

# **ACCESS TO JUSTICE FOR CHILDREN: SOUTH AFRICA**

*This report was produced by White & Case LLP in January 2014 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.*

## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

South Africa<sup>1</sup> ratified the CRC in June 1995. South Africa follows the dualist approach to international law, in which international agreements become law only when they are enacted into law by national legislation.<sup>2</sup> Although the CRC has not been fully incorporated into national law, South Africa has sought to incorporate certain provisions of the Convention into its 1996 Constitution and legislation (see part I.C. below).<sup>3</sup>

### **B. Does the CRC take precedence over national law?**

The CRC does not take precedence over national law. However, when interpreting legislation, courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>4</sup>

### **C. Has the CRC been incorporated into national law?**

The CRC has not been fully incorporated into national law, although key features have been incorporated into Section 28 of the Constitution,<sup>5</sup> which forms part of the Bill of Rights, as well as certain national laws. For example, the Child Justice Act<sup>6</sup> enshrines the rights of children in conflict with the law. The Children's Act,<sup>7</sup> which addresses social services for children, aims to bring South Africa's law in line with the Bill of Rights and the CRC. One of the Act's general principles is that decisions should be made in the best interests of the child, and that children have a right to participate in all decisions affecting them and for these views to be given due consideration.<sup>8</sup>

### **D. Can the CRC be directly enforced in the courts?**

It does not appear that the CRC can be directly enforced in South African courts.

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<sup>1</sup> Comments on this report provided by Professor Ann Skelton, Director, Centre for Child Law, University of Pretoria, South Africa, October 2015.

<sup>2</sup> Constitution of the Republic of South Africa 1996 ("Constitution"), s. 231, available at: <http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>.

<sup>3</sup> *Initial report of South Africa to the UN Committee on the Rights of the Child*, CRC/C/51/Add.2, 22 May 1998, para. 1. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f51%2fAdd.2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f51%2fAdd.2&Lang=en).

<sup>4</sup> Constitution, s. 233.

<sup>5</sup> Available at: <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#28>.

<sup>6</sup> 75 of 2008, available at: [http://www.justice.gov.za/legislation/acts/2008-075\\_childjustice.pdf](http://www.justice.gov.za/legislation/acts/2008-075_childjustice.pdf).

<sup>7</sup> 38 of 2005 (as amended by Act 41 of 2007), available at:

<http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>.

<sup>8</sup> *Ibid.*, ss. 6-7, 9-10.

However, the Constitution requires a court or tribunal to consider international law when interpreting the Bill of Rights, and requires courts to interpret statutory law in a way that is consistent with international law where reasonable.<sup>9</sup> Moreover, certain provisions of the CRC can be enforced indirectly through Section 28 of the Constitution and other provisions of national law that have incorporated parts of the CRC.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

According to a UNICEF report, the CRC has become “an essential frame of reference in the South African legal system.”<sup>10</sup> Courts have looked to Section 28 of the Constitution and other national laws that incorporate the CRC, while pointing to the “interpretive influence” of the Convention itself.<sup>11</sup> Many court decisions have expressly applied, discussed and/or cited provisions of the CRC.<sup>12</sup> The Courts have also made reference to UN guidelines and general comments of the Committee on the Rights of the Child.<sup>13</sup>

## II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children’s rights?

Children with the assistance of their representatives may bring cases in domestic courts to challenge violations of children’s rights. Under the Children’s Act, “every child has the right to bring, and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court”.<sup>14</sup> This right is of general application and not limited to the Children's Act only. Children and their representatives have the right to bring a case to a competent court alleging that a right in the Bill of Rights or the Children’s Act has been infringed or threatened.<sup>15</sup> This includes the right to challenge the lawfulness of their detention in person before a court.<sup>16</sup>

The Bill of Rights provides for the right to judicial review of any law of conduct that is alleged to be unconstitutional, as well as judicial review of administrative acts. Under section 33, everyone, including children, “has the right to administrative action that is lawful, reasonable and procedurally fair”.<sup>17</sup> Under the Promotion of Administrative Justice Act, any person may institute proceedings in a court or tribunal for the judicial

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<sup>9</sup> Constitution, ss. 39(1) and 233.

<sup>10</sup> UNICEF, ‘The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries’, [http://www.unicef.org.uk/Documents/Publications/UNICEFUK\\_2012CRCImplementationReport.pdf](http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationReport.pdf), 2012, (accessed 29 January 2014), p. 93.

