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# THE OBLIGATION TO PROVIDE FREE BASIC EDUCATION IN SOUTH AFRICA: AN INTERNATIONAL LAW PERSPECTIVE

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# THE OBLIGATION TO PROVIDE FREE BASIC EDUCATION IN SOUTH AFRICA: AN INTERNATIONAL LAW PERSPECTIVE

**L Arendse***

## SUMMARY

In South Africa many learners are denied the right to basic education because of the levying of school fees and other educational charges, in spite of the international obligation imposed on government to provide free primary education. This article examines the exact nature and extent of this obligation by exploring the concept of "free" basic education. The applicable international instruments and their interpretation as well as the significance of the right to education as a central, facilitative right are examined in order to establish the content of the right to basic education and the legal obligations that ensue. Against this background, the implications of the South African Constitutional Court's approach to the realisation of socio-economic rights and the possibility of the establishment of a core minimum obligation are analysed. It is argued that learners in South Africa may come from different socio-economic backgrounds but as learners in the same public school domain and as equal bearers of their constitutional right to basic education all of them are entitled to the same type and quality of free basic education.

**KEYWORDS:** Right to education; free education; basic education; international obligations; core obligations

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# THE OBLIGATION TO PROVIDE FREE BASIC EDUCATION IN SOUTH AFRICA: AN INTERNATIONAL LAW PERSPECTIVE

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## 1 Introduction

In an earlier judgment[1] on the right to education delivered by the South African Constitutional Court (the Constitutional Court), the principal focus was on the restriction of access to education through the implementation of the language policy of the school. Language, however, is only one barrier preventing access to education in South Africa. Learners countrywide are denied the right to basic education because of the levying of school fees and other educational charges.[2] This practice is prevalent in spite of the international obligation imposed on the South African government to provide free primary education. This article examines the exact nature of this obligation by exploring the concept of "free" basic education.

## 2 The right to basic education in the South African *Constitution*

Section 29 of the South African *Constitution* consists of a cluster of education rights and has consequently been called a "hybrid" right.[3] This is because section 29(1) characterises the socio-economic nature of the right whereas sections 29 (2) and (3) are civil and political rights. As a socio-economic right, section 29(1) obliges government to make education available and accessible to everyone. Section 29(1)(a) in particular entitles everyone to a basic education.

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1 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).

2 Centre for Applied Legal Studies and Social Surveys Africa *National Survey.*

3 Veriava and Coomans "Right to Education" 60. S 29(1) of the *Constitution* provides: "Everyone has the right (a) to a basic education, including adult basic education, and (b) to further education, which the state through reasonable measures, must make progressively available and accessible." As a civil and political right, the right to education provides freedom of choice, as s 29(2) confers the right to choose the language of instruction in a public educational institution,

The South African Constitutional Court has to date not considered the scope and content of the right to a basic education.[4] It is submitted that the Constitutional Court's contextual approach to interpretation together with South Africa's international law obligations calls for an understanding of section 29(1)(a), which guarantees free basic education for disadvantaged learners first, before it is extended to more privileged groups.

## 3 International law

### *3.1 Sources*

The right to education enjoys extensive protection in international law. The *Universal Declaration of Human Rights* (*UDHR)*[5] was the first international instrument to give expression to the right to education.[6] Article 26 provides that "everyone has the right to education" and that "education shall be free, at least in the elementary and fundamental stages." It further states that "[e]lementary education shall be compulsory."[7] Since the adoption of the *UDHR* in 1948, the elements of "free" and "compulsory" have in the subsequent international instruments been attributed to the right to a primary education.[8]

Article 4(a) of the *UNESCO*[9] *Convention against Discrimination in Education* (*CDE***)**[10] requires of state parties "to promote equality of opportunity and treatment in the

whereas s 29(3) grants the freedom of choice between private and public education by recognising the right to establish and maintain independent educational institutions.

4 Veriava and Coomans "Right to Education" 61-62.

5 Adopted and proclaimed by General Assembly Resolution 217A (III) on 10 December 1948.

6 Beiter *Protection of the Right to Education* 90.

7 Beiter *Protection of the Right to Education* 90. According to Beiter elementary and fundamental education are synonyms for primary education. Only the method of instruction differs.

8 The terms "basic education" and "primary education" are sometimes used as synonyms in international law discourse. According to a 5 of the World Declaration on Education for All, "[t]he main delivery system for the basic education of children outside the family is primary schooling." According to Sloth-Nielsen, primary education could be defined as the formal basic education given to children in primary schools by primary school teachers. See Beiter *Protection of the Right to Education* 324; Sloth-Nielsen and Mezmur "Free Education" 10. The terms "basic education" and "primary education" will be used interchangeably in this article.

9 United Nations Educational, Scientific and Cultural Organisation.

10 Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960.

matter of education and in particular [t]o make primary education compulsory and free." State parties are required to make secondary education only generally available and accessible.[11] Like the *UDHR*, the *CDE* distinguishes two core elements of a primary education, namely making it compulsory and making it free. Whereas the right to primary education was included in the *UDHR* as a mere aspiration, the *CDE* was the first international treaty to include an obligation on states parties to provide free and compulsory primary education.[12]

The *International Covenant on Social, Economic and Cultural Rights* (*ICESCR*)[13], in article 13(2) (a) and (b), obliges states parties to make primary education compulsory and free, whereas secondary education "shall be made generally available and accessible".

The *Convention on the Rights of the Child* (*CRC*)[14] protects the right to education in article 28. Article 28(1)(a) obliges states parties to make primary education compulsory and free, whereas article 28(1)(b) requires states to make secondary education available and accessible to the child.

