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**THE SOUTH AFRICAN CONSTITUTIONAL COURT’S DECISION IN TAC:  
A “REASONABLE” CHOICE?**

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# **THE SOUTH AFRICAN CONSTITUTIONAL COURT’S DECISION IN TAC: A “REASONABLE” CHOICE?**

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## *Abstract*

The South African Constitutional Court in *Minister of Health v. Treatment Action Campaign (TAC)* ordered the government to nationalize a prevention of mother-to-child transmission of HIV (PMTCT) program in the public health sector, finding that its failure to do so violated the right to health. The Court in TAC followed the line of reasoning in *South Africa v. Grootboom*, formally rejecting “minimum core obligation” analysis developed in international law, and instead applying a test of “reasonableness,” well-entrenched in Anglo jurisprudence, to evaluate government action or lack thereof. This paper argues that the Court formally passes up the “minimum core” approach 1) to earn domestic legitimacy and 2) to reserve discretion to decide future economic rights cases under the very fact-dependent “reasonableness” rubric. But its pragmatic approach confines the transformative effect of the decision in TAC and does not give due weight to the provisions in the South African Constitution that elevate international law, foremost as an interpretive tool.

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## I. Introduction

In early July 2002, AIDS treatment activists in South Africa celebrated the decision of the South African Constitutional Court in Minister of Health and others v. Treatment Action Campaign and others (hereinafter TAC), which considered the government's obligations to fulfill the right to health, which the South African constitution protects. The Court in TAC ordered the government 1) to make an approved drug for the prevention of mother-to-child transmission of HIV (PMTCT) available in the public health sector, and 2) to set out a timetable for the roll-out of a national program for PMTCT. The Court in TAC followed the line of reasoning in its earlier judgment, Government of the Republic of South Africa and others v. Grootboom and others (hereinafter Grootboom), finding that the State had failed to comply with its constitutional obligations to fulfill petitioners' housing rights. The Court formally rejected (although possibly preserving for later cases) the "minimum core obligation" approach, which I address below, to evaluate State compliance with the constitution and international human rights law. Instead, it applied a test of "reasonableness" to evaluate government action or lack thereof towards fulfilling the economic right at issue.

In these decisions, the Court is weighing in on the international debate over economic rights. Scholars and States have challenged economic rights' justiciability and whether they ought to be constitutionalized, among other things. Some scholars think that without taking the "minimum core" approach, economic rights cannot be adjudicated in courts. If the South African Constitutional Court is weighing in against these scholars, the outcomes of its orders in both cases belie its words.

The Court seems to say that the "minimum core" approach is beyond the capacity of the judiciary, or at least less legitimate when taken by the judiciary compared with the reasonableness approach. At least, that is its *formal* stance. In substance, the effect of its rulings in TAC and Grootboom is that the Court has ordered the State to take *particular* actions to meet its obligations *in the minimum*—but without engaging in the question of whether the actions required are minimum core obligations. In this paper, I speculate that the Court's persistent dicta in TAC and Grootboom that it is formally passing up the "minimum core" approach earns the Court domestic legitimacy and reserves to the Court a great deal of discretion to decide future economic rights and policy issues under the very fact-dependent "reasonableness" rubric.

## II. AIDS in the South African Context

With 5.3 million HIV-positive people, 1.7 million of whom need treatment,<sup>1</sup> South Africa has the highest prevalence of HIV in the world.<sup>2</sup> Orphaned children run 300,000 of South African households.<sup>3</sup>

<sup>1</sup> *South African Pharmaceuticals: Welcome New Investment in the Generic Drug Industry*, The Economist (March 25, 2004).

<sup>2</sup> "HIV-1 prevalence reached 24.5% in pregnant women attending public health services in 2002." Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, The Lancet vol. 363, no. 9418 (April 24, 2004), at [http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health_and_human_rights.29400.1).

<sup>3</sup> *In Mandela's Shadow*, The Economist (Dec. 12, 2002).

It is no accident: HIV/AIDS is widespread in South Africa largely because apartheid enforced a migrant labor system that destabilized family life and conjugal fidelity, and it has progressed almost entirely unchecked.<sup>4</sup> Generally, blacks in apartheid South Africa suffered from a lack of access to medical care:

Under the Apartheid regime in South Africa, the official policy of racial segregation and inequality adversely affected most South Africans by reducing the provision of medical and mental health care. The government segregated public hospitals and allocated significantly more funds per capita to health care for whites than for blacks.<sup>5</sup>

In an economic model with baseline parameters roughly reflecting the current South African economy, it is estimated that

in the absence of AIDS, there would be modest economic growth and universal education within three generations. If nothing is done to combat the epidemic, however, the model predicts a complete economic collapse within four generations.<sup>6</sup>

Without HIV/AIDS, the population of the country would total 61 million in 2015, but the epidemic will decrease population growth by 18% to 49 million.<sup>7</sup> The cost of not treating AIDS in South Africa will be higher than the cost of treating it.

Nelson Mandela, the new democracy's first president, established AIDS in 1994 as a "presidential lead project" and "reconstruction and development programme."<sup>8</sup>

The government doubled its budget for AIDS in 1995.... The state embarked on programmes to teach life skills and to provide education and health care to those infected with HIV and other sexually transmitted diseases. Millions of condoms were made freely available.<sup>9</sup>

Overall, the ANC government understands health to be of top priority for budget allocations: in 1995-96, health in the national budget was given the second-highest allocation, and in 1996, the government developed a national health care system.<sup>10</sup>

### **A. AIDS Denialism in the ANC**

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<sup>4</sup> Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, *The Lancet* vol. 363, no. 9418 (April 24, 2004), at [http://www.thelancet.com/journal/vol363/iss9418/full/lan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/lan.363.9418.health_and_human_rights.29400.1).

<sup>5</sup> Audrey Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 *TENN. L. REV.* 389, 403 (1998).

<sup>6</sup> *Epidemics and Economics*, *The Economist* (April 10, 2003).

<sup>7</sup> South African Press Association (SAPA) (Jan. 20, 2003) (reporting a study by the University of South Africa's Bureau of Market Research).

<sup>8</sup> Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, *The Lancet* vol. 363, no. 9418 (April 24, 2004), at [http://www.thelancet.com/journal/vol363/iss9418/full/lan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/lan.363.9418.health_and_human_rights.29400.1).

<sup>9</sup> Jeremy Sarkin, *Health*, 7 *S. AFR. HUM. RTS. Y.B.* 115, 131 (1996).

<sup>10</sup> *Id.* at 116.

In 1999, however, President Thabo Mbeki took office. A disciple of Peter Duesberg and the marginalized school of scientists who deny that HIV causes AIDS, Mbeki doubted that antiretrovirals were effective and emphasized their toxicity.<sup>11</sup>

Peter Duesberg, a retrovirologist at UC Berkeley, has challenged the “AIDS establishment” for 13 years, asserting that factors such as promiscuous homosexual activity, sexually transmitted diseases (STDs), recreational drugs, and AZT (Retrovir) are responsible for the AIDS pandemic. More recently, malnutrition, poverty, and illicit drug use have been cited as causes of AIDS. The individuals and groups who hold these views are often referred to as “AIDS dissidents” or “AIDS denialists.”<sup>12</sup>

The international consensus is that “AIDS is caused by the human immunodeficiency virus (HIV). By leading to the destruction and/or functional impairment of cells of the immune system, notably CD4+ T cells, HIV progressively destroys the body’s ability to fight infections and certain cancers.”<sup>13</sup>

Other officials within the ANC, including ex-President Mandela, have challenged Mbeki on his stance on AIDS and pointed out that the Parliamentary and Provincial Medical Aid Scheme provides full coverage of HIV-related treatment for members of parliament, provincial legislatures, judges and the President himself.<sup>14</sup>

The AIDS denialism among top officials of the African National Congress (ANC) government in South Africa has undoubtedly delayed and frustrated an effective response to the pandemic there.<sup>15</sup> Even now that the government has rolled out an antiretroviral treatment program, its HIV/AIDS policies “still trail those of more progressive countries like Botswana by three years.”<sup>16</sup>

President Mbeki was re-elected despite popular frustration with his slow pace rolling out AIDS treatment, and he just re-appointed his notorious Minister of Health, Dr. Manto Tshabalala-

<sup>11</sup> Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, *The Lancet* vol. 363, no. 9418 (April 24, 2004), at

[http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health_and_human_rights.29400.1)

<sup>12</sup> San Francisco AIDS Foundation (SFAF), *HIV Causes AIDS: And Knowing It Could Save Your Life* (2000), available at [http://www.sfaf.org/aboutsfaf/outreach/index.html?june00/hiv\\_causes\\_aids.html](http://www.sfaf.org/aboutsfaf/outreach/index.html?june00/hiv_causes_aids.html).

<sup>13</sup> National Institutes of Health (NIH), *The Evidence that HIV Causes AIDS* (Nov. 1994) (last updated Feb. 27, 2003), available at <http://www.niaid.nih.gov/factsheets/evidhiv.htm>.

HIV fulfills Koch’s postulates as the cause of AIDS.... [V]irtually all AIDS patients are HIV-seropositive; that is they carry antibodies that indicate HIV infection.... [M]odern culture techniques have allowed the isolation of HIV in virtually all AIDS patients, as well as in almost all HIV-seropositive individuals with both early- and late-stage disease.... Postulate #3 has been fulfilled in tragic incidents involving three laboratory workers with no other risk factors who have developed AIDS or severe immunosuppression after accidental exposure to concentrated, cloned HIV in the laboratory.... Koch’s postulates also have been fulfilled in animal models of human AIDS.

*Id.*

<sup>14</sup> Samantha Power, *Letter from South Africa: The AIDS Rebel*, *The New Yorker* 54, 64-65 (May 19, 2003).

<sup>15</sup> Sharon LaFraniere, *After Reconciliation, Steering South Africa to a Reckoning*, *The New York Times* A3 (April 27, 2004).