<sup>11</sup> *C and Others v. Department of Health and Social Development* [2012] ZACC 1, para. 33; *Director of Public Prosecutions KwaZulu-Natal v. P*, Supreme Court of Appeal of South Africa, Case No. 363/2005; ILDC 492 (ZA 2005), para. 15.

<sup>12</sup> See, e.g., *Ibid.*; *AD v. DW* [2007] ZACC 27, *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa & Government of the Province of Western Cape*, Case no: 18678/2007.

<sup>13</sup> See generally A Skelton, ‘South Africa’, in T Liefwaard and J Doek, *Litigating the rights of the child: The UN Convention on the Rights of the Child in international and domestic jurisprudence* (2015), Netherlands: Springer.

<sup>14</sup> Children’s Act, s. 14.

<sup>15</sup> *Ibid.*, s. 15.

<sup>16</sup> Constitution, s. 35(2)(d).

<sup>17</sup> Constitution, s. 33.

review of an administrative action or the failure to take a decision.<sup>18</sup>

Any person, including a child, may bring a case in the Children's Court when they believe that a child may be in need of care and protection. The Children's Court is a special court which deals with issues affecting children, including: maltreatment, abuse, neglect or exploitation of a child (except criminal prosecutions in this regard); temporary safe care; and alternative care.<sup>19</sup> It does not deal with criminal cases.

In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence, any person (including a child or their representative) may bring a private prosecution in respect of that offence in any competent court. This person would have to prove some substantial and peculiar interest in the issue of the trial arising out of some injury which they individually suffered as a victim of the offence. The legal guardian or curator of a child may bring a private prosecution for an offence committed against the child where the Director of Public Prosecutions declines to prosecute.<sup>20</sup>

Complaints about violations of rights under the Bill of Rights can be lodged with the South African Human Rights Commission (SAHRC), whose functions include monitoring, investigating and reporting on the observance of human rights situation in South Africa, and taking steps to secure appropriate redress where human rights have been violated.<sup>21</sup> The SAHRC has a specific Commissioner who focuses on children's rights under the CRC.<sup>22</sup>

Complaints about government services or conduct may be brought to the Public Protector.<sup>23</sup> The Public Protector has the power to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct, and to take appropriate remedial action.<sup>24</sup>

The SAHRC and the Public Protector are both independent State institutions established by Chapter 9 of the Constitution.<sup>25</sup>

All proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfill the child's rights set out in the Bill of Rights, the best interests of the child principle, and the rights and principles set out in the Children's Act, subject to any lawful limitation.<sup>26</sup>

**B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a**

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<sup>18</sup> Promotion of Administrative Justice Act 3 of 2000, s. 6, available at: <http://www.justice.gov.za/legislation/acts/2000-003.pdf>.

<sup>19</sup> Children's Act, s. 45.

<sup>20</sup> Criminal Procedure Act 51 of 1977, s. 7, available at: <http://www.justice.gov.za/legislation/acts/1977-051.pdf>.

<sup>21</sup> Constitution, s. 184.

<sup>22</sup> South African Human Rights Commission, 'Office of the Commissioners', <http://www.sahrc.org.za/home/index.php?ipkContentID=74&ipkMenuID=56>, (accessed 29 January 2014).

<sup>23</sup> Public Protector South Africa, <http://www.publicprotector.org/index.asp>, (accessed 29 January 2014).

<sup>24</sup> Constitution, s. 182.

<sup>25</sup> Constitution, Chapter 9.

<sup>26</sup> Children's Act, s. 6.

representative?

It is a common law principle that children (persons under 18) have no standing to appear on their own in civil proceedings in court without the assistance of a guardian (e.g. their parent) or a curator *ad litem* (i.e. a court-appointed legal representative to represent the best interests of the child). A child above the age of seven years may sue in their own name, assisted by their guardian or curator *ad litem*. In the case of an *infans* below the age of seven years, the practice is that the guardian or curator *ad litem* should sue in their representative capacity.<sup>27</sup>

Section 14 of the Children's Act states that "every child has the right to bring, and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court". Section 15 states that "a child who is affected by or involved in the matter to be adjudicated", or "anyone acting in the interest of the child or on behalf of another person who cannot act in their own name" has the right to approach a competent court, alleging that a right in the Bill of Rights or the Children's Act has been infringed or threatened. There is debate among experts as to whether these provisions alter the abovementioned common law restrictions imposed on a child's capacity to litigate.<sup>28</sup>