### *3.2 Interpreting the right to basic education*

In interpreting the rights in the Bill of Rights, section 39(1)(b) of the *Constitution* requires of courts to consider international law.[15] South Africa has ratified the principal instrument on children's rights, the *Convention on the Rights of the Child*.[16] It has signed but not ratified the *Convention against Discrimination in Education* and the *International Covenant on Economic, Social and Cultural Rights*.[17] However, the non-ratification status of these treaties does not prevent us from looking towards

11 Article 4(a) *UNESCO Convention against Discrimination in Education* (1960).
12 Beiter *Protection of the Right to Education* 90.
13 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XX1) of 16 December 1966, entered into force on 3 January 1976.
14 Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 December 1990.
15 Section 39(1)(b) states: "When interpreting the Bill of Rights, a court, tribunal or forum… (b) must consider international law…"
16 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=e.
17 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=e.

them as a guide in interpreting the right to basic education. In *S v Makwanyane*[18], the Constitutional Court held that binding and non-binding international law are applicable in interpreting the rights in the Bill of Rights. However, in *Grootboom*[19], the Constitutional Court considered the textual difference between the Constitution and the non-binding international treaty (the *ICESCR)* in assessing the significance of the *ICESCR* as a guide to interpretation of the constitutional provisions. The Court's stance in this regard implies that where there are significant differences between the wording of a provision in the Constitution and the wording of a provision of the non-binding treaty, the Court will attach less weight to the non-binding treaty as an interpretative source for the Constitution.[20] The Court, however, did not unequivocally state that non-binding law may *not* be applicable where there are considerable differences between the Constitution and the relevant international law document.[21] Moreover, the relatively young South African socio-economic rights jurisprudence is in need of guidance from non-binding treaties such as the *ICESCR*, a document on which many of the socio-economic rights provisions in the Bill of the Rights have clearly been modelled.[22] The *ICESCR* is undoubtedly the most significant treaty which entrenches the right to education. General Comment No 13 published by the Committee on Social, Economic and Cultural Rights (CESCR) provides the most comprehensive description of the content of the right to basic education in international law.[23] This General Comment entrenches the so-called 4-A Scheme, developed by the former United Nations Special Rapporteur on the Right to Education. This scheme gives concrete content to the right to basic education. CESCR General Comment No 11 provides detailed content to the right by clarifying the two core elements of "free" and "compulsory."[24] Although South Africa has not ratified the *ICESCR*, the Committee on the Rights of the Child (CRC Committee) is of the view that where provisions of the *ICESCR* are similar in wording to the provisions under the *CRC*, the General Comments published by the CESCR should

18 *S v Makwanyane* 1995 3 SA 391 (CC) para 35.
19 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom)* para 28.
20 *Grootboom* para 28.
21 My emphasis.
22 Brand "Introduction to Socio-economic Rights" 7.
23 *CESCR General Comment No 13* (1999).
24 *CESCR General Comment No 11* (1999).

be seen as complementary to those issued by the CRC Committee.[25] Since the provisions on primary education under the *ICESCR* and the *CRC* are almost identical[26], General Comment No 13 and General Comment No 11 should thus be viewed by all states which have ratified the *CRC* (including South Africa) as significant guides in defining the content of the right to basic education.[27]

## 4 The significance of the right to education as central, facilitative right

The primary international law instruments prioritise basic education above other levels of education by requiring of states parties to make it compulsory and free. The rationale is that education, if guaranteed, unlocks the enjoyment of other human rights[28] and ultimately empowers a person to play a meaningful role in society. For example, an educated person has the ability to make informed political choices, such as choosing a suitable political representative or political party or even standing for public office.[29] Education also plays a crucial role in the fulfilment of socio-economic rights: education enhances a person's prospects of securing employment, which in turn secures access to food, housing and health care services.[30] The South African government regards basic education as "…the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults".[31] It has consequently committed itself to the provision of

25 *CRC General Comment No 5* (2003) para 5. The General Comments published by the CESCR and the CRC Committee are not legally binding. However, they do carry considerable legal weight as authoritative interpretations of a relevant treaty. Moreover, in the absence of an "individual complaints procedure generating international case law" on the interpretation of socio-economic rights, General Comments provide an important tool to the respective committees to develop jurisprudence on socio-economic rights. See Liebenberg "Interpretation of Socio-economic Rights" 33-13,14.

26 See s 3.1 above.

27 Verheyde points out that because "article 28(1) of the CRC has largely been drawn up along the lines of article 13(2) of the ICESCR, one may suggest that [the findings of the CESCR] may be read into the text of article 28(1) of the CRC." See Verheyde *Commentary* 28.

28 Tomasevski *Human Rights Obligations in Education* 47.

29 Tomasevski *Human Rights Obligations in Education* 47.

30 Tomasevski *Human Rights Obligations in Education* 47. The Committee on Social, Economic and Cultural Rights (CESCR), in *CESCR General Comment No 11* (1999) para 4, notes the following: "… [T]he work of the [CESCR] has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment for girls and major reductions in child marriages."

31 GN 196 in GG 16312 of 15 March 1995 (*White Paper on Education and Training*) (hereafter *White Paper*).

free, compulsory primary education by becoming a signatory to the *Dakar Framework,*[32] which calls upon participating countries to realise six goals by developing or strengthening national plans of action for the realisation of the right to primary education.[33] These goals includes "universal access to and completion of free and compulsory primary education of good quality by 2015" and "improving all aspects of the quality of education".[34] The South African Education Department published the national *Plan of Action: Improving access to free and quality basic education for all* in 2003, [35] in which it declares that it is "well on the way to attaining ….the provision of basic education that is compulsory for all children of school-going age, that is of good quality and in which financial capacity is not a barrier for any child…before 2015."[36]

## 5 The right to basic education: clarifying its content and legal obligations

Through its ratification of the *CRC* and as a signatory to the *ICESCR* and the *Dakar Framework*, South Africa has committed itself to achieving basic education for its children. However, the realisation of its commitment depends on meeting the obligations engendered by the right to basic education. This is possible only if the content of the right is understood first.