<sup>16</sup> *Id.*

Msimang, despite her name having “become synonymous with the government’s halting response to AIDS.”<sup>17</sup> Another AIDS “denialist,” she “has drawn ridicule from AIDS activists for her insistence that a diet including beetroot, African potatoes and other natural ingredients would help stave off [AIDS].”<sup>18</sup> In general, the Department of Health in South Africa has suffered credibility losses from its inception.<sup>19</sup>

## **B. Challenges in Expanding Access to Treatment and Prevention**

### **1. Debunking the Myth that Treatment Is Not Effective in Resource-Poor Settings**

In addition to confronting AIDS denialism, important to the effort to expand access to HIV-related treatment has also been the debunking of the myth that you cannot provide highly active antiretroviral therapy (HAART) in resource-poor settings. Physicians and politicians have pointed out that “[c]ountries with limited resources lack the laboratory infrastructure and trained technicians to... [monitor] patients receiving HAART,” which can make it difficult to micro-manage dosages and protocols.<sup>20</sup> Erratic therapy in Côte D’Ivoire and Gabon led to the development of high levels of drug resistance;<sup>21</sup> and coinfection and nutritional deficiencies complicate HAART in resource-poor settings.<sup>22</sup>

But three clinics set up in April 2000 by Médecins Sans Frontières (MSF) and the TAC in government health facilities in the poorest township in the Western Cape of South Africa, Khayelitsha,<sup>23</sup> have conclusively proven that poverty does not preclude patient compliance.<sup>24</sup> Beginning in May 2001, MSF implemented HAART in its Khayelitsha clinics, which became the first government health facilities in South Africa to use antiretroviral treatment outside of clinical trials; and they demonstrated a model for AIDS treatment in primary health care clinics that is “feasible, affordable, and replicable.”<sup>25</sup>

<sup>17</sup> Craig Timberg, *Mbeki Retains Health Minister*, The Washington Post A22 (April 29, 2004).

<sup>18</sup> *Id.*

<sup>19</sup> Early on, the Department of Health spent 14.7 million rand of funding for public AIDS education on an ineffective musical. But to its credit, the Department of Health has been praised for liberalizing abortion access and holding firm against the tobacco industry. Jeremy Sarkin, *Health*, 7 S. AFR. HUM. RTS. Y.B. 115, 116-117 (1996).

<sup>20</sup> Steven J. Reynolds, John G. Bartlett, Thomas C. Quinn, Chris Beyrer, and Robert C. Bollinger, *Antiretroviral Therapy Where Resources Are Limited*, 348 The New England Journal of Medicine 1806 (May 1, 2003).

<sup>21</sup> “The World Health Organization (WHO) has responded to this concern by establishing the Global HIV Drug Resistance Surveillance Network to assist countries in monitoring for the emergence of HIV drug resistance.” *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Out of 500,000 inhabitants in Khayelitsha, 50,000 are HIV-positive. The apartheid government designed the township in 1983 when it evicted black residents from settlements closer to Cape Town. Samantha Power, *Letter from South Africa: The AIDS Rebel*, The New Yorker 54 (May 19, 2003).

<sup>24</sup> Toby Kasper, David Coetzee, Françoise Louise, Andrew Boule, and Katherine Hilderbrand, *Demystifying Antiretroviral Therapy in Resource-Poor Settings*, 32 Essential Drugs Monitor 20-21 (2003); Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, The Lancet vol. 363, no. 9418 (April 24, 2004), at

[http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health_and_human_rights.29400.1)

<sup>25</sup> Toby Kasper, David Coetzee, Françoise Louise, Andrew Boule, and Katherine Hilderbrand, *Demystifying Antiretroviral Therapy in Resource-Poor Settings*, 32 Essential Drugs Monitor 20-21 (2003). As a senior nurse in the Vaal pointed out, “Like with all other diseases and treatments, nurses can be trained on possible side effects of the drug and how to deal with this.” Personal Affidavit of Tshidi Mahlonoko at para. 23, Treatment Action

The Khayelitsha clinic and similar undertakings have also demonstrated that offering treatment makes prevention efforts more effective, cutting through the false zero-sum debate over how to use scarce resources that pits prevention and treatment against one another in the fight against AIDS. Testing, for one, is *crucial* to prevention efforts, but if treatment for HIV/AIDS is not available, it is a death sentence to learn you are HIV-positive, and advertising your status will only stigmatize you. But people are more willing to be tested for HIV when they know they can also get treatment; in this way, the availability of treatment enhances prevention efforts.<sup>26</sup>

The growing consensus is that with long-term commitment, international partnerships, and a sustained availability of drugs, HAART is effective in resource-poor settings.<sup>27</sup>

## 2. Making the Drugs Affordable

The project's success, of course, depends on the affordability of drugs.<sup>28</sup> When the South African Medicines Control Council (MCC) approved the use of Brazilian generic antiretrovirals and the pharmaceutical industry, after negative publicity, withdrew its court case against the government on generic drug procurement, twice as many patients in Khayelitsha could be treated.<sup>29</sup>

In anticipation of contracts to supply drugs to the new national treatment program, new investment in generic drug facilities in South Africa is expanding capacity and slashing drug prices.<sup>30</sup> "The price of a basic daily antiretroviral dose for one patient is now under \$1; the Clinton [AIDS] Foundation will provide it for less than 40 cents."<sup>31</sup>

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Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>.

<sup>26</sup> Samantha Power, *Letter from South Africa: The AIDS Rebel*, *The New Yorker* 54, 56 (May 19, 2003).

<sup>27</sup> Paul Farmer, F. Leandre, and Joia S. Mukherjee, *Community-based Approaches to HIV Treatment in Resource-poor Settings*, 358 *The Lancet* 404-09 (2001); Quarraisha Abdool Karim, HIV treatment in South Africa: overcoming impediments to get started, *The Lancet* vol. 363, no. 9418 (April 24, 2004), at [http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health_and_human_rights.29400.1); Toby Kasper, David Coetzee, Françoise Louise, Andrew Boulle, and Katherine Hilderbrand, *Demystifying Antiretroviral Therapy in Resource-Poor Settings*, 32 *Essential Drugs Monitor* 20-21 (2003); *Scaling Up Antiretroviral Therapy in Resource Limited Settings: Guidelines for a Public Health Approach*, World Health Organization (June 2002), available at <http://www.who.int/hiv/topics/arv/ISBN9241545674.pdf>.

<sup>28</sup> Toby Kasper, David Coetzee, Françoise Louise, Andrew Boulle, and Katherine Hilderbrand, *Demystifying Antiretroviral Therapy in Resource-Poor Settings*, 32 *Essential Drugs Monitor* 20-21 (2003).

<sup>29</sup> *Id.*; Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, *The Lancet* vol. 363, no. 9418 (April 24, 2004), at [http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health_and_human_rights.29400.1).

<sup>30</sup> *South African Pharmaceuticals: Welcome New Investment in the Generic Drug Industry*, *The Economist* (March 25, 2004).

<sup>31</sup> *Id.*

### C. Progress and Achievements in Expanding Access to Treatment and Prevention

Meeting these challenges head-on is the incredibly well organized civil society movement centered on the non-governmental organization the Treatment Action Campaign (TAC). Thanks in no small part to the TAC, access to HIV/AIDS treatment and prevention has expanded in South Africa. The pronouncement of the Constitutional Court in the TAC's case against the Minister of Health that South Africa must provide a program of prevention of mother-to-child transmission of HIV has emboldened the civil society campaign for a universal treatment program, to which the government finally committed and began to implement this year.<sup>32</sup>

## III. South Africa's Final Constitution

### A. The Certification Judgment

The Constitutional Court itself was to sit above the existing court system, to be staffed by justices chosen by a democratically elected government, and thereby to provide a new forum untainted by apartheid in which to establish democratic constitutionalism. It was *particularly created* for an unprecedented task in the birth of a new nation: to certify with finality that the Final Constitution was itself constitutional.<sup>33</sup>

Since it was "the first time that such a process had taken place anywhere in the world,"<sup>34</sup> in the first certification judgment the Court explains the undertaking: "Judicial 'certification' of a constitution is unprecedented and the very nature of the undertaking has to be explained."<sup>35</sup> Unlike the American Constitution, unenumerated powers of the government are not reserved to local government and the South African provinces are not sovereign; therefore, the Court was also empowered to certify provincial constitutions.<sup>36</sup>

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<sup>32</sup> In January of this year the Western Cape provincial government rolled out HAART to 2000 patients; the government accepted in February over \$41 million in grants that the Global Fund to Fight AIDS, Tuberculosis, and Malaria (created to scale up the fight against these three infectious diseases through increased resources and accountability) had approved in August 2003. *South Africa Grant Agreements Signed: Over US\$ 40 Million for Treatment and Prevention of HIV/AIDS and TB*, The Global Fund to Fight AIDS, Tuberculosis, and Malaria (Aug. 7, 2003), available at [http://www.theglobalfund.org/en/media\\_center/press/pr\\_030807.asp](http://www.theglobalfund.org/en/media_center/press/pr_030807.asp). By April 1 AIDS treatment had rolled out to 27 sites in four provinces. The goal is to provide HAART to 1.2 million people by 2008. Quarraisha Abdool Karim, *HIV treatment in South Africa: overcoming impediments to get started*, *The Lancet* vol. 363, no. 9418 (April 24, 2004), at [http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health\\_and\\_human\\_rights.29400.1](http://www.thelancet.com/journal/vol363/iss9418/full/llan.363.9418.health_and_human_rights.29400.1).

<sup>33</sup> Carmel Rickard, *The Certification of the Constitution of South Africa*, in PENELOPE ANDREWS AND STEPHEN ELLMANN (eds.), *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 286* (2001).

<sup>34</sup> PROF. G.E. DEVENISH, *A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION* 338 (1998).

<sup>35</sup> *Certification of the Constitution of The Republic of South Africa*, 1996 para. 1264G [1996] CCT 23/96 (S. Afr.), available at <http://www.concourt.gov.za/files/const/const.pdf>.

<sup>36</sup> Constitution of the Republic of South Africa (Act 200 of 1993) § 160(3), available at <http://www.gov.za/constitution/1993/1993cons.htm> [hereinafter S. AFR. INTERIM CONST.]; see also Carmel Rickard, *The Certification of the Constitution of South Africa*, in PENELOPE ANDREWS AND STEPHEN ELLMANN (eds.), *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 280* (2001).

Certification was a political compromise; the white government was not going to allow the new black majority a blank slate, and Nelson Mandela and the ANC could not agree to a Constitution that an unelected body drafted. A two-stage process was agreed to, through which a credible body would adopt a Final Constitution, but would also reflect the negotiated settlement constituting the transition.

First, a transitional drafting committee wrote an Interim Constitution that contained 34 “Constitutional Principles” and went into effect on April 27, 1994. Meanwhile, the bicameral Parliament was elected, and it drafted the Final Constitution. To ensure that this Final Constitution reflected the Constitutional Principles agreed to by all stakeholders who constituted the transition, the new Constitutional Court would certify the Final Constitution:

The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles.<sup>37</sup>

Many appeared before the Court simply to challenge its authority to certify the Final Constitution, but what it was given was recognizable as a legal task: to check the draft provisions against the set of 34 Constitutional Principles and ascertain the compatibility of the two texts.<sup>38</sup>

Only after the second certification judgment did the Court certify the Final Constitution, and it went into effect on February 7, 1997. Its judgment was final and binding:

A decision of the Constitutional Court in terms of ss (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding...<sup>39</sup>

Though the Final Constitution is written in much plainer language than the Interim Constitution, there are very few material differences between the two: “An examination of the two texts reveals that the negotiations concerning the latter were more of an editorial than of a conceptual nature.”<sup>40</sup> Nine provisions were found incompatible with the Constitutional Principles and sent back to the Constitutional Assembly; after further work, it passed a second certification judgment that did not assume the public importance nor attract the public attention of the first.<sup>41</sup>

## **B. The Place of International Law in the Final Constitution**

### **1. Qualified Dualism**

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<sup>37</sup> S. AFR. INTERIM CONST. § 71(2).