At common law, if a child has no guardian, or where the action is between the child and their guardian, or where there is a conflict between the interests of the child and those of their guardian, a curator *ad litem* must be appointed to assist the child. According to expert opinion, since the coming into operation of the Guardianship Act on 1 March 1994, where a child has more than one guardian and the proceedings are between the child and one of the guardians, or where there is a conflict of interest between the child and one of the guardians, the child must be assisted by the other guardian. It is only if a conflict of interest extends to both guardians that a curator *ad litem* must be appointed for the child.<sup>29</sup>

C. In the case of infants and young children, how would cases typically be brought?

As discussed in part II.B above, in the case of an *infans* below the age of seven years, the practice is that the guardian (e.g. their parent) or curator *ad litem* would bring proceedings on behalf of the child in their representative capacity.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

The Constitution provides that every child has the right to have a legal practitioner assigned to them by the state, and at state expense, in civil proceedings affecting them, if substantial injustice would otherwise result.<sup>30</sup> It also provides that every person (including every child) who is detained (including sentenced prisoners) or accused has the right to choose, and be represented by, a legal practitioner, and to have a legal

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<sup>27</sup> Judicial Officers Association of South Africa, 'Civil procedure: the new Children's Act', <http://www.joasa.org.za/childrenact.html>, (accessed 29 January 2014).

<sup>28</sup> Cf T. Boezaart; D.W. de Bruin, 'Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate', De Jure Law Journal, 2011, 25, who argue that it does, available at: <http://www.saflii.org/za/journals/DEJURE/2011/25.html#sdfootnote15anc>; and H Kruger and A Skelton (eds), *The Law of Persons in South Africa* (2010), who argue that it does.

<sup>29</sup> Judicial Officers Association of South Africa.

<sup>30</sup> Constitution, s. 28(1)(h).

practitioner assigned to them by the state and at state expense, if substantial injustice would otherwise result.<sup>31</sup> Where a child involved in a matter before the Children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to Legal Aid South Africa.<sup>32</sup>

Legal Aid South Africa was established by the Legal Aid Act,<sup>33</sup> and is the national Legal Aid Board that provides free legal services and legal representation to indigent persons in criminal, civil, and certain administrative cases.<sup>34</sup> Legal aid may also be provided in “impact litigation” cases, which cover public interest litigation or the litigation of a small number of matters that resolve a large number of disputes and help broader communities.<sup>35</sup>

For an applicant to qualify for legal aid, three requirements have to be satisfied, namely: (1) The matter must be one that is covered by the legal aid scheme; (2) for civil matters there must be merit in pursuing the matter; and (3) the applicant must pass the means test.<sup>36</sup> In civil cases, the family of the child will need to take and pass the means test.<sup>37</sup> The total household income must be less than R6,000.00 per month after tax. The value of assets and personal belongings will also be taken into account. In criminal matters, children automatically qualify for legal aid and do not have to take the means test. Such legal representation can be obtained from the time the child is arrested.<sup>38</sup>

If a child qualifies for legal aid, they will not have to pay for anything. However, if a child should win a civil case, the Legal Aid Board will deduct the money that the court grants to pay for costs and benefits, before it pays the money owing to the child.<sup>39</sup>

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child’s parents or guardian have to agree to a case being brought)?

There are no other such conditions or limits. A child’s parent or guardian does not have to consent to the child bringing a case before a children’s court.<sup>40</sup>

### **III. How can children’s rights violations be challenged before national courts?**

A. If there is a potential violation of the Constitution or other principles established in

<sup>31</sup> Ibid., s. 35.

<sup>32</sup> Children's Act, s. 55.

<sup>33</sup> 22 of 1969, available at: <http://www.justice.gov.za/legislation/acts/1969-022.pdf>.

<sup>34</sup> For more information, see Legal Aid South Africa, <http://www.legal-aid.co.za>, (accessed 29 January 2014).

<sup>35</sup> Legal Aid South Africa, ‘Impact litigation’, <http://www.legal-aid.co.za/?p=929>, (accessed 29 January 2014).

<sup>36</sup> Legal Aid South Africa, ‘Country report: legal aid South Africa’, [http://www.ilagnet.org/jscripts/tiny\\_mce/plugins/filemanager/files/The\\_Hague\\_2013/National\\_Report/South\\_Africa\\_National\\_Report.pdf](http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/The_Hague_2013/National_Report/South_Africa_National_Report.pdf), 2013, (accessed 29 January 2014), p. 7.