### *5.1 Content*

As stated earlier, General Comment No 13 and General Comment No 11 provide detailed content applicable to the right to basic education. All forms and levels of education, including basic education, display the four interrelated features of availability, accessibility, acceptability and adaptability.[37] Firstly, education must be made available to learners. This entails the provision of schools and qualified

32 *Education for All: Meeting our Collective Commitments: The Dakar Framework for Action* (2000). See Beiter *Protection of the Right to Education* 323-326.
33 *Education for All: Meeting our Collective Commitments: The Dakar Framework for Action* (2000). See Beiter *Protection of the Right to Education* 323-326.
34 *Education for All: Meeting our Collective Commitments: The Dakar Framework for Action* (2000). See Beiter *Protection of the Right to Education* 323-326.
35 *Plan of Action: Improving access to free and quality basic education for all* (2003) para 6.
36 *Plan of Action: Improving access to free and quality basic education for all* (2003) para 6.
37 *CESCR General Comment No 13* (1999) para 6.

teachers.[38] In addition, access to education must be ensured. Education must be economically and physically accessible and must be guaranteed on a non-discriminative basis.[39]

According to Wilson,[40] who developed a complementary legal framework in which to consider the 4-A scheme, the terms available and accessible refer largely to the rights *to* basic education, whereas acceptable and adaptable refer to rights *in* education. Because the rights in education are primarily civil and political rights and this article is concerned with the right to basic education as a socio-economic right, the principal focus will be placed on the availability and accessibility features.[41]

### 5.2 *General obligations*

The right to basic education, like all human rights, imposes three types or levels of obligations on states: the obligations to respect, protect and fulfil.[42] The obligation to respect requires the state to refrain from impairing access to an existing right.[43] The obligation to protect requires of states to take steps to protect people's existing access to a right and their ability to enhance and gain access to a right against interference by third parties.[44] The obligation to fulfil means that the state must take positive steps to ensure that those lacking access to the enjoyment of a right gain access.[45]

Article 4 of the CRC sets out the overarching duty imposed upon states by the right to primary education:

38 *CESCR General Comment No 13* (1999) para 6(a).
39 *CESCR General Comment No 13* (1999) para 6(b).
40 SAHRC *Report* 9.
41 The relevant aspect of the acceptability feature is that the quality of basic education must be guaranteed. Adaptability refers to the rights of children with special needs, such as the disabled and children who are normally out of school, such as child soldiers. These particular features of the content of the right to basic education fall beyond the scope of this article and will not be addressed. See Sloth-Nielsen and Mezmur "Free Education" 14; Beiter *Protection of the Right to Education* 627.
42 *CESCR General Comment No 13* (1999) para 46.
43 Brand "Right to Food" 159.
44 Brand "Right to Food" 159.
45 Brand "Right to Food" 159.

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 2 of the ICESCR contains a similar provision:

> 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

### *5.2.1 "Progressive realisation" and "to the maximum extent of its available resources"*

The lack of financial and other resources in a particular state may hinder the full implementation of the right to education,[46] which entails that the complete realisation of the right will not be achieved immediately or within a short period of time.[47] However, the progressive realisation of rights does not mean that the fulfilment of the right will never be achieved.[48] States have a specific and continuing obligation "…to move as expeditiously and effectively as possible" to ensure the full realisation of the right.[49] This implies that states have an obligation to take continuous steps in order to satisfy varying degrees of realisation before achieving the complete implementation of the right. As discussed earlier, the language in which the CRC and ICESCR is couched makes it clear that primary education is prioritised above the more advanced forms of education. Consequently, the achievement of the right to basic education is the first degree of realisation in the process of ultimately fulfilling all forms of education. Resources directed at implementing basic education must therefore be prioritised in state budgets.[50]

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46 *CRC Committee General Comment No 5* (2003) para 7.
47 *CESCR General Comment No 3* (1990).
48 *CESCR General Comment No 3* (1990).
49 *CESCR General Comment No 3* (1990).
50 The South African Constitutional Court has endorsed the meaning of the term "progressive realisation as described by the CESCR and the CRC Committee. In G*rootboom,* the Constitutional Court held at para 45: "Although the [CESCR]'s analysis is intended to explain the scope of states parties' obligations under the [ICESCR], it is also helpful in plumbing the meaning of 'progressive realisation' in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no

Article 4 of the *CRC* requires of states parties to take steps **"**to the maximum extent of their available resources". The "maximum available resources" include the resources available within a particular state as well as those available from the international community.[51] The CESCR as well as the CRC Committee are of the view that international co-operation in this regard is an obligation upon all states, in particular those states which are in a position to assist.[52] One of the focal points of the CRC Committee is the budgetary allocation for education.[53] In its reporting guidelines the Committee requests states to furnish information on the proportion of the overall budget devoted to children and allocated to the various levels of education.[54] The CRC Committee, in its concluding observations, is often concerned about an insufficient allocation of resources to education and thus welcomes an increase in the educational budget and frequently encourages states to increase budgetary allocations to education.[55] Any deliberate retrogressive measures taken by a state need to be fully justified by reference to the totality of the rights provided and in the context of the full use of the maximum available resources.[56] Thus, a retrogressive measure such as a decrease in the education budget would be very difficult to justify because states have the burden of proving that they have exhausted their own as well as international resources.[57] That said, an increase in the education budget is not always enough to ensure that a child receives a basic education. All measures which are at a state's disposal should be utilised to guarantee that children are guaranteed a basic education. The content of these measures will be explored in the next part of this article.