<sup>38</sup> PROF. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 339 (1998).

<sup>39</sup> S. AFR. INTERIM CONST. § 71(3).

<sup>40</sup> Dennis Davis, *Deconstructing and Reconstructing the Argument for a Bill of Rights Within the Context of South African Nationalism*, in PENELOPE ANDREWS AND STEPHEN ELLMANN (eds.), *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* 216 (2001).

<sup>41</sup> Carmel Rickard, *The Certification of the Constitution of South Africa*, in PENELOPE ANDREWS AND STEPHEN ELLMANN (eds.), *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* 267 (2001).

By differentiating between *kinds* of international agreements with different degrees of automaticity of incorporation into South African law, the South African Constitution implements what has been called a “qualification of the dualist approach.”<sup>42</sup> Moreover, while the Constitution explicitly “trumps” international law when they come into conflict, interpretive provisions specify that South African law as far as is reasonable is to be interpreted to be consistent with international law. Commentators have furthermore understood this to include nonbinding as well as binding international law, an interpretation favored by the Constitutional Court in its decision *S v. Makwanyane and Another*, at the very least for using international law as an interpretive tool with respect to construing the Bill of Rights provisions.<sup>43</sup>

The Final Constitution follows other post-war Constitutions in requiring legislative enactment of international agreements to juridify them in national law, but recognizes *by subject matter* a category of “self-executing” agreements:

[231](2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces...<sup>44</sup>

The Constitution is the supreme law of the land in South Africa, and “trumps” international law where they conflict:

[231(4)] Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>45</sup>

Nevertheless, customary international law, as in the United States, is South African law, and commentators suggest that its interpretive role implies that customary international law supercedes common law and legislation:

232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>46</sup>

<sup>42</sup> PROF. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 324 (1998).

<sup>43</sup> *S v. Makwanyane and Another* para. 35, note 46 [1995] CCT 3/94 (S. Afr.), *available at* <http://www.concourt.gov.za/files/deathsn/makwanyane.pdf> (finding capital punishment to be unconstitutional).

<sup>44</sup> S. AFR. FINAL CONST. § 231.

<sup>45</sup> *Id.* at § 231(4).

<sup>46</sup> *Id.* at § 232.

233. When interpreting any legislation, every court 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>47</sup>

The argument goes, there will be some treaties that may not bind South Africa, but may nevertheless be used as interpretive guides, particularly “as evidence of a customary rule of international law,” to fill a gap or to resolve a statutory ambiguity.<sup>48</sup> Particularly with respect to customary international law, its status under § 232 of the Final Constitution as “law in the Republic,” combined with the interpretive role it plays, implies that it takes precedence over legislation or the common law.<sup>49</sup>

## 2. Interpretation of the Bill of Rights Provisions

### a. The Limitation of Rights

The South African Constitution, like the Canadian and Israeli Constitutions, contains a clause expressly providing standards for justifiable limitations on constitutional rights. Constitutional review, therefore, is a two-stage process. When legislation is challenged as unconstitutional, the first inquiry undertaken is whether it infringes a constitutional right. If it is determined not to, the case is closed. If the legislation does infringe a constitutional right, the inquiry proceeds within the limitation clause to ask whether the infringement is justified.

The first subsection of § 36, “Limitation of Rights,” in the Final Constitution reads:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.<sup>50</sup>

As compared with the limitation clause in the Interim Constitution, the notion that limitations cannot “negate the essential content of the right in question” has been taken out of the limitation clause. The Interim Constitution’s limitation clause in § 33 read in part:

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<sup>47</sup> *Id.* at § 233.

<sup>48</sup> PROF. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 325 (1998).

<sup>49</sup> *Id.* at 327.

<sup>50</sup> S. AFR. FINAL CONST. § 36(1).

(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

a. shall be permissible only to the extent that it is-

i. reasonable; and

ii. justifiable in an open and democratic society based on freedom and equality; and

b. shall not negate the essential content of the right in question...<sup>51</sup>

Perhaps the notion that rights have “essential content” survives in the language in the Final Constitution’s limitation clause requiring the Court to take account of the “extent of the limitation” in holding whether or not an infringement is justified.

That the Interim Constitution referred to “essential content” in its limitation clause is interesting for economic and social rights jurisprudence. It follows the language used by the Committee on Economic, Social and Cultural Rights in its General Comments interpreting the rights enshrined in the International Covenant on Economic and Social Rights and begs the development of the “essential content” of economic and social rights, which are underdeveloped when compared with civil and political rights. That language, however, was excised from the Final Constitution.

### **b. The Obligation to Consider International Law**

Under both the Interim and Final Constitutions, the Constitutional Court was and is *required* to consider international law in its construction of Bill of Rights provisions. The obligatory language in § 39 is, “When interpreting the Bill of Rights, a court, tribunal or forum... must consider international law...”<sup>52</sup>

S v. Makwanyane and Another, an early decision of the Court under the Interim Constitution, established that, at least with respect to construing the Bill of Rights provisions, binding as well as nonbinding international law must be considered: “In the context of s 35(1), public international law would include non-binding as well as binding law.”<sup>53</sup> The Court cited the South African scholar John Dugard’s interpretation of § 35, the provision analogous to § 39 in the Final Constitution:

s 35 requires regard to be had to “all the sources of international law recognised by art 38(1) of the Statute of the International Court of Justice, ie:

‘(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

<sup>51</sup> S. AFR. INTERIM CONST. § 33(1).

<sup>52</sup> S. AFR. FINAL CONST. § 39(1)(b).

<sup>53</sup> S v. Makwanyane and Another para. 35 [1995] CCT 3/94 (S. Afr.), available at <http://www.concourt.gov.za/files/deathsn/makwanyane.pdf>.

- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations; and
- (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”<sup>54</sup>

Turning to international law for interpretive guidance with respect to the Bill of Rights provisions in the South African context is a “genealogical” use comparable to the American incorporation of imperial English common law in early United States Supreme Court jurisprudence.<sup>55</sup>

Inspired by the Atlantic Charter signed by Roosevelt and Churchill, the ANC drafted its own African Claims demanding a Bill of Rights.... In June 1955 the Freedom Charter... was drafted. In fact, the words in the preamble of the Freedom Charter declaring that “South Africa belongs to all those who live in it” found their way into the preamble, as did many of the Charter’s sentiments into the provisions of the final Constitution.<sup>56</sup>

From the 1950s, the Universal Declaration of Human Rights was literally in the back pockets of ANC leaders. International law is the *framework* for the Bill of Rights, and in many places, its provisions take their wording directly from human rights conventions.<sup>57</sup>

At a time when South Africa’s official government policy was apartheid—racism and segregation—the global movement was in the opposite direction: anti-discrimination, decolonizing, the introduction of the recognition of universal human rights and standing for individuals in the international legal order. Especially towards the end of apartheid, South Africa was isolated from the international community through boycotts and sanctions; “[i]nternational law and political pressure played a significant role in the ultimate demise of apartheid.”<sup>58</sup> For this reason, South Africa, in large part because of its Constitution and Constitutional Court, is today “a leading exponent of international public law.”<sup>59</sup>

### **C. The Place of Socio-Economic Rights in the Final Constitution**

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<sup>54</sup> *Id.* at note 46.

<sup>55</sup> See generally Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999) (analyzing modes of comparative constitutional interpretation and finding three: universalist, dialogical, and genealogical).

<sup>56</sup> Hassen Ebrahim, *The Making of the South African Constitution: Some Influences*, in PENELOPE ANDREWS AND STEPHEN ELLMANN (eds.), *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* 86 (2001).

<sup>57</sup> John Dugard, *Public International Law*, in MATTHEW CHASKALSON ET AL (eds.), *CONSTITUTIONAL LAW OF SOUTH AFRICA* 13-10 (1996-1999).

<sup>58</sup> PROF. G.E. DEVENISH, *A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION* 326 (1998).

<sup>59</sup> Margaret A. Burnham, *Constitution-Making in South Africa: Symposium Article: Cultivating a Seedling Charter: South Africa’s Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29, 34 (1997).

## 1. Socio-Economic Rights Are Founding Values

The preamble to the South African Constitution, as Justice Sachs elucidated in *S v. Mhlungu*, “connects up, reinforces and underlies all of the text that follows [it]” rather than being merely a “throat clearing exercise.”<sup>60</sup> It is an integral part of the Constitution.<sup>61</sup>

Purposive interpretation with regard to the unique history of South Africa and its transition from a repressive to a democratic state is a rule of constitutional law:

[The] court is entitled to have regard to the circumstances and events leading up to the adoption of the Constitution and the human, social and economic impact that any decision of the court will have...<sup>62</sup>

Particularly with respect to the Bill of Rights provisions, the Constitution, elaborating on the values and objectives the preamble enshrines, requires the interpretation of the law to be values-based:

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom....

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.<sup>63</sup>

“[A]partheid... consistently denied Africans and others their basic social and economic needs.”<sup>64</sup> In recognition that the transition to democracy required more than the establishment of formal equality, improving “the quality of life of all citizens,” establishing “a society based on... social justice,” and freeing “the potential of each person” are all included in the preamble as purposes for which the Constitution was adopted, recognizing that injustices under apartheid included economic injustices.<sup>65</sup>

## 2. The Fight for Socio-Economic Rights in the Final Constitution

<sup>60</sup> *S v. Mhlungu and others* para. 112 [1995] CCT 25/94 (S. Afr.), available at <http://www.concourt.gov.za/files/mhlungu/mhlungu.pdf> (holding that the Constitution applied to proceedings pending before any court at the date of commencement of the Constitution).

<sup>61</sup> PROF. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 32 (1998).

<sup>62</sup> *Id.* at 231, citing *Baloro v. University of Bophutswana* [1995].

<sup>63</sup> S. AFR. FINAL CONST. § 39(1) and (2).

<sup>64</sup> Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 8 (1993). See also Jeremy Sarkin, *Health*, 7 S. AFR. HUM. RTS. Y.B. 115, 137 (1996).

<sup>65</sup> S. AFR. FINAL CONST. Preamble. See also PROF. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 29 (1998).