<sup>37</sup> Legal Aid South Africa, ‘Who qualifies for legal aid’, <http://www.legal-aid.co.za/?p=956>, (accessed 29 January 2014).

<sup>38</sup> Department of Justice and Constitutional Development, ‘Protection for children accused of crime’, <http://www.justice.gov.za/services/children-accused.html>, 2012, (accessed 29 January 2014).

<sup>39</sup> Legal Aid South Africa, ‘Who qualifies for legal aid’.

<sup>40</sup> Department of Justice and Constitutional Development, ‘FAQ on the Children’s Act’, <http://www.justice.gov.za/vg/children/children-chp02.html>, (accessed 29 January 2014).

domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

As discussed in part II.A above, children generally have access to all courts and complaints mechanisms. This is protected by Section 34 of the Constitution, as well as the Children’s Act, which provides that every child has the right to bring a matter to court, provided that matter falls within the jurisdiction of that court.<sup>41</sup> In particular, children and their representatives have the right to bring a case to a competent court alleging that a right in the constitutional Bill of Rights or the Children’s Act has been infringed or threatened.<sup>42</sup>

*Regional mechanisms*

Individuals, including child victims, their parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as “communications”) to the African Committee of Experts on the Rights and Welfare of the Child (“African Committee”) about violations of the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”).<sup>43</sup> All available domestic remedies must have been exhausted before bringing a case to the African Committee.<sup>44</sup> The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.<sup>45</sup> The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.<sup>46</sup>

Individuals, groups or NGOs may submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).<sup>47</sup> All available domestic remedies must have been exhausted before bringing a case to the African Commission.<sup>48</sup> The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.<sup>49</sup> The African

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<sup>41</sup> Children’s Act, s. 14.

<sup>42</sup> *Ibid.*, s. 15.

<sup>43</sup> African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), Article 44, available at:

<http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/acrwc-charter-full-text/>. For more information about communications, see:

<http://acerwc.org/the-committees-work/communications/>.

<sup>44</sup> African Committee of Experts on the Rights and Welfare of the Child, ‘Communications’, available at:

<http://acerwc.org/the-committees-work/communications/>.

<sup>45</sup> War Resisters’ International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Committee of Experts on the Rights and Welfare of the Child: communication procedure’, 2012, available at:

<http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

<sup>46</sup> *Ibid.*

<sup>47</sup> African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at:

<http://www.achpr.org/instruments/achpr>.

<sup>48</sup> *Ibid.*, Article 56(5).

<sup>49</sup> Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rule 93,

Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.<sup>50</sup> If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples' Rights.<sup>51</sup>

**B. What powers would courts have to review these violations, and what remedies could they offer?**

The Constitution grants South African courts flexible powers to remedy violations. Section 38 provides that a court may grant “appropriate relief, including a declaration of rights”, where a person’s right in the Bill of Rights has been infringed or threatened. The Children’s Act mirrors this provision with respect to violations of the Bill of Rights of the Children’s Act.<sup>52</sup> Chapter 8 of the Constitution further empowers courts to remedy and enforce rights violations. In particular, section 178 grants courts broad authority to “make any order that is just and equitable”. It also gives courts the power to declare invalid any law or conduct, including any Act of Parliament, provincial legislation or conduct of the President, that it finds to be inconsistent with the Constitution.<sup>53</sup>

Aside from declaratory relief (declaring certain law or conduct invalid), other judicial remedies for rights violations include damages,<sup>54</sup> prohibitory orders (preventing the State from engaging in behaviour determined to violate rights) mandatory orders (requiring government officials to take remedial action), and structural interdicts (supervising government plans to remedy rights violations).<sup>55</sup>

Under the South African law of delict, which governs civil wrongs, available remedies include compensatory damages, an order for specific performance, and a final interdict (usually an order either to prevent harm to a legal right (prohibitory interdicts) or to make good harm already suffered (mandatory interdicts)).<sup>56</sup>

In proceedings for judicial review of administrative action, the court or tribunal may

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available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

<sup>50</sup> War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Commission on Human and Peoples' Rights: communication procedure’, 2012, available at:

<http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

<sup>51</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at:

<http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rules 84(2) and 118, available at:

<http://www.achpr.org/instruments/rules-of-procedure-2010>.