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reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived."

51 *CESCR General Comment No 3* (1990) para 13.

52 *CESCR General Comment No 3* (1990) para 14; *CRC Committee General Comment No 5* (2003) para 1.

53 Verheyde *Commentary* 53.

54 CRC Committee *General Guidelines* para 26.

55 See for example CRC Committee *Yemen* para 51; CRC Committee *Lebanon* para 36; CRC Committee *Uruguay* para 117.

56 *CESCR General Comment No 3* (1990) para 9.

57 *CESCR General Comment No 13* (1999) para 45.

### *5.3 Guiding principles in assessing the obligations imposed by the CRC*

In implementing the obligations imposed by the CRC, states are required to be guided by four articles identified as guiding principles by the CRC Committee.[58] Articles 2, 3, 6 and 12 express these principles, which embody the underlying requirements for any of the rights in the CRC to be realised.[59] The CRC Committee has emphasised the importance of ensuring that the domestic law of states parties reflects the four guiding principles.[60] Three of these principles will be considered here.

#### *5.3.1 Article 2: the obligation of states to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind*

The principle of non-discrimination prohibits discrimination against any child.[61] States are required to actively identify individual children or groups of children who are experiencing discrimination.[62] Marginalised and disadvantaged groups in particular are required to be identified and prioritised.[63] There seems to be a stronger obligation to pinpoint discrimination against those children who are vulnerable because of their specific status. This will undeniably include children who are barred access to school because of an inability to pay school fees or other educational costs, such as those related to transport or the wearing of uniforms. Addressing discrimination requires more than the mere adoption of legislation. States are obliged to take administrative, financial and educational measures to change attitudes as required by the CRC Committee.[64] A targeted approach by the state is required which translates into the following: setting up administrative structures to deal specifically with discrimination in schools, devoting part of the education budget to

58 *CRC Committee General Comment No 5* (2003) para 12.
59 *CRC Committee General Comment No 5* (2003) para 12.
60 *CRC Committee General Comment* No 5 (2003) para 12.
61 *CRC Committee General Comment No 5* (2003) para 12.
62 *CRC Committee General Comment No 5* (2003) para 12.
63 *CRC Committee General Comment No 5* (2003) para 30.
64 *CRC Committee General Comment No 5* (2003) para 12.

particularly address discriminatory practices and establishing education programs devoted to eradicate discrimination.

The principle of non-discrimination does not mean identical treatment of all learners.[65] Special measures may be taken to diminish or eliminate the conditions that cause discrimination against learners of a certain group.[66] Thus, even if the implementation of special measures discriminates against learners or parents of a specific group, this does not constitute a violation of the principle of non-discrimination if the object of such discrimination is to give priority to marginalised and disadvantaged children. For instance, if the state compels affluent schools to share their resources with disadvantaged schools this may amount to discrimination against wealthy parents on account of their economic status.[67] However, this will not be a violation of the non-discrimination principle because the object of the discrimination is to eradicate inequality. Resources to be shared may include school space, teachers, books and other facilities. In this context, the principle of non-discrimination is related to the obligation on states to make use of all their available resources so as to ensure the expeditious realisation of the right to basic education, specially for disadvantaged children.

### *5.3.2 Article 3(1): the best interests of the child as primary consideration in all actions concerning children*

This principle compels the courts and governments to always act in the best interests of the child when they are taking decisions which affect the child.[68] It will apply in those circumstances where the rights of the child are in conflict with the prerogatives of parents and/or with those of the state.[69] In those instances, the principle calls for

65 *CRC Committee General Comment No 5* (2003) para 12. The notion of substantive equality is the underlying rationale for allowing fair discrimination against certain people in order to alleviate the plight of the marginalised and disadvantaged in society. Whereas formal equality assumes that equality is achieved if a law or policy treats everyone the same, irrespective of their circumstances, substantive equality takes account of the inherent disadvantage that certain groups of people may experience and is concerned that laws or policies do not maintain but rather alleviate this disadvantage. See *CESCR General Comment No 16* (2005) para 7.

66 *CRC Committee General Comment No 5* (2003) para 12.

67 These parents may argue that forcing them to indirectly finance the education of disadvantaged children amounts to discrimination on the basis of their economic status in society.

68 Concepcion 2008 www.wcl.american.edu.

69 Concepcion 2008 www.wcl.american.edu.

the best interests of the child to prevail.[70] The operation of the principle was illustrated in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*[71] in which the court interpreted section 28(2) of the South African *Constitution*.[72] The case concerned the plight of English-speaking learners who were initially denied permanent accommodation at the Middelburg primary school by the school's governing body.[73] Although the school was legally entitled to adopt an Afrikaans-medium language policy at the school, the court held that "section 28 establishes a fundamental right of every child to come first where there are competing rights" and ordered that "the interests of the relevant learners would best be served by allowing an English course to be created at the ... school".[74]

### *5.3.3 Article 6: the child's inherent right to life and states parties' obligation to ensure to the maximum extent possible the survival and development of the child*

The third principle outlines the child's right to life. This principle is broadened by including the right to survival and development.[75] "Development" includes the child's physical, mental, spiritual, moral, psychological and social development.[76] One of the primary objectives of education is the development of a “child’s personality, talents and mental and physical abilities to their fullest potential.”[77] The lack of basic education threatens not only the personal growth of children but also the development of skilled persons capable of ensuring their own survival. For this reason the right to basic education has to be interpreted in light of its significance as an empowerment right.