Typical criticisms of the constitutionalization of economic and social rights, as explored above, can be summarized as follows. One, they are rights requiring “positive” state action rather than rights requiring the state to refrain from acting, and they therefore require resources for their fulfillment, a point which leads to three objections to their constitutionalization. First, they cannot be guaranteed due to resource constraints. Second, their dependence on resources for their enforcement makes them non-justiciable: asking judges to supervise budget allocations both violates the separation of powers and is too complex a task for the judiciary. Third, their dependence on resources for their enforcement requires redistributive orders, which the unelected judiciary ostensibly would make, and therefore their enforcement may infringe civil and political rights. Finally, critics argue, creating socio-economic entitlements would overburden the judiciary with a flood of litigation.<sup>66</sup>

Many of these criticisms were made of the constitutionalization of economic and social rights in the Final Constitution and answered in the certification judgment. The debate over constitutionalizing economic and social rights came up on the third day of the second week of arguments heard in the original certification judgment on the Final Constitution.<sup>67</sup> Arguing against their constitutionalization in particular were the Free Market Foundation and the South African Institute of Race Relations. Key to their arguments was the contention that making economic and social rights judicially enforceable violates the separation of powers, as the Court cannot interfere with budget allocations and would sacrifice its independence if it did so. They also asserted that judges were not competent in the area, and that the courts would experience a flood of litigation if their doors were opened to economic and social claims.<sup>68</sup>

Answering these objections in the certification judgment, the Court held that including economic and social rights in the Constitution was in keeping with the principle of the separation of powers.<sup>69</sup> The Court made two replies to the issue of judicial competence and authority to make orders with budgetary implications. One, that objection does not rule out, at the very least, the negative enforcement of economic and social rights: “At the very minimum, socio-economic rights can be negatively protected from improper invasion.”<sup>70</sup> Two, orders with budgetary implications are not uniquely required to enforce economic and social rights, but, often, “ordering liberty” also costs money:

[E]ven when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such [budgetary] implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our

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<sup>66</sup> Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 14 (1993). (As an aside, that opening the judiciary to economic and social claims would produce a flood of litigation seems, in my opinion, to be an argument in favor of constitutionalizing economic and social rights, as it evinces the suspected need for such vindication.)

<sup>67</sup> Carmel Rickard, *The Certification of the Constitution of South Africa*, in PENELOPE ANDREWS AND STEPHEN ELLMANN (eds.), *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* 254 (2001).

<sup>68</sup> *Id.* at 255-57.

<sup>69</sup> Certification of the Constitution of The Republic of South Africa, 1996 para. 77 [1996] CCT 23/96 (S. Afr.), available at <http://www.concourt.gov.za/files/const/const.pdf>.

<sup>70</sup> *Id.* at paras. 1290B-C.

view it cannot be said that by including socio-economic rights within a Bill of Rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a Bill of Rights that it results in a breach of the separation of powers.<sup>71</sup>

The Court's authority to declare legislation unconstitutional does not infringe the legislative branch's law-making power: "the primary responsibility for taking measures aimed at fulfilling these rights would rest with the legislature.... Courts would declare legislation which fails to fulfill these rights as unconstitutional,"<sup>72</sup> and that has been the practice. And now that the Court has actually adjudicated five cases implicating socio-economic rights, some former skeptics of their constitutionalization have become converts in support of judicial intervention in this area.<sup>73</sup>

With respect to judicial competence to adjudicate economic and social claims, it can only grow as the rights themselves develop content, interpretive tools, and standards *through* their use, as civil and political rights have. For instance, "Only through constitutional adjudication have the courts given legal content to the right of free speech."<sup>74</sup> With respect to all adjudication, moreover, the Court follows the rule of deciding "no more than what is absolutely necessary for the adjudication of a case,"<sup>75</sup> and has held that all courts should follow it.<sup>76</sup> It is with this understanding that we can view the South African Constitutional Court's economic and social rights jurisprudence as contributing to this body of law.

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<sup>71</sup> *Id.* at paras. 1289F-G. See also Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 20 (1993).

<sup>72</sup> Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 15 (1993).

<sup>73</sup> See Kevin Hopkins, *Democracy in a post-TAC society*, De Rebus 14, 17 (Nov. 2002). (De Rebus is a monthly South African law magazine.)

<sup>74</sup> Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 17 (1993).

<sup>75</sup> PROF. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 225 (1998).

<sup>76</sup> *S v. Mhlungu and others* para. 59 [1995] CCT 25/94 (S. Afr.), available at <http://www.concourt.gov.za/files/mhlungu/mhlungu.pdf>.

## IV. Economic and Social Rights as International Human Rights

### A. The International Debate over Economic Rights

Entitlements to goods that fulfill basic needs, such as food, shelter, and water, in the parlance of international human rights law, fall under the label “economic” or “social” rights. They have been the subject of controversy since the drafting of the Universal Declaration of Human Rights. The ideological battle at the heart of the Cold War, moreover, has left economic rights a poor step-cousin to civil and political rights—e.g. the right to vote, freedom of speech and assembly, etc.—both in terms of their lesser acceptance and reification, philosophically and legally, as rights at all, and in terms of the lesser outrage trained on violations of economic rights.<sup>77</sup> For the purposes of this paper, to contextualize the decisions of the South African Constitutional Court in TAC and Grootboom, I mention briefly two interrelated questions challenging economic rights: are they justiciable, and ought they to be constitutionalized?

In the post-Cold War era, with the emergence of many new democracies, the question whether to constitutionalize economic rights has reinvigorated debate over them. Specifically in the context of Eastern European countries making the transition from Communism to free market economies, Cass Sunstein has argued against the constitutionalization of economic rights, but distinguished other countries, where constitutionalization would not necessarily be harmful.<sup>78</sup> Whether economic rights are justiciable and therefore amenable to constitutionalization is a central question:

[T]he institutional logic of social rights is said to preclude their constitutionalisation because judges lack the *legitimacy* and/or the *competence* to deal with such issues.... [I]t is the democratic majority’s moral right to allocate resources as they see fit, and/or they should not be allowed to adjudicate these rights because they are not equipped to do so.<sup>79</sup>

On the other hand, “courts are generally already involved in a considerable range of matters which have important resource implications.”<sup>80</sup> Nevertheless, scholars have suggested that judges, in adjudicating economic rights, should refrain from substituting their judgments for legislative processes, and merely “remind the government that it is under a duty to do x: [the judiciary] should not tell the government *how* to fulfil this duty...”<sup>81</sup>

<sup>77</sup> See generally HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 237-320 (2d ed. 2000).

<sup>78</sup> Cass Sunstein, *Against Positive Rights*, 2/1 EAST EUR. CONST. REV. 35 (1993), reprinted in part in HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 280-82 (2d ed. 2000).

<sup>79</sup> Cécile Fabre, *Constitutionalising Social Rights*, 6 J. POLIT. PHIL. 263 (1998), reprinted in part in HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 278 (2d ed. 2000).

<sup>80</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 9, para. 10, U.N. Doc. E/1999/22, Annex IV (1998) (on domestic application of the Covenant) (hereinafter General Comment 9).

<sup>81</sup> Fabre, *supra* note 3, at 279.

South Africa is one new democracy that *has* constitutionalized economic rights; its constitution specifies that they give rise to causes of action;<sup>82</sup> and its Constitutional Court has held that the justiciability of economic rights in the Constitution “has been put beyond question by the text” of the Constitution.<sup>83</sup> As the Court noted in TAC, “[t]he question... is not whether socio-economic rights are justiciable. Clearly they are.”<sup>84</sup> How the Constitutional Court has adjudicated economic rights in Grootboom and TAC, however, can be considered its “weighing in” on the international debate over economic rights’ justiciability. The Court read in the Constitution the standard of “reasonableness” to evaluate the constitutionality of government action or lack thereof with respect to economic rights, and it rejected (at least formally) as inapplicable to the South African constitution the “minimum core obligation” approach, which some scholars assert is a requisite for the justiciability of economic rights.

## B. Sources of Economic Rights for South African Citizens

Rights to health and housing are recognized in the South African constitution, the *travaux préparatoires* of which indicate that international human rights law guided its drafting,<sup>85</sup> and which in Section 39(1)(b) requires courts in interpreting the Bill of Rights to consider international law.<sup>86</sup> Therefore, in the cases discussed here, international law bears upon the question of how to interpret and enforce economic rights. Numerous international instruments to which South Africa is a party recognize the right to health. For instance, the African Charter on Human and Peoples’ Rights features in Article 16 the right to the “best attainable state of physical and mental health,” and similar language in Article 14.1 for the right thereto of every child; South Africa ratified the African Charter in 1996.

Critical to the arguments in TAC and Grootboom are the obligations of South Africa under the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR” or “the Covenant”), which it signed on October 3, 1994. That economic rights are to some extent qualified by a State’s available resources and are to be achieved “progressively” is codified in Article 2(1) of the ICESCR:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>87</sup>

<sup>82</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (Act 108 of 1996), ch. 2 (Bill of Rights), § 38, *available at* <http://www.concourt.gov.za/constitution> [*hereinafter* S. AFR. FINAL CONST.].

<sup>83</sup> Government of the Republic of South Africa and others v. Grootboom and others para. 20 [2000] CCT 11/00 (S. Afr.), *available at* <http://www.concourt.gov.za/files/grootboom1/grootboom1.pdf> (*hereinafter* Grootboom).

<sup>84</sup> Minister of Health and others v. Treatment Action Campaign and others para. 25 [2002] CCT 8/02 (S. Afr.), *available at* <http://www.concourt.gov.za/files/tac/tac.pdf> (*hereinafter* TAC).

<sup>85</sup> Brief of Amici Curiae Community Law Centre and the Human Rights Commission of South Africa, para. 18.2, Grootboom.

<sup>86</sup> S. AFR. FINAL CONST., ch. 2 (Bill of Rights), § 39.

<sup>87</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Article 2(1), U.N. Doc. A/6316, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (*hereinafter* ICESCR) (*emphases added*).

In Articles 11 and 12 the Covenant also recognizes the rights to adequate housing and “the highest attainable standard of physical and mental health”:

#### Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate... housing, and to the continuous improvement of living conditions...

#### Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases...<sup>88</sup>

The Committee on Economic, Social and Cultural Rights has, since 1987, monitored States Parties' compliance with their ICESCR obligations, and from time to time issues interpretive jurisprudence on the Covenant in the form of “General Comments” considered authoritative.<sup>89</sup> The *amici* and the Court in Grootboom and TAC considered these interpretations of the economic rights protected by the Covenant. With respect to “progressive realization,”

the undertaking in article 2(1) “to take steps”... is not qualified or limited by other considerations.... [S]teps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>90</sup>

That the obligation of States Parties progressively to realize economic rights is subject to the availability of their resources has given rise to the critique that these qualifications make the obligations “devoid of meaningful content” and “difficult if not impossible to determine when [they] ought to be met or indeed have been met.”<sup>91</sup> But the Committee has replied:

[R]ealization over time, or in other words progressively... should not be misinterpreted as depriving the obligation of all meaningful content. It is... a necessary flexibility device.... [It] imposes an obligation to move as expeditiously and

<sup>88</sup> *Id.* at Articles 11-12.