<sup>52</sup> Children’s Act, section 15.

<sup>53</sup> Constitution, s. 172.

<sup>54</sup> K. O’Regan, ‘Fashioning Constitutional Remedies in South Africa’, *Advocate*, April 2011, available at: <http://www.sabar.co.za/law-journals/2011/april/2011-april-vol024-no1-pp41-44.pdf>.

<sup>55</sup> M. Ebadollahi, ‘Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa’, *New York University Law Review*, Vol. 28, No. 5, 2008.

<sup>56</sup> J. Klaaren, ‘Judicial remedies’, [http://www1.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/9-Judicial%20Remedies.pdf](http://www1.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/9-Judicial%20Remedies.pdf), (accessed 29 January 2014).

grant any order that is just and equitable, including orders: directing the administrator to give reasons or act in the manner the court or tribunal requires; prohibiting the administrator from acting in a particular manner; setting aside the administrative action and remitting the matter for reconsideration by the administrator, or, in exceptional cases, substituting or varying the administrative action or correcting a defect resulting from the administrative action, or directing the administrator or any other party to the proceedings to pay compensation; declaring the rights of the parties in respect of any matter to which the administrative action relates; granting a temporary interdict or other temporary relief; directing the taking of the decision; directing any of the parties to do, or to refrain from doing, any act.<sup>57</sup>

South African law generally has no concept of punitive damages.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

It is possible to challenge a violation of children's rights without naming specific victims. The Constitution provides that anyone acting in the interest of a group or class of persons or "anyone acting in the public interest" may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened.<sup>58</sup> The Children's Act mirrors these provisions with respect to actions alleging that a right in the Bill of Rights or under the Children's Act has been infringed or threatened.<sup>59</sup> In class actions, it is not necessary to identify all the members of the class (see part III.D below).<sup>60</sup> In the case of *Centre for Child Law v. Minister of Justice*,<sup>61</sup> the Constitutional Court found that the Centre had standing to bring the case on behalf of unspecified child offenders who might in the future be sentenced to minimum sentences.

For civil claims, the identification of specific victims is usually required.<sup>62</sup>

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Collective action and group litigation are permitted. South African law allows proceedings in which a number of potential plaintiffs join together in one action to pursue claims against one or more defendants on the basis that the common issues of fact and law in relation to their claims make such a joinder appropriate.<sup>63</sup>

The Constitution allows "anyone acting as a member of, or in the interest of, a group or class of persons", "anyone acting in the public interest", and "an association acting in the interest of its members" to bring an action for violations of a right in the Bill of Rights.<sup>64</sup> The Children's Act mirrors these provisions, except with respect to

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<sup>57</sup> Promotion of Administrative Justice Act, s. 8.

<sup>58</sup> Constitution, s. 38.

<sup>59</sup> Children's Act, s. 15.

<sup>60</sup> *Children's Resource Centre Trust v. Pioneer Food* (50/2012) [2012] ZASCA 182, available at: <http://www.saflii.org/za/cases/ZASCA/2012/182.html>.

<sup>61</sup> 2009 (6) SA 632 (CC).

<sup>62</sup> See, e.g., Uniform Rules of Court, available at:

<http://www.justice.gov.za/legislation/rules/UniformRulesCourt%5B26jun2009%5D.pdf>.

<sup>63</sup> *Ibid.*, r. 10.

<sup>64</sup> Constitution, s. 38.



associations.<sup>65</sup>

In line with this provision in the Constitution, the Supreme Court of Appeal recently ruled that class actions (i.e. actions in which a representative brings proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf) are allowed in South Africa, both for constitutional matters and for general matters. Certain requirements must first be met. In defining the class it is not necessary to identify all the members of the class. It is, however, necessary that the class be defined with sufficient precision that a particular individual's membership can be objectively determined by examining their situation in the light of the class definition. A class action should not be certified if the case is 'hopeless' (i.e. if it is advanced on a basis that is legally untenable or in the absence of any credible evidence to support it) and there must be *prima facie* evidence to support a cause of action. There must be issues of fact and/or law that are common to all members of the class and can appropriately be determined in one action. Finally, a court certifying a class will look for any conflicts of interest within the class and among those representing it.<sup>66</sup>

While class actions in South Africa are rare, it is relatively common for public interest litigation to be brought on behalf of a group of litigants 'similarly placed' to a particular litigant, without having to specify who those persons are. It is also quite common for organisations to bring cases in the public interest.<sup>67</sup>