70 Concepcion 2008 www.wcl.american.edu.
71 *Laerskool Middelburg v Departementshoof: Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).
72 Section 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child."
73 The single-medium policy at the school was validly established in terms of s 6(2) of the *South African Schools Act* 84 of 1996. The latter section gives effect to s 29(2) of the *Constitution* which provides: "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions..."
74 For an in-depth discussion of this case, see Visser 2007 *THRHR* 459.
75 Concepcion 2008 www.wcl.american.edu.
76 *CRC Committee General Comment No 5* (2003) para 12.
77 Section 29(1)(a) of the CRC.

### *5.4 Specific obligations*

#### *5.4.1 The right to basic education and the notion of the "minimum core" in international law*

The concept of the "minimum core content" of a right to which "minimum core obligations" correspond is often referred to in determining the violation of socio-economic rights.[78] The CESCR developed the notion of a minimum core to explain the core substance of a right and the corresponding minimum obligations which states must comply with.[79] The minimum core content is the "essence" of a right: "that essential element without which a right loses its substantive significance as a human right".[80] It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.[81] A failure to provide the minimum core obligations of a right therefore results in a breach of the particular right. According to Coomans free, compulsory primary education under the *ICESCR* is the minimum core of the right to education. He argues that primary education is so essential for the development of a person's abilities that it can be "rightfully defined as a minimum claim".[82] His argument is strengthened by the fact that the *ICESCR* regards basic education as so important that it imposes an immediate obligation on states to realise the right.[83] According to the Maastricht Guidelines the corresponding core obligations of the right to basic education apply irrespective of the availability of resources and should thus be fulfilled by all countries, including developing countries.[84] However, the CESCR does "take account of resource constraints

78 *CESCR General Comment No 3* (1990) para 10 provides: "[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 essentials 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. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d' etre*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned."

79 Wesson 2004 *SAJHR* 284.

80 Coomans "Clarifying the Core Elements" 7.

81 This particular view was emphasized by the CESCR during its ninth session in December 1993. See *Grootboom* para 31.

82 Coomans "Clarifying the Core Elements" 7.

83 CESCR General Comment No 13 (1999) para 51.

84 The *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), reprinted in 20 *Human Rights Quarterly* 691-704 (1998) paras 9-10.

applying within the country concerned" in assessing whether or not a state has discharged its minimum core obligations.[85] Whenever a state claims that a lack of resources is hindering the implementation of the core levels of the right, it must prove that this is because of reasons beyond its control and that it could not secure the assistance of the international community.[86] Although the minimum core obligations of the right to basic education may not be subject to "progressive realisation", this does not mean that states will have to enforce them immediately in all circumstances.[87] However, even if states are able to justify their non-compliance with the minimum core obligations, they are still under stringent scrutiny to ensure that the right to basic education is at least prioritised above other rights which are subject to progressive realisation. Finally, although the minimum core is a right vested in everyone[88] a minimum core approach to the realisation of socio-economic rights prioritises certain needs over others.[89] This approach is justified by the argument that these "core" needs are most urgent.[90] In the sphere of education, such an approach would require that the state "devotes all the resources at its disposal first to satisfy" its minimum core obligations in respect of disadvantaged learners before "expending resources on relatively privileged groups".[91] This is termed temporal prioritisation.[92]

### *5.4.2 Core obligations*

Section 28(1a) of the *CRC* provides that:

> States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make primary education compulsory and available free to all.

85 See *CESCR General Comment No 3* (1990) para 10.
86 Eide "Economic, Social and Cultural Rights" 27.
87 Although *CESCR General Comment No 3* (1990) lists the right to primary education as a right "capable of immediate application", the CESCR, in *CESCR General Comment No 11* (1999) para 10 provides that "[t]he plan of action [which states are required to adopt in terms of article 14 of the ICESCR] must be aimed at securing the progressive implementation of the right to compulsory primary education..."
88 *CESCR General Comment No 15* (2002) para 44(c).
89 Wesson 2004 *SAJHR* 284.
90 Wesson 2004 *SAJHR* 284.
91 Roux 2002 *Constitutional Forum* 41, 47.
92 Roux 2002 *Constitutional Forum* 41, 47.

Sloth-Nielsen[93] argues that "article 28(1)(a) states the core minimum:'free' and 'compulsory' education at the primary stage…" According to Verheyde[94], article 28 has to be read with article 41 of the *CRC,* which provides that if any standard set in national law or applicable international instruments is higher than those of the *CRC*, it is the higher standard that prevails. She claims that article 41 together with the significance the CRC Committee attaches to the notion of the minimum core and the strong advocacy for this concept in legal doctrine justifies her submission that the obligation to make primary education free and compulsory constitutes a minimum core obligation.[95] The minimum core obligations engendered by the right to basic education can therefore be derived from the concepts of "free" and "compulsory" assigned to primary education.[96]

The CESCR, in General Comment No 11 defines the meaning of "free of charge" as follows:

> The nature of this requirement is unequivocal. The right [to primary education] is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs[97], constitute disincentives to the enjoyment of the right and may jeopardise its realisation. They are also often highly regressive in effect. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.[98]

#### 5.4.2.1 Availability

The first overarching obligation to be extracted from this definition is the state's obligation to ensure the *availability* of free primary education. The element of