<sup>89</sup> STEINER AND ALSTON, *supra* note 1, at 248.

<sup>90</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3, para. 2, U.N. Doc. E/1991/23, Annex III (1990) (on the nature of States parties obligations) (hereinafter General Comment 3).

<sup>91</sup> STEINER AND ALSTON, *supra* note 1, at 246.

effectively as possible.... [A]ny deliberately retrogressive measures... would require the most careful consideration and would need to be fully justified...<sup>92</sup>

In General Comment 14 on the right to health, the Committee made clear that Article 12(1) provides the *definition* of the right to health, and Article 12(2) “enumerates illustrative, non-exhaustive examples of States parties’ obligations.”<sup>93</sup> “Core obligations” with respect to the right to health include the provision of essential drugs, “reproductive, maternal (pre-natal as well as post-natal) and child health care,” “immunization against the major infectious diseases,” and “measures to prevent, treat and control epidemic and endemic diseases...”<sup>94</sup> Finally, with respect to justiciability, the Committee has clarified, “[W]henver a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”<sup>95</sup>

The relevant language in the South African constitution, in many cases, reflects the ICESCR, although as I describe in later sections, the Constitutional Court has found important differences between the Covenant and the constitution. For purposes of reference, the constitutional provisions at issue in TAC and Grootboom are laid out here:

7. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights...

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions...

27. (1) Everyone has the right to have access to

a. health care services, including reproductive health care...

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment...

28. (1) Every child has the right...

c. to basic nutrition, shelter, basic health care services and social services...

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<sup>92</sup> General Comment 3, para. 9.

<sup>93</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, para. 7, U.N. Doc. E/C.12/2000/4 (2000) (on the right to the highest attainable standard of health) (hereinafter General Comment 14).

<sup>94</sup> *Id.* at paras. 43-44.

<sup>95</sup> General Comment 9, para. 9.

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b. must consider international law...<sup>96</sup>

### C. Minimum Core Obligation Approach

It has been said that “being fundamental, universal and *clearly specifiable*” (emphasis added) are the criteria for a human right, and that for economic rights to meet these criteria, “some minimum standards need to be established... necessary to the idea of a ‘core’ of rights, and to the assumption of the UN Committee on ESCR that such rights can increasingly be justiciable...”<sup>97</sup> The Committee has developed the “minimum core” approach to economic rights:

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.<sup>98</sup>

The South African Constitutional Court characterized the minimum core obligation as “the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.”<sup>99</sup>

In the South African constitution, Section 27(1)(a) entitles “everyone” to access to “health care services including reproductive health care”<sup>100</sup> but does not make a list or describe the extent of the services. Therefore, *amici* in TAC argued, in line with scholarly critique and the Committee’s approach, “their extent must be capable of determination to give meaningful content to the right,” at least requiring delineation of the minimum to which everyone has a right to access.<sup>101</sup>

To determine the “core” health care services guaranteed by Section 27(1)(a), the TAC *amici* in paragraphs 37.1 through 61 of their brief apply rules of constitutional interpretation set out in Section 39 of the South African constitution and South African common law. Under Section 39 interpretation of a right should give effect to the purpose of South African constitutional rights, which can be found in the text of the constitution, and in the South African historical and social

<sup>96</sup> S. AFR. FINAL CONST., ch. 2 (Bill of Rights), §§ 7, 26, 27-28, 39.

<sup>97</sup> David Beetham, *What Future for Economic and Social Rights?*, 43 Pol. Stud. 41 (1995), reprinted in part in HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 255, 256 (2d ed. 2000).

<sup>98</sup> General Comment No. 3, para. 10.

<sup>99</sup> Grootboom, para. 31.

<sup>100</sup> S. AFR. FINAL CONST., ch. 2 (Bill of Rights), § 27.

<sup>101</sup> Brief of Amici Curiae Community Law Centre and the Institute for Democracy in South Africa, para. 12, TAC.

context: “achievement of the value of human dignity”<sup>102</sup> and “advancement of race and gender equality.”<sup>103</sup> So the TAC amici argued, “the full extent of the health care services to which everyone is entitled to have access in terms of s 27(1)(a)... must at least include the minimum of health care services required for dignified human existence.”<sup>104</sup> Following Section 39’s requirement that South African courts look to international law to interpret economic rights,<sup>105</sup> the TAC amici referred to General Comment 14, which as quoted earlier describes essential primary health care as the minimum core content of the right to health, including the provision of essential drugs; reproductive, maternal and child health care; immunization against major infectious diseases; and measures preventing, treating and controlling epidemic diseases.<sup>106</sup> Taking this into account, the TAC amici conclude,

The minimum core of health care services to which everyone is entitled to have access.... clearly includes the provision of Nevirapine to pregnant women with HIV and to their new-born babies, to prevent MTCT of the infection.... [Nevirapine] is an essential drug as defined under the WHO Action Program on Essential Drugs. It constitutes basic maternal and child health care. It is a basic measure to prevent and control an epidemic disease. It is moreover akin to immunization....<sup>107</sup>

The first half of the *amicus* brief in Grootboom similarly refers to the General Comment on adequate housing to argue for a minimum core housing right; but it also criticizes the government’s response to housing needs for being discriminatory, arbitrary, and irrational.<sup>108</sup>

But the Court did not take, at least formally, the minimum core obligation approach to enforcing economic rights; it chose instead to read the standard of “reasonableness” in the constitution to evaluate the constitutionality of government action or lack thereof.

## **V. The Treatment Action Campaign: Empowering People to Articulate and Demand the Right to Health**

The Treatment Action Campaign (TAC) is “the largest and most effective AIDS group in the third world.”<sup>109</sup> It is impossible to undertake to study the South African Constitutional Court’s decision in the TAC case without appreciating the political effect the organization has had on the country. Steven Budlender, the clerk to Justice Chaskalson at the time he was writing the opinion in TAC, said that as a law clerk and within the Court, it was impossible not to consider the actual impact of the decision, as is sometimes the case in the insulation of the country’s highest court. The TAC would literally be outside with placards, organizing support for a favorable decision,

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<sup>102</sup> Grootboom, para. 25.

<sup>103</sup> *Id.* at para. 23.

<sup>104</sup> Brief of Amici Curiae Community Law Centre and the Institute for Democracy in South Africa, para. 42, TAC.

<sup>105</sup> S. AFR. FINAL CONST., ch. 2 (Bill of Rights), § 39(1)(b).

<sup>106</sup> Brief of Amici Curiae Community Law Centre and the Institute for Democracy in South Africa, para. 59.3, TAC; *see also* General Comment 14.

<sup>107</sup> Brief of Amici Curiae Community Law Centre and the Institute for Democracy in South Africa, paras. 60-61, TAC.

<sup>108</sup> Brief of Amici Curiae Community Law Centre and the Human Rights Commission of South Africa, paras. 67-67.4, Grootboom.

<sup>109</sup> Tina Rosenberg, *A Hero Measured by the Advance of a Deadly Disease*, *The New York Times* (Jan. 13, 2003).

and mobilizing the media to cover the case's progress and outcomes.<sup>110</sup> To quote national TAC leader Mark Heywood,

The mobilization culminated on 25 and 26 November, when rallies and marches took place around South Africa, including an all-night vigil of 600 TAC volunteers outside the [High] court before the hearing commenced. For the two days of the hearings the court was packed by people with HIV wearing TAC's trademark "HIV-positive" T-shirt, health professionals and journalists, listening intently to the evolution of the argument.... [T]he Constitutional Court itself was filled with activists, doctors, nurses and the media.<sup>111</sup>

Founded on International Human Rights Day, on December 10, 1998, the TAC has raised the profile of the AIDS issue and intersecting international intellectual property rights controversies. When it was founded, many South Africans, even those living with the virus, did not even know HIV could be treated. The organization has also promoted medical literacy, making accessible the concept of HIV transmission and increasing understanding of the drugs used to treat HIV and AIDS-related opportunistic infections. The TAC has made fluconazole, the drug used to treat AIDS-related fungal infection, literally a household word through its literacy programs.<sup>112</sup> Most beneficially, it has empowered a generation of young people—the people who lead the organization, the cohort whose lives are most affected by the course of the HIV/AIDS epidemic—to articulate and demand their rights.

#### A. Zackie Achmat: The Charismatic and Committed Leader

At the helm of the TAC is the forty-one year-old, former apartheid-era ANC activist and gay rights activist<sup>113</sup> Zackie Achmat, now "South Africa's most prominent AIDS activist."<sup>114</sup> HIV-positive with full-blown AIDS as well,<sup>115</sup> Zackie is the moral center of the civil society campaign in South Africa, and Samantha Power called him "the most important dissident in the country since Nelson Mandela."<sup>116</sup> Cutting through the rhetoric and taking action, Zackie did not take antiretrovirals for four years while on a drug strike to protest first the unconscionably high prices

<sup>110</sup> Interview with Steven Budlender, then-clerk to Justice Chaskalson, The Constitutional Court, in Johannesburg, S. Afr. (Apr. 7, 2003).

<sup>111</sup> Mark Heywood, *Current Developments: Preventing Mother-to-Child Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 S. Afr. J. HUM. RTS. 278, 300 and 310 (2003). By way of example, a taxi driver I spoke to when I was in South Africa told me that the TAC decision was very well known and had restored his faith in the Constitution's ability "to protect children."

<sup>112</sup> See generally the TAC website, at <http://www.tac.org.za/>.

<sup>113</sup> Geoff Budlender, counsel for the TAC in its action against the government, said that gay rights in South Africa probably have not moved forward in years because Zackie has diverted his attention to fighting for AIDS treatment, he is that central to the causes for which he campaigns. Interview with Geoff Budlender, counsel for TAC in TAC, Legal Resources Centre, in Cape Town, S. Afr. (Apr. 10, 2003). Zackie campaigned for the inclusion of sexual orientation as impermissible grounds on which to discriminate in the post-apartheid final constitution and was involved in the Constitutional Court case that decriminalized sodomy. Samantha Power, *Letter from South Africa: The AIDS Rebel*, *The New Yorker* 54, 58 (May 19, 2003).

<sup>114</sup> Tina Rosenberg, *A Hero Measured by the Advance of a Deadly Disease*, *The New York Times* (Jan. 13, 2003).