**E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?**

Non-governmental organisations may file challenges in the public interest to violations of children's rights under the Bill of Rights or the Children's Act.<sup>68</sup> For other violations, the common law of South Africa dictates that a litigant may sue or intervene if he has a direct and substantial interest in the subject matter of the litigation.<sup>69</sup> Finally, the Uniform Rules of Court allow any party entitled to join as a plaintiff to apply to intervene at any stage of the proceeding.<sup>70</sup>

Particularly significant is the role played by a 'friend of the court' or 'amicus curiae' in the South African legal system. Amici curiae may be invited by the court or apply to enter into a matter. They are generally permitted to present written and oral submissions through counsel, and may lead evidence at the High Court level.<sup>71</sup> Amicus curiae interventions have played a highly important role in several children's rights cases.<sup>72</sup>

**IV. Practical Considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of

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<sup>65</sup> Children's Act, s. 15.

<sup>66</sup> *Children's Resource Centre Trust v. Pioneer Food*.

<sup>67</sup> See, e.g., *Teddy Bear Clinic and Another v. Minister of Justice and Others* 2014 (2) SA 168 (CC).

<sup>68</sup> *Children's Resource Centre Trust v. Pioneer Food*; Constitution, s. 38; Children's Act, s. 15.

<sup>69</sup> *Ansari and Another v Barakat and Other, In re: Barakat v Copper Sunset Trading 424 (Pty) Ltd and Others* (5530/2011) [2012] ZAKZDHC 1, available at: <http://www.saflii.org/za/cases/ZAKZDHC/2012/1.html>.

<sup>70</sup> Uniform Rules of Court, r. 12.

<sup>71</sup> It was a children's rights case that established the right to present evidence: *Children's Institute v. Presiding Officer of the Children's Court* 2013 (2) SA 620 (CC).

<sup>72</sup> See, e.g., *S v. M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC); *J v. NDPP* 2014 (2) SACR 1 (CC); *Wayne Coughlan NO v. Road Accident Fund* 2015 (4) SA (CC).

children's rights, such as:

- A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Cases concerning constitutional matters such as violations of the Bill of Rights or the constitutionality of any law or conduct are initiated in the High Court, except for those matters listed in section 167 of the Constitution that only the Constitutional Court may decide.<sup>73</sup>

If the action is one seeking compensation for a civil wrong, the case can be filed in the magistrate's court.<sup>74</sup> The civil jurisdictional limit of magistrate's courts is R100 000. For certain family law matters and civil claims for amounts between R100,000 and R300,000, cases can be filed in the Regional Courts.<sup>75</sup>

Traditional courts may hear and determine civil claims arising from indigenous law and custom, brought before them by an African against another African within their area of jurisdiction.<sup>76</sup>

If the action is criminal, cases will be initiated in the magistrate's court, regional court or High Court, depending on the seriousness of the offence.<sup>77</sup> Private prosecutions would be initiated by summons filed in a magistrate's court, or an indictment in the case of a superior court, in the name of the prosecutor. The summons or indictment must describe the private prosecutor "with certainty and precision". An amount must be deposited as security with the court.<sup>78</sup>

For matters concerning the care, protection or well-being of a child, a child or their representative may approach the clerk of the Children's Court. Every magistrate's court in South Africa is a Children's Court.

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

For information on legal aid, see part II.D above.

An indigent person may apply to the High Court for assistance with legal representation and court fees in terms of a High Court Rule 40 *in forma pauperis* proceeding or to the Magistrate's Courts in terms of a Magistrate Court Rule 53 *pro deo* proceeding. Lawyer's costs and court fees can be recovered from the costs awarded to the *in forma pauperis* or *pro deo* litigant if they are successful.<sup>79</sup>

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<sup>73</sup> Constitution, s. 167.

<sup>74</sup> Uniform Rules of Court, r. 40.

<sup>75</sup> South African Government, 'Courts', <http://www.info.gov.za/aboutgovt/justice/courts.htm>, 2013, (accessed 29 January 2014).

<sup>76</sup> *Ibid.*

<sup>77</sup> Criminal Procedure Act.

<sup>78</sup> *Ibid.*, ss. 9-10.

