ensure that children, especially adolescents, can participate in these structures.
- Define and prioritise the delivery of a package of basic health care services and nutrition for children through a

^{iv} Article 4 of the CRC, read with section 28(2) of the Constitution, and sections 6, 7 and 9 of the Children's Act.

consultative legislative or policy process. Regularly review the package to enable progressive expansion beyond the minimum core, and to ensure that it is responsive to the current health challenges facing children, and the latest developments in medical science.

- Educate government planners, policy-makers, members of Parliament, health service managers, and health professionals on children's rights so that they can actively contribute to the realisation of children's rights in policy and practice.

The Constitutional Court judgment in the *Treatment Action Campaign* case shows the power of having justiciable socio-economic rights. However, the *Mazibuko* case shows a lack of consideration of children's rights and best interests. While it can be argued that adults have the ability to use political processes to engage with Parliament and the Executive to advocate for improvements to socio-economic services, children lack such political power and opportunity. The Constitutional Court should therefore take a more pro-active role as the upper guardian of children and actively consider children's rights and best interests, even if children are not direct litigants in the case, and even if the parties before the court do not raise children's rights in their arguments.

References

- Office of the United Nations High Commissioner for Human Rights (1966) *International Covenant on Economic, Social and Cultural Rights. General Assembly resolution 2200A (XXI) of 16 December 1966*. Geneva: UN.
- Office of the High Commissioner of Human Rights (1989) *Convention on the Rights of the Child, UN General Assembly resolution 44/25*. Geneva: UN.
- Secretary General of the Organisation of the African Union (1990) *African Charter on the Rights and Welfare of the Child, OAU resolution 21.8/49*. Addis Ababa: OAU.
- United Nations Committee on Economic, Social and Cultural Rights (2000) *The right to the highest attainable standard of health. General comment 14, E/C.12/2000/4*. Geneva: UN, par. 11.
- United Nations Committee on the Rights of the Child (2003) *Adolescent health and development in the context of the Convention on the Rights of the Child. General comment 4, CRC/GS/2003/4*. Geneva: UN.
- United Nations Committee on the Rights of the Child (20003) *HIV/AIDS and the rights of the child. General comment 3, CRC/GC/2003/3*. Geneva: UN.
- United Nations Committee on the Rights of the Child (2003) *General measures of implementation of the Convention on the Rights of the Child. General comment 5, CRC/GC/2003/5*. Geneva: UN.
- United Nations Committee on Economic, Social and Cultural Rights (1990) *The nature of states parties obligations (art. 2, par. 1): 12/14/1990. CESCR general comment 3, E/1991/23*. Geneva: UN, par. 9.
- Hodgkin R & Newell P (2007) *Implementation handbook for the Convention on the Rights of the Child*. Geneva: UNICEF.
- See no. 9 above.
- United Nations General Assembly (2000) *Resolution adopted by the General Assembly [without reference to a Main Committee (A/55/L.2)]: 55/2. United Nations Millennium Declaration*. New York: UN.
- Black Sash (2010) *Campaign for ratification*. Accessed on 18 February 2010: www.blacksash.org.za/index.php?option=com_content&task=view&id=1410&Itemid=187.
- Personal communication. Chanwi L, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, 18 February 2010.
- Personal communication. Directorate: Human Rights and Humanitarian Affairs, Department of International Relations and Co-operation, 6 April 2010.
- United Nations Committee on the Rights of the Child (1999) *Initial reports of States parties due in 1997: South Africa. 05/22/1999, CRC/C/51/Add.2. (State Party report)*. Geneva: UN.
- Mahery P (2009) *The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African law*. In: Boezaart T (ed) *Child law in South Africa*. Claremont, South Africa: Juta.
- Viljoen F (2009) *The African Charter on the Rights and Welfare of the Child*. In: Boezaart T (ed) *Child law in South Africa*. Claremont, South Africa: Juta.
- Personal communication. Office on the Rights of the Child, 13 October 2009. [Follow-up e-mail communication on 10 May 2010 indicated that the situation had not changed.]
- South Africa (2005) *South Africa: Millennium Development Goals: Mid-term country report*. [South Africa: s.n, 2005]
- Skelton A & Proudlock P (2007) *Interpretation, objects, application and implementation of the Act*. In: Davel CJ & Skelton A (eds) *Commentary on the Children's Act*. Cape Town: Juta.
- Children's Act 38 of 2005.
- Constitution of the Republic of South Africa. Act 108 of 1996, sections 26(2) and 27(2).
- Stewart L (2008) *Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others*. *South African Journal on Human Rights*, 24(2008): 472-498.
- National Health Act 61 of 2003.
- See no. 4 above.
- Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033*.
- Bilchitz D (2007) *Poverty and fundamental rights: The justification and enforcement of social and economic rights*. Oxford: Oxford University Press; Brand D (2003) *The proceduralisation of South African socio-economic rights jurisprudence or "What are socio-economic rights for?"* In: Botha H, van der Walt A & van der Walt J (eds) *Rights and democracy in a transformative constitution*. Stellenbosch: Sun Press.
- Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09 2009 ZACC 28*. [Not yet reported]
- Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae) (2008) 4 All SA 471 (W)*, par. 38.