93 Sloth-Nielsen and Mezmur "Free Education" 14.
94 Verheyde *Commentary* 55.
95 Verheyde *Commentary* 55.
96 Verheyde *Commentary* 55.
97 Direct costs are directly produced by the educational service, including teacher salaries, provision of schools and their maintenance, and the management of the education system. Other direct costs include costs without which education could not be delivered, namely text and other books, learning materials, basic school equipment (stationery such as pens, pencils, rulers, etc.), and fees for examination. Indirect costs are indirectly caused by the educational service. These include transport costs and costs related to school meals, school uniforms, sporting equipment, and further educational equipment. See Sloth-Nielsen and Mezmur "Free Education" 10.
98 *CESCR General Comment No 11* (1999) para 7.

availability requires that the state provide the necessary resources to ensure that the basic infrastructure of schools is maintained.[99] The government is also obliged to provide safe drinking water, sanitation facilities, classrooms, desks and chairs to its learners.[100] The provision of textbooks, blackboards and stationery constitutes a further core obligation as well as the provision of qualified teachers. Although many South African schools are in a deplorable physical condition[101] and many teachers are unqualified[102], these obligations are core obligations. Without these the right to basic education loses its significance as a human right.

5.4.2.2 Accessibility

General Comment 11 proceeds by distinguishing between the various costs incurred by education. The CESCR emphasises that the scope of free primary education extends beyond the prohibition on charging school fees. Parents are exempted from other direct costs as well, such as fees for examinations, textbooks, learning materials and all basic school equipment. The CRC Committee is in agreement that direct costs, such as the maintenance of school buildings and the supply of books and learning materials, are free of charge and thus the responsibility of the state.[103] The position is therefore that parents are not legally obliged to make any contribution that will supplement the direct costs related to education.

Indirect costs such as those related to school uniforms seem to fall under the scope of free primary education. In this regard, the CRC Committee notes that where the wearing of uniforms is mandated by school regulations, the state should provide for

99 *CESCR General Comment No 13* (1999) para 6(a).

100 *CESCR General Comment No 13* (1999) para 6(a).

101 In 2006, the South African Human Rights Commission disclosed the following data on the state of South African schools: 2 280 schools have buildings in a very poor condition; 10 723 schools have a shortage of classrooms; 13 204 schools have inadequate textbooks; 8 142 195 learners live beyond a 5-kilometre radius from school; 10 859 schools are without electricity; 9 638 schools are without telephones; 2 496 schools are without adequate toilets; 19 085 schools do not have access to computer facilities; 21 773 schools lack access to library facilities and 17 762 lack access to recreational and sporting facilities. See SAHRC *Report*.

102 SAHRC *Report* 25. Government may argue that it does not have enough qualified teachers to deploy at schools. It is conceded that the process of training more teachers requires time and financial resources. However, nothing prevents the state from adopting policies which would result in qualified teachers sharing their skills among schools, thus accelerating the rate at which children are able to benefit from qualified teaching.

103 Sloth-Nielsen and Mezmur "Free Education" 16.

them, at least for poor children.[104] The overriding principle is that the requirement to wear uniforms should not lead to the exclusion of any child.[105] The CRC Committee is of the view that the wearing of school uniforms should not be compulsory and that a disadvantaged child, in particular, should not be excluded in any way for not wearing the uniform. The same applies to the transport costs of disadvantaged learners. The Committee has stated that the obligation to provide free primary education includes the state's subsidising of transport costs for learners who cannot afford such costs.[106] This position corresponds with that of the CESCR, which provides that the right to equality and its corollary of non-discrimination is not subject to progressive realisation.[107] The right to enjoy socio-economic rights on an equal basis creates an immediate obligation on states parties.[108] General Comment No 13 confirms that states parties are immediately obliged to ensure that the right to education "will be exercised without discrimination of any kind".[109] The non-discrimination provision under the CRC is also regarded as imposing an immediate obligation.[110] Moreover, the obligations to respect have been identified as part of the core content of the right to education.[111] This means that governments should realise these obligations immediately and irrespective of their economic development.[112] They are under an immediate obligation to remove any impediment which may cause discrimination against children in schools, including the charging of school fees, the compulsory wearing of school uniforms and the obligation on parents to contribute to any direct educational costs where they are unable to afford it. States are also mandated to take positive steps to pinpoint discriminatory practices in schools and to address them through the adoption of administrative, fiscal and educational programs as stated earlier. In the South African context, the eradication of systemic discrimination in the education system may take time.[113] However, this

104 Sloth-Nielsen and Mezmur "Free Education" 16.
105 Sloth-Nielsen and Mezmur "Free Education" 16.
106 Sloth-Nielsen and Mezmur "Free Education" 16.
107 *CESCR General Comment No 3* (1990) para 5.
108 *CESCR General Comment No 16* (2005) para 16.
109 *CESCR General Comment No 13* (1999) para 43.
110 Sloth-Nielsen and Mezmur "Free Education" 15.
111 Coomans "Clarifying the Core Elements".
112 Verheyde *Commentary* 57.
113 The education system inherited by the post-apartheid government is "riddled with inequalities". In reality South Africa still harbours separate education systems in its public school domain: the one consists of the former Model C schools, which is adequately resourced and the other constitutes the township and rural schools entrenched in abject poverty. The legacy of Apartheid education manifested in a minimum level of resources, a lack of qualified teachers, high teacher-pupil

does not mean that government has an excuse to drag its feet. It is under an immediate obligation to explore all possible options, including the employment of affirmative action measures in order to aggressively tackle the inequality in our school system. In this regard, I agree with Beiter that the provision of qualified teachers to disadvantaged schools constitutes such an affirmative action measure.[114]

The element of "compulsory" provides further insight into the core entitlements engendered by the right to basic education. This element is described by the CESCR, in General Comment No 11, at para 6 as follows:

> The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights.