<sup>79</sup> Uniform Rules of Court, r. 40; Rules Regulating the Conduct of the Proceedings of the Magistrates'

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

In addition to government-funded legal aid (see part II.D above), legal assistance and representation is provided by university law clinics and private lawyers and law firms on a pro bono basis. The Bar Councils and the Law Societies of South Africa both require legal practitioners to undertake 20 to 24 hours of pro bono service per year.<sup>80</sup> Legal clinics, including child-specific clinics such as the Centre for Child Law (University of Pretoria),<sup>81</sup> have been established in most of South Africa's law schools and provide free legal advice and representation to children.

There are also a number of non-profit public interest litigation organisations which bring strategic impact litigation. For example, the Centre for Child Law (which specialises in children's rights cases), Lawyers for Human Rights, Legal Resources Centre, Equal Education, Section 27, Socio-economic Rights Institute, and Centre for Applied Legal Studies.

Contingency fees are now permitted in South Africa, so it would be possible for practising lawyers to represent a child or a group of children under an agreement that did not require legal fees upfront.<sup>82</sup>

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

South Africa has no statute of limitations for the prosecution of certain serious offences, including murder, kidnapping, child-stealing, rape, crimes against humanity, trafficking in persons for sexual purposes, and using a child or person who is mentally disabled for pornographic purposes.<sup>83</sup> Apart from these and other offences listed in the Criminal Procedure Act, the right to institute a prosecution for any offence, will, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

For other actions, South Africa has a general three-year statute of limitations, which in some cases could be determined to begin at the time the claimant gained knowledge of the relevant facts and circumstances, rather than the date of the incident that gave rise to the claim.<sup>84</sup> When an incident giving rise to civil damages occurs to a child, the claim is

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Courts of South Africa, r. 53, available at:

[http://www.justice.gov.za/legislation/notices/2010/20100823\\_GG33487\\_NoticeR740\\_civil-jurisdiction-rules.pdf](http://www.justice.gov.za/legislation/notices/2010/20100823_GG33487_NoticeR740_civil-jurisdiction-rules.pdf).

<sup>80</sup> E. Webber, 'Pro Bono Work in South Africa: From Moral Duties to Legal Duties', <http://ohrh.law.ox.ac.uk/?p=567>, 2012, (accessed 29 January 2014).

<sup>81</sup> <http://www.centreforchildlaw.co.za/>, (accessed 29 January 2014).

<sup>82</sup> Contingency Fees Act 66 of 1997, available at: <http://www.info.gov.za/view/DownloadFileAction?id=70812>.

<sup>83</sup> Criminal Procedure Act, s. 18.

<sup>84</sup> S. Harder, 'Statutes of Limitation between Classification and Renvoi—Australian and South African Approaches Compared', *International Comparative Law Quarterly*, Vol. 60, No. 3, 2011, 659.

not extinguished before he or she turns 18. The matter will not prescribe until one year following the child's 18th birthday.<sup>85</sup>

Proceedings for judicial review of administrative action must be instituted "without unreasonable delay" and not later than 180 days following: (1) the date of the conclusion of any proceedings for internal remedies; or (2) where no such remedies exist, the date on which the person concerned was informed of the administrative action, or became aware, or might reasonably have been expected to have become aware, of the action and the reasons for it.<sup>86</sup> This time limit may be extended by the court in the interests of justice.<sup>87</sup>

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

South African civil procedure rules allow parties to a suit to have subpoenas issued for oral testimony or for the production of physical evidence.<sup>88</sup>

The Children's Act allows the following persons to adduce evidence in proceedings involving children: a child involved in the matter; a parent of the child; a person who has parental responsibilities and rights in respect of the child; a care-giver of the child; a person whose rights may be affected by an order that may be made by the court in those proceedings; and a person who the court decides has a sufficient interest in the matter.<sup>89</sup>

The Children's Act also provides for the participation of children in Children's Court proceedings concerning them. Amongst other provisions, a child has the right to express their view and preference in the matter if the court finds that the child, given their age, maturity and stage of development and any special needs, is able to participate in the proceedings and chooses to do so. The court may require that certain procedures be undertaken in the best interests of the child, including: intervening in the questioning or cross-examination of a child; questioning of children serving as a party or witness in proceedings through an intermediary;<sup>90</sup> and removal of any person present in the room where the proceedings take place if a child is present at the proceedings.<sup>91</sup> The Act also requires Children's Court proceedings to be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere.<sup>92</sup>

The confidentiality of Children's Court proceedings is protected. No person has access to such court records except for those with official duties, by court order, or for the purposes of appeal or review, bona fide research, or reporting in law reports.<sup>93</sup> Furthermore, no person may, without the permission of a court, publish any information relating to Children's Court proceedings which reveals or may reveal the name or

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<sup>85</sup> T. Boezaart (Davel), 'Some Comments on the Interpretation of section 7 of the Children's Act', *De Jure*, 2008, 245.