<sup>115</sup> *Id.*

<sup>116</sup> Samantha Power, *Letter from South Africa: The AIDS Rebel*, *The New Yorker* 54 (May 19, 2003).

of essential drugs on patent, and second, the unavailability of treatment to everyone who needs it in South Africa.<sup>117</sup>

## **B. Parallels to Apartheid-era Activism**

Last year, the last stage of the TAC's campaign for antiretroviral treatment included civil disobedience. "Its leaders are using techniques they learned in the anti-apartheid struggle,"<sup>118</sup> the New York Times reported, before the campaign was even in full swing. This time, the *target* of the protests was the ANC.

When I went to Khayelitsha in April 2003, young and old TAC activists were singing "Senzenina," an important anti-apartheid movement song that translates, "What have we done"—implying, nothing: apartheid was arbitrary and racist.<sup>119</sup> Appropriated to the fight for AIDS treatment, "Senzenina" is just as empowering: all that stands in the way of the poor and treatment is money, and that is just as arbitrary and wrong.

Throughout April 2003, the TAC overtook police stations demanding that police arrest government ministers for "culpable homicide" for forestalling the use of antiretrovirals in public facilities and thereby allowing thousands to die. Finally, in May 2003, the government consented to meet with the TAC, and it suspended civil disobedience in exchange for the budgeting of funds for treatment.<sup>120</sup>

## **C. The TAC's Deteriorating Relationship with the Minister of Health: Racial Tension**

The TAC's leadership started out extremely loyal to the ANC, but their relationship with key party officials has deteriorated over Mbeki's and other's AIDS denialism and the slow pace of the government in rolling out treatment.

The TAC is a "multi-colored" organization with a fair amount of white and mixed race national leadership. The South African Health Minister has on more than one occasion publicly verbally attacked its white members for inciting protests and breaking down dialogue between the government and civil society, insultingly implying that its black members follow the group's white leaders with no agency of their own.

I happened to witness one of these high-profile incidents when I visited South Africa in April 2003, and it was also reported in the papers. The Global Fund to Fight AIDS, Tuberculosis, and Malaria (created to scale up the fight against these three infectious diseases through increased resources and accountability) was visiting the country at the same time, intending to sign a grant agreement with South Africa, which was delayed.

At a welcoming ceremony the Minister of Health hosted for the delegation, she did not refer to antiretroviral treatment but said that the National AIDS Council would "put forward issues of

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<sup>117</sup> Tina Rosenberg, *A Hero Measured by the Advance of a Deadly Disease*, The New York Times (Jan. 13, 2003).

<sup>118</sup> *Id.*

<sup>119</sup> AMANDLA!: A REVOLUTION IN FOUR PART HARMONY (Artisan Entertainment 2002).

<sup>120</sup> Samantha Power, *Letter from South Africa: The AIDS Rebel*, The New Yorker 54, 66-67 (May 19, 2003).

nutrition and traditional herbal remedies”;<sup>121</sup> The Fund’s executive director did not shy away from the issue in his comments, but encouraged applications for the Fund to co-finance antiretroviral therapy.<sup>122</sup>

Outside, TAC activists I had spoken to earlier in the day picketed the event, holding “Wanted” signs with the Minister of Health’s picture. The Fund’s executive director invited in Mark Heywood, a TAC national leader.

The health minister was speaking at a welcoming ceremony for... the executive director of the Global Fund... when she launched the attack on TAC [leader] Mark Heywood... accusing him—“a white man”—of masterminding the civil disobedience campaign against the government and her.<sup>123</sup>

Of black AIDS treatment activists, she said, “[T]hey wait for the white man to tell them what to do... Our Africans say: ‘Let’s us wait for a white man to deploy us... to say to us... you must *toyi toyi* here.’”<sup>124</sup>

This racial tension has deteriorated the relationship between the TAC and the Minister of Health and has also negatively affected relationships between the TAC and non-governmental AIDS organizations with which the Minister has regular contact.<sup>125</sup>

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<sup>121</sup> Pitting nutritional needs against the need for treatment of HIV has been both a tactic of the Mbeki administration and a myth about administering treatment in resource-poor settings. Treatment activists’ rejoinder is that the epidemic nature of AIDS means no sector of the economy is unaffected, least of all agriculture. Food security also depends on the treatment of farmers. In fact, “The World Food Program estimates that seven million farmers have died of AIDS across Africa.” Stephanie Nolen, *When Farmers Get AIDS, Everyone Starves*, *Globe and Mail* (March 26, 2004).

<sup>122</sup> Nawaal Deane, *The Madness of Queen Manto*, *Mail&Guardian* 6 (April 11-16, 2003).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* *Toyi toyi* is an apartheid-era protest dance exiled ANC members developed; it generates a lot of rhythmic momentum from the stomping of feet. *AMANDLA!: A REVOLUTION IN FOUR PART HARMONY* (Artisan Entertainment 2002).

<sup>125</sup> Treatment Action Campaign Newsletter (March 30, 2004), available at <http://www.tac.org.za/>.

### **D. A Movement Literally Dying**

The South African government's commitment to roll out antiretroviral treatment has come too late for many people who have been lost to AIDS. Zackie Achmat himself, who has lost over 50 friends to AIDS, wondered bitterly, when the TAC's civil disobedience campaign seemed to have achieved its objectives so much more quickly than anticipated, if he should have overcome his own party loyalty to the ANC and changed tactics sooner.<sup>126</sup> So many of the TAC activists themselves are living with HIV, without treatment it is just a matter of time before AIDS sets in and they die.

One of the last days I was in South Africa, a TAC activist brought me to the Chris Hani Baragwanath Hospital in Johannesburg to meet Edward Mavundla, one of the TAC's founders and an oral poet. Edward had AIDS and was dying of tuberculosis complications, and in fact, we arrived too late to meet him. He passed on just two hours before our arrival.

It was a tragedy for the treatment activist community in South Africa:

“All the people who started TAC are now all almost gone,” said an emotional Zwelinzima Vavi, general secretary of [COSATU, the Congress of South African Trade Unions].... [Vavi] said Mavundla “stood out” among HIV/AIDS sufferers because he was still active, despite his illness.... “Ultimately, it is not the controversies and debates that matter, but people's lives.”<sup>127</sup>

Someone expressed to me this very same concern last April when I visited South Africa: that the movement would literally die before it had won its campaign.

### **E. The TAC Developed Economic and Social Rights Jurisprudence in Their Documentation of the Violation of the Right to Health in South Africa**

The TAC's victory in the Constitutional Court obtained a favorable result for the applicants, as the Court found unconstitutional the government's failure to make nevirapine available for prevention of mother-to-child transmission of HIV. The Court came to its decision using the very fact-dependent standard of “reasonableness,” however, confining the effect of the decision. The *real* development for economic and social rights jurisprudence to come out of the TAC case, in my opinion, is the documentation of the violation of the right to health that its founding and supporting affidavits to the High Court achieve.

How to select and interview petitioners in bringing any Constitutional claim in the public interest is difficult in general, even for complaints alleging violations of more entrenched, “older” rights whose violations citizens of democratic countries more instinctively recognize. Civil and political rights litigation can draw on the practices of thousands of cases that have gone before,

<sup>126</sup> Samantha Power, *Letter from South Africa: The AIDS Rebel*, *The New Yorker* 54, 66 (May 19, 2003).

<sup>127</sup> *TAC Activist Dies in Johannesburg Hospital*, *South African Press Association (SAPA)* (April 9, 2003).

but in the economic and social rights context, the TAC and its counsel have provided a rare example.<sup>128</sup>

Siphokazi Mthathi, then-Deputy Chairperson of the TAC, filed the organization's affidavit on Aug. 21, 2001 at Pretoria High Court.<sup>129</sup> Many of the arguments she makes on behalf of the TAC in her affidavit were later relied upon by the Court in its decision in TAC, which I go through in a later section of this paper, that the government's policy regarding prevention of mother-to-child transmission of HIV was *unreasonable* and therefore unconstitutional.<sup>130</sup> Mthathi's arguments, a competent deconstruction of how government policy was *not* made, are primarily at the "macro" level, concerning, e.g., the timeline of steps taken towards the roll-out of a PMTCT program and the government's self-contradictions to show its intransigence and irrationality.

The stories given in the *supporting* affidavits, however, in my view, taken together document how the government's policy regarding prevention of mother-to-child transmission of HIV unconstitutionally visited *indignities* upon women and their babies as well as upon health care providers. Poor women who lived far from pilot sites could not receive PMTCT for their babies, despite in many cases having knowledge of their status and of the availability of nevirapine at pilot sites. That the government had restricted the use of a known, effective drug to prevent mother-to-child transmission of HIV, which was widely used in the private sector and *could have been made available* in the public sector *at no cost*, also meant that health care providers felt demoralized in their capacities to support and treat their patients.

Busiswe Maqungo only found out that she and her daughter had HIV when they were both tested for it when her daughter was one month old. Her daughter only lived to the age of nine months.<sup>131</sup> She emphasized the importance of a comprehensive program simply to provide testing and information:

If there was a program in all hospitals where mothers book and women were asked to be tested for HIV, I would have gone for a test. And if doctors had given me information about treatment to prevent my baby from getting HIV, I would have tried to get it, for the sake of my baby.... Doctors always told me that my baby will die and that there was nothing they could do for her.... I gave birth to an HIV positive baby who should have been saved. That was my experience, the sad one, and I will live with it until my last day.<sup>132</sup>

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<sup>128</sup> For other examples, *see generally, e.g.* CENTRE ON HOUSING RIGHTS AND EVICTIONS, LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES AND STRATEGIES (2004) (comprised of 21 in-depth case studies of the litigation of economic, social, and cultural rights at the international and national level), *available at* <http://www.cohre.org/library/Litigating%20ESCR%20Report.pdf>.

<sup>129</sup> Affidavit of First Applicant: Siphokazi Mthathi for the TAC, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), *available at* <http://www.tac.org/za/>.

<sup>130</sup> *See generally* Minister of Health and others v. Treatment Action Campaign and others [2002] CCT 8/02 (S. Afr.), *available at* <http://www.concourt.gov.za/files/tac/tac.pdf>.

<sup>131</sup> Personal Affidavit of Busiswe Maqungo, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), *available at* <http://www.tac.org/za/>. *See also* Affidavit of First Applicant: Siphokazi Mthathi for the TAC at paras. 239-241, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), *available at* <http://www.tac.org/za/>.

<sup>132</sup> Personal Affidavit of Busiswe Maqungo at paras. 7-16, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), *available at* <http://www.tac.org/za/>.