The South African government legally obliges all children in the compulsory school phase to attend school.[115] Parents are liable to pay a fine or may even be imprisoned if they fail to ensure the attendance of their children at school during the compulsory school phase.[116] This obligation upon parents is seen to be necessary if it is taken into account that parental choice may be exercised to the detriment of the child.[117] A parent may decide that a child should look after the household or contribute financially to the family by working instead of going to school. In this context and for various other reasons, compulsory education becomes critical. However, nobody can do the impossible, and parents therefore cannot be under an obligation to ensure that their children attend school if they cannot afford the costs related to schooling.[118]

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ratios, a lack of libraries and laboratories and a shortage of classrooms at the latter schools. On the other hand, most of the former Model C schools are equipped with modernised computers, well-resourced libraries and laboratories and well qualified teachers. See Veriava and Coomans "Right to Education" 60 and SAHRC *Report* 2.

114 Beiter *Protection of the Right to Education* 409.

115 Section 3(6) *South African Schools Act* 84 of 1996.

116 Section 3(6) *South African Schools Act* 84 of 1996.

117 Sloth-Nielsen and Mezmur "Free Education" 18.

118 Tomasevski *Human Rights Obligations in Education* 47.

Thus, making primary education compulsory is contingent on making it free.[119] Read with the first element of "free" primary education, the prohibition on discrimination and temporal prioritisation in terms of the minimum core concept, states are therefore under a core obligation to ensure that those costs related to ensuring the attendance of disadvantaged children at school are free.

## 6 Adjudicating the right to basic education under the Constitution

The South African Constitution obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights."[120] In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [121], the court held:

> [The right to basic education][122] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.[123]

Therefore, the state is not only prohibited from impairing access to the enjoyment of the right, but is also obliged to take positive steps to ensure that basic education is provided. An understanding of the specific obligations engendered by the right to basic education requires an understanding of the scope and content of the right.

In its textual formulation, section 29(1)(a) differs from the right to further education under section 29(1)(b) of the Constitution. The right to further education is qualified to the extent that the second subsection of this right states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of this right. The right to basic education is neither formulated as a right of access nor subject to the same internal qualifiers as section

119 Tomasevski *Human Rights Obligations in Education* 47.
120 Section 7(2) *Constitution of the Republic of South Africa*, 1996.
121 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) (hereafter *School Education Bill case).* (This case was decided under the *Interim Constitution*, the *Constitution of the Republic of South Africa Act* 200 of 1993).
122 Section 32(a) *Constitution of the Republic of South Africa Act* 200 of 1993.
123 *School Education Bill case* para 9.

29(1)(b). The Constitutional Court has now confirmed that the right to basic education is not subject to progressive realisation. In the *Juma Musjid Primary School* case[124] , the Court held the following:

> It is important… to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."[125]

So far, claims have been made against the state for the enforcement of socio-economic rights in various cases before the Constitutional Court. In *Grootboom*, the claimants sought access to housing, in *Minister of Health v Treatment Action Campaign,*[126] access to health care services was claimed, and in *Khosa,*[127] permanent residents sought to enforce access to social security. In determining if government has fulfilled its obligations in respect of each of these rights, the Constitutional Court scrutinised the reasonableness of the government programme put in place to provide for the housing, health and social security needs of the claimants.[128] The notion of reasonableness has become the standard against which the Constitutional Court assesses government's compliance to meet its constitutional obligations in respect of qualified socio-economic rights. In *Grootboom*, the court held that "[i]n any challenge based on section 26 [or section 27] in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2)[or section 27(2)], the question will be whether the legislative and other

124 *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC); BCLR 446 (CC).

125 *Juma Musjid Primary School* para 37 (footnotes omitted).

126 *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) (hereafter *TAC*).

127 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) (hereafter *Khosa*).

128 *Grootboom* para 41; *TAC* paras 67-68; *Khosa* paras 44-67.

measures taken by the state are reasonable".[129] In order to be reasonable, a government programme must display various characteristics.[130]

The Court's rejection of the reasonableness review in respect of the right to basic education begs the question how it will assess state compliance of unqualified socio-economic rights in future. Nkabinde J's approach in *Juma Musjid Primary School* was one of extracting the state's obligations in respect of the right to basic education from the Schools Act. She held that the state has an obligation to make schools available to learners and restricted access of education to the compulsory nature of basic education.[131] Of course, the availability of education encompasses far more than the provision of school buildings and making education compulsory does not guarantee that a child will stay in school and receive a meaningful education. The specific question before the Court, however, did not require of her to give detailed content to the right. The case concerned the plight of learners enrolled at Juma Musjid School, a public school that was located on private property. The Juma Musjid Trust, the owner of the private property obtained an eviction order against the state in the High Court and effectively, against the learners situated at the school. The state and the school governing body unsuccessfully appealed the High Court decision in the Supreme Court of Appeal and ultimately sought relief in the Constitutional Court. The main concern of the Court was that the learners should not be left without alternative placements.[132] They were therefore not required to grapple with the broader question of what exactly the right to basic education entails. Even so, it is submitted that in the event that the Court is faced with the general question whether the state is succeeding in its obligation to provide basic education to its children, it will be forced to define at least the core content of the right to education.

129 *Grootboom* para 41.

130 The programme must be comprehensive and co-ordinated with a clear delineation of responsibility amongst the various spheres of government, with national government having overarching responsibility; it must be reasonable both in conception and implementation; the programme must be balanced and flexible and make appropriate provision for crises and for short-, medium- and long-term needs; it cannot exclude a significant segment of society and the programme must include a component which responds to the urgent needs of those in most desperate situations and the state must plan, budget and monitor measures to address immediate needs and the management of crises. See Liebenberg"Interpretation of Socio-economic Rights" 33-34.