<sup>86</sup> Promotion of Administrative Justice Act, s. 7(1).

<sup>87</sup> *Ibid.*, s. 9.

<sup>88</sup> Uniform Rules of Court, r. 38.

<sup>89</sup> Children's Act, s. 58.

<sup>90</sup> *Ibid.*, s. 61.

<sup>91</sup> *Ibid.*, s. 60(2).

<sup>92</sup> *Ibid.*, s. 60(3).

<sup>93</sup> *Ibid.*, s. 66.

identity of a child who is a party or a witness in the proceedings.<sup>94</sup>

In criminal proceedings, special procedures exist for dealing with evidence produced by child witnesses. Where a child witness is involved in criminal proceedings before any court, the court may direct that no person, other than the child and their parent or guardian, can be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the court.<sup>95</sup> Any person including a child who is found not to understand the nature of the oath or affirmation may give evidence in criminal proceedings without taking the oath or making the affirmation, provided that they are admonished by the judge, judicial officer or an intermediary to speak the truth.<sup>96</sup> If it appears to the court that any child witness would be exposed to undue mental stress or suffering if they testify at criminal proceedings, the court may appoint an intermediary through which the child can give their evidence. The court may also direct that the child witness give their evidence via an intermediary at any place which is informally arranged to set that witness at ease, or is so situated that any person whose presence may upset that witness is outside their sight and hearing.<sup>97</sup>

F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Specific time limits for the resolution of cases could not be found.

Under the Bill of Rights, every accused person has a right to a fair hearing including the right to have their trial “conclude without unreasonable delay”.<sup>98</sup> Other explicit provisions on delay could not be found.

The Children’s Act requires that the investigation period into the care and protection of a child conclude within 90 days. However, it imposes no time limitation on Children’s Court proceedings themselves.

G. Appeal. What are the possibilities for appealing a decision to a higher court?

Decisions of the Children’s Court or magistrate’s court may be appealed to the High Court of the relevant jurisdiction, then the Supreme Court of Appeal.<sup>99</sup> The Supreme Court of Appeal is the final court of appeal in all non-constitutional cases.

Cases concerning violations of the Bill of Rights of the Constitution may be appealed to the Supreme Court of Appeal, then the Constitutional Court. The Constitutional Court is the highest court in South Africa on constitutional matters, and its decisions are final and binding on all other courts in South Africa.

All custodial sentences on child offenders go on automatic review to a High Court in

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<sup>94</sup> Ibid., s. 74.

<sup>95</sup> Criminal Procedure Act, s. 153(5).

<sup>96</sup> Ibid., ss. 164(1) and 165.

<sup>97</sup> Ibid., s. 170A.

<sup>98</sup> Constitution, s. 35(3)(d).

<sup>99</sup> Children’s Act, s. 51.

chambers.<sup>100</sup> This provides an important safeguard for young offenders and also helps to maintain a steady growth of jurisprudence on sentencing.

- H. **Impact.** What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

South Africa uses a common law system, so a negative decision could have a lasting impact. Because lower courts are bound by the decisions of higher courts, a negative decision from a court of appeal will have a more significant impact than that of a magistrate's court. Political backlash or repercussions from positive decisions have not been reported.

- I. **Follow up.** What other concerns or challenges might be anticipated in enforcing a positive decision?

Orders made by the Children's Court expire at most after two years unless extended by the court.<sup>101</sup> Whoever assists a child in bringing a suit should be sure to monitor the child's situation close to the time of expiration to see if an order for extension is necessary.

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

The South African report on the implementation of the CRC states that in some areas of law, "South African civil law and customary law do not accord with one another and, for this reason, the South African Law Commission is working on the harmonisation of common and indigenous law".<sup>102</sup> This disharmony could present challenges in areas of the country relying heavily on customary law.

*This report is provided for educational and informational purposes only and should not be construed as legal advice.*

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<sup>100</sup> Child Justice Act of 75 of 2008, s. 85.

<sup>101</sup> Children's Act, s. 159.

<sup>102</sup> *Initial report of South Africa to the UN Committee on the Rights of the Child*, para. 598.