“SH”<sup>133</sup> is a woman who had planned to get to Chris Hani Baragwanath Hospital in Johannesburg, one of the two pilot sites in Gauteng Province where nevirapine was provided for PMTCT; but the city is far from her home, and she unexpectedly went into premature labor and had to go to the nearest hospital. By the time she could take her premature baby to the city hospital, it was too late for PMTCT for him.<sup>134</sup>

Two supporting affidavits were given by nurses who work at hospitals that were not originally pilot sites for the PMTCT program; they describe the hoops pregnant women had to jump through to seek PMTCT as well as the demoralizing effect on health care providers the inability to provide a known effective treatment has.<sup>135</sup> Vivienne Nokuzola Matebula testified,

I am aware of the existence of antiretroviral drugs that can treat HIV infection and particularly of those drugs like NVP (nevirapine) that reduce the risk of mother to child transmission. But we do not have these at Kopanong hospital. The result is that where a pregnant woman asks for these drugs I have to refer them to Chris Hani Baragwanath hospital (CHB) where I know they can get the medicine. Chris Hani Baragwanath hospital is 60 kms away, and because women who come to our hospital are poor, getting there causes great difficulty.... To get to Baragwanath from Kopanong you have to take three taxis. You have to wait for each taxi to fill up. Eventually when you get to CHB you have to climb the bridge over the road.<sup>136</sup>

A woman Matebula nursed did all of this while in labor to make sure her newborn got his suspension form postpartum dose of nevirapine.<sup>137</sup>

Tshidi Mahlonoko documented her feelings of hopelessness and discontent with her own service to HIV-positive pregnant women in particular:

For these seven years I have seen and experienced the hopes and despairs of the community about this epidemic.... I have become aware of drugs like fluconazole and

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<sup>133</sup> “SH” is Sarah Hlalele. When she gave her affidavit, she wanted to remain anonymous, but later she spoke at a TAC press conference and attended all the hearings at the High Court. She died before the decision of the Constitutional Court was handed down, on April 14, 2002. Mark Heywood, *Current Developments: Preventing Mother-to-Child Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 S. AFR. J. HUM. RTS. 278, 309 (2003).

<sup>134</sup> Personal Affidavit of “SH,” Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>. See also Affidavit of First Applicant: Siphokazi Mthathi for the TAC at paras. 242-245, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>.

<sup>135</sup> Personal Affidavit of Vivienne Nokuzola Matebula, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>; Personal Affidavit of Tshidi Mahlonoko, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>. See also Affidavit of First Applicant: Siphokazi Mthathi for the TAC at paras. 252-253, 263-265, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>.

<sup>136</sup> Personal Affidavit of Vivienne Nokuzola Matebula at paras. 9-12, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>.

<sup>137</sup> *Id.* at para. 12.

Nevirapine and how anti retroviral treatment works. For me this news was a blessing in that after we had done so much to try to manage AIDS, now there was a way forward. This gave me hope and motivated me and other nurses.... But for me the whole package, especially for a pregnant mother who is HIV positive, is naked. This is because in the Sedibeng Municipality, Nevirapine is not available.... If I was not aware of Nevirapine I would have been content that the package that I was delivering to my patients was complete, and I would feel content and confident.<sup>138</sup>

Happily, Bongiwe Mkhutyukelwa, as a Khayelitsha resident, received testing, counseling, PMTCT, and formula milk to prevent seroconversion of her baby from breastfeeding. After 18 months, her baby was still HIV-negative.<sup>139</sup> Including her story puts into relief the others, and demonstrates the feasibility of the relief the applicants were requesting even given resource constraints.

The two aspects of the violation of the right to health in this case are inextricably linked, of course: a rational policy that did not arbitrarily discriminate between women and their babies or between private and public health care providers would, presumably, also respect human dignity.

## VI. Reasonableness Approach in Grootboom and TAC

### A. Grootboom

The petitioners in Grootboom, Mrs. Grootboom and others—510 children and 390 adults—were forcibly and inhumanely evicted from their informal homes—shacks—on private land; many had been on wait lists for subsidized housing for as long as seven years. The Court found no minimum core obligation of the government with respect to the right to housing, but it did find that the government’s nationwide housing program was not “reasonable” because it contained no provision “for people in desperate need,” but rather only medium- and long-term objectives.<sup>140</sup>

Grootboom is the foundational economic rights case in South African constitutional jurisprudence, laying out the “reasonableness” test for the government’s program or lack thereof to realize economic rights: “A reasonable programme... must clearly allocate responsibilities and tasks to the different spheres of government.”<sup>141</sup> The Court specifies that the program must be comprehensive, reasonably implemented,<sup>143</sup> and inclusive, and that “the programme will require continuous review.”<sup>144</sup>

<sup>138</sup> Personal Affidavit of Tshidi Mahlonoko at paras. 7-19, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>.

<sup>139</sup> Personal Affidavit of Bongiwe Mkhutyukelwa at para. 5, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>. See also Affidavit of First Applicant: Siphokazi Mthathi for the TAC at paras. 249-250, Treatment Action Campaign and others v. Minister of Health and others [2001] Pretoria High Court (S. Afr.), available at <http://www.tac.org/za/>.

<sup>140</sup> Grootboom, para. 63.

<sup>141</sup> *Id.* at 39.

<sup>142</sup> *Id.* at 40.

<sup>143</sup> *Id.* at 42.

<sup>144</sup> *Id.* at 43.

This “reasonableness” concept is well entrenched in Anglo common law jurisprudence and respects traditional separations of power between the branches of government in a parliamentary democracy and the perception of what judges are competent legitimately to judge, purporting as it does to evaluate only procedural aspects of governmental action. While “evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them.”<sup>145</sup>

This test of “reasonableness” for evaluating government and administrative action (or inaction) is acceptable to different States parties before multilateral dispute settlement bodies, for reasons elaborated in a 1994 General Agreement on Tariffs and Trade (GATT) Dispute Settlement Panel case:

[R]easonableness... was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel *did not substitute its judgement [sic] for that of the government*. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in different forms, was also applied in the administrative law of many contracting parties, including the EEC (European Economic Community) and its member states, and the United States. It was a standard of review of government actions which [sic] *did not lead to a wholesale second guessing [sic] of such actions*.<sup>146</sup>

By way of national example, the Canadian case Southam defines reasonableness *simpliciter* as follows:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.<sup>147</sup>

And as long as the action taken is based in sound reasoning, it must be upheld even if it is not the action the evaluating court would itself have taken.

Grootboom dealt with the alternative minimum core approach for which the *amici* argued by relying on the differences between the wording of the right to housing in the ICESCR and in the South African constitution. The ICESCR guarantees “the right of everyone to... adequate... housing,” and uses the qualifier “appropriate” in describing the means that must be taken to achieve economic rights,<sup>148</sup> whereas the South African constitution guarantees to everyone “the

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<sup>145</sup> TAC, para. 34.

<sup>146</sup> GATT Dispute Settlement Panel, United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R, para. 3.73 (1994) (emphasis added).

<sup>147</sup> [1994] 2 S.C.R. 557, 776-777.

<sup>148</sup> ICESCR, Articles 2(1) and 11.

right to have *access* to adequate housing,” and qualifies the obligation of the state, which “must take *reasonable* legislative and other measures, *within its available resources*, to achieve the *progressive* realisation of this right.”<sup>149</sup> Therefore, the Court in Grootboom concludes, “the real question in terms of our Constitution is whether the measures taken by the state... are reasonable.”<sup>150</sup> But the Court also seems to reserve the minimum core question: “*In this case*, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.”<sup>151</sup>

Taking the minimum core approach, and thereby developing the concept of what a violation of a particular socio-economic right “looks like,” is certainly within the Court’s authority, given its obligation to consider international law under § 39(1)(b) of the Final Constitution. Within the “reasonableness” standard for evaluating governmental action or inaction with respect to socio-economic rights fulfillment, there is room to point to failure to fulfill the minimum core obligation as *prima facie* evidence of unreasonableness. Why then did the Court *choose* explicitly not to incorporate it?

While the Court characterizes Grootboom as providing sufficient context to lay out a minimum core obligation with respect to housing, curiously, it concludes that the case did not provide the opportunity to do so. In the decision, it pronounces what kinds of circumstances are needed for a minimum core obligation to be determined: “Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.”<sup>152</sup> Then, the Court seems to characterize Grootboom as providing such circumstances. The petitioners in Grootboom were a class of homeless persons, over half of whom were children, for whom adequate shelter, to which they were each individually, constitutionally entitled, was years off.<sup>153</sup> The Court describes how the government not only evicted the petitioners from their shacks, but did so a day early, bulldozed and burnt the shacks, and in the process destroyed petitioners’ possessions.<sup>154</sup>

Even more curiously, the Court’s order in Grootboom belies the dicta in the case that defining the minimum core would be too complex a task for the judiciary and would violate the separation of powers: the Court went as far as to specify the number of toilets and taps the municipality would have to erect by a specific date in order to have fulfilled the order to provide basic sanitation services for the petitioners, and also which level of government would have to provide the funding for their construction.<sup>155</sup>

## **B. TAC**

In early July 2002, AIDS treatment activists in South Africa celebrated the decision of the South African Constitutional Court in TAC upholding (and modifying) a high court order against the

<sup>149</sup> S. AFR. FINAL CONST., ch. 2 (Bill of Rights), §§ 26(1) and (2) (emphases added).

<sup>150</sup> Grootboom, para. 33.

<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> *Id.* at para. 31.

<sup>153</sup> *Id.*; S. AFR. FINAL CONST. § 28(1)(b) (guaranteeing to children the right to basic shelter).

<sup>154</sup> *Id.* at para. 10.

<sup>155</sup> Grootboom and others v. Government of the Republic of South Africa and others para. 1 [2000] CCT 38/00 (S. Afr.), available at <http://www.concourt.gov.za/files/grootboom/grootboom.pdf>.

government requiring it 1) to make nevirapine available in the public health sector, and 2) to set out a timetable for the roll-out of a national program for prevention of mother-to-child transmission of HIV (PMTCT). The case had been brought by a group of AIDS treatment activists, many of them people living with HIV/AIDS, led by the Treatment Action Campaign.

Nevirapine is an antiretroviral drug approved for PMTCT by the World Health Organization and (at the time of the case) by the South African Medicines Control Council.<sup>156</sup> Boehringer Ingelheim, the drug's manufacturer, offered to provide it free to the South African government until 2005.

The Court identified two main issues: was the prohibition of the prescription of nevirapine where medically indicated at public health institutions unconstitutional, and was the government constitutionally obliged to plan and implement a nationwide, comprehensive program for PMTCT?