131 *Juma Musjid Primary School* paras38 and 39.

132 *Juma Musjid Primary School* paras 74 and 78.

### *6.1 The right to basic education and the transformative Constitution*

The Constitutional Court has adopted a contextual method of interpretation with regards to rights in the Bill of Rights. Besides construing rights in their textual setting, the contextual approach to interpretation requires that a right must be understood in its social and historical context.[133] This entails an understanding of the right against our specific "history and background to the adoption of the Constitution".[134] This history has been interpreted by the Constitutional Court as specifically the history of apartheid, in which the majority of the South African population was denied their political freedom and deprived of opportunities to advance their economic and social position in life.[135] At the core of the transformative purpose of the South African constitution lies a commitment to addressing the inherent inequality created by Apartheid in order to ensure a future country in which the constitutional values of human dignity, equality and freedom will be enjoyed by all.[136] Therefore, in order to realise the transformative goals of the Constitution, an interpretation of the right to basic education must be aimed at rectifying the injustices of the past education system. Currently the South African education system is still characterised by its legacy: former white schools continue to be adequately resourced whilst former black schools are entrenched in abject poverty.[137] The Constitutional Court aptly remarks:

> Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.[138]

A contextual interpretation of the right to basic education therefore necessitates the provision of free basic education at least to disadvantaged learners first so as to meet the requirements of the Constitution.

133 *Grootboom* para 25.
134 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 16.
135 De Vos 2001 *SAJHR* 263.
136 The South African *Constitution*, through its entrenchment of socio-economic rights, embodies a transformative model of constitutionalism. This differs from traditional liberal constitutions which only place restraints on the exercise of state power. Besides providing measures to curb an abuse of state power, the transformative Constitution also requires of government to take steps "to advance the ideals of freedom, equality, dignity and social justice". See Brand "Introduction to Socio-economic Rights" 1.
137 SAHRC *Report* 2.
138 *Juma Musjid Primary School* para 42.

### 6.2 *Minimum core revisited*

In *Grootboom* the Constitutional Court rejected a minimum core approach in terms of the right of access to housing due to the varied needs in the context of housing: "there are those who need land; others need both land and houses; yet others need financial assistance".[139] As a result, the Court argued that the needs and opportunities for the enjoyment of the right will be hard to define and it will be very difficult to decide "whether the minimum core obligation should be defined generally or with regard to specific groups of people."[140] The Court's reasoning established that defining the minimum core content is possible only "in so far as a country-specific core is capable of being ascertained".[141] The Court further pointed out that in cases where it is appropriate to define the minimum core content, "sufficient information" needed to be placed before the Court to make such a determination.[142]

A distinction has to be made between the right of access to housing and the right to basic education. The requirements for the enjoyment of the right to basic education are the same for all of the learners entitled to it.[143] Learners in South Africa may come from different socio-economic backgrounds but as learners in the same public school domain and as equal bearers of their constitutional right to basic education all of them are entitled to the same type of education. Defining the content of basic education is thus possible in a South African context, since the objectives to be met are the same for all South African learners, and the necessary information is available to provide guidance as to the content of the right. The 4-A scheme has been accepted in international law as the most comprehensive framework in which to define the content of the right to basic education. At local level, this scheme has been endorsed by the South African Human Rights Commission and is cited with approval by the leading commentators on the right to education.[144] The Department of Education, through the adoption of its *National Plan of Action* and other policies, has borrowed from the 4A Scheme to give content to section 29(1)(a).[145]

139 *Grootboom* para 32.
140 *Grootboom* para 32.
141 *Grootboom* paras 32-33. See also Veriava and Coomans "Right to Education" 65.
142 *Grootboom* para 32.
143 *Comment on DOE Report* 18.
144 See Veriava and Coomans "Right to Education" and SAHRC *Report*.
145 *White Paper* 37.

## 7 Conclusion

South African children are frequently turned away from schools because of their parents' inability to pay school fees. Many learners are also barred from schools because they are not able to afford transport costs and other charges such as those for books and stationery.[146] This is unacceptable in view of the fact that South Africa has an international obligation to provide free primary education. Furthermore, the contextual approach to the interpretation of rights in the Bill of Rights developed by the Constitutional Court requires an interpretation of section 29(1)(a) which guarantees free basic education to disadvantaged learners as a priority.

In General Comment No 11 the CESCR gives meaning to the core minimum under the CRC, namely free and compulsory education in the primary school phase. "Free" primary education means that parents are exempted from paying school fees and other educational charges as mentioned above. The core minimum also entails that schools are prohibited from discriminating against learners in any way for not being able to afford the charges related to schooling. In this regard, the South African government has an immediate obligation to investigate discriminatory practices against learners and implement the relevant policies to combat these. The non-discrimination principle goes further by requiring of the government to implement affirmative action measures to eradicate the persistent inequality in our schools. The South African education system in particular will benefit once government starts employing fair discrimination measures such as compelling wealthy schools to make their teachers, school infrastructure and other facilities available to marginalised schools. This will accelerate the rate at which the inequality caused by apartheid is eradicated from our education system.

146 See Centre for Applied Legal Studies and Social Surveys Africa *National Survey.*

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**List of abbreviations**

| | |
|---|---|
| CDE | Convention against Discrimination in Education |
| CRC | Convention on the Rights of the Child |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CRC Committee | Committee on the Rights of the Child |
| DOE | Department of Education |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| SAHRC | South African Human Rights Commission |
| SAJHR | South African Journal of Human Rights |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |

| | |
|---|---|
| UNESCO | United Nations Educational, Scientific and Cultural Organisation |