With respect to the first issue, the South African Minister of Health had confined the use of nevirapine to two research sites per province (for a total of 18 sites)—public physicians outside the pilot sites could not prescribe it—because of governmental concerns regarding its safety and efficacy, and/or because of “a need to assess the operational challenges inherent in the introduction of antiretroviral regimens for the reduction of vertical transmission,” such as the need for voluntary and confidential counseling and HIV testing, formula feeding of infants to prevent transmission of HIV through breast milk, etc.<sup>157</sup>

Following Grootboom's precedent, the Court in TAC trumpeted its institutional incompetence to decide the minimum core, and it also disclaimed its effect on the budgeting process by claiming that effect is merely incidental to determining “reasonableness”:

[T]he courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards... should be, nor for deciding how public revenues should most effectively be spent.... [D]eterminations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.<sup>158</sup>

The Court went on to say regarding the first issue, couching its judgment in language more traditionally used in adjudicating civil and political rights, that there is, at least, the *negative* obligation of the State not to prevent or impair the right of access to health care services.<sup>159</sup> Along this line and in following the reasonableness test laid out in Grootboom, it proceeded to engage in the very “wide-ranging factual and political enquiries” it claimed it was not equipped

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<sup>156</sup> For more information on the clinical trials of nevirapine locally in South Africa, *see generally* Mark Heywood, *Current Developments: Preventing Mother-to-Child Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 S. AFR. J. HUM. RTS. 278, 285-86 (2003).

<sup>157</sup> TAC, para. 16, citing the government's Protocol for providing a comprehensive package of care for the prevention of mother to child transmission of HIV in South Africa (draft version 4) (April 2001).

<sup>158</sup> TAC, paras. 37-38.

<sup>159</sup> *Id.* at para. 46.

to make and to strike down every objection of the government to making nevirapine available for public physicians to prescribe it where medically indicated.

The government objected to making nevirapine widely available based on its uncertainty as to its efficacy, safety, and the risk its widespread use poses to the development of resistant HIV strains. But the Court answered each objection. First, it determined the issue of fact with respect to efficacy: “[T]he wealth of scientific material produced by both sides makes plain that... nevirapine... remains to some extent efficacious in combating mother-to-child transmission even if the mother breastfeeds her baby.”<sup>160</sup> Then, it weighed the balance of risks involved, and judged that “the risk of some resistance manifesting at some time in the future is well worth running,” because the chances of a child dying if infected are very high.<sup>161</sup> Finally, it said the government’s objection based on safety was not reasonable, since the World Health Organization had unqualifiedly recommended the use of nevirapine for PMTCT.<sup>162</sup>

The Court’s disclaimer about its self-styled incidental effect on budgets is more relevant to its adjudication of the second issue, finding that the government was constitutionally obliged to plan and implement a nationwide, comprehensive program for PMTCT. In this case, even though nevirapine itself is provided free to the government, voluntary and confidential HIV counseling and testing and making formula feeding an available option, especially given the need for potable water particularly in rural areas, as well as appropriately trained staff, are necessary components of a comprehensive PMTCT program, which therefore bears cost implications. To resolve this issue, the Court considered the relatively low total training time required to prepare counselors for the PMTCT program,<sup>163</sup> as well as statistical information about the capacity outside the research sites to implement a PMTCT program.<sup>164</sup> It decided the government’s policy failed the reasonableness test for neglecting to provide training of counselors at hospitals and clinics outside the research sites in the use of nevirapine for PMTCT.<sup>165</sup>

In its order, the Court did not require the provision of formula feed,<sup>166</sup> given the complex issues regarding access to potable water of rural populations.<sup>167</sup> Implicitly, then, a government in the South African context can be acting reasonably by not providing formula feed and access to potable water, notwithstanding the risk of seroconversion breastfeeding poses for the infant child of an HIV-positive mother and the basic right a lack of access to potable water implicates. Obviously, it would be desirable, commendable, and, presumptively, constitutionally permissible for the government to provide above and beyond what the order requires. The selective order in TAC brings into relief the “minimum obligation” effect of the Court’s decision: access to the barest PMTCT protocol is deemed, in effect, a more basic concern than some components of a basic public health program.

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<sup>160</sup> *Id.* at para. 58.

<sup>161</sup> *Id.* at para. 59.

<sup>162</sup> *Id.* at para. 60.

<sup>163</sup> *Id.* at para. 83.

<sup>164</sup> *Id.* at para. 90.

<sup>165</sup> *Id.* at para. 135(2)(c)(ii).

<sup>166</sup> *Id.* at para. 135(3)(d).

<sup>167</sup> *Id.* at para. 128.

## VII. The Value of the “Reasonableness” Approach

In TAC, the Court decided the availability of nevirapine and a comprehensive PMTCT program using nevirapine were constitutionally obliged, but the provision of formula feed was not. So what value does the “minimal-ness” of a “minimum obligation” in constitutional adjudication of economic rights add? If something is a “minimum obligation,” it is presumably constitutionally obliged; and some constitutional obligations are “minimum obligations.”

Because the rights of *children* to health care services and shelter were at issue in both cases, the Court’s decision to decline to adopt the minimum obligation approach is perplexing. The language of the Bill of Rights provisions with respect to children’s rights is absolute. Children under the Bill of Rights have the rights “to *basic* nutrition, shelter, *basic* health care services and social services” (emphases added), and their rights are not constrained by the availability of resources.<sup>168</sup> This formulation seems to invite the Court to construe the child’s right to shelter and health care with respect to a basic or minimum level, as opposed to a deferential standard of rationality. Particularly in the TAC case, the relief requested and granted did not treat mothers for HIV, but rather only provided prophylaxis for her fetus and, subsequently, newborn.

What does the Court preserve by deciding the issues in TAC and Grootboom under the “reasonableness” standard? Had the government not introduced nevirapine into 18 research sites, and not pursued any PMTCT program at all, how might the Court have ruled on an application by TAC for such a program?

More than anything else, the choice of the Constitutional Court to apply a “reasonableness” test in Grootboom and subsequently in TAC domesticizes the decision: while the South African constitution contains the word “reasonable” in describing the means the government must use to fulfill economic rights obligations, it also requires courts to look to international law to interpret constitutional rights.

Perhaps the dicta in which the Court rejects the “minimum core” approach as undemocratic and beyond the capacity of the judiciary serves to make its decisions, especially in the controversial area of “new” rights such as socio-economic rights, seem more legitimate. Instead of importing a standard from international law, it takes one from well-entrenched Anglo jurisprudence that, even though judge-made, has the ratification of time. Perhaps the “reasonableness” approach also *looks* more like classical civil and political rights adjudication, deflecting surface challenges to the justiciability of economic rights and enabling judges to apply familiar constructs to new claims.

More meaningfully, if the Court were to say, X and Y are minimum components of the right to health or the right to housing, it would be bound in future cases to those determinations, even if underlying circumstances change, such as the available resources of the South African government.<sup>169</sup> Contrast the view of the minimum core obligation in the body that monitors the International Covenant on Economic, Social and Cultural Rights:

<sup>168</sup> S. AFR. FINAL CONST. § 28(1)(b).

<sup>169</sup> As an aside, counsel for the Minister of Health in the TAC case told me that he considered the fact that the Court adopted the reasonableness standard to be a partial victory for the government, as the effect of the choice might be to

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every State party [to the Covenant].... [E]ven in times of severe resource constraints... the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.<sup>170</sup>

Choosing the standard for evaluating governmental compliance with its economic rights obligations to be “reasonableness” means that in future cases, at least nominally, the Court will begin afresh its inquiry and reserves a great deal of discretion to fashion a very fact-dependent decision. Bouvier’s Law Dictionary defines “discretion” as:

That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.<sup>171</sup>

The “reasonableness” standard appears to defer greatly to the law-making branches of government by holding them simply to a standard of rationality as opposed to creating entitlements around which they must plan, but it also actually preserves flexibility and law-making power for the judiciary.

Perhaps in the future, as members of the legal community and the public come to perceive economic and social rights to be justiciable and valid, the Court will expand and develop economic and social rights to include minimum content, as Justice O’Regan in Makwanyane suggested could be done with all the rights in the Bill of Rights:

The purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of chapter 3 of the Constitution, and at other times a narrower or specific meaning. It is the responsibility of the courts, and ultimately this court, to develop fully the rights entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed.<sup>172</sup>

## VIII. Conclusion

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lessen constraint on the government. Interview with Marumo T.K. Moerane, counsel for the Minister of Health in TAC, Franschoek Guest House, in Franschoek, S. Afr. (Apr. 11, 2003).

<sup>170</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. International Human Rights Instruments, 1st Sess., at 45-46, U.N. Doc. HRI/GEN/1 (1992).

<sup>171</sup> BOUVIER’S LAW DICTIONARY, vol. 1 884 (3d rev., 8th ed., 1914).

<sup>172</sup> S v. Makwanyane and Another para. 325 [1995] CCT 3/94 (S. Afr.), available at <http://www.concourt.gov.za/files/deathsn/makwanyane.pdf>.

I do not claim to be able to predict how the decision of the South African Constitutional Court to evaluate governmental compliance with economic rights obligations under a test of “reasonableness” will play out in future cases, but my assessment of its choice is that it is pragmatic and not transformative.

Perhaps choosing the reasonableness standard and preserving the minimum obligation approach gives economic rights litigants more “tools” of argument, by including the “minimum core” as among the evidence to be considered in determining the reasonableness of government action or inaction.<sup>173</sup> Perhaps also it is a comfortable, conduct-evaluative starting point for judges unaccustomed to adjudicating “new” claims for socio-economic rights fulfillment and challenged for “intervening” in traditionally legislative and administrative domains.

In November 2003, the South African Cabinet announced that it had approved an antiretroviral treatment plan, which would within a year establish one service point in every health district and would become universally, locally accessible within five years.<sup>174</sup> The government has set aside 12.1 billion rands (£1.1 billion) over three years for the program.<sup>175</sup> Is this “reasonable”? And if the Court says, in some future case, that it is not—that, e.g., the program must roll-out more quickly—will it be saying between the lines that immediate treatment of HIV/AIDS for all who need it is a minimum obligation of the State under the right to health?

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<sup>173</sup> When I met Geoff Budlender, the attorney for the TAC in TAC (and author of the *amicus* brief in Grootboom), I suggested this to him; he half-smiled, cocked his head, and contemplated my assessment, but all he said was, “That is an interesting point.” Interview with Geoff Budlender, counsel for TAC in TAC, Legal Resources Centre, in Cape Town, S. Afr. (Apr. 10, 2003).

<sup>174</sup> *South African Cabinet Approves “Comprehensive” HIV/AIDS Treatment Plan*, BBC Monitoring Int’l Reports (Nov. 19, 2003).

<sup>175</sup> *South Africa to spend £1bn on AIDS*, The Times (London), (Nov. 13, 2